# Safety at the Construction Site and Post Construction
# The Legal Responsibilities & Sanctions

a paper by,

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1. Safety is not a magical word. It is not an absolute concept. It requires ensuring that the circumstances are protected from the known and foreseeable risks. However, it is the extent of the foreseeable risks and the extent of the protection that has been controversial.

2. We all agree that there must be safety standards. However, it is our subjective foresight and concept of adequate protection that differs. As such, the concepts cannot remain subjective and laws have been created to ensure objective standards are maintained by all and sundry within each nation. Yet the controversy continues.

3. The controversy worldwide stems from 2 essential problems.

4. The first problem is that no legislation or law can adequately describe all possible risks for all possible circumstances and provide all possible solutions to those risks. This inadequacy is further exacerbated by the fact that legislations and laws use language as a tool and no language can avoid the pitfall of interpretive differences. Hence parties involved in the industry may interpret the standards differently from the interpretation of the statutory enforcers. Yet again, these interpretations may totally differ from those held by the guardians of the law, the Courts.

5. Expecting totally clear and intelligible standards may be wishful thinking, but there must be the means towards resolving this issue.

6. Asides from the obvious risks and preventive methods, the only possible way of avoiding the problems of understanding the standards that ought to be achieved can effectively be by the unfortunate concept of “we learn from our mistakes”. It is unfortunate simply because those mistakes may cost lives.

7. Judicial pronouncements of legal interpretations for the standards arise from mistakes or suggested mistakes prosecuted or tried in court. Yet the industry needs such pronouncements especially where there is uncertainty.

8. The statutory enforcers should be encouraged to disseminate their interpretations.

9. The issue would be then be as to whether the statutory enforcer’s interpretations ought to be held out as the binding standards and if the judiciary should maintain these standards as the general legal standards.

10. As such, additional controversy arises from differing standards being maintained within the general laws of the country from the standards maintained under specifically prescribed statutory standards.

11. If the general legal standards are lower than the statutory standards, this does not make sense. After all, ignorance of the law is no defense and statutory law applicable to an industry must be the standards in general law by which the professionals or experienced persons in that industry are gauged.

12. If the general legal standards are higher than the statutory standards, then it is arguable that the legislators have failed to ascertain the standards and have misled the industry. This again cannot be the appropriate way forward.

13. The second problem is that somehow, unlike other laws that are quasi-criminal or criminal, the safety legislative standards are constantly being breached by many a company and persons who normally would not violate other quasi-criminal or criminal laws.

14. To an extent, the second problem is sometimes exacerbated by the first problem relating to interpretation.

15. Nevertheless, the second problem also stems from the essential issue of profit –v- risk of breach –v- sanctions. This issue cannot be ignored.

16. Employers fear imposing too strict a regime on safety as this will merely increase the tender price and project period. Therefore at times, it is a battle between price –v- lives and safety.

17. Sanctions are another issue within the problem. This issue of sanctions seems to be currently the topic of concern and discussion.

18. For a long time now, civil liability sanctions have lost their impact simply because insurance covers and other social welfare protections and compensations have deprived an employer from its gains or profits that could have been better used to maintain the safety standards in the first place.

19. As for criminal sanctions, the fines prescribed by the relevant legislations tend to be non-obstructive especially if there is a plea of guilt. Whilst there are

custodial sanctions within the relevant legislations, there has been no serious attempt to impose these types of sanctions.

20. Furthermore, the traditional criminal law sanctions are also not readily applicable to the situation. The safety breaches as offences are not clear cut, few of these breaches arise from clear reckless indifference, few can be blamed on one particular individual and the difficulty is as to whether carelessness, oversight, lack of knowledge and means, inadequate supervision or sheer inefficiency can amount to a criminal conduct.

21. This paper considers the current development of safety standards within the laws of Malaysia. The focus is not however on the establishment of safety standards but the equally important aspect of the enforcement of these standards or arguably the ineffectiveness of the enforcement process thus far.

22. In the quest for safety especially in a developing nation, the rules promulgating the standards are derived from experience. Therefore converting standards to conduct cannot be merely by way of prescription but they must be imposed and enforced as benchmark standards.

23. The enforcement of safety standards has thus far been positive, judging by the attempt to introduce clear and precise standards vide legislations or subsidiary legislations and guidelines etc and assistance in management training. There has finally been a serious move towards enforcing the standards by sanctions, which essentially carries deterrence as its main and long term armory of enforcement.

24. The time is therefore ripe for a serious review of the legal repercussions relating to the safety standards existing within the laws of Malaysia.

25. The extent of the incidences and deaths arising from works or presence of workers at construction areas is extensive. In 2004, DOSH reported 52 incidents involving deaths. In 2005, the figure was 25 incidences of deaths. By March 2006, there were 9 incidences of deaths. It is unknown how many humans lost their lives but taken globally, it sounds like a disaster. The question is then as to how many of these incidences could have been avoided and how many of these relevant employers or parties responsible are being charged?

26. On 30.12.2005 at approximately 3.00pm, tragedy struck an innocent by-stander of a construction site. Dr. Liew Boon Hong was killed when an ironmould weighing 2 tonnes fell from the 20$^{th}$ floor of a condominium cum office building under construction at Jalan Sri Hartamas.

27. Neighboring tenants were reported as saying that on many occasions, stones and debris had fallen into the areas surrounding the construction site.

28. Officers from the Occupational Safety and Health Department were reported to have inspected the construction site and found it unsatisfactory. By 15.3.2006, the construction site was reported as still remaining unsatisfactory and was supposedly given a further 2 weeks to comply to the relevant occupational safety standards.

29. It is now reported that the construction site supervisor has been charged with manslaughter for causing death by negligence alternatively abetting the offence.

30. The main sub-contractor and 2 other sub-contractors have also been reported as having been charged under the Occupational Safety and Health Act 1994.

31. This Paper is only limited to reviewing the existing standards in place in Malaysia without any suggestion of any need for further standards of safety. This Paper however focuses on the enforcement of these standards vis-à-vis the legal responsibilities attached to organizations and individuals involved in the industry and their ensuing liabilities.

32. This Paper seeks to highlight the present weaknesses within the Malaysian legal system in the area of legal responsibilities and liabilities. It seeks to provide a comparative analysis of other legal systems that may perhaps have similar problems, sharing examples where some have found certain solutions.

33. After all, legal responsibility and accountability have not merely been a concept of the industrial age or revolution but a concept consonant with the construction industry from the early history of human ability to govern the industry.

***"If a builder has built a house for a man and his work is not strong, and if the house he has built falls in and kills the householder, that builder shall be slain"***

***"If a man has been too lazy to strengthen his dyke, and has not strengthened the dyke, and a breach has opened in the dyke, and the ground has flooded with water, the man in whose dyke the breach has opened shall be reimbursed the corn he has destroyed***

***King Hammurabi of Babylon, 18th Century BC***

***"When you build a new house, make a parapet around your roof so that you may not bring the guilt of bloodshed on your house if someone falls from the roof."***

***Deuteronomy 21:15, the Bible***

34. Whilst it may be tempting to stamp out any flagrant failures to maintain safety standards with retributive sanctions, it must be understood that generally mishaps occur at site due to a myriad of events or failures and no one person can normally be held wholly responsible for the same. The sanctions must therefore be tempered to suit its main intention, which is to initially create deterrence not only to individuals but also organizations so that eventually maintaining high standards of safety or at the very least maintaining the standards prescribed by the laws of the country becomes an expected part of the culture.

35. There must also be realization that there cannot be emphasis on remote risk, which can lead to disproportionate responses and standards. Nevertheless, there are risks that may seem remote to one but not to another and at times remains remote until it actually happens. Over-regulating merely leads to absurdities and unnecessary impacts on the development of an industry.

36. The balance between the risk assessments and responses and standards is one that must constantly be fine-tuned. People such as politicians, lobbyist and journalist have differing interests and hence when certain remote risks do transpire, there can be a tendency to go overboard with the necessary response. Likewise, ignoring an incident where human lives have been lost and where a standard may have prevented it, is not the answer.

37. There are of course other forms of enforcement, that can be employed such as, temporary stop work orders, improvement notices, termination of contract or withdrawal of licenses or status.

38. In a commercial world, safety tends to compete with cost, profitability and the saving of time.

39. The argument raised against any strict implementation of high safety standards has been “cost” whether the contractor’s own absorbed cost or the project cost. Aside from the obvious responsive argument that human life cannot be equated to cost, it is more important for organizations to understand that once maintaining high safety standards have become the culture, the cost effect actually reduces simply because the general work force themselves become educated.

40. Similarly, any argument against such implementation because it purportedly affects productivity and efficiency is again countered easily with proof that these affects are merely temporary as a safety conscious industry and labour-force moves forward with its learning curve.

41. If the enforcement of safety standards continues to have a non-burdensome impact on the balance sheet of the companies or on the personal well being of those in charge, the standards will remain ignored.

42. However, if the enforcement benchmark is to be elevated, there must equally be clarity and certainty within the standards set. The standards must not only be understood, they must be understandable. Standards that are prescriptive must be also descriptive.

43. The language used must not be in such broad terms but more specific and the construction industry should not be left to decipher the meaning and the exactness of the standards by reference to judicial interpretations that can change and differ in courts of equal standing, thus leading to uncertainty.

44. Structural safety has been developed over the years and through by-laws, it has taken an established and familiar approach. It is time that the issue of workers’

safety receives the same treatment. John Barber, a consulting engineer and lecturer in construction law at King's College, London considers the structural safety model as a valuable paradigm for general application to all safety matters[1]. The risks and methods of avoiding them are encapsulated under a code or practice or by-law and it essentially recognizes the problems and sets the standards for the solution. It must however be recognized that certain engineering matters are scientifically predictable but other risks especially those involving the human kind are not.

45. It is often said that the only predictable thing about human conduct is its unpredictability. Safety that is linked to human conduct can therefore be unpredictable and therefore cannot be over prescribed.

## Safety Standards imposed by Law in Malaysia

### *OSHA 1994*

46. The main legislation is the Occupational Safety and Health Act 1994 ('OSHA").

47. OSHA applies to the private and public sector as well as statutory authorities (not shippers and armed forces).

48. OSHA provides for the appointment of the Director General, Deputies and Occupational Safety and Health Officers.

49. The Director General in turn can appoint persons or independent inspecting bodies to advise or assists him.

[1] Safety Issues – A challenge or Burden, by John Barber, [2002] 18 Const. LJ. No.1

50. OSHA also provides for the establishment of a National Council for Occupational Safety and Health which is empowered to carry out investigations and make reports and recommendations to the Minister on basically the standards of safety and codes of practice, amongst others.

51. The Government later established the National Institute of Occupational Safety and Health (NIOSH) to promote education, research and development in the field in support of the Department of Occupational Safety and Health in the Ministry of Human Resources. NIOSH is also empowered to foster co-operative consultative relationships between the parties affected by the legislation.

52. There are also Non Governmental Organisations (NGOs) such as the Society for Occupational Safety and Health that play a role in increasing workers' awareness and lobbying for improvements and amendments to the legislations.

53. OSHA also provides a whistleblower's protection and these provisions bind employers and trade unions. It prevents dismissals, injury or detrimental treatment against whistleblowers.

54. The Director General can cause an inquiry to be held over a mishap and can prohibit plant and substance by gazetted order.

55. The Minister is empowered to issue industry codes of practice so as to provide practical guidance on the requirements or standards for a particular industry. The breach of the codes does not automatically constitute a breach of a general duty but it is admissible as evidence where it is relevant to the proof of a breach of the general duties.

56. The powers of investigation under the OSHA are wide and it includes a right to enter, inspect and examine any place of work or even residential place (with consent of the owner or reasonable cause to believe that there is a breach). The power also extends to giving an order that any evidence not be disturbed for as long as required, take measurements and photographs, take samples, cause any plant or substance in question to be dismantled and to take possession of it, the power of seizure, the power to make a forceful entry and detain persons being searched, seize documents and examine any witnesses.

57. The Minister is empowered to make regulations, which carry the weight of the OSHA.

58. There have also been a large number of guidelines and codes of practice issued under the OSHA.

59. The relevant guidelines include the "Guidelines for Public Safety and Health at Construction Sites" issued in 1994, "Guideline on Occupational Safety and Health in Tunnel Construction" issued in 1998, "Guideline on Trenching For Construction Safety" issued in 2000 and the "Guidelines on Occupational Health Services" issued in 2005

60. The problem with the guidelines is that they are said to be recommended practices but compliance does not confer immunity from the general obligation.

61. This leaves the interpretative issue open-ended and is of great concern to the industry.

62. The codes of practice such as the Indoor Air Quality Code of Practice is said to be evidence admissible in a court of law as good practice although not

mandatory. The willingness to allow codes of practice and guidelines as tools of consideration in Court begins to give a hint that the intention is for such codes of practice or guidelines to equate the "in so far as practicable" standards required under the OSHA.

63. The lack of direction as to whether the codes of practice and guidelines as to fulfill the standards is further exacerbated by the language used in the Guidelines for Public Safety and Health at Construction Sites, where it is said that the guidelines must be read together with the various legislations and industry code of practice. It in fact suggests that one can look at the guidelines as a interpretative view of the standards required by the Ministry and relevant Department. If so, why is this not made clear?

***F&MA***

64. The other applicable legislation is the Factories and Machineries Act 1967 as revised in 1974 and 1978 (F&MA).

65. Under section 2 (1) of the F&MA, a construction site clearly falls within the definition of factory (unless it is a premises where 5 or less workers carry out works without use of machinery).

66. F&MA applies to the private and public sector as well as statutory authorities

67. F&MA provides for the appointment of the Chief Inspector of Factories and Machinery, Deputy Inspectors, Senior Inspector and Inspectors and Officers.

68. The powers of investigation under the F&MA are equally wide and it includes a right to enter, inspect and examine any factory or even any other place reasonably believed to be carrying out related works or processes or used for

storage. The power also extends to requiring the production of records and documents and to inspect and copy them. Also there are powers to examine any person employed, to take samples and to prevent the use of any machinery sealed or to prevent any alteration to the relevant machinery until investigations are over.

69. There is a requirement that only machinery with a certificate of fitness issued under the F&MA can be utilized or operated and that some machinery required operators who hold a certificate of competency issued under the F&MA.

70. There are also powers to conduct periodical inspections under the F&MA.

71. The Minister may issue Regulations, which carry the weight of the F&MA.

72. The Minister has issued a relevant Regulation entitled "Factories and Machinery (Building Operations and Works of Engineering Construction) (Safety) Regulations 1986 (F&MA Building Regulation).

**Others**

73. There are other specific legislations that stipulate safety standards and requirements for specific industries such as the Petroleum (Safety Measures) Act 1984 which relates to the safety measures in loading, transporting, unloading, discharge, storage and handling of petroleum and petroleum products. There is also the Uniform Building By-Laws 1984 which relates to not merely engineering requirements in design but also requirements that relate to the construction process that is directly linked to safety issues. Further, there is the Street, Drainage and Building Act 1974 which also prescribes certain standards to avoid accidents and allows sanctions to be taken by the local authorities against a project when the safety and stability of

the constructed or constructing structure is in doubt (the review and revocation of permits).

## Parties that can be made responsible and liable

***Under OSHA***

74. The number of parties involved in a project site can be quite exhaustive and as long as they play a role and therefore have a license to be at the project site, legal responsibilities and liabilities can attach.

75. There are essentially 3 relevant and different types of duties.

76. The first are duties that arise due to a relationship with the worker.

77. The parties responsible includes a principal employer (ie. the employer that owns the project or the occupier of the project site) who owes a duty to its own employees (including hired or seconded employees) and those of its independent contractor. This clearly includes the owner/developer, the lead or main contractor and even labour contractors that have been hired or seconded for the job.

78. It also includes an immediate employer (ie. the employer that has undertaken works in whole or in part or preliminary or incidental to the works of the principal employer, at the principal employer's project or under the supervision of the principal employer) who owes a duty to its own employees and those of its independent contractor. This would include, the employer's representatives or project management company, the consultants, the suppliers, the sub-contractors and the other down-line sub-contractors or sub-suppliers.

79. The second are duties that arise pursuant to the works carried out by an employer.

80. The employer responsible can be any party involved in a project but their duties are limited to any impact caused by their works.

81. These duties are owed to the public and to any other person (not just an immediate employee or an employee of an independent contractor) who may be affected by the said works.

82. The third are duties that arise out of works being conducted at a non-domestic premise and these duties are owed to any persons (not just employees) licensed or permitted to use the premises or plant or substance therein for work.

83. The parties responsible include an occupier who is in management or control of the non-domestic premises or a person contracted or leased to ensure that the said duties are so performed. This includes the lead or main contractor, the contractor in control of any installations, sub-contactor who is in control of specific areas at site, plant or substance safety supervisors and general maintenance or repair of site contractors or the fire escape consultants.

84. There are also duties of manufacturers, designers, importers, suppliers (not financiers or hire-purchase or leasers), erecters or installers of plant and duties of manufacturers, importers and suppliers of substances.

85. There are also duties imposed on employees while at work and any person that interferes with or misuses any safety and protective measure.

***Under F&MA***

86. The F&MA places duties on an "owner" and an "occupier" of the factory (although for an owner to be responsible, the machinery must be in common use by both the occupier and owner). An occupier has been defined to mean an entity that occupies or uses any premises as a project site or work site.

87. An occupier of a project site is usually seen as the lead or main contractor.

88. However, any sub-contractor or supplier entering the site would also be deemed an occupier vis-à-vis the machinery that is being used, so long as there is an actual functional or profit making relationship with the machinery[2].

89. All the duties are owed to employees, workers and even any licensees or invitees to the project site.

90. There are also duties imposed on the employees as well.

91. The F&MA Building Regulation duties apply to every contractor and every employer who undertakes works related to a building or engineering construction (whether private or public excluding railway) and to their employees

92. These duties are only applicable to a particular employer if the risks are such that it would affect the particular employer's employees or if the risks relates to the works of the particular employer (including if the employer is involved in altering even temporary works such as scaffolding etc.).

[2] Palanisamy Pillai v Musa Ibrahim & Anor [1984] 2 CLJ 340 (Rep)

## Legal Responsibility within the Laws of Malaysia Applicable to Safety

***Under OSHA***

93. In relation to the duties that arise due to a relationship with the worker, the duties are extremely wide and termed ***"…to ensure, so far as is practicable, the safety and health at work…"***

94. The duties are said to include but are not limited to the provision and maintenance of safe plant and systems. This involves making arrangements to ensure that there is an absence of risk of health and that activities involving the plant and substances are safe; the provision of information, training, instruction and supervision to ensure safety and health; the maintenance of any premises within the control in a condition that is safe and without risk to health; the provision/of means of access and egress at the said premises are safe and without such risks; the provision and maintenance of safe and without risks to health, a working environment with adequate facilities for their welfare.

95. In relation to the duties that arise pursuant to the works carried out by an employer, the duties are to conduct its undertakings in a manner so as to ensure that those who may be affected are not exposed to risks involving safety and health. These duties extend to providing information on the manner in which the undertakings are conducted, that might pose a danger to persons that may be so affected.

96. As for the duties that arise out of works being conducted at a non-domestic premise, the duties include ensuring that such premises and means of access

and egress at the said premises and any plant or substance in the premises or provided for use therein, are safe and without risks to health.

97. The fulfillment of these duties and hence the breach of these duties are measured by the "in so far as is practicable" measure.

98. The employer also has a duty to prepare and revise a written statement on its general policy on safety and health and its implementation. This written statement must be brought to the attention of all its employees.

99. The employer has a further duty to notify the closest occupational and safety office of any mishap or likely mishap (accidents, dangerous occurrences, occupational poisoning or disease).

100. If an employer has 40 or more persons employed at a place of work (or if directed by the Director-General), the employer shall establish a safety and health committee. The committee shall be consulted on arrangements for co-operation to promote and develop measures of safety and consulted in checking its effectiveness. The committee shall also review the measures taken and investigate any assertion of lack of safety.

101. An employee's duties are to take reasonable care for his own safety and health and that of others who may be affected by his acts or omissions at work, to co-operate to discharge any duty or requirement of the employer, to wear or use protective clothing or equipment that is provided and to comply with instructions and measures by his employer.

102. An occupier (lead or main-contractor) must employ a safety and health officer exclusively to ensure due observance of the standards and the promotion of safe conduct at work.

103. By section 59 of the OSHA, the duties prescribed in the OSHA are expressly excluded from conferring a right of action, a defence or affecting any rights in any civil proceedings.

104. If the Guidelines for Public Safety and Health at Construction Sites 1994, are to be construed as the benchmark for the standards to be achieved under the OSHA, then the duties have essentially been extended to the following:-

103.1 a written statement of the policies is insufficient and a written safety and health manual must be prepared;

103.2 the main contractor should appoint a part time site safety supervisor who spends at least 15 hours per week ;

103.3 every other contractor who employs more than 20 workers, should appoint a part time site safety supervisor who spends at least 5 hours per week;

103.4 newly employed workers, foreign workers and illiterate workers should be properly instructed;

103.5 architects, engineers and designers should ensure that they have considered the safety of workers and the public when they design the works including having such considerations as to the erection process of the structure (although very often method of construction is determined by the main contractor). The design should not allow for unwarranted dangerous structural procedures and undue hazards whilst constructing especially if they could be avoided by design

modifications. The design should also take into account safety problems associated with the subsequent maintenance requirements;

103.6 there are now specified duties relating to hoarding, movement of vehicular properties, disconnection of utilities, preparatory work for demolition and demolition work, catch platforms for demolition works, blasting and use of explosives, removal of debris and waste materials, clearing of the project site, excavation works, piling works, superstructure works and all related temporary works such as scaffolding, peripheral netting, catch platforms, sidewalk sheds, shuttering, finishing works, worker's temporary accommodation, use of lifting equipment such as cranes, the lifting operations, storage and stacking, erection works, climbing and jacking, the operation of machinery, and the inspection, testing, maintenance and repair and dismantling of equipment and machinery.

***Under F&MA***

105. The duties are stipulated as being without prejudice to any laws of the local authorities. Hence both duties will apply and the duties under the F&MA cannot be superseded by any duty under local authority laws.

106. The duties mainly involve the condition of the work site and the machinery and its impact on safety.

107. The duties include matters relating to the design of foundations and floors and roofs vis-à-vis the loads, the working levels, platforms, decks, stairways, passages, gangways, ladders and steps vis-à-vis the risk of collapse, the safe access within the factory, the openings, sumps, pits or fixed vessels in a floor vis-à-vis risks of falling, the storage or stacking of all goods, articles and

substance vis-à-vis their stability or the risk of collapse and its interference or obstruction with operations or safety standards, the elimination of the risk of bodily injury from explosive, inflammable, poisonous or corrosive substances, the lifting of weights vis-à-vis the likelihood of causing bodily injury, the precautions against fire and means of escape, the sound and free from defect machinery that is being used, the fixed guard or fencing of dangerous machinery vis-à-vis injury to the operator and others and the projection of material beyond the machinery.

108. There is also a duty to provide and maintain safety appliances and machinery within the factory, the maintenance of the sanitary state of the factory, the working space for the workers within the factory, the provision of adequate and suitable ventilation, temperature, lighting and sanitary conveniences within the factory.

109. There are also duties to provide sufficient and suitable protection for person employed from exposure to the natural elements or factory emanating elements.

110. There are also duties relating to the welfare of the workers employed such as drinking water, suitable washing areas, first-aid provisions etc.

111. There are further duties to train and supervise inexperienced workers and to prevent any person below the age of 16 to carry out work related or connected in any way with machinery.

112. There are also duties to inform the Inspector before commencement works at factories, and the duty to inform and report upon the occurrence of a mishap.

113. The employees duties include non willful interference or misuse of protective and safety measures, the duty not to willfully and without reasonable cause act in a manner likely to cause bodily injury to himself or others or likely to cause damage to machinery or property, and the duty to use all means and appliances provided to them for securing their safety within the factory.

114. The duties under the F&MA Building Regulation are wide and covers most aspects within the construction process such as installed machineries, drowning, slipping , tripping and cutting hazards, access to the work place, emissions at the work place such as dusts and gasses or corrosive substances and the protective gears required, electrical hazards, public vehicular traffic, stability of structure, illumination of passageways, storage of materials and substances, disposal of debris, use of safety helmets, concrete works, structural steel and precast concrete assembly, cleaning, repairing and maintaining roof, gutters, windows, louvers and ventilators, catch platforms, chutes, safety belts and nets, danger notices, runway and ramps, ladders and steep ladders, scaffolding, working platforms, guardrails and toe-boards, demolition works, excavation works, piling works, material handling, storage and disposal, blasting and use of explosives, and hand and power tools.

115. A main contractor has a duty to employ a part time competent site safety supervisor who spends at least 15 hours a week, whilst all other contractors or sub-contractors who employ more than 20 persons at a project site shall appoint a part time competent site safety supervisor to spend at least 5 hours a week.

116. The Main Contractor who employs 50 or more workers at a project site must set up a safety committee.

## Sanctions within the Laws of Malaysia Applicable to Safety

***Under OSHA***

117. OSHA provides for pre-emptive or anticipatory sanctions through improvement notices (the related works must stop till the improvements are implemented) or prohibition notices (the relevant plant or substance cannot be used until danger is removed).

118. OSHA also provides for financial and/or custodial sanctions.

119. Under OSHA, a body corporate can only be sanctioned by fines.

120. It must be highlighted that through the application of potential liabilities to all officers of the company, the provisions of the OSHA have exceeded many other nations in its enforcement of corporate governance and responsibility relating to the maintaining of the safety and health standards.

121. Pursuant to Section 52 of the OSHA, a director, manager, secretary or other like officers of a body corporate at the time when the body corporate contravened the standards imposed, shall be deemed to have likewise contravened the standards imposed, and can be charged jointly with the body corporate or severally and held guilty for an offence. Such a person may be charged and convicted even if the body corporate is not charged separately.

122. There are statutory defences provided to a person and not a corporation charged under the OSHA. These include establishing that the offence was committed without consent or connivance and that due diligence was exercised to prevent the commission of the offence as he ought to have having regard to his position within the corporation.

123. Further by section 60 of the OSHA, the burden of proof on the issue of “in so far as practical” has been shifted to the accused, so that if a mishap occurs and an employer is charged, it shall be the burden of the accused to proof that it had used the best practicable means or that there was no other practicable means or that it was not practicable to do more.

124. There are policy reasons behind this shifting of the burden namely due the fact that the employer being a party experienced in the industry ought to be better placed to proof or disproof the question of what is practical in terms of safety bearing in mind there are subjective elements such as the site conditions that are at hand.

125. At first blush, this type of shifting of the burden in criminal cases are essentially considered rebuttable presumptions. However, in a situation where an immediate employer or principal employer is charged for a mishap, the fact that the mishap has occurred and the fact that the worker was employed by the charged employer is usually not in dispute. As such, the effect of the presumption can actually be a reversal of the entire burden of proof.

126. A failure to abide by the improvement or prohibition notice without reasonable excuse can be sanctioned by a fine not exceeding RM50,000.00 and/or imprisonment not exceeding 5 years , and a further fine of RM500.00 each day that there is a failure to abide.

127. For a breach of duty or duties in relation to the duties that arise due to a relationship with the worker or in relation to the duties that arise pursuant to the works carried out by an employer or in relation to duties that arise out of works being conducted at a non-domestic premise, the sanction is a fine not exceeding RM50,000.00 and/or imprisonment not exceeding 2 years.

128. For a breach of duty or duties in relation to the duties owed by manufacturers, designers, importers, suppliers and erectors or installers for plant and substances, the sanction is a fine not exceeding RM20,000.00 and/or imprisonment not exceeding 2 years.

129. For an employee's breach of his duties, he is liable to a fine of not exceeding RM1,000.00 and/or imprisonment not exceeding 3 months.

130. For any person who interferes with or misuses any safety or protective measures, he is liable to a fine of not exceeding RM20,000.00 and/or imprisonment not exceeding 2 years.

131. For a breach of the whistleblower's protection, the sanction includes a fine not exceeding RM10,000.00 and/or imprisonment not exceeding one year and order for compensation of damages or reinstatement.

132. An occupier that does not employ a safety and health officer can be sanctioned by a fine not exceeding RM5,000.00 and/or imprisonment not exceeding 6 months.

133. An employer that does not set up or consult a safety and health committee can be sanctioned by a fine not exceeding RM5,000.00 and/or imprisonment not exceeding 6 months.

134. Any person interfering or obstructing an investigation can be sanctioned by a fine not exceeding RM10,000.00 and/or imprisonment not exceeding 1 year.

135. By section 58 of the OSHA, there can be compensatory sanctions for loss and damage if the loss or damage was occasioned by intention, through recklessness or gross negligence.

***Under F&MA***

136. F&MA provides for pre-emptive or anticipatory sanctions through improvement notices (the related item within the machinery must not be used till the improvements are implemented) or prohibition notices (the relevant machinery altogether cannot be used until the danger is removed). The Inspector can render the machinery inoperative for that purposes.

137. Under the F&MA, the sanctions are only fines (except for interference and obstruction with investigations).

138. Pursuant to section 50(3) of the F&MA, if the contravention of the duties are committed by persons other than the occupier or owner, then the occupier and/or the owner can still be open to a charge unless they are able to show that the contravention was committed without their knowledge or consent and they took all reasonable measures to prevent such contraventions and to observe the duties.

139. This effectively means that despite another person being found responsible, the occupier and/or owner can still be charged but there are possible defences.

140. The sanctions are however rather ineffective in that it amounts to a fine not exceeding RM2,000.00 or if it is a continuing offence, not exceeding RM100.00 per day.

141. It is only in the situation where a person interferes or obstructs an investigation, that there is a more severe sanction by a fine not exceeding RM5,000.00 and/or imprisonment not exceeding 2 years.

142. Likewise, the sanction under the F&MA Building Regulation is rather weak in that it is a fine not exceeding RM2,000.00.

143. It is expressly stated in section 47 of the F&MA that nothing in the said act will relieve any person from civil and criminal liability. This differs from the OSHA in that it does not state that the standards cannot be construed as the minimum standards under the common law or the penal code but it clearly sates that the prescribed standards will not be deemed to be fulfilling the standards required under the common law or penal code (ie. not the maximum standards).

## Legal Responsibilities and Sanctions within the General Civil Law of Malaysia

144. Civil liabilities ought to be a powerful tool in deterring any breach of standards imposed under statute or in common law.

145. Civil liabilities as a form of deterrence has however to a large extent been extinguished by the social welfare legislation and insurance.

146. The Employees' Social Security Act 1969 and the Employees' Social Security (General) Regulations 1971 and specifically the amendment Act A675/1987 (SOCSO) are applicable to employees that earn a monthly wage of RM2,000.00 and below per month, those employees who later earn more but were previously registered with SOCSO and as such continue to be compulsorily covered, or those employees who opt and are allowed to be registered with their employer's consent. These persons are all deemed insured persons under the said legislation.

147. By virtue of Section 31 of the said Act, an employee covered under SOCSO cannot receive or recover any compensation or damages for an injury sustained during employment, from his employer or his employer's servant.

148. The position before the amendment of 1987 was that Section 31 did not apply to an employee who was not registered with SOCSO[3] but since the amendment to Section 31 in 1987, it is now construed as applicable to any employee that qualifies to be registered with SOCSO at the time of the accident even if they were actually not registered[4] .

149. However, qualification for SOCSO does not preclude an employee from suing other persons who are not his employers or co-employees or servants of his employer[5].

150. In Malaysia and under the Workmen's Compensation Act 1952, there is compulsory compensation required of an employer to an employee for injury (disabled from working for at least 4 days) or for death arising from an accident howsoever caused, providing the accident and hence the injury or fatality arises out of or in the course of the employment. This includes even where the conduct of the employee was in contravention of any statute or regulations or instruction from his employer. (Injury directly attributable to the influence of alcohol or drugs or deliberate self-injury or deliberate aggravation of an accidental injury are all not covered).

151. The compensations prescribed are fixed compensations such as 6 months wages with a maximum of RM8,000.00 for death with dependants. There are

[3] Lian Ann Lorry Transport & Forwarding Sdn Bhd v Govindasamy [1982] 2 CLJ (Rep) 232
[4] Che Noh bin Yacob v Seng Hin Rubber (M) Sdn Bhd [1982] 1 MLJ 80, Tan Peng Loh v Lee Aik Fong & Anor [1981] 1 CLJ 167, Abdul Rahim Mohammad v Kejuruteraan Besi dan Pembinaan Zaman Kini [1999] 5 CLJ 85, Liang Jee Keng v Yik Kee Restaurant Sdn Bhd [2002] 2 CLJ 750
[5] Abdul Ghani bin Hamid v Abdul Nasir bin Abdul Jabbar & Anor [1995] 4 CLJ 317, Liang Jee Keng (supra),

also prescribed fixed compensations for permanent total disablement, permanent partial disablement and temporary disablement.

152. The legislation requires compulsory insurance cover for the workmen's compensation.

153. It is however clear that recovery of compensation under this legislation is not forced upon a worker but it does deprive him of proceeding with a suit against the employer per se. It does not deprive him of proceeding against third parties.

154. It is clear that a workman can sue any third party (not his employer except to recover workmen's compensation) except that he must account to his employer for any monies received from the 3rd party tortfeasor and repay the employer any sum so collected from the employer under the workmen's compensation legislation[6] (ie. repay the insurer).

155. Even then, civil liability claims against 3rd parties within a project site (other contractors or consultants) now tend to be matters covered by insurance.

156. The above legislations and insurance covers have effectively defeated the civil liability financial deterrence factor and have therefore rendered criminal sanctions as the necessary tool to make up the deterrence factor for safety breaches.

157. Furthermore, as a result of civil liabilities now being commonly within the domain of insurance, the extent of civil cases have diminished due to out-of-court settlement.

[6] Raja Harun Mohamad v Lim Ba Ba & Anor [1986] CLJ (Rep) 652

158. This in turn has deprived the civil courts from construing the appropriate conduct regarding standards of safety that should be achieved. Again, it is then left to the criminal courts to provide the judicial pronouncements.

159. Nevertheless, the Malaysian common law standards applicable to safety as a part of the common law duty of care in tort, has mirrored the legislative standards despite some legislations like the OSHA, expressly stipulating that a breach of the duties therein per se do not create a civil liability.

160. There is a dearth of civil precedents[7] that have indicated the judicial approach of assimilating the breaches of the F&MA as equivalent to a breach of duty and standards imposed by the common law, but there has also been one published authority todate that has suggested the same approach for the standards under the OSHA[8].

161. It is very likely that this trend of judicial interpretation will continue. The legislations and regulations do create a reasonable foresight as to the standards that can and ought to be practicably achieved and likewise provides a reasonable foresight that failure may cause hurt and injury to the worker/employee. Therefore, these legislations and their regulations, guidelines and code of practices, all essentially establish the objective foresight necessary for the common law standard of care and the objective foresight necessary to overcome the remoteness of causation and damage. As such the legislated standards do eventually become at the very least the standards applicable in common law. Ignorance of the law is not applicable to objective test. .

[7] Palanisamy Pillai v Musa Ibrahim & Anor [1984] 2 CLJ (Rep) 340, Kee Su Ngoy v Teh Bok [1989] 1 CLJ (Rep) 666 and Abdul Rahim Mohamad v Kejuruteraan Besi dan Pembinaan Zaman Kini [1999] 5 CLJ 85

[8] Abdul Rahim Mohamad v Kejuruteraan Besi dan Pembinaan Zaman Kini [1999] 5 CLJ 85

162. There have also been judicial pronouncements of the common law standards applicable to occupier's vis-à-vis safety. In common law, there is a recognition of the descending scale of a duty of care owed by an occupier to various persons entering the site or building. On the upper scale are persons who enter the site due to a contract (includes contractors, suppliers and employees) who are said to be owed an extremely high duty of care, followed by persons who enter the site on a business of interest such as invitees, followed by persons who are pure licensees as they have an express or implied permission to enter the site. On the bottom scale of the duty and standards, are trespassers[9].

163. Licensees are persons who may enter the site but are not persons required to enter or are not invited to enter (members of the public entering any non-exclusive building are licensees), must take the premises as they find it. The duty owed to them is merely not to expose them to hidden perils. So this duty is normally evaded by warnings of concealed danger.

164. As such, in the case of an occupier vis-à-vis a person contracted to enter, such as contractors and employees, it is likely that the very high standards will at least equate the standards prescribed by the safety legislations.

165. The question of vicarious liability vis-à-vis an independent contractor, does constantly crop up. Normally safety standards imposed on particular parties will be deemed non-delegable duties and hence even if the duties were passed on to an independent contractor and there has been a failure, the statutory responsible party will still be liable.

[9] Datuk Bandar, Dewan Bandaraya, Kuala Lumpur v Ong Kok Peng [1993] 2 AMR 28

166. The F&MA has been found to set non-delegable duties and therefore, employees or workers can sue the statutorily responsible party as the party owing them a duty in civil law[10].

167. It is likely that a similar interpretation will be given to the OSHA.

168. There is another potential cause of action against the statutorily responsible parties namely, to sue on a breach of a statutory duty. This cause of action is possible under the F&MA as there are no provision excluding civil liabilities arising from the stipulated statutory duties.

169. The statute in question must be found to have intended to create a civil liability and the duty is owed to a particular class of people, which includes the said employee or worker.

170. The OSHA however expressly provides that it does not create a civil liability and hence no cause of action for a breach of statutory duties can be commenced against the parties responsible under OSHA..

171. As for the public at large, an employer must realize that all other parties employed within the project site can be deemed to be the agents of the owner (because of the non-delegable safety duties arising from the works as a whole albeit carried out through various independent main contractor and consultants).

172. The distinction between the civil liabilities and the criminal liabilities is hence the contributory factor, which can be taken into account to reduce civil liabilities (ie. the degree of causation). Hence the employees' failure of his

[10] Datuk Bandar, Dewan Bandaraya, Kuala Lumpur v Ong Kok Peng [1993] 2 AMR 28

own statutory duties or general duties to use reasonable care, can reduce the compensations payable.

173. There is also the opportunity in civil actions to use the presumption of negligence principle akin to the criminal presumption in the OSHA. In civil law this is called the principle of "*res ipsa loquitur*".

## Legal Responsibilities and Sanctions within the General Criminal Law of Malaysia

174. The Penal Code is the general legislation that sets out the offences by which a person can be charged in Malaysia.

175. It is to be noted that under the Penal Code, a company cannot be charged.

176. There are various possible charges that can be proffered against a person involved in a breach of safety causing injury or death arising from a construction project.

177. Under Section 304A of the Penal Code a charge for manslaughter of causing death by a rash or negligent act not amounting to culpable homocide can be proffered with a potential sanction of imprisonment with a maximum of 2 years or/and a fine.

178. Under Section 336 of the Penal Code, a charge for rashly or negligently endangering life or the personal safety of others can be proffered with a sanction of imprisonment with a maximum 3 months or/and a fine with a maximum of RM500.

179. Under Section 337 of the Penal Code, a charge for causing hurt by doing a rash or negligent act, which endangers life or the personal safety of others, can be proffered with a sanction of imprisonment with a maximum of 6 months or/and a fine with a maximum of RM1000.

180. Under Section 338 of the Penal Code, a charge for causing grievous hurt by doing a rash or negligent act, which endangers life, or the personal safety of others can be proffered with a sanction of imprisonment with a maximum of 2 years or/and a fine with a maximum of RM2000.

181. Under Section 287 of the Penal Code, a charge for doing a rash or negligent act with a machinery which endangers life or is likely to cause hurt or injury, or for failing to take such order with any machinery which is in possession or care so as to sufficiently guard against any probable danger to life, can be proffered with a sanction of imprisonment with a maximum of 6 months or/and a fine with a maximum of RM2000.

182. Under Section 288 of the Penal Code, a charge for knowingly or negligently omitting to take such order with any building that is being pulled down or repaired so as to sufficiently guard against any probable danger to life, can be proffered with a sanction of imprisonment with a maximum of 3 months or/and a fine with a maximum of RM500.

183. The negligent act referred to in the Penal Code tends to be construed more strictly and must satisfy the test of recklessness more than the civil standard of negligence[11].

[11] One may be guilty of a criminal offence (eg. Manslaughter caused by criminal negligence) if he (accused) is shown to have acted not only in gross breach of a duty of care but recklessly, in the sense that he was creating an appreciable risk of really serious bodily injury to another or others and that nevertheless he chose to run the risk. ~*R. v. Holzer* [1968] V.R. 481at 482

184. Thus in a criminal case, the liability is determined by the degree of negligence or how far short of the standard of reasonable care was the act of the accused[12].

## Comparative To Other Legal Systems

### *The UK*

185. The legislation applicable in the UK is the Health and Safety at Work Act 1974 (HSWA).

186. The legislation was introduced based on the Robens Committee Report of 1972 at a time when there were differing and piecemeal health and safety legislations which were excessively prescriptive.

187. The Robens Report recommended that the regulations and laws on safety be unified and the standards introduced be clear and readily intelligible. The recommendation was that the standards introduced should be constructive and prohibitory with practical guidance.

188. Legislative introduction was also felt necessary in order to ensure that an evolving common law standard was always made clear. The benchmark for civil and criminal liability had to be made known to those that were to be regulated without the law of tort developing the same through case precedents.

189. The legislation set up the Health and Safety Commission (HSC), which is responsible for the issuance of regulation and policies and enforcement.

[12] as per Lord Hewart CJ, R v Bateman [1925] 94 LJKB 791

190. The Act is now supplemented by Regulations, Approved Codes of Practice and guidance and there have been numerous mandatory standards or directives set by the European Union.

*Changing Policies*

191. Yet in the UK, the process of regulating the construction site only took a serious turn in the area of enforcement after a serious incident referred to as the "Ramsgate Walkway Collapse".

192. On 14.9.1994, a high-level passenger walkway spanning between the terminal building and a portal frame mounted on a floating pontoon at the Ro-ro terminal, Berth 3, Port Ramsgate collapsed killing 6 people and seriously injuring seven others. A lengthy criminal trial then took place in 1997 where several organizations were involved.

193. The Swedish design and build contractor and the Swedish design sub-contractor along with the port owners and operators were charged and found guilty under section 3 (1) of the HSWA. The fines imposed were hefty and together with the order to pay prosecution cost, the Swedish design and build contractor had to pay BP875,000.00 and the design sub-contractor had to pay BP375,000.00 and the Port owners and operators had to pay BP419,000.00.

194. The judge's direction to the jury was that the jury would be setting the standards in preventing accidents in the future.

195. The civil liabilities were settled through insurers.

196. Thus began the era of post-accident retribution as a mode of deterrence.

*The Responsibility and Liability under the HSWA*

197. Under Section 3(1) of the HSWA, a duty is placed on every employer to conduct its undertaking in a manner not to expose others to risks of health or safety. This duty is owed to employees and even persons not within the employment who may be affected.

198. Under Section 2, a duty is placed on persons in control of the site and it is owed to all others within the site except for adult trespassers. This is essentially seen as akin to the duty in common law.

199. The Section 3(1) HSWA duty has been held as not a totally delegable duty in the sense that it cannot be avoided by an employer contracting with an independent contractor to carry out those duties as a whole. Technically, there is then no distinction between the employer using an employee or an independent contractor[13]. Therefore it is clear that the Section3(1) duty was not to be interpreted in accordance with the common law but instead on its strict wordings which were found not to have introduced the element of vicarious liability as a factor in determining the undertaking of the employer (note that the common law in turn developed a strict liability non-delegable principle).

200. In the Port Ramsgate trial, the trial judge gave a direction to the jury on the port authority's duty despite the part authority having contracted and appointed independent design and construction experts, by saying ***"it is incumbent upon an operator like Port Ramsgate to have proper management systems in place to ensure that they had some control over the process of design and construction".***

[13] R v Associated Octel [1996] 4 All ER 846

201. In the R v Associated Octel case, the House of Lords and specifically Lord Hoffman spelled out the test as ***"If an employer engages an independent contractor to do work which forms part of the conduct of the employer's undertaking, he must stipulate for whatever conditions are needed, to avoid those risks and are reasonably practicable. He cannot, having omitted to do so, say that he was not in a position to exercise any control".***

202. The fulfillment of the duty is measured by reasonably practicable measures taken to ensure that the employees or persons are not exposed to risks to health and safety.

203. The word "risks" has had to obtain judicial interpretation and has now been defined by the Court of Appeal, to be the possibility of danger or hazard (until and unless of course it is interpreted differently by the House of Lords)[14].

204. Under the HWSA, burden of proof is shifted. It is for the accused to proof that it was not practicable or reasonably practicable to do more or there was no practical means than what was implemented.

205. The effect of this is that the prosecution does not have to specify in a charge what it believed the accused ought to have done or not done.

206. The Management of Health and Safety at Work Regulations 1992 as revised in 1999 adopting the EU Framework directive of 1989 imposes upon employers a risk assessment and control obligation. As such, an employer must be able to show that it has carried out a suitable and sufficient assessment of the risks to health and safety of its employees whilst at work and also of those not in its employment who may be put at such risk by the employer's undertaking. This

[14] R v Board of Trustees of the Science Museum [1993] 3 All ER 853

assessment will then determine the measures needed to comply with the standards within the legislation.

207. The EU directive in fact sets out a clearer framework which is namely, identifying the risks, avoiding the risks, evaluating the risks that cannot be avoided, combating the risks at source, adapting the work to the individual, adapting the technical progress, replacing the dangerous with the non-dangerous or less dangerous, developing a coherent overall prevention policy, giving collective protective measures priority over individual protective measures and giving appropriate instructions to the workers.

208. The Construction (Design and Management) regulations 1994 and Construction (Health, Safety and Welfare) Regulations 1996 has now specifically stipulated that an employer must appoint a planning supervisor and principal contractor and must ensure that these parties along with any designers or contractors have the competence to perform the duties prescribed by HSWA. There is also a duty not to allow the construction phase to commence until the construction safety plan is prepared. An employer is also obliged to ensure that its health and safety file is available for inspection. The planning supervisors' duties include the risks assessment process.

*The Sanctions under the HSWA*

209. The guiding philosophy of sanctions has been prevention by way of anticipatory intervention.

210. The use of improvement notices and prohibition notices allows HSE inspectors to enforce compliance before any mishap.

211. The HWSA also allows prosecution for non-compliance, independent of any mishap. In practice however, this type of prosecution have seldom taken place.

212. The Roben's Committee Report was essentially critical of the enforcement and sanction policies. The Report did have a practical appreciation of the negative impact on the industry if sanctions were the emphasis and especially if the criminal justice system was used for enforcing the standards.

213. The Roben's Committee Report recommended:-

***"..a fundamental weakness of sanctions in this field – that the criminal courts are inevitably concerned more with events that have happened than with curing the underlying weaknesses that caused them. The main need is for better prevention."***

***"It must be recognised that there will always be some who are indifferent to the demands of safety. Flagrant offences call for the quick and effective application of the law. In what follows we are not arguing in favour of a generally milder, more tolerant approach but in favour of a much more discriminating and efficient approach-constructive where appropriate, rigorous where necessary"***

***"The fact is-and we believe this to be widely recognized - that the traditional concepts of the criminal law are not readily applicable to the majority of infringements which arise under this type of legislation. Relatively few offences are clear-cut, few arise from reckless indifference to the possibility of causing injury, few can be laid at the door of a particular individual. The typical infringement or combination of infringements arises rather through carelessness, oversight, lack of knowledge or means, inadequate supervision or sheer inefficiency. In such circumstances, the process of prosecution and***

***punishment by the criminal courts is largely an irrelevancy. The real need is for a constructive means of ensuring that practical improvements are made and preventive measures adopted. What-ever the value of the threat of prosecution, the actual process of prosecution makes little direct contribution towards this end. On the contrary, the laborious work of preparing prosecution….and conducting them consumes much valuable time which the inspectorates are naturally reluctant to devote to such little purpose. On the other side of the coin-and this is equally important-in those relatively rare cases where deterrent punishment is clearly called for, the penalties available fall far short of what might be expected to make any real impact, particularly on the larger firms."***

***"We have said that criminal proceedings are inappropriate for the generality of offences that arise under safety and health at work legislation. We recommend that criminal proceedings should, as a matter of policy be instituted only for infringements of a type where the imposition of an exemplary punishment would be generally expected and supported by the public. We mean by this offences of a flagrant, willful or reckless nature which either have or could have resulted in serious injury. A corollary of this is that the maximum permissible fines should be considerably increased."***

***"We associate with this two further recommendations. First, provision should be made for the imposition of high penalties in the case of repeated offences. Secondly, the fact that not only corporate bodies but also individuals such as directors, managers and operatives are liable to prosecution should be spelt out very clearly."***

214. Until 1992, the penalties imposed tended to be small with fines for summary convictions being £400.00 up to £2,000.00. The actual fines on full indictment

were equally unimpressive although not limited under the stature but there was the financial loss for defending the charge by way of legal cost.

215. In 1992, fines for summary convictions were increased to £20,000.00. There were signals within the legal system of an intention to substantially hike up the fines to deter such breaches[15].

216. R v Howe was a landmark decision where the Court of Appeal set out the general guidance for the factors to be considered in determining the extent of the fines. 2 main elements were identified namely the gravity of the offence and the means of the offender (whether individual or a corporation).

217. Within the gravity of the offence element, there were 3 categories of factors to be considered namely, the basic factors, the aggravating factors and the mitigating factors.

218. Within the basic factors, issues such as the degree of risk, the extent of the danger and the extent of the breach or breaches are to be considered. The extent of the breach or breaches must be with a view to whether it is an isolated breach or whether it was continuing over a period of time and also how far short of the appropriate standard of the reasonable practicable test was achieved by the accused.

219. Within the aggravating factors, issues such as whether there was death or serious injury, whether the accused had failed to heed warnings and whether the breach was deliberate so as to cut cost with a view to increasing profit, are to be considered.

[15] R v Howe [1999] 2 All ER 249 at p. 253

220. Within the mitigating factors, issues such as whether there was a prompt admission, a timely plea of guilt and whether the accused had responded to the mishap by taking the appropriate measures to prevent its reoccurrence, are to be considered.

221. Additionally, the accused were liable to pay very substantial investigation costs incurred by the HSE or other investigative authorities. Hence the courts extended the power to award prosecution cost under the Prosecution of Offences Act 1985 to include the investigative cost carried out with a view to prosecution[16].

222. The Ramsgate trial and eventual fines were extensive. Whilst it was couched as a deterrence sanction, it was apparent that the objective was retribution. The trial judge in delivering the extensive fines justified the same by stating ***"One of the purposes of the Health and Safety at Work Act 1974 is to ensure that the public is safe, that it is protected from …. All risks of this kind. It is unacceptable that ordinary members of the public going on board a ferry in the course of their ordinary lives should be exposed to the risk of death or serious injury. The purpose of these fines is, in part, to bring it home to the boardrooms and to the controlling minds of other entities who may be employers that the safety of the public is paramount."***

223. However, it must be noted that the trial judge in the Ramsgate trial did additionally find the accused parties guilty of the criminal offence of gross carelessness.

224. Section 47 of the HSWA expressly prevents civil liability arising from breaches of the HSWA. This therefore prevents a party from commencing a tortious action for breach of statutory duty.

[16] R v Associated Octel [1997] 1 Cr.App.R(S) 435

225. This however does not mean that the civil court will not find that the duties prescribed by the statute are not effectively the duties owed in common law and under other specific statutory tortious actionable rights.

***The Responsibility and Liability under UK general Laws***

226. Essentially when the HSWA was proposed, it was intended to mirror the general duties under the common law. However, HSWA allowed pre-emptive and anticipatory liabilities whilst common law generally only had liabilities post the tortious act. Thus the former is actionable before the mishap and the latter after the mishap.

227. Otherwise, the HSWA mirrors the common law duties such as under the Occupier's Liability Act 1957 (where control over an independent contractor is equally a requirement[17]), Defective Premises Act 1972 (latent defects applicable to safety of owners and tenants), negligence and the vicarious liability position (ie. if the party owes a duty in the first place then it cannot be avoided by wholesale delegation of the duty to 3rd parties without some degree of control[18] and its continued duty to control and duty to act to prevent a mishap when it is in the hands of the independent contractor is subject to the test of forseeability[19]).

228. The duties under the HSWA have been described as non-delegable duties and hence using an independent contractor to perform these duties does not allow avoidance of liability.

[17] AMF International Ltd v Magnet Bowling Ltd [1968] 1 WLR 1028
[18] D&F Estates v Church Commissioners [1989] AC 177
[19] Eckersley v Binnie [1988] 18 Con. L.R. 1

229. For civil liability, the principle of contributory negligence is available as a form of reduction to the compensation.

230. In the English criminal justice system, the offences of criminal negligence or corporate manslaughter exist. However, there has been a preference for prosecutions under the HSWA simply because the burden of proof has been statutorily reversed.

231. There has been great difficulty in prosecuting corporate manslaughter simply because there is a need to identify the individuals in the company who were responsible for safety in order to hold the company responsible.

232. The Sheen Report did suggest that all concerned in management must be regarded as sharing the responsibility for the failure of management to allow the infection of sloppiness in the conduct of its undertakings.

233. Nevertheless, there has been a move to enact legislation to overcome these difficulties premised on the report published by the Law Commission by actually avoiding the need to identify persons as long as the corporation's activities are not managed or organized to ensure that the health and safety standards are maintained.

***The Positives and Criticisms against the HSE and the HSWA***

234. HSWA has been enforced not only for patent breaches of safety standards but also latent breaches of safety standard (ie. post completion structures).

235. HSWA is therefore seen as extending the protection under the legislation to the public at large not only whilst construction is in progress but post completion.

236. The HSE have taken an active role in disseminating knowledge acquired from its role as the watchdog and from its own research and investigations.

237. The HSE had realized the difficulty with elucidating the statutory standards and requirements and had published a valuable framework document known as "***Reducing Risk, Protecting People***" or known as R2P2. This document also provides assistance to the corporations in their development of ideas for safety systems.

238. The HSE are empowered to issue approved codes of practice so as to provide practical guidance as to the requirements of HSWA and have issued numerous such documents. By virtue of Section 17 of the HSWA, breach of the codes do not constitute an offence but they are admissible as evidence where it is relevant to the proof of a breach of the general duties.

239. The HSE has also published a number of reports and discussion papers which cover specific incidents or categories of work.

240. The HSE is also active in holding conferences and discussion platforms.

241. The HSE has voiced its strategy of regulating and setting standards and providing interpretations by putting forward ideas for debate rather than merely laying down departmental policies. It is yet to be seen whether the courts would respect the interpretations decided upon at these debates.

242. The wide language used in the HSWA has been criticized especially when it took some 20 years before the word "risks" was defined by the courts. Even then there can be no certainty that the same interpretations will be accepted before a superior court or a court of equal standing in the future.

243. Further, the elements to establish a breach of the HSWA is open to judicial interpretations where it is possible that at one sitting of conservative pro-safety judges, the interpretation given may take an extremely narrow approach (such as in environmental breaches where the House of Lords have held that breach of statutory duty do not require the establishment of foreseeability[20]).

244. Also, judicial interpretation has led to some absurd decisions such as where an employer appointed engineers to inspect a malfunctioning lift and when the engineers were carrying out their inspection, in accordance with statutory requirements, they left the trapdoor open. However, an employee who was in the habit of using the malfunctioning lift because there was a habit of solving the problem by freeing the faulty electric contact fell through the trapdoor. The company was nevertheless convicted under the HSWA because it had allowed the irregular practice of the employees using the malfunctioning lift through their initiative method of solving the malfunctioning problem. In the end, the fact that the injury was caused by the open trapdoor which was in compliance with the statutory requirement was ignored[21].

245. This is the problem when duties under statutes relating to criminal liability begins to differ from the duties for civil liability under common law. It can only lead to confusion and uncertainty.

246. Further, there have been no interpretation as to what appropriate control is required when an employer uses an independent contractor.

247. The effect of a breach of the Management of Health and Safety at Work Regulation 1992 (now replaced by a 1999 Regulation) or the Construction

[20] Empress Cars Company (Abertillery) Ltd v National River Authority [1998] 1 All ER 481.
[21] R v Gateway Foodmarkets Limited [1997] 3 All ER 78

(Design and Management) Regulation 1994 which was extended by the Construction (Health, Safety and Welfare) Regulations 1996, is unknown. Would it constitute a breach of the general duty? Does compliance constitute evidence of satisfying the general duties?

248. If a breach of the HSE codes of practice can be used as evidence whenever relevant to a breach of a general duty, then the issue is whether compliance conversely can be used as evidence of the lack of guilt?

249. There have been instances where HSE inspectors have taken the task unto themselves to promulgate interpretations of the standards which have led to legal actions[22]. There must always be a coordinated and controlled dissemination as to the interpretations.

250. Whilst HSE has admirably resisted using the criminal justice system for its prosecutions, the trend of prosecutions have always related to breaches that have already caused damage and especially injury or death. This has inevitably drawn a comparison with the tort of negligence and focused the courts on the seriousness of the effect of the breach of safety standards rather than the prevention objective.

251. On the issue of sanctions, whilst R v Howe has set an appropriate guideline, there is a danger that the full extent of the guideline may never be appreciated when the offence is treated as a strict liability offence. This has yet to happen with the HSWA perhaps due to the possible defences available and the shift in the burden of proof but this danger can surface especially where there is a plea of guilt.

[22] Harris v Evans [1998] 3 All ER 522, where the HSE inspector and HSE were later sued in negligence but the Court of Appeal held that the inspector did not owe a duty of care, on public policy grounds.

252. As with all judicial guidelines, there are dangers that other courts will not see it fit to apply an equal weightage to the elements and in fact some have ignored certain mitigating factors[23].

***Further Developments***

253. There has been a recent reversal of the fines imposed against Balfour Beatty for the Hatfield disaster. The £10million fine was cut to £7.5million.

254. In line with the Law Commissions recommendations over the corporate manslaughter amendments, a draft bill was originally proposed on November 2004 and re-proposed on 23.3.2005. The draft bill proposes the new offence of corporate manslaughter.

255. The bill avoids the current difficulty of identifying the individuals responsible for the company's breach of the standards leading to death.

256. The bill targets very serious failings in the necessary management of the company's activities which has resulted in death. It focuses on the wider management failings.

257. The bill does not intend to target any individual within the corporation. If a particular person is directly to be blamed, then prosecution on an individual basis remains within the existing offences.

258. The new bill will equally apply to Crown Bodies such as Government Departments but with some exceptions.

[23] The prosecution of Geoconsult for the Heathrow Express Tunnel collapse where the judge ignored Geoconsults assertion that their culpability was severely enhanced by the contractual restriction on their resources placed by Balfour Beatty.

259. The new bill will carry a penalty of an unlimited fine rather than a custodial sentence.

260. The English Trade Union Congress has called for the bill to apply to un-incorporated bodies such as partnerships. As for the sanctions, there has been a call for more innovative sentencing approaches such as corporate probation. However, the biggest concern is that without punitive sanctions against company officers such as directors, there would be insufficient deterrence in the new bill.

261. There has been a proposal by the Government of a new Compensation Bill following the House of Lord's decision of Barker v Corus where it has been held that where employees have been exposed to asbestos at different times for differing employers and have contracted mesothelioma, the compensation will be apportioned amongst all employers and the victim has to seek to recover from each individual employer.

262. The new Compensation Bill will effectively reverse the situation allowing a joint and several liability and requiring the employers to seek apportionment between themselves.

***The United State of America (US)***

263. The legislation applicable in the Occupational Safety and Health Act effective from December 29, 1970.

264. The legislation basically set up a statutory authority to an agency within the US Department of Labour, namely the Occupational Safety and Health Administration (OSHA).

265. OSHA was empowered to issue regulations that have binding effect on non-governmental workplaces (the various States are also allowed to operate their own state programs for the private sector and develop plans for the public sector).

266. The legislation also created a research agency known as National Institute for Occupational Safety and Health (NIOSH) to determine the type of safety dangers in the workplace and ways of controlling the same.

***Changing Policies***

267. OSHA has been criticized for setting up confusing and burdensome regulations.

268. OSHA has also been criticized for arbitrary and inconsistent enforcement.

269. Compliance came at a heavy cost as equipment had to be retro-fitted with safety devices and mandated training, communication and documentation to comply were extensive and difficult.

270. During the Reagan administration, OSHA launched its Voluntary Protection Program where OSHA offered its partnership with the industry to educate and train the major corporations.

271. The Clinton administration attempted to focus on improving the standards believing that there would be satisfaction with compliance assistance. An example is the ergonomics standard (for musculoskeletal injuries) issued in the year 2000.

272. The current Bush administration is however focused on replacing mandatory regulations with voluntary guidelines and have moved OSHA's resources towards its voluntary and alliance programs.

273. In 2004, the General Accounting Office issued a report questioning the effectiveness of these programs.

***The Responsibility and Liability under the OSHA***

274. Initially, only a particular employer was responsible for its employees.

275. Now, the liability has been expanded under a "multi-employer workplace doctrine" such as in project sites, where each employer is responsible and liable for another employer's employees when the said employer or his employees create the hazard or exposes the injured person to the hazard or is responsible to correct the hazard or is the controlling employer of the site.

276. The issue of which particular employer is responsible for correcting the hazard is determined by either the terms of the construction contracts or by conduct.

277. There is an OSHA compliance directive (CPL 2-0.124) setting out the policy for multi-party work sites.

278. There are classifications for the seriousness of the liability, which will determine the discretion in the sanctions. They include willful conduct, serious or non-serious failures, repetitive failures, failures to abate or egregious conduct.

279. The legislative defences include subjective matters such as unavoidable employee misconduct, technological or economic infeasibility, abatement that

in fact creates greater hazard or lack of employee exposure or objective matters such as unanticipated hazard.

280. To establish unavoidable employee misconduct, the employer must prove that it had safety programs for the specific hazard, that it had trained the employees, that its safety supervisors did observe their duties and disciplined violators and that the safety supervisors did not have the reasonable means of knowing the violation that led to the mishap.

281. Under Section 6 of the OSHA Act, whenever a new regulation is introduced, an employer may apply to the Secretary for a temporary order granting a variance from the standards required. Where the employer is able to establish that the employer is unable to comply with the standard because of the unavailability of professional or technical personnel or materials and equipment needed for compliance within the period prescribed in the regulation. The employer must also establish that it is taking all available steps to safeguard its employees from the hazard so covered by the new regulation and it has an effective program for achieving compliance within a period as quickly as practicable.

***Post Mishaps Rights***

282. The OSHA has the right to conduct inspection with consent or a search warrant, the right to use a video camera, the right to record voices without notice or consent and the right to inspect documents.

283. The employer has the right to limit the inspection to the complaint or mishap, the right to accompany the inspector and the right to attend interview with other employees (not the injured employee or the complainant).

284. The injured or complainant employee has a right to a private one-to-one interview with the inspector but equally a right to refuse the interview or end the interview at any time and to refuse to sign statements or be photographed or tape recorded.

***The Sanctions under the OSHA***

285. A citation for a non-serious violation may receive a civil liability of any amount up to a maximum of US$7,000.00 per violation and a citation of a serious violation shall receive a civil liability of up to US$7,000.00 per violation.

286. A repeated violation or a willful violation will receive a civil liability of not less than US$5,000.00 per violation and not more than US$70,000.00 per violation.

287. The legislation provides for criminal liability if there is a fatality caused by a willful violation of the specific regulation. The sanctions include 6 months imprisonment and/or up to US$500,000.00 fine per fatality for a corporation and up to US$250,000.00 fine per fatality for individuals (without the need for Miranda warnings). The fines were amended and increased by the Sentencing Reform Act 1984 (previously up to US$10,000.00 or US$20,000.00 for second conviction within one year).

288. There are also criminal sanctions if the corporation or individual causes an obstruction of justice by interfering with inspections by OSHA or falsifies records or lies to the federal inspectors or misrepresents the status of a contractor to avoid OSHA liability.

289. The strict statutory/regulatory liability means that a person can be convicted of a violation without knowledge of the illegality of the action or even knowledge of the action itself.

290. The test is that of 'failure to use reasonable care' (definition of negligence in civil law) rather than that of 'gross deviation from the standard of care that a reasonable person would observe in the situation' (as the definition of criminal negligence)

291. Persons can be prosecuted with crimes even without the evidence of direct participation or actual knowledge.

292. The prosecutor need only to prove that a violation occurred and that the accused failed to act reasonably[24].

293. Unlike ordinary criminal prosecution, bearing in mind that the legislation seeks to protect public health and safety, intention is not a necessary element of proving violation.

***The Responsibility and Liability under US general Laws***

294. The Laws of Tort govern the civil responsibilities and liabilities.

295. Negligence or intentional acts create the liability.

296. Liability attaches to the party in charge of ensuring the particular hazard does not occur or is abated including safety supervisors, the direct employer or the employer responsible. Liability can also attach to the particular employee or another employer or co-employee which caused the hazard.

[24] United States v Hanousek 176 F.3d 1116 (9th Cir.1999)

297. To identify the person to be held liable, the usual test is whether the said person is capable of identifying the imminent hazard (hazards identified by OSHA are deemed within the capability) and the person is authorized to take prompt corrective action against the identified imminent hazard.

298. As for an employer to be held liable, the same test applies as to the capability of identifying the imminent hazard but additionally it must be proven that either the employer did not employ or designate or inform the appropriate person to take corrective action, or the person so employed did not make frequent and regular inspections or never took the corrective action (vicarious liability).

299. Interestingly, under the US Laws on Tort, there is a further duty attached to the parties involved to preserve the evidence which includes the machinery and documents related to the mishap where possible or the condition of the site or equipment must be memorialized through photographs or other documentary means (notes, measurement etc). The evidence must be securely stored and the police and OSHA can have access to the evidence. There can potentially be liability for loss or destruction of the evidence.

300. In the general criminal law, charges for murder, attempted murder, battery, assault or reckless endangerment can be made out depending on the situation.

301. The principle of double jeopardy does not apply and there can be possible federal or state prosecutions.

***The Sanctions under the US general Laws***

302. In the Laws of Tort, death creates a larger liability than Malaysia and personal injury has the same compensatory standards as in Malaysia except there is additionally a claim for loss of consortium (emotional claim). If the hazard causing the mishap is done intentionally, there is the additional claim for punitive damages.

303. In fact, in 1988 and in a landmark decision, the Tennessee Courts of Appeal found that the violation of a federal or state safety statute constitutes negligence per se and not merely evidence of negligence. Further, if the statutes did not provide for contributory negligence to mitigate the award, there could be no consideration of such a legal concept. The case was Bellamy v Federal Exp Corp, 749 SW .2d 31.

304. The criminal sanctions of course carry the full range of imprisonment and fines depending on the charge and mitigating circumstances.

***An Objective Analysis of the effectiveness of the OSHA***

305. The OSHA was set up to pro-actively address specific regulatory and enforcement needs. It has been pro-active in varying degrees depending on the political administration of the day.

306. The fact that it is empowered to conduct its own prosecutions and has the ability to seek sanctions that includes hefty fines was initially seen as an appropriate deterrence to the breach of the regulation and appropriate standards set by the OSHA.

307. It further set up “whistleblower laws” which protects employees that reveal shortcomings and breaches by their employers. If the employer takes adverse

action against the employee concerned, the employees can file a 11(c) complaint and the OSHA will investigate and bring the employer to court.

308. There has been a constant debate over the cost of regulating and enforcing as compared to the actual benefit in reducing workers injuries, illnesses and deaths.

309. A 1995 study of several OSHA standards by the Office of Technology Assessment shows that the regulated industries do typically overestimate the expected cost of implementation of standards.

310. The main criticism has been the ineffectiveness of the penalties especially the criminal sanctions. Criminal sanctions are only available for willful violations leading to death and the maximum penalty is a misdemeanor with a maximum 6 months imprisonment.

311. This has led to OSHA pursuing high-profile criminal prosecutions in conjunction with the Department of Justice using the general criminal laws of the US for violations under the OSHA regulations (they have also jointly prosecuted under the environmental legislations in conjunction with the Environmental Protection Agency where higher fines can be sought).

312. Recently, there have been criminal charges proffered for incidents involving scaffolding collapse, illegal asbestos removal without personal protective equipment, excavation collapse, failure to train electrical workers that led to an electrocution and the failure to provide or enforce personal fall arrest systems.

313. Some local state prosecutors have charged company executives with manslaughter and other felonies for criminal negligence that lead to death.

314. In the US, even a corporation can be charged with a criminal offence for safety violations. An example is the charges proffered in the State of Michigan against Lanzo Construction Co and its Vice President Angelo D'Alessandro for separate counts of involuntary manslaughter and willful criminal violation of the Michigan OSHA. The company was found guilty in 2002 and sentenced to 2 years probation by the district court whilst the charges against the Vice President were eventually dismissed on appeal. The company is also facing a US$650,000.00 fine and a civil law suit from the workers family. The court found that the company had consciously and callously neglected to train the supervisory personnel on its worker's safety rules. The company's employees failed to slope, shore or protect workers working at an excavation when a cave-in occurred.

315. There is currently a lobby involving congressional democrats, labour unions and community safety and health advocates, seeking a revision of the OSHA Act to make it a felony with higher penalties for willful violations.

316. The seriousness of the situation, can be seen from an extract in a publication by the New York Committee for Occupational Safety and Health entitled "Campaign to Stop Corporate Killing":-

***"Long prison sentences are supposed to deter crime.***

***However, the penalty for an employer who knowingly kills a worker by violating job safety laws is only six months in jail. Approximately twice a week in the U.S. an employer commits that crime, perhaps because prosecutions are rare and the penalty is so limited. In the last 20 years, fewer than three dozen criminal convictions have sent killer employers to jail.***

***Even though any willful violation that results in a death could give rise to a criminal prosecution, fewer than two percent of the fatalities caused by a willful violation have resulted in criminal prosecution. The rest are settled with a civil penalty of US$70,000 or less – much less in most cases. In contrast, harassing mule deer can be punished with up to five years in jail and a US$250,000 fine.***

***The extreme rarity of criminal prosecution for preventable workplace fatalities and the relatively light penalties that can be imposed are the focus of a "Campaign to Stop Corporate Killing" by the National Network of Committees for Occupational Safety and Health. This Campaign seeks to promote safer workplaces by increasing the law's deterrent effect on safety and health violators.***

***The Campaign has three objectives: It backs federal legislation that will increase both the civil and criminal penalties for a willful violation that results in a fatality. It seeks to pressure OSHA to impose the maximum possible fine for willful fatalities and to greatly increase the number of willful fatality cases that OSHA refers to the Justice Department for criminal prosecution. It aims to encourage local law enforcement officials to increase the use of ordinary criminal sanctions to punish employers who negligently kill workers.***

***The first objective, to pass federal legislation that boosts civil and criminal penalties, is already on the congressional agenda in the form of two bills, the "Wrongful Death Accountability Act," (S.1272/HR4270) sponsored by Senator Jon Corzine (D-NJ) and Representative Major Owens (D-NY), and the "Protecting America's Workers Act," (S2371) sponsored by Senator Edward Kennedy (D-MA). Both bills would increase the criminal penalties for a willful fatality to 10 years' imprisonment and a US$250,000 fine. The***

***Kennedy bill would also increase the civil penalty for a willful fatality to US$250,000. There is little chance of either bill becoming law as long as both houses of Congress and the White House are under Republican control, but their sponsors hope to develop a record of evidence and testimony that could lead eventually to their passage.***

***The Campaign has also made progress by pressing OSHA to refer more cases for criminal prosecution. OSHA has acknowledged that one obstacle to making referrals is its staff's lack of experience with criminal investigations. Accordingly, OSHA has announced a new program to teach a group of OSHA inspectors criminal investigation techniques. "Currently our inspectors are trained to do only civil investigations. Criminal cases require much more evidence than our typical civil cases to document willfulness," said Richard Fairfax, director of OSHA's enforcement program. "If trained properly, [OSHA inspectors] would not mishandle these investigations," said Ron Hayes, founder of the FIGHT Project, an organization for family members of workers killed on the job.***

***The project's third objective aims at, encouraging local prosecutors to make greater use of their power to charge employers with manslaughter or assault when a worker is killed or seriously injured as a result of an employer's recklessness. This is being undertaken at the grassroots level by COSH groups and safety and health advocates in numerous locations, as exemplified by the Central Labor Council's resolution.***

317. These views have in fact been supported by the Courts and lawyers

***'public welfare offense is a crime for which "a reasonable person should know [that the prescribed activity] is subject to stringent public regulation and may seriously threaten the community's health or safety."***

***Liparota v United States, 471 US 419, 433 (1985), the Supreme Court.***

***"The imposition of mere monetary sanctions on a corporation might not lead to material changes in conduct. Holding executives and managers criminally liable, with the probability of jail time will deter the relevant parties from using cost-benefit analysis in their decision-making and from treating fines against their corporations simply as a cost of doing business.***

***Paul W. Berning, Thelen Reid & Priest LLP***

***Others***

318. In Canada, there is a specific criminal code, Bill C-45 which is effectively a safety enforcement code. This is in addition to the country's OSHA legislation.

319. Bill C-45 creates a duty for organizations and their representatives to take every reasonable precaution in order to protect their workers as well as the general public.

320. Bill C-45 imposes criminal liability on organizations for negligence (s. 22.1), even in the case where no single individual can be charged for committing a criminal offence.

321. The Bill also creates a new duty (s. 217.1) which is applicable to both individuals and organizations, and reads as follows:

***Everyone who undertakes, or has the authority, to direct how another person does work or performs a task is under a legal duty to take reasonable steps to prevent bodily harm to that person, or any other person, arising from that work or task.***

322. In *R. v. Fantini*, [2005] O.J. No. 2361, the prosecutors relied on existing OSHA regulations to resolve the proceedings. It is suggested that Bill C-45 criminal charges were not used as it may instead be reserved for severe

disasters. The Bill's vague language does provide prosecutors with vast discretion in determining whether to apply OSHA or criminal charges (or both).

## What next for Malaysia

### *Within the Construction Industry*

323. Local Standard Form Conditions of Contracts should carry specific stipulations on the safety standards introduced and the repercussions of failure. Repeated breaches should be construed as a ground for termination or a repudiation of the Contract.

324. Cost and time effects of providing and maintaining safety standards should be priced within the preliminaries and allowed within the work program.

325. In order to ensure design safety is at all times achieved, independent peer review of the design (Lloyd's Register was found not to carry out peer review) and a review of the works during construction.

326. Require risks assessments as a matter of practice.

327. Wherever possible set up Malaysian Standards to cater for safety issues. These standards may have engineering aspects which are best handled by the industry. These standards can then be referred to in the relevant safety regulations.

328. CIDB should be clearer about the actions that can be taken against a contractor with convictions. Down grading their classifications, suspending and removal from the registry are possible industry sanctions.

***Within the Corporation***

329. Ensure that the main parties involved such as the employer, the designer and the contractor all operate a quality management system allowing control over the design and construction process.

330. Recognise that safety supervisors or those appointed in projects whether by the employer, contractor or consultants, generally tend to have a lack of knowledge of the safety standards prescribed by the law, they lose their enthusiasm and therefore the effective implementation especially once the progress of the project is at its peak or are they are generally reluctant or unaware of their obligation to implement disciplinary sanctions against employees and workers that breach the standards imposed . This is especially true if those in breach are fellow employees or efficient and productive workers.

331. It is imperative for organisations to ensure constant training and retraining where necessary, of all its safety supervisors. Training programmes must help to increase the awareness of the rights and responsibilities of supervisors in maintaining safety at the site. Greater awareness of safety standards and its corresponding sanctions, will set the expectation and improve the knowledge of trainee supervisors.

332. Further, the orgainsations must ensure that tools and resources and the support structure including the necessary manpower that are made available for the implementation and supervision process.

333. One of these support systems is to realize that your workers are possibly your best watchdogs and enforcers.

334. Prepare and issue a multi-lingual manual or directive leaflet or even attach notices for the steps of action to be taken by a worker within general areas, so that the workers can understand their duties. A one-off training session will not achieve this goal and workers must be constantly reminded of their duties.

335. The steps of action should be simple and straightforward. Examples of these are:-

***"Supervisor or Worker observes contractor employees in unsafe activity***

- ***Contact contractor supervisor immediately to inform of hazard***
- ***(demand/request/inform) that supervisor immediately remove employees from hazardous areas***
- ***(demand/request/inform) prompt corrective action***
- ***Imminent Danger – demand that subcontractor employees immediately exit hazardous area***
- ***Document incident for formal corrective action***

***Supervisor or Worker observes Company employee falling to wear personal protective equipment (PPE)***

- ***Immediately stop employee from working***
- ***remove employee from exposure to hazard***
- ***provide appropriate PPE***
- ***issue discipline to employee and document***
- ***conduct retraining of employee***

336. Have a post accident policy and process that provides for immediate investigation of the incident, reporting the incident and its causes, and

brainstorming with supervisors and connected workers on the remedial steps to avoid and prevent further like incidents. Note however that the report may later have legal ramifications so it should avoid speculations, finger pointing and admissions. If the reporting process is connected with instructions from external legal counsel, it will possibly attract legal privilege.

***Within the Legal System and the Executive***

*Interpretative difficulties*

337. The clarity of the applicable standards and the volume of prescribed standards are extremely daunting.

338. The first fact to note is that there is must duplicity within the various laws.

339. The OSHA and the F&MA especially the F&MA Building Regulations, covers similar areas of work but they are differing standards being imposed where some of the standards are the same and some of the standards are different or subtly different.

340. Within each legislation itself, there are various regulations which can be read to be covering the similar standard for the similar area of work, yet there are subtle differences.

341. A layperson cannot be expected to decipher all these legislations and regulations without any confusion. This leads to interpretative disasters.

342. It is imperative that the executive realizes that there ought to be one legislation and one set of standards albeit amended standards over time, for any particular industry.

343. It is time that the Ministries and Departments work towards a united and single legislation and standards for the various industries.

*Sanctions as a deterrence*

344. The OSHA has in fact provided the most severe sanction for breaches of the improvement and prohibition notices. This is not by chance but a calculated move by the legislature to realize that actions must be taken before the mishap occurs. In comparison to most other countries, the sanctions under this particular enforcement method are far more severe. Therefore it ought to be far more effective.

345. As such, if there are sufficient enforcement officers inspecting the project sites and they are offered incentives to ensure their job is done, we may see very anxious employers taking immediate steps to resolve any failure in standards. The time and cost effect including the danger of a custodial sanction ought to be effective.

346. The OSHA also has a deeming provision for officers of a company that have contravened the standards imposed. With all these legal weaponry, it is a wonder how breaches of standards continue to remain. Perhaps it is the failure to appreciate or utilize the weaponry.

347. It is noted that there are seldom any prosecutions let alone a prosecution of the upper echelons of management of a corporation in breach, when there have been legislative efforts to make these provisions available.

348. Having said that, large fines ought to be sufficient to produce a suitable response from the organization in question as well as the industry at large. It

must convey an actionable message and contribute to the development of safety standards. The cost of prosecution and investigation should also be charged against the convicted accused.

349. In doing so, the courts ought to consider the company's track record and inadequacies in its efforts to maintain the safety standard as a benchmark for the severity of the sanction rather than merely the severity of the mishap and its effect.

350. There ought to be an opportunity in proposing or mitigating of sanctions for a consideration of the elements set out in the UK landmark decision of R v Howe. However, this opportunity must exist even when there is a plea of guilt.

351. In order to avoid the discrepancies that tend to occur in the application of judicial guidelines especially as to the measure of sanctions, the R v Howe test can be further elaborated and codified as identifiable factors determining identifiable levels of sanctions, within the Regulations under the legislation.

352. Tapering the fines with a consideration of the means of the accused is also an important factor to ensuring deterrence and not retribution. The accused has to learn from his or its experience but must be allowed to continue in the business with a financial capability to ensure safety standards are met in the future. A lesson learnt prevents re-occurrence especially within the same organization.

353. There should be clear mitigation considerations that ought to include factors such as causation, the contributory effect caused by other parties, the previous safety record/ attitude to safety, the nature of the mishap, the frequency of mishap or similar occurrences and steps taken post event.

354. It must be noted that especially with less known hazards or risks, the best way to learn is sometimes unfortunately through the experience of one organization and in such situations there must be a no-blame culture. An obvious example of this is asbestos once used for fire protection purposes. However, the appropriate test for maintaining safety standards should allow for matters reasonably unforeseeable on an objective test and not simply a strict liability standard.

355. The safety management of some post completion structures requires periodical inspections and assessments. Certain types of structures such as multi-storey car parks may require a continued assessment and inspection, and legislation does not seem to provide for such actions.

356. As such, risk assessment standards and documentation ought to be introduced and these risk assessment reports may have to be reviewed from time to time especially to ensure that it keeps in touch with the development of knowledge of risks and hazards or protective systems.

357. On the other hand, penal imprisonment sanctions should only be applicable to persons who can be proven to have willfully allowed and encouraged repeated breaches with an intention to profit their organizations. Penal sanctions against corporations which affect their reputations and force the application of their financial gains towards bound over community service activities should be introduced similarly for willful repeated breaches of the standards.

358. There is also a need for the development of the law and judicial interpretative views in the area of safety standards and therefore merely setting low fines for plea bargains will not allow this to occur.

359. Finally it must be realised that bigger sanctions do not mean safer structures. Most drastic cures have side-effects. A balance must be achieved.

## Conclusion

360. The legal fraternity and the legislature should pay more attention to safety issues and the development of the laws governing the same. There should be one framework and a clear set of requirements and standards.

361. Only then can the parties responsible be seriously taken to task.

362. However, the right message must be sent by the single framework of standards by stringent enforcement of these standards.

363. The message must be that the standards are a balanced set of necessary protections learnt from previous lessons. The responsibility to prevent repetition must be collectively avoided. The penalties for not compliance must be financially un-attractive (high) and penal custodial sanctions are to be used for the clear willful profit intended violators including the individuals in management of such companies.

364. Furthermore as a nation, it is important that Malaysia sends out a message that human rights and workers rights are not only seen to be protected but are in fact protected. It is a part of our global reputation and the initial costs impact will be outweighed by the benefits that are achieved in the long run, especially if our construction players are to be global players in the time to come.