

# Contractor's Liability As Occupier Of Premise To Trespasser In Safety At Work Cases

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When a contractor carries out construction activities at the worksite, the contractor is the occupier of the site throughout the work progress. As the occupier of the site, the contractor has the duty to ensure that his workplace is safe not only to the employees who work thereon but also to all persons who come into the worksite. Notwithstanding the fact that the contractor has a safety duty towards his employees and any visitor whom the contractor has given permission to enter, the question arises whether the contractor, as the occupier, has the same duty to a trespasser who enters the worksite without the permission from the said contractor. In the law of torts, a trespasser is a person who is trespassing on a property without the permission of the owner.

## Liability To Trespasser

In England, the Occupiers Liability Act 1957 protects lawful visitors while the Occupiers Liability Act 1984 affords protection to trespassers as well. Prior to the Act 1984, the common law did not afford protection to anyone who falls outside the category of lawful visitors. Thus, if a trespasser was to be injured on other person's premise due to the defective state of the premise, the trespasser had only himself to blame. This was because the trespasser went on the occupier's premise at his own risk and the occupier owed him no duty to protect him from injury. However, while the English Occupiers Liability Act 1984 affords some protection to the trespassers in circumstances previously unknown to law, the Act is not applicable in Malaysia. Therefore, the law relating to occupier's liability towards a trespasser



Entry to construction site

in Malaysia is still governed by the common law principles, in absence of a specific statute on occupier's liability.

The original common law rule was that the occupier of a premise is only liable to a trespasser in respect of some willful act 'done with deliberate intention of doing harm ..... or at least some act done with reckless disregard of the presence of the trespasser'. This common law principle towards trespassers can be found in the case of *Robert Addie & Sons (Collieries) v. Dumbreck (1929) AC 358*, where the court held that an occupier was not liable for injury to trespassers unless he, the occupier, had acted intentionally or recklessly. In *Robert Addie's* case, there was a haulage system which was worked intermittently, on the company's land. The company had tried unsuccessfully to prevent trespassing near it. On one occasion, when the mechanism was put in motion, a young child was playing with it. When it started he was caught in it and killed. It was held that there was no legal duty upon the

appellants to afford protection against the danger.

However, there was substantial development of the law in 1972 when the case of *British Railways Board v. Herrington [1972] AC 877* was heard. The House of Lords in the case introduced the 'duty of common humanity', owed by the occupier to the trespasser. The principle in *British Railways Board* is applicable to local cases, in which the duty owed to trespassers arises when the occupier knows the fact which show a substantial chance that the trespasser may come to a place where there is danger which the occupier has created or knows about; and the duty is discharged by the occupier taking steps to avoid it in accordance with the dictates of common humanity and in the light of his own circumstances and financial limitations.

In the case of *British Railways Board v. Herrington*, the defendants owned an electrified line which was fenced off from a meadow where children lawfully played. In 1965 the fence had been in a dilapidated condition there for several months and through it people took a short cut across the line. The defendants' station master, who was responsible for that stretch of line, was notified in April 1965 that children had been seen on it, but the fence was not repaired. On June 7, 1965, the plaintiff, then aged six, trespassed over the broken fence from the meadow where he had been playing and was injured on the live rail. He brought an action claiming damages for negligence, and the judge held that the defendants were negligent in allowing the fence to fall and remain in disrepair and were liable to the plaintiff since the emergence of a child

trespasser from the meadow on to the line was reasonably foreseeable. The Court of Appeal further held that the defendants acted in reckless disregard of the plaintiff's safety. On appeal to the House of Lords, it was held that the defendants were in breach of their duty to the plaintiff who was entitled to damages.

According to Lord Morris, there was no duty on an occupier to ensure that no trespasser enters his land, nor to make his land fit for trespassers to trespass in, nor to survey his land to discover the existence of dangers of which he is not aware, since a trespasser trespasses at his peril; but, while the occupier is not under the same duty of care which he owes to a visitor, he owes a trespasser a duty to take such steps as common sense or common humanity would dictate to exclude or warn or otherwise, within reasonable and practicable limits, reduce or avert danger. As explained by Lord Pearson in the said case, with the increase in the population and the greater proportion living in towns, where there is less space for children to play, there is a greater temptation for them to trespass. With the progress of technology there are more and greater dangers and steps to deter persons, especially children, from trespassing in dangerous places.

For further understanding, the application of the principle can be seen in the case of *Lim Seow Wah &*

*Anor v. Housing & Development Board & Anor* [1991] 1 MLJ 386. In this case, there was an action for damages in relation to the death of Lim Kim Tong, following an accident on December 19, 1981 at a construction site which was occupied by the building contractors who were constructing a 25-storey block of flats for the Housing & Development Board. On the date of the accident, the contractors had already completed the entire structure of the building and were in the course of hacking the uneven walls in preparation for plastering them. During the construction of the building a safety net had been strung across the walls to catch any falling stones and debris but the safety net was removed by the contractors' workers in order to do the hacking work. A gondola was used to hack the 25 floors of the building and it was hanging beside the wall on the 14<sup>th</sup> level at the time of the accident. On the ground floor of the building, there was located a coffee stall. This stall was operated by a licensee of the contractors from the beginning of the construction works to cater to the needs of the workers and the coffee stall was accessible to members of the public.

The question in this case was whether the contractors were negligent as regards Lim Kim Tong (the deceased) who was a member of the public. The deceased was then living at the flat which was situated next to the building site. On the afternoon of

December 19, 1981 at about 1 p.m., the deceased and his one friend went to a nearby *kampung* to catch spiders. It began to rain about half an hour later and they wanted to look for shelter in the building as well as have a cup of coffee. They ran to the building, went under it on the ground floor on one side of it and continued to run towards the coffee stall. To reach the coffee stall by the most direct route, they have to cross an open space between two sections of the building. As they were crossing this space, the deceased was struck by something falling from above. The deceased fell on the ground and he began to bleed and appeared unconscious. Later, the ambulance arrived and took him to the hospital but he fell into a coma in hospital and died on December 25, 1981. The post-mortem report on the deceased disclosed that he died from a fracture of the skull. There was a fracture of the right temporal bone with extramural hemorrhage, which was caused by a hard object falling on the head of the deceased. The hard object was probably a stone or a lump of hardened cement which had fallen from the side of a wall or the gondola which was hanging in the air next to the wall.

The counsel for the contractors submitted that the contractors owed no duty of care to the deceased as he was a trespasser who had also been warned by signboards of the dangers on entering the site. However, on the evidence adduced before the judge, the findings of fact showed that:

- (a) the building was not fenced off;
- (b) it was accessible to the public;
- (c) the coffee stall next to it was also accessible to the public, members of which patronized it;
- (d) hacking work was going on;
- (e) there was no safety net to prevent falling debris from injuring any person who happened to be at that spot;
- (f) a gondola was left hanging in the air between the walls; and
- (g) there was no signboard warning people not to go to the site or walk through the building.



Contractor inspecting construction site

Subsequently, the judge found that the building contractors owed a duty of care to all those who came to the site to patronize the coffee stall and they accordingly owed a duty of care to Lim Kim Tong and that they breached their duty of care in not putting up a safety net where and when their employees were hacking the walls of the building. The works created a danger and the deceased was a foreseeable victim. Thus, the contractors were liable for damages.



Walking through a building site

## Children Trespasser

In discussing the trespasser's issue, in all cases, enhanced care must be observed in dealing with trespassers who are children, given the nature of children and the infantile curiosity associated with their age and nature. So, the more serious the danger, the greater is the obligation to avoid it, especially if the dangerous thing is an allurements to children that may greatly increase the chance those children will come there. The relevant local case which involved children trespasser is the case of *Lembaga Letrik Negara, Malaysia v. Ramakrishnan* [1982] 2 MLJ 128. This case was a case of occupier/trespasser on the simple ground that the respondent trespassed on the property of the appellants and therefore the principles in the common law case of *British Railways Board* are applicable.


*Ramakrishnan's* case involved a ten year old boy (the respondent) who climbed up a H-pole (erected and maintained by the appellants) in an attempt to release a bird which was trapped on the wire of the pole. The boy was electrocuted as he reached the bracket which supported the cable-box. He was thrown to the ground and suffered severe injuries and first and second degree burns which resulted in scars and permanent disfiguring. The claim was based on

the negligence of the appellants in having erected and maintained the H-pole which carried high-voltage electric wires immediately adjoining an unfenced public footpath in a padi field, in which the H-pole and wires constituted a dangerous hazard and allurements to the respondent. In the course of arguments before the High Court and the Federal Court, the main contention was that the respondent was a trespasser and therefore the relationship of occupier/trespasser fell into consideration.

On the evidence of the case, the judge held that the appellants owed a duty to the respondent as they had erected, maintained and controlled a highly dangerous H-pole of hidden lethal potentialities immediately adjacent to a footpath connecting the *kampung* to the main road which was used by the *kampung* folk including children. The pole was within easy reach of children and it was ideally suited for children wishing to climb it. The appellants must be assumed to know that children could be mischievous and could do things without realizing the consequences and therefore there was a substantial chance that they might come there. Thus, there was a duty because of the existence, near to the public, of a dangerous situation. It was also held that in this case, commonsense and common humanity dictated that steps like putting up warning signs and adequate anti-climbing devices should be taken but this was not done. Therefore, the appellants were

in breach of the duty owed to the respondent, resulting in injury to him. It was a fair inference from the evidence that it was the dangerous situation created by the appellants which the child neither knew nor could be expected to know which brought about his misadventure.

## Conclusion

From the above discussion, it is clear that the law relating to the duty of the occupier to trespassers is still governed by the common law principles. Therefore, the Courts in Malaysia will still refer to the decision in the above cases, *Herrington* and *Ramakrishnan*, in deciding any case concerning the contractor's liability as the occupier of the worksite. As such, the 'duty of common humanity' is to become the basis for the occupier's duty to trespassers and the principle shall apply to trespassers cases in Malaysia. 

## References

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