

Occupier's Legal Duties to Prevent Injury: Reviving Tourism Through Understanding Standard of Care

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ABSTRACT

The outbreak of Covid-19 pandemic has adversely impacted Malaysia's tourism especially Visit Malaysia 2020 (VM2020) campaign. This had led to a large reduction of visitors and cancellations of various tour programmes. Nevertheless, with the progressive national Covid-19 immunisation programme, Malaysia eventually sees light at the end of coronavirus tunnel. Now countries including Malaysia are turning to build recovery strategies in an immediate effort to support the tourism sector. Restructuring the tourist sector by restoring visitor's trust on safety and wellbeing in travel and tourism are among measures taking by the government in tourism recovery plan. In planning a recovery plan, the concept of duty of care has becomes an emerging issue that tourism player must wisely pay attention to as most lawsuits in tourism involving negligence. The concept of duty of care which refers to legal obligation to ensure the reasonable care and safety or well-being of others and thus requires occupier to implement measures and strategy to mitigate the risk and harm to those who visit his place. The covid-19 pandemic undoubtedly has added a special concern with respect to duty of care and standard of care to be adhered by tourism player during re-opening tourism while ensuring the safety of visitors. The main objective of this paper is to examine the standard of care required under tort law with respect to tourism players as occupiers under tort law. Special focus will be given to standard of care of an invitee as tourist or visitor typically falls under this category of entrant. Doctrinal methodology is adopted as it critically analysed relevant legislations and case law to answer the research question. To strike a balance between public health and economic recovery, a systematic plan must be adopted by government which to include awareness on specific laws and regulations. In addition, the legal awareness on standard of care imposed by law is very useful in supporting tourism in a new norm and restoring visitor's confidence.

Key Words: occupier, legal duties, prevention of injury, tourism industry, standard of care

1. INTRODUCTION

The outbreak of Covid-19 had begun in early 2019 and showed an instant impact to tourism sector all over the world including Malaysia (OECD, 2020). The consequences of the outbreak led to the failure of tourism operation as a large reduction and cancellations of various tour programmes took place in an instant. Meanwhile in Malaysia, the pandemic affected the entire tourism sector especially Visit Malaysia 2020 (VM2020) campaign which is happened to be cancelled (Wasiul Karim et. al, 2020). Based on report made by Malaysian Association of Hotels (MAH) has estimated a loss of RM560.72 million revenues for the movement control order (MCO) period in 2020, and witnessing 2,041 staff were laid off, 9,773 (17%) were asked to take unpaid leave and 5,054 (9%) got pay cuts. Kuala Lumpur (61,859 booking cancellations with RM24.91 million losses), Sabah (33,769 booking cancellations with RM11.79 million loses), Selangor (RM9.05 loses) and Penang (18,476 booking cancellations with RM8.96 loses) had experience massive cancellation during 2020 (Wasiul Karim et. al, 2020).

After more than two years suffering from the impact of pandemic Covid-19, Malaysia local tourism try to rise again with the recovery plan and strategies from government as an effort to support the tourism sector. On 11st October 2021, Malaysia had implemented Recovery Plan Phase 4- Hotel Accommodation Premises as an action to boost the local tourism sector (Ministry of Health, 2021). Beside the government had officially announced to ease restriction on outbound international travel and interstate movement for fully vaccinated citizens. The announcement been made a day before by Prime Minister, Datuk Seri Ismail Sabri Yaakob, after almost 90% (21,003,074 individuals or 89.7%) of the adult population fully vaccinated through progressive national Covid-19 immunisation programme as well as it seems to encourage more tourism premises to be reopen once again (The Star, 10 October 2021). In new era post Movement Control Order (MCO), restructuring the tourist sector by restoring visitor's trust on safety and wellbeing in travel and tourism are among measures taking by the government in tourism recovery plan. In planning a recovery plan, the concept of duty of care has becomes an emerging issue that tourism player must wisely pay attention to as most lawsuits in tourism involving negligence. The concept of duty of care which refers to legal obligation to ensure the reasonable care and safety or well-being of others and thus requires occupier to implement measures and strategy to mitigate the risk and harm to those who visit his place. The covid-19 pandemic undoubtedly has added a special concern with respect to duty of care and standard of care to be adhered by tourism player during re-opening tourism while ensuring the safety of visitors.

2. PROBLEM STATEMENT

After Recovery Plan Phase 4- Hotel Accommodation Premises implemented, Langkawi becoming the first travel bubble pilot project and targeting 400,000 visitors in the end of 2021. The government carefully taken a prevention action and practically using a Standard Operating Procedure (SOP) suggested by National Security Council (MKN). Only visitor, who had completed two doses of vaccination allowed to join Langkawi Travel Bubble. Unfortunately, the risk of pandemic's outbreak still there and on 4th October 2021, the Langkawi witnessing 59 people found positive comprised local staff and close contact involving family members. Kedah Health Director, Dr Othman Warijo said the outbreak had stemmed from one of hotel employee's home due to failure to comply with Standard Operating Procedure (SOP) and the virus spread to the other hotel staff (New Straits Times, 2021). Although the government guarantee that the outbreak will not affect to the Langkawi Travel Bubble project, but the standard of care should become one of most important matter to be focus by government especially involving occupier and visitor as invitee during reopening tourism sector.

Other than Langkawi, Malaysia witnessing another two tragedies involving standard of care matter after Recovery Plane Phase 4 and interstate movement had been implemented on 11 October 2021. First the tragedy as reported 6 years old child falls to her death during family outing in Penang on 18 October 2021. The parent said their children suddenly dash to elevator and close the door without any companion. After 10 minutes, the parent been informed by hotel staff about the children death body at hotel's second floor (The Star, 2021). The second tragedy as reported a mother, Leong Choy Kee, 34 years old and her children, Ng Ho Jun, 4 years old found drowned in resort's pool at Dungun. Dungun District Police Chief, Superintendent Baharuddin Abdullah said both mother and children can't swim and the distant from the incident place and their room only 15 meter (Sinar Harian, 2021). Based on Langkawi issue and two tragedies discussed above, the needs of clarifying a suitable standard of care to be practice are desperately needed. The concept of duty of care which refers to legal obligation to ensure the reasonable care and safety or well-being of others and thus requires occupier to implement measures and strategy to mitigate the risk and harm to those who visit his place. The covid-19 pandemic undoubtedly has added a special concern with respect to duty of care and standard of care to be adhered by tourism player during re-opening tourism while ensuring the safety of visitors

The main objective of this paper is to examine the standard of care required under tort law with respect to tourism players as occupiers under tort law. Special focus will be given to standard of care of an invitee as tourist or visitor typically falls under this category of entrant. To strike a balance between public health and economic recovery, a systematic plan must be adopted by government which to include awareness on specific laws and regulations. In addition, the legal awareness on standard of care imposed by law is very useful in supporting tourism in a new norm and restoring visitor's confidence.

3. METHODOLOGY

Doctrinal methodology is adopted in this paper as it traces legal precedents and critically analyses case relevant case law, statutes, and other legal sources. This paper also employs library-based research method, which the primary sources and online databases as secondary sources used statutes, regulations and decided cases. This study reviews the cases taken from English Common Law and Malaysian Law. For this study, cases were chosen based on the keywords ***standard of care*** which led to the discussion on the standard of care on the occupier. The searching process for cases was done using website search, Current Law Journal (1 case, Table 1).

Table 2 List of Selected Case to Review from Website

No.	Case Title	Year	Volume	Source	Page
1.	Stampark Place Sdn Bhd v. Liu LI (f) [2017] 1 LNS 320	2017	1	LNS (Legal Network Series), Current Law Journal	320

4. DISCUSSION

4.1 Standard of Care of tourism player as an occupier

It is a trite law that the occupier has a duty of care to visitors to his premises. Therefore, a visitor who is injured due to occupier’s negligence may institution civil action against him. An occupier is defined as someone who has a sufficient level of control over a property but does not need to have complete control over it (Wheat v.Lacon & Co. Ltd [1966] 1 All ER 582,HL). In Malaysia, his duty of care is established on common law principle. The common law’s principle has differentiated the standard of care required by law according to types of entrants to the premise. They are contractual entrants, invitees, licensees, and trespassers. For contractual entrance, an occupier must exercise care and skill in ensuring the premise is safe for the occupancy of main purpose entrants (MacLenan v.Segar, 1917) while for an invitee, the law requires” the occupier to warn and apply reasonable care for any probable and unusual danger of which the occupier knew or should have known that could cause injury to the invitee” (Stampark Place Sdn Bhd v. Liu LI(f),2017). For the third category of entrant name **licensee**, the occupier’s standard of care is to not to expose the licensee to a dangerous condition and to warn him about the danger that is truly known to the occupier (Sutton v Bootle Corporation, 1947)

4.2 Case review: Stampark Place Sdn Bhd v. Liu LI (f) [2017] 1 LNS 320

The respondent, the mother of the deceased has taken legal action against the appellant, the owner and operator of “Stampark Place Waterpark” for negligence. The deceased, a healthy woman of 24 years old was found drowning in the swimming pool in the park. Stampark Place Waterpark was a recreational facility which is opened to a public with an entrance fee. In this case, the deceased paid RM6.50 as an entrance fee to the park to go for a swim and thus considered as licensee under the law. She was found dead by other swimmer who were in the pool. She was declared death due to severe hypoxic brain injury due to secondary drowning. The pool was found to be 1.8 metres depth. The respondent in this case claimed that the appellant failed to take adequate precautions and provide adequate warnings to guarantee that the swimming pool was safe to use. The appellant also failed to keep a lifeguard on duty while people used the pool. Furthermore, the appellant neglected to place clear signage identifying the pool’s depth, thus failing to warn visitors of the hazard. On the other hand, the appellant argued in its defence that the accident was caused entirely or in part by the deceased’s negligence. Among others, she failed “to keep any proper look of the depth marker of the swimming pool” and “failing to swim in the necessary depth in the swimming pool as reasonably expected to do so”. The Appellant also claimed that the deceased was fully informed about the risk of swimming, that she freely accepted the risk and damage, and that the deceased should be held liable for the risk. Therefore, it was contended that with a disclaimer signage displayed at the facilities, the depth of the swimming pool adequately indicated, and a competent lifeguard on duty, the appellant had sufficiently notified and informed the public of the hazards

associated in using the facilities. The issue before the court is whether the appellant as an occupier owed a duty of care towards the deceased. If so, what are the duty of Stampark Place Sdn Bhd towards the deceased as an invitee to the waterpark facility (Stampark Place Sdn Bhd v. Liu LI(f),2017).

4.3 Standard of care towards an invitee

In the landmark case of *Indermaur v Dames (1886) LR ICP 274*, Justice Willes defined an invitee as "a person who goes on business which concerns the occupier and upon his invitation express or implied". In other words, an invitee is a person who comes into the occupier's premise with his authority and consent. For instance, a police who was on duty at the quarry was held to be an invitee. Therefore, had his injuries been caused by unusual danger on the premises of which the occupier knew or ought to have known, he must responsible for it (Shamsuddin v. Yap The & Anor [1969] 1 MLJ 26). From this case it can be adduced that the occupier has a duty to warn an invitee of the dangerous conditions which he knew or ought to have known to exist in his premise. In *Glasgow Corporation v. Muir [1943] A.C. 48*, Lord Wright is of the view that special rules apply to the people who come as invitees upon premises. Therefore, to determine whether or not the occupier can be held negligence, the court must ascertain whether the invitor knew or ought to have known that the invitee was exposed to unusual danger. Willes J in *Indermaur v Dames [1866] L.R. I.C.P.274* outlined principles of law to be observed for an invitee's negligence case to be successful. There are (a) the invitee has suffered damage due to unusual danger, (b) that the occupier knew or ought to have known of such danger and (c) the occupier has not taken reasonable care and precaution to avoid the danger. In *Takong Tabari v. Government of Sarawak & Ors [1996] 5 MLJ 435*, an explosion happened in Public Bank, resulting in the deaths and injury of clients inside. The court ruled that as the occupier, Public Bank owed a duty to the deceased client, an invitee, to avoid harm or injury to the invitee as a result of extraordinary dangers on the premises that it knew or should have known but that the invitee was unaware of. The court found that the bank failed to take any reasonable care and measures to meet its duty as an occupier. The court further elaborates on the definition of an invitee. In this case, the deceased was at the bank premise as its client for business purpose which gives commercial benefit to the bank. Therefore, he shared the common interest with the bank as an occupier. An an occupier, the standard of care required to be observed towards the invitee is to take reasonable care to prevent any harm arising from unusual danger. Unusual danger on the other hand is explained in *London Graving Dock Co Ltd v. Horton {1951} AC 737* as "one which not usually found in carrying out the task which invitee has in hand". From the above discussion, it can be concluded that the duty towards an invitee is more stringent than the duty towards a licensee.

4.4 Ruling of court

In this case, the court testimonies showed no indication of a heart attack or seizure before to her drowning, nor of any medical issues that caused or contributed to her death. When the deceased was retrieved from the pool, the lifeguard was not present. The deceased was rescued by other swimmers and not the respective lifeguard as he was only there when he was alerted by other visitors. Besides that, the judge found that the deceased entered the swimming pool willingly though for a price, and in there was a disclaimer notice at the pool which among others provides for non-liability of occupier towards visitors of the said premise for any bodily injury or death which occurred at the respective place (Stampark Place Sdn Bhd v. Liu LI(f),2017).

"Disclaimer of liability

All those entering Stampark premises do so at their own risk. The management of Stampark Place Sdn Bhd accepts no responsibility for any bodily injury of death howsoever caused to any person entering / using the premises or any person who for whatever reasons is in the premises or for any loss of or damage to personal belongings through fire, theft, accident, or other misdemeanor however caused whilst on the premises.

The Management."

Nevertheless, the judge ruled such a liability disclaimer would not eliminate total culpability. This is because the deceased drowned due to the appellant's failure to provide a safe place for swimming with

competent lifeguards who should have closely monitored the pool and acted quickly to save visitors from drowning. After finding these facts, the court ruled that even though the occupier should use reasonable care to prevent damage from unusual danger which he knows or ought to know, the onus of proving “unusual” danger rests on the respondents. Unfortunately, since respondents had failed to establish it, the appellants owed no duty of care to the deceased. Besides that, the respondent failed to plead in using the swimming pool facilities, the deceased expected the appellant to use reasonable care to prevent damage from unusual danger which the appellant knew or ought to know. In other words, the respondent in this case failed to describe the depth of the pool as “unusual danger” or that the deceased ought to be protected from this danger. The respondent has failed to prove negligence against the appellant based on the pleadings and circumstances put forth in the record of appeal (*Stampark Place Sdn Bhd v. Liu LI(f),2017*).

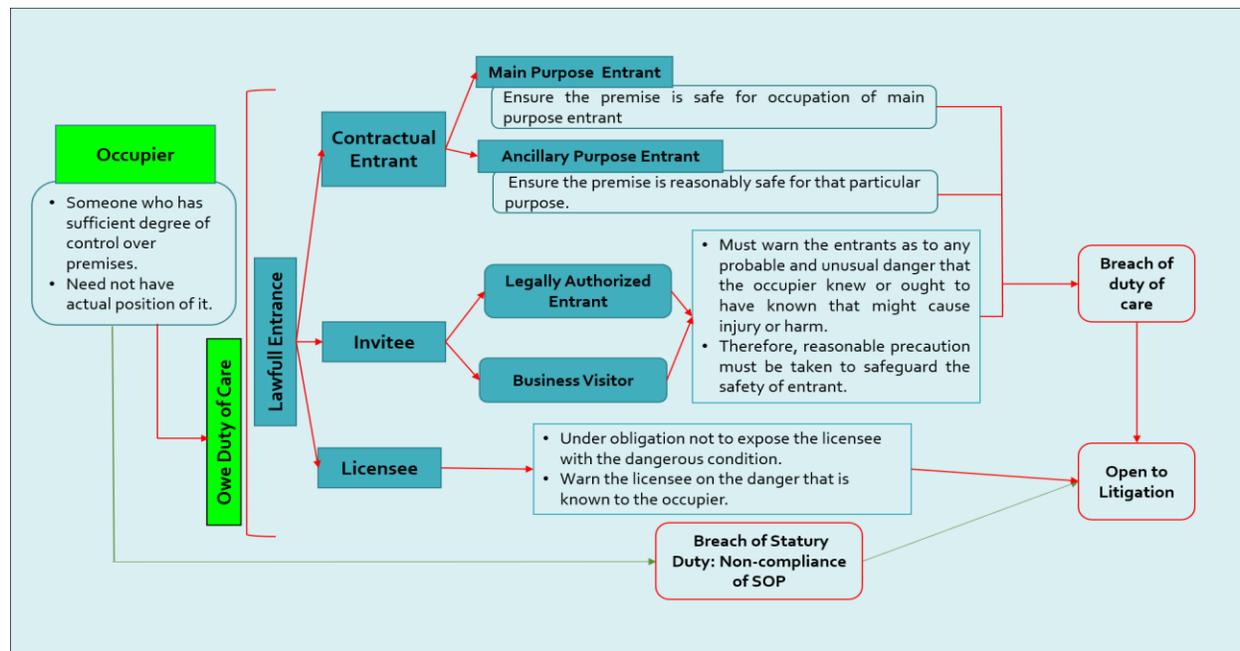


Figure 1: General Standard of Care Framework

5. CONCLUSION

Negligence is one of the most common torts and has become more significant in recent days due to the unprecedented situation of Covid-19. Tourism industries are more exposed to legal liability due to close interaction with the public at large. During the restructuring and revitalizing of tourism industry, government should not only encourage domestic travel but also rebuilding public confidence towards the safety and health on travel and vacation. Therefore, a balance must be strike between public health and economic recovery by adopting systematic which to include awareness on specific laws and regulations.

REFERENCES

Adie Zulkifli (5 October 2021), **Covid 19** outbreak in hotel does not affect Langkawi tourism bubble. Retrieved from <https://www.nst.com.my/news/nation/2021/10/733821>.
 Glasgow Corporation v. Muir [1943] A.C. 48
 Indermaur v Dames (1886) LR ICP 274
 Lo Tern Chern (18 October 2021), Child falls to her death during family outing in Penang. Retrieved from <https://www.thestar.com.my/news/nation/2021/10/18>.
 London Graving Dock Co Ltd v. Horton {1951} AC 737
 MacLenan v.Segar, 1917

- OECD. (2020). Rebuilding tourism for the future: COVID-19 policy responses and recovery. <https://www.oecd.org/coronavirus/policy-responses/rebuilding-tourism-for-the-future-covid-19-policy-responses-and-recovery-bced9859/>
- Shamsuddin v. Yap The & Anor [1969] 1 MLJ 26
- Sinar Harian (23 October 2021), Ibu, anak lelaki 4 tahun ditemui lemas di kolam renang. Retrieved from <https://www.astroawani.com/>.
- Stampark Place Sdn Bhd v. Liu LI (f) [2017] 1 LNS 320
- Sutton v Bootle Corporation [1947] K.B. 359
- Takong Tabari v. Government of Sarawak & Ors [1996] 5 MLJ 435
- TheStar (10 October 2021), Hitting the highways: Interstate travel allowed from Monday (Oct 11), says PM. Retrieved from <https://www.thestar.com.my/news/nation/2021/10/10>.
- Wasiul Karim, Ahasanul Haque, Zohurul Anis, Mohammad Arije Ulfy (2020). The Movement Control Order (MCO) for COVID-19 Crisis and its Impact on Tourism and Hospitality Sector in Malaysia. *International Tourism and Hospitality Journal* 3(2): 1-07 (2020).
- Wheat v.Lacon & Co. Ltd [1966] 1 All ER 582,HL