

The Application Of Standard Of Care During Post Movement Control Order (Mco) In Malaysia Tourism Industry

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Abstract

Tourism Has Attracted Many Visitors Over The Years. It Is Financial Blooming, However, Was Severely Affected Due To The Outbreak Of Covid-19 Pandemic. In Malaysia, The Government Had Allowed Some Leisure And Hospitality Premises To Reopen Starting July 2020. The Covid-19 Is Still Going On, Occupiers Of Leisure And Hospitality Premises Are At The Risk Of Being Legally Liable Upon Failing To Observe The Standard Of Care Required By The Law. The Purpose Of The Study Is To Discuss The Standard Of Care Towards Three Types Of Entrants To The Leisure And Hospitality Premises During The Post Movement Control Order (Mco). As For Methodology, A Legal Perspective Was Adopted In Discussing The Issue. A Case Review That Applied The Doctrinal Method Was Used In This Study. This Study Reviewed Selected Legal Cases To Provide Further Support To The Arguments Put Forth. As A Result, Despite Having Different Standards Of Care Imposed On The Occupiers Towards Different Types Of Premise Entrants, The Occupiers May Be Legally Liable For Failing To Observe The Required Standard Operating Procedures (Sop). Therefore, The Occupier Is Recommended To Observe The Standard Of Care In Operating Their Business While Complying With Standard Operating Procedures (Sop) Provided By The Government To Avoid Liability In Laws And Prevent The Spread Of Covid-19.

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Keywords: Standard Of Care, Movement Control Order (Mco), Tourism Industry, Leisure And Hospitality, Legal Case Review.

Introduction

The Coronavirus Disease 2019 (Covid-19) Pandemics That Started In Wuhan China In December 2019 Have Affected The Worlds' Population. Because The Global Spread Of The Virus Has Resulted In The World Health Organization (Who) Declare Covid 19 As A Global Pandemic (Chen, M. H., Demir, E., García-Gómez, C. D., & Zaremba, 2020) And Until August 2020 The Reported Death Due To Covid 19 Is Over 779, 443 (Lee, C. C. And Chen, 2020). The Spreading Of Covid-19 Has Resulted In The Implementation Of Numerous Government Policies Such As Border Closure, Social Distancing And Stay At Home. This Action Has Affected Many Industries Among Them Are The Leisure And Hospitality Industries.

Generally, There Are Many Sectors Underneath The Leisure And Hospitality Industries Such As Hotels, Transportation, Entertainment Such As Theme Parks, Food And Beverages And Other Related Sectors. For Example, One Of The World's Most Popular Tourism Destinations, The Walt Disney World Amusement Parks And Two Water Parks Located In Orlando, Florida, Had Million Visitors In 2018. Furthermore, With About 75,000 Workers In The Orlando Region, Walt Disney World Is The Largest Single-Site Employer In The United States (Gabe, 2020). In Malaysia, Ali Et Al. (2018) Found That Malaysian Visitors Are Devoted To Visit Local Theme Parks Compare To Non-Malaysian Based Theme Parks Due To The Customer Satisfaction Level Which Reflects The Visitor's Loyalty. However, Because Of The Covid-19 Pandemic, Many Of These Sectors Need To Be Closed And They Suffered Losses In Their Businesses.

To Rescue The Economy From The Pandemic And To Stimulate Economic Growth, Many Governments Around The World Allowed The Company And Industries To Re-Open Their Business. Different Countries Have A Different Methods In Reopening The Economy. Denmark For Example, Implementing 4 Phases Of Reopening The Economy. Qatar Also Implementing A 4-Phase Plan In Reopen Their Economy. Russian Federation, On The Other Hand, Implement A 3-Stage Reopening Plan And Singapore Also Use A 3-Phase Approach To Resume Their Industry's R Activity. While In Malaysia, Government Introduce National Economic Regeneration Plan (Penjana) Valued At Rm35 Billion In June 2020 (Dezan Shira & Associates, 2020) And Followed By The Malaysian Economic And Rakyat's Protection Assistance Package (Permai) Valued At Rm15 Billion To Accelerate The Reopening Process (Dezan Shira & Associates, 2021). Project Acceleration And Coordination Unit (Pacu) Establish On 5 June 2020 Under The Malaysian Investment Development Authority (Mida), Been Pointed To Facilitate The Process (Dezan Shira & Associates, 2021). The Companies Need To Be Very Careful In Managing Their Business. This Is To Prevent The Spreading Of Covid 19 Since This Disease Is Easily Being Transmitted To Other Individuals Especially When They Are Sitting In Crowds And Closed Area. However, The Increasing Infection Rates And The Existence Of The Covid19 Variant , Have Forced The Government To Implement Targeted Lockdown To Curb The Virus From Disseminate (Www.Imf.Org, 2021).

Problem Statement

According To Dato' Sri Nancy Shukri, The Minister Of Tourism, Arts And Culture Malaysia, The Oecd (2020) Prediction Of The International Tourism To Decrease By Around 80% In 2020 Because Of The Covid19 Pandemic Has Become Reality When The Malaysian Tourism Industry Suffered The Loss Of Rm45 Billion During The Movement Control Order (Mco) (Bernama, 2020). The Leisure And Hospitality Industries Are Much Affected Because Unlike Other Business Sectors, This Sector Faced Permanent Loss Because Of The Unsold Capacity. For An Example, Hotels Cannot Be Equipped With Customers And Amusement Park Cannot Be Visited

By The Visitors. This Is Because This Industry Requires High Contact And People Need To Engage In The Activities In Getting The Services (Gössling Et Al., 2020).

Furthermore, The Global Air Transport Also Needs To Stop Their Operations. It Is Because It Is Believed That The Transport Carry The Virus To All Continents, And It Had Been Established In 146 Countries By Mid-March. This Resulted In The Worldwide Infections To Doubled (Anderson Et Al., 2020). Thus, Covid-19 Also Caused 100% Travel Restrictions Upon Worldwide Destination (United Nation World Tourism Organization, 2020). The Covid-19 Pandemic Has Affected Many Industries All Over The World Because The Travel Restriction Introduced By The Government Around The World (Aburumman, 2020). This Pandemic Condition Has Affected Malaysian Hotel Industries Because The Travel Restriction Makes Them Struggle To Survive. The Struggle Resulted In Hotels And Other Industries Taking Several Measures For Them To Survive Such As Implementing Wage Or Allowance Cuts, Unpaid Holidays And The Worst-Case Scenario Is To Retrench Their Workers. Other Than That, Covid-19 Pandemic Also Resulted In Around 35 Percent Of Hotels To Closed Temporarily And 15 Percent Of The Hotels Unable To Survive And Need To Close Completely (L, 2020).

The Covid-19 Pandemic Has Resulted In More Than 4.3 Million Confirmed Cases And More Than 290,000 Death Worldwide (Aburumman, 2020). Consequently, For The Industries To Reopen The Business They Need To Follow All The Guidelines And Sop Set By The Malaysian National Security Council (Msc Or Mkn In Malay). However, Some Companies Fails To Comply With The Covid-19 Sop. Therefore, Legal Action Will Be Taken Towards Them And The Government May Revoke Their Business Permit. In Contrast, If The Clients, Customers Or Visitors Failed To Follow The Sop That Has Been Set, It Will Create A New Cluster (Muguntan Vanar, 2021). Moreover, The Current Situation Of Covid-19 Is Also Too Worrisome. (Sean, 2021)

Resulting The Risk To Reclose The Operation Of The Leisure And Hospitality Industry After Its Reopening, This Paper Presents A Discussion On The Standard Of Care Towards Three Types Of Entrants To The Leisure And Hospitality Premises During The Post Movement Control Order Sop Among Premises Occupiers From The Legal Perspective. The Present Study Was Based On The Selected Malaysian Legal Cases. Specifically, The Discussion Was Guided By Two Research Objectives As Following:

- (1) To Identify The Required Standard Of Care On An Occupier To Avoid Negligence Of Sop.
- (2) To Identify What Happens To An Occupier If He Or She Fails To Follow The Required Standard Of Care .

Research Questions;

The Research Questions For This Study As The Following:

- 1. What Is The Required Standard Of Care On An Occupier To Avoid Negligence Of Standard Operating Procedures (Sop).?*
- 2. What Happens To An Occupier If He Or She Fails To Follow The Required Standard Of Care ?*

Methodology

This Paper Used A Legal Methodology Called The Doctrinal Method. This Paper Employs Library-Based Research Method ,Which The Primary Sources And Online Databases As Secondary Sources Used Statutes, Regulations And Decided Cases.. This Method Is Used Because It Involves Reading And Interpreting The Laws, Statutes And Decisions Of Courts.

This Study Reviews The Cases Taken From English Common Law And Malaysian Law. As The Law In Malaysia Is Mainly Based On The English Common Law, It Becomes The Predominant Source Of Malaysian Law. As The Law Applies Judicial Precedent, Landmark Cases Are Chosen In Order To Answer The Research Questions. In

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Addition, The Current Decided Cases In Malaysia Pertaining To The Issue Under Discussion Were Also Chosen In Order To Know The Current Standing Of The Court.

For This Study, Cases Were Chosen Based On The Keywords ***Negligence***, ***Occupier Liability***, ***Standard Of Care*** And ***Duty Of Care*** Which They Lead To The Discussion On The Standard Of Care On The Occupier. The Searching Process For Cases Was Done Using Two Different Sources; The First Website Search Is The Malayan Law Journal And Current Law Journal. The Second Source Referred To Is From The Books; The Law Of Torts In Malaysia 3rd Edition And The Book Nathan Of Negligence And The Book Law Of Tort In Malaysia 3rd Edition. For The Website Search, 143 Hits Are Found Pertaining To The Subject Matter But Only 6 Cases (Table 1) Were Selected. Whereas, , 41 Hits Are Found And 11 Cases (Table 2) Were Selected From The Book Sources.

Table 1 List Of Selected Cases To Review From Websites

No.	Case Title	Year	Volume	Source	Page
1.	Ch'ng Chong Shong V. Lok Chen Chong & Yong Ah Jun	1991	1	Clj (Current Law Journal)	515
2.	Ee Lau & Sons Realty Sdn Bhd V. Tan Yah & Ors	1983	1	Lns (Legal Network Series), Current Law Journal	175
3.	Lau Tin Sye V. Yusuf Bin Muhammad	1973	2	Mlj (Malayan Law Journal)	186
4.	Ramsay V Appel	1972	46	Aljr (Australian Law Journal Report)	510
5.	Shanta Manickam V. Teik Joo Chan Sdn Bhd & Anor	2015	8	Clj (Current Law Journal)	611
6.	Stampark Place Sdn Bhd V. Liu Li (F) [2017] 1 Lns 320	2017	1	Lns (Legal Network Series), Current Law Journal	320

Source: The Malayan Law Journal And Current Law Journal.

Table 2 List Of Selected Cases To Review From Books (Year)

No.	Case Title	Year	Volume	Source	Page
1.	Caswell V. Powell Duffryn Associated Collieries Ltd	1939	3	All Er (All England Report), Book; Nathan On Negligence	722
2.	Cunard & Anor V Antifyre Ltd	1932	-	All Er (All England Report), Book; Nathan On Negligence	558
3.	Donaghue V. Stevenson	1932	-	Ac (Appeal Court), Book; Nathan On Negligence	562
4.	Hall V Brooklands Auto-Racing Club	1933	1	Kb (King Bench), Book; Law Of Torts In Malaysia	205

5.	Hawkins V Couldson & Purely Urban District Council	1954	1	Qb (Queen Bench) Book; Law Of Torts In Malaysia	319
6.	Harris V. Birkenhead Corporation	1976	1	All Er (All England Report), Book; Law Of Torts In Malaysia	341
7.	Kimber V. Gas Light & Coke Co Ltd	1918	-	All Er (All England Report), Book; Nathan On Negligence	123
8.	London Graving Dock Co V. Horton	1951	-	Ac (Appeal Court) Book; Law Of Torts In Malaysia	737
9.	Maclenan V.Segar	1917	2	Kb (King Bench) Book; Nathan On Negligence	328
10.	Sutton V Bootle Corporation	1947	1	All Er (All England Report), Book; Nathan On Negligence	92
11.	Wheat V Lacon & Co. Ltd	1966	1	All Er (All England Report), Book; Law Of Torts In Malaysia	582

Source: Law Of Torts In Malaysia 3rd Edition, Book Nathan Of Negligence And Book Law Of Tort In Malaysia 3rd Edition.

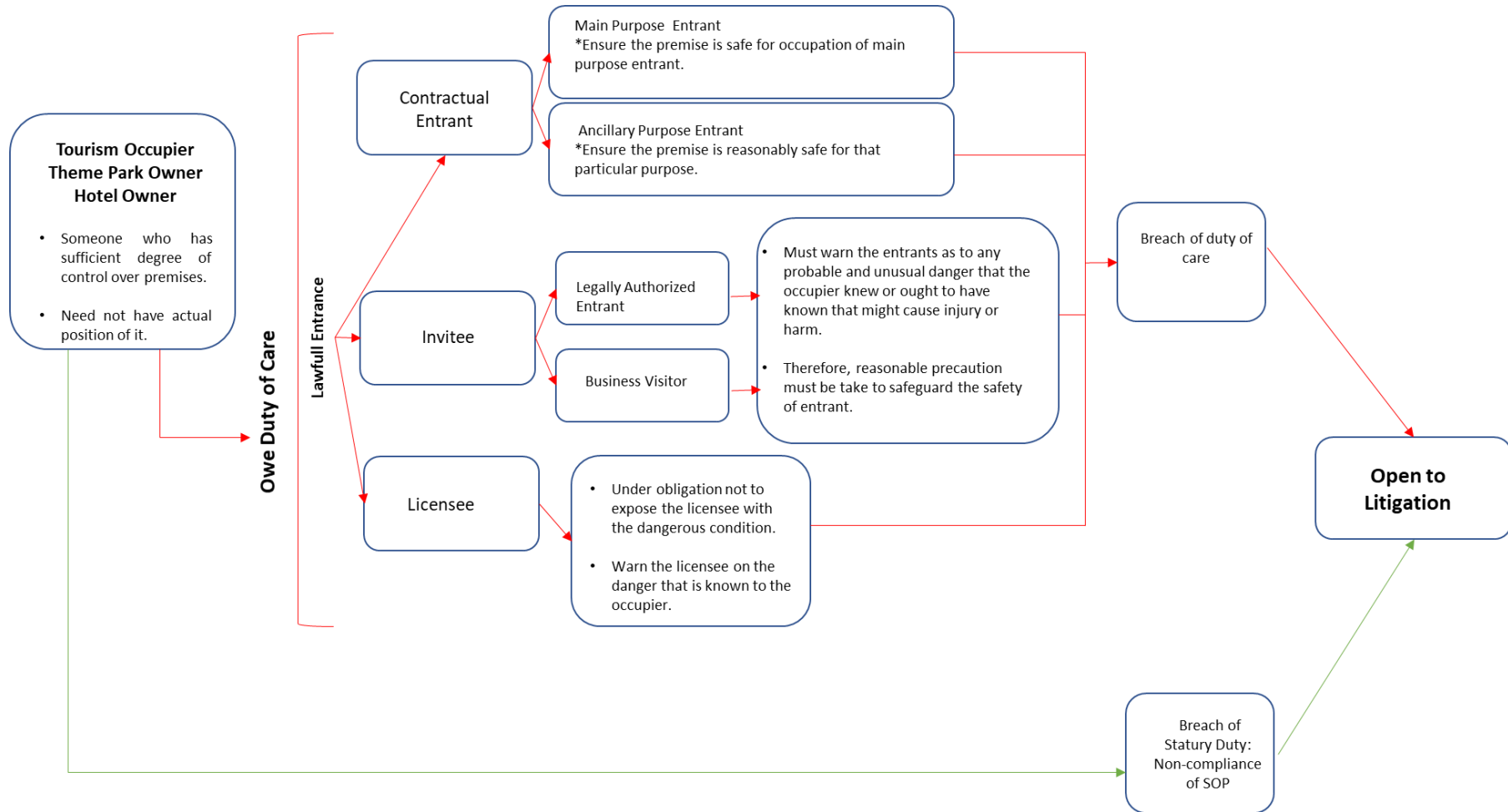
Result And Discussions

Negligence Is A Breach Of Duty To Take Care That A Reasonable And Prudent Man Would Take Depending On Those Particular Circumstances (Cunard & Anor V Antifyre Ltd ,1932). There Is No Uniform Standard On What Constitutes A Duty Of Care As It May Vary According To The Circumstances, The Place, The Parties Involve And Time (Caswell V. Powell Duffryn Associated Collieries Ltd,1939). In Measuring The Standard Of Care, An Assessment Of Whether The Damage Is Reasonably Foreseeable Must Be Taken Into Consideration. Under The Law, The Occupier Owes A Duty Of Care Towards Anyone Who Comes And Visits His Premises. If A Visitor Suffers Injury Due To Negligence On The Part Of Occupier In Failing To Provide A Safe Premise Or Failing To Observe Standard Procedures Before Carrying Any Activities On The Premise, The Occupier May Face Legal Action Under The Torts. An Occupier Is Defined As Someone Who Has A Sufficient Degree Of Control Over Premises. Therefore, He Needs Not To Have Absolute Control Over It (Wheat V.Lacon & Co. Ltd [1966] 1 All Er 582,HI)Nor Actual Possession Of It (Harris V. Birkenhead Corporation [1976] 1 Wlr 279,[1976] 1 All Er 341,Ca). As Long As He Has The Power To Permit Someone To Enter Or Forbidding Someone From Entering The Respective Premise, He Is Considered As An Occupier And Thus Owes A Duty To Use Reasonable Care Toward Visitors Entering The Premise. A Person Who Has Parted With Possession Of The Premise Is No Longer Liable To The Visitors But If He Retains The Right To Control Over The Premise, He Still Owes A Duty Of Care Towards The Person Visiting The Premise (Shanta Manickam V. Teik Joo Chan Sgn Bhd & Anor, 2015). Unlike England That Has Enacted The Occupier's Liability Act 1957 And Occupiers' Liability Act 1984, The Law On Occupier's Liability In Malaysia Is Based On Common Law Principles.

According To The Common Law, The Standard Of Care Required By Law Differs In Accordance With Types Of Entrants To The Premise. They Are **Contractual Entrants, Invitees, Licensees** And **Trespassers**. The Scope Of Our Discussion Is Only Focused On The Required Standard Of Care Towards Legal Visitors, Which Excludes **Trespassers**. Framework 1 Summarizes The Standard Of Care Based On The Cases That Have Been Reviewed In The Present Study.

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Framework 1: Standard Of Care Of Leisure And Hospitality Premises Occuppier Based On Cases Review



Source: Extracted And Modified From The Malayan Law Journal, Current Law Journal, Law Of Torts In Malaysia 3rd Edition, Book Nathan Of Negligence And Book Law Of Tort In Malaysia 3rd Edition.

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The **Contractual Entrants** Are Further Divided Into Two Main Purposes; Entrant And Ancillary Purpose Entrants. An Occupier's Duty Is To Ensure The Premise Is Safe For The Habitation Of Main Purpose Entrants. Therefore, He Or She Must Exercise Care And Skill In Safeguarding The Safety And Interest Of The Contractual Entrant In Accordance With The Purpose For Which It Is Contracted Out (Maclenan V. Segar, 1917). Alternatively, For, The Occupier Owes A Duty To Ensure The Premise Is Reasonably Safe For The Ancillary Purpose Tenants. (Hall V Brooklands Auto-Racing Club, 1933). The Standard Of Care For Contractual Entrants Is Higher Compare To The Other Types Of Entrants.

When A Person Enters Into Certain Premise With The Authority Of The Occupier Such As Police Officer, He Is Regarded As An Invitee (Talib, 2011). **Invitees** Are Divided Into Two; , Legally Authorized Entrant And Business Visitor. The Law Requires The Occupier To Warn And Use Reasonable Care For Both Categories Of Entrants As To Any Probable And Unusual Danger That The Occupier Knew Or Ought To Have Known That Might Cause Injury To The Invitee (Stampark Place Sdn Bhd V. Liu Li(F), 2017). An Unusual Danger Is One That Is Extraordinary Which Is Not Common And Usually Found For The Purpose Of Entering The Premise Or For That Particular Invitee (Ee Lau & Sons Realty Sdn Bhd V. Tan Yah & Ors, 1983). Therefore, A Reasonable Precaution Must Be Taken For Safeguarding The Safety Of The Invitee On The Premise Especially On The Conceal Danger That The Occupier Knew Or Ought To Have Known. However, No Absolute Duty To Prevent Danger Imposes Upon The Occupier. As Long As The Occupier Ensures That The Premise Is Safe And He Or She Is At The Least Dangerous As It Reasonably Be, He Or She Has Fulfilled His Or Her Obligation (Lau Tin Sye V. Yusuf Bin Muhammad, 1973).

As For The **Licensee**, A Licensor Is Not Liable For Injury Sustained By The Licensee If The Injury Is Caused By Dangers Of Which The Licensor Ought To Have Known. Therefore, The Occupier Is Under The Obligation Not To Expose The Licensee To The Dangerous Condition And To Warn Him Of The Danger That Is Actually Known To The Occupier (Sutton V Bootle Corporation, 1947). The Licensee Therefore Cannot Presume That The Premise Is Free From Any Dangers. To Constitute Actual Knowledge Of The Danger, It Is Sufficient For The Occupier To Realize The Existence A Physical Object That Might Cause Harm To Others And That A Reasonable Man Having That Particular Knowledge Would Have Appreciated The Probable Risk And Danger Connected With It (Hawkins V Couldson & Purely Urban District Council, 1953). In Other Words, The Licensee Who Has Suffered An Injury Due To An Unsafe Premise May Succeed In His Claim Once It Is Proven A Reasonable Man Who Would Have Appreciated The Risks Of The Danger Even If The Occupier Does Not Appreciate It. It Is Worth Noting That The Duty Owes By The Occupier Is Higher Towards Children Licensee As The Child Is Unable To Appreciate Nor Aware Of The Dangerous Condition That Might Be Transparent To An Adult (Ramsay V Appel, 1972).

Recommendation For Policy Maker

The Unprecedented Situation Caused By Covid-19 Had Severely Impacted The Tourism Industry In Malaysia. Nevertheless, The Senior Defense Minister, Datuk Seri Ismail Sabri Yaakob, Had Announced That The Businesses In This Sector Resume Their Operation Starting From July 1, 2020. The Reopening, However, Is Subject To Strict Compliance And Adherence To The Sops Specified By The Government. Despite The Clear Instruction Given By The Government, There Were Still Cases Of Non-Compliance To The Sops As Reported By The Media In Recent Months. On July 10, 2020, For Instance, 36 People Were Caught, Detained And Fined By The Court For Violating The Regulations Under The Restricted Movement Control Order (Rmco). Those Detained Were Found To Have Committed Various Offences, Which Include Gathering In Large Numbers Beyond Permissible Numbers And Taking Part In Sports Activities Without Following The Sops (Zolkipli, 2020). Similarly, Police Have Detained 286 Individuals On August 16, 2020, Also Due To Violation Of The Sops (Radhi, 2020). The Examples Show That There Is A Probability That The Same Scenario Of Non-Compliance To The Sops Could Be Observed At Theme Parks Upon Its Reopening.

As Discussed Above, A Person Who Knowingly Creates Dangerous Conditions On His Premises, Or He Sees Such Dangerous Condition Can To Expose Either Himself, His Staffs And Visitors To The Danger, He Is Under

A Duty To Give Warning To The Respective Parties (Kimber V. Gas Light & Coke Ltd,1918). Failure To Take Reasonable Care May Open A Door To Litigation. The Duty Arises Where An Injury Is Reasonably Foreseeable And The Relationship Between The Defendant And Claimant Are So Close That The Negligence On The Part Of The Defendant Might Cause Harm To The Claimant(Donaghue V. Stevenson,1932). To Make The Occupier Liable For Action Under A Tort, There Is Certainly A Grey Area For The Lawful Visitors Who Claim That They Got Infected By Covid-19 At The Respective Premise. The Visitors Need To Prove That The Contraction Of Covid-19 Is At The Location Of The Premise And The Location Is Within The Occupier's Liability To Take Reasonable Care. The Claimants Must Also Prove That It Is Reasonably Conceivable For The Occupier To See The Danger That Might Harm The Visitors And That Their Relationship With The Occupier Is Close That The Occupier Is Under Obligation To Take Reasonable Care To Ensure His Safety By Providing Relevant Measures Such As Signage On The Newly Adopted Sops And Relevant Rules That Need To Be Observed By The Respective Visitors. However, It Is Worth Noting That To Bring An Action Under A Tort, The Court Faces Difficulty To Determine The Burden Of Liability Because The Standard Of Care Depends On The Classification Of Lawful Visitors Entering The Premises. As There Is No Single Standard Of Reasonable Care Towards The Lawful Visitors, Technical Arguments Might Hinder The Swift Process Of Laws.

Contributory Negligence On The Part Of The Visitor In Non-Compliance With The Sops Can Be A Common Defence For The Occupier For The Damage Or Injury Suffered By The Claimant. It Occurs When There Has Been An Act Or Omission Committed By The Visitor, Which Has Contributed To Damage Suffered By Him (Ch'ng Chong Shong V. Lok Chen Chong & Yong Ah Jun,1991). It Would Certainly Lessen The Burden Of The Occupier If The Visitors Are Also Being Careful And Obedient Adhere To The Respective Sops. If The Occupier Observes The Sop Measures Such As Social Distance Practice, And The Order To Wear A Face Mask And To Provide Hand Sanitizer, Then Certainly No Legal Liability Can Be Brought Against The Occupier Even If The Claimant Can Prove That He Or She Was Infected With Covid-19 During His Or Her Visit At The Respective Premise.

However, It Is Not Only An Action Can Be Brought Under A Tort, An Action Can Also Be Brought Against Him For Her Or Breach Of Statutory Duty In Non-Compliance With The Sops. Thus, A Failure To Observe The Relevant Rules And Regulations As Provided By The Ministries And Authorities Is Sufficient For A Legal Action To Be Brought, Without Any Proof Of Negligence.

In Summary, The Occupiers Of Leisure And Hospitality Premises Owe A Duty Of Care To Contractual Entrants, Invitees And Licensees During The Reopening Of Their Operations During The Period Of The Covid-19 Pandemic Outbreak. Despite The Different Required Duty Of Care For Different Types Of Entrants, The Occupiers Are Urged To Comply With The Sops Specified By The Government. The Occupiers Must Adopt Mysejahtera Apps And Put It Up At The Main Entrance So That The Entrants Can Easily Scan It For Registration Purposes; Provide And Display A Guideline On The "Dos" And "Don'ts" On Covid-19 Prevention Measures At Strategic Locations Within Their Premises As A Reminder And An Easy Reference To The Entrants; And Ensure An Only Limited Number Of Entrants Are Allowed At Any One Time. The Full List Of The Sops, Which Is Available On The National Security Council's Website, Must Be Observed By The Occupiers To Eliminate The Grey Area In Which They Can Be Sued For Breach Of Duty Of Care And Non-Compliance Of The Sops.

Conclusion

The Tourism Industry Has Once Again Opened Its Door To Visitors In The Era Of Covid-19 With Strict Compliance To The Sops Provided By The Government. Theme Parks, Which Are Part Of The Industry, Are No Exception. Compliance With The Sops, It Is Necessary To Ensure The Safety Of The Visitor And To Instill Visitors' Confidence For Visiting The Respective Premise. Although Such Policy Has Been Set Up, There Will Always Be Some Cases Of Non-Compliance Among The Premise Entrants, Especially From The Visitors. To Minimize The Legal Risk Due To The Grey Areas, The Occupiers Of The Premises Are Advised To Adopt And

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Adhere Strictly To The Existing Sops Provided By The Government. By Doing So, They Can Run Their Businesses Without Much Adversity.

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