THE WORKPLACE SAFETY AND HEALTH ACT: AN OVERVIEW

The Workplace Safety and Health Act[1] came into effect on 1 March 2006 and with its coming into force, the former Factories Act[2] was repealed. While there are a few similarities between the two statutes, more notable are the differences. For instance, unlike in the case of the former Factories Act, a breach of the Workplace Safety and Health Act does not give rise to civil liabilities.[3] It only gives rise to criminal liabilities. On the other hand, the Workplace Safety and Health Act extends the categories of persons who owe health and safety duties at the workplace. It also extends the categories of persons who receive statutory protection. The aim of this article is to, at a broad level, examine the framework and at a more specific level, address the various possible uncertainties and issues that can arise under the Workplace Safety and Health Act. Unless otherwise stated all sections and acts referred to in this article are with reference to the Workplace Safety and Health Act.

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I. The workplaces covered

1 Section 2(1) of the Act provides that except as otherwise expressly provided,[4] the provisions of the Act apply to workplaces within

1 Act 7 of 2006.
2 Cap 104, 1998 Rev Ed.
3 See p 21.
4 In this regard, s 62(1) provides that the Act shall not apply to such persons at work as are specified in the Sixth Schedule, notwithstanding that their work is carried out or performed in a workplace specified in the First Schedule. The persons specified in the Sixth Schedule to the Act include any member of the Singapore Police Force, Singapore Prisons Service, Internal Security Department, Central Narcotics Bureau, Singapore Armed Forces, Singapore Civil Defence Force and the Immigration & Checkpoints Authority. Thus, for instance, a prisons officer working in a prison will not owe duties under the Act even if it may be argued that part of the prison may fall under workplaces covered (see for instance, s 5(3)(*e*) of the Act). This is in addition to s 62(2), which provides, *inter alia*, that the Minister may by order published in the Gazette, and with or without conditions, exempt any class or description of premises from all or any provisions of the Act. See Workplace Safety and Health (Exemption) Order 2006 (S 142/2006) where subject to some exceptions, any workplace wholly or partly owned or occupied by the Singapore Armed Forces is exempted . However, in

the class or description of workplaces specified in the First Schedule. The workplaces specified in the First Schedule are:

(a) any premises which is a factory;

(b) any premises within an airport where any checking, inspecting, cleaning, loading, unloading or refuelling of an aircraft is carried out by persons other than by the crew of the aircraft;

(c) any ship in a harbour where any scaling, scurfing or cleaning of boilers (including combustion chambers and smoke boxes) in the ship; any cleaning of any tank, bilges or holds in the ship; or any construction, re-construction, repair, fitting, furnishing or breaking up, is carried out;

(d) any dock, wharf or quay where loading, unloading or bunkering of a ship is carried out by persons other than by the crew of the ship;

(e) any premises delineated as a railway area under the Rapid Transit Systems Act and where any inspection, testing or maintenance of any railway is carried out;

(f) any premises (other than domestic premises) in which a steam boiler, steam receiver or air receiver is used; and

(g) any laboratory or other premises where the testing, examination or analysis of any article is carried out.

2 In relation to (a) above, the former Factories Act, s 6(2) deemed a total of 21 types of premises as amounting to "factories". Under the Act, there are only 19 categories. The two categories that are missing are the former s 6(2)(*s*) and s 6(2)(*u*). However, these can now be found in the First Schedule to the Act (paras 7[5] and 5 respectively). So in actual effect, there is not much of a difference in this regard. Further, in relation to the existing 19 categories, the definition is similar other than in three instances, in respect of which there has been a slight extension.[6] However,

respect of persons or workplaces not covered, there may be other statutory obligations; see for instance, n 10.

5 However, unlike s 6(2)(*s*) of the former Factories Act, there is now no requirement for the work to be carried on by way of trade or for purposes of gain.

6 The three sections are ss 6(2)(*a*) to 6(2)(*c*) of the former Factories Act (currently ss 5(3)(*a*) to 5(3)(*c*) of the Act respectively).

it is noteworthy that the First Schedule does cover some totally new premises such as airports. Initially it was thought that the Act would be far more encompassing in nature and would cover other places such as restaurants and hotels. But this has not materialised as yet. This is in sharp contrast to the position in the UK upon which the present Act has been based. The relevant legislation in the UK is the Health and Safety at Work *etc* Act,[7] under which all premises are covered.[8] However, it has been said that categories of premises included would eventually be extended to cover other premises,[9] such as hotels and restaurants. While it is understandable that the coverage should be increased gradually, it is hoped that eventually all premises would indeed be included[10] as it is difficult to see why a person working in other types of premises should not be protected from health and safety risks or injuries.

3 Coming back to the definition of the term "factories", under the former Factories Act, s 6(1) gave a general definition of what amounted to a factory and s 6(2), as already described, gave a list of specific premises which were deemed to be factories. In relation to the definition of the term "factories" under the Act the same basic structure has been adopted. Further in relation to the general definition, there has not been much of a change[11] and it provides:[12]

7 Health and Safety at Work *etc* Act, 1974 (c 37).

8 Though domestic premises *per se* are not excluded (for instance, if a contractor sends his employee to work in a private residence and an accident occurs because the contractor failed to take some reasonable precaution, there could be liability), a person who employs another or is himself employed, as a domestic servant in a private household, does not owe duties under the UK Health and Safety at Work *etc* Act. See s 51 of the UK Health and Safety at Work *etc* Act.

9 See *Singapore Parliamentary Debates*, vol 80, (17 January 2006) at col 2207.

10 It is suggested this should include domestic premises. As said, in UK domestic premises *per se* are not excluded though a person who employs another or is himself employed, as a domestic servant in a private household does not owe duties under the UK Health and Safety at Work *etc* Act (*supra* n 8). Nonetheless, the percentage of households with domestic servants or the percentage of accidents involving them may not be as high as in Singapore. Further, though there may be liabilities under other statutes, the duties or requirements under the other statutes may not be the same. For instance, under s 304A of the Penal Code (Cap 224, 1985 Rev Ed), liability only arises where there has been a *death* which has been caused by a rash or negligent act. Similarly the extent of liabilities may not be the same. For instance, if the conditions of the work permit state that the employer has to provide safe working conditions and that is breached, the liabilities for breaching the conditions (see s 22(1) of the Employment of Foreign Workers Act (Cap 91A, 1997 Ed)) are far less compared to the liabilities for breaching the Act (see s 50).

11 However, now under s 5(2) of the Act there is no requirement that the persons must be "employed in manual labour" unlike under s 6(1) of the former Factories Act.

12 Section 5(2).

Factory means any premises within which

(*a*) persons are employed in any process for or incidental to any of the following purposes:

(i) the making of any article or part of any article;

(ii) the altering, repairing, ornamenting, finishing, cleaning or washing, or the breaking up or demolition of any article; or

(iii) the adapting for sale of any article; *and*

(*b*) any work referred to in para (a) is carried out by way of trade or purposes of gain[13] and to or over which the employer of the persons employed therein has the right of access or control.

4 The term "employed" in the definition of the term "factory" was not restricted to direct employment under the former Factories Act in some circumstances.[14] The position is even wider now under the Act s 5(4) of which provides that where any person carries on any work referred to in s 5(2) or 5(3) in a workplace with the express or implied permission of, or under any agreement with, the occupier of the workplace, then, notwithstanding that the person is not an employee of the occupier of the workplace —

(a) the workplace shall be treated as a factory for the purposes of this Act; and

(b) the provisions of this Act relating to the duty of an occupier shall apply to the occupier of the workplace as if he were the occupier of a factory.

13 It may be noted that the requirement that the work must be carried out for purposes of trade or gain was also present under the former Factories Act (see s 6(1) of the former Factories Act). However, now that there are new categories of workplaces specified in the First Schedule to the Act and they do not require that the work must be carried on for purposes of trade or gain, it is difficult to see why this requirement should apply to the definition of factories alone under s 5(2) (see further, n 5), though there may not be many such instances in either case. Whatever it is, this is subject to s 5(9) which provides that any premises in which work is carried on by or on behalf of the Government or any statutory board shall not be excluded from the definition of "factory" by reason only that the work carried on at the premises is not carried on by way of trade or for purposes of gain. Though the government is not excluded, this is subject to s 3(2) which provides that nothing in the Act shall render the Government liable to prosecution of an offence. This could possibly mean for instance, that while the government can be issued with a remedial order (see p 43), it cannot be prosecuted if there is a breach of that remedial order.

14 See s 6(4) of the former Factories Act.

5 Thus for instance, if a developer is the occupier of the workplace and he contracts with a contractor to carry out the building works, then though the contractor's employees are not the occupier's employees, the workplace will be treated as a factory and the duties of an occupier in relation to a workplace would be applicable to the developer.[15]

6 However, under the former Factories Act, the term "employ" was not defined. The term has now been defined in the Act.[16] More importantly, s 6(2)[17] extends the definition of employees to include volunteers. In common law, a volunteer may or may not be an employee.[18] But this definition makes the position clearer, though there may not be that many volunteers who are used by persons carrying on work, by way of a trade or for purposes of gain.[19] Nonetheless, this could prove to be important[20] when the categories of premises are eventually extended. Section 6(3)[21] also extends the definition of employees to include persons who are in the workplace for the purpose of receiving job training or gaining work experience including under a rehabilitation scheme. This provision could cover apprentices and in common law an apprentice is not an employee,[22] but s 6(3) effectively reverses this. Further, s 6(4)[23] provides that where an employer places an employee (referred to in this subsection as the loaned employee) at the disposal of another person to do work for that other person and there is no contractual relationship between the employer and that other person regarding the work to be performed by the loaned employee, the loaned employee shall be regarded as if he were an employee of that other person (instead of his employer) while the loaned employee is at work for that other person. Thus for instance, if A works for B and is lent to work for C which is B's

15 However, even without s 5(2), the occupier would owe duties to the employees of the contractor by virtue of s 11 (see below) which applies to all persons within the premises and not just the employees of the occupier, if any. As such s 5(2) may not be that significant in the context of the Act unlike in the context of the former Factories Act.
16 See s 4(1). This definition is not restricted to the term "employed" under the definition of the term factories, but rather it applies throughout the Act.
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18 See for instance, *Melhuish v Redbridge Citizens Advice Bureau* [2005] IRLR 419.
19 Though, as stated earlier, there is no such requirement in relation to the other categories of workplaces other than factories generally.
20 For instance, if all workplaces are covered and a charity organisation runs a second hand shop and volunteers man it, the volunteers could be covered under the protections applicable to employees.
21 See also n 17.
22 *Horan v Hayhoe* [1904] 1 KB 288.
23 See also n 17.

subsidiary, assuming there is no contractual relationship between B and C pertaining to the work, A would be considered to the employee of C for the duration of the work, though this is only for the purposes of this Act. It may also be pointed out that unlike the former Factories Act which was silent on the matter, by virtue of s 4(3) of the Act liability is not affected by the fact that the employee concerned is unlawfully working in the workplace.[24]

7 It may be noted that s 6(5) provides that where a person carries on any work in a factory, the occupier of the factory shall be deemed to be the employer of that person and the provisions of this Act shall apply as if the occupier of the factory were the employer of the person, unless the occupier of the factory proves that he is not the employer of the person. In common law, it has been suggested that in a case involving an industrial incident, where there are several defendants, the onus is not on the employee to prove precisely in whose employment he was at the time of the accident.[25] Nonetheless, this section makes the position clearer by placing the burden of proof on the occupier.

II. General principles relating to the duties

8 Unlike the former Factories Act, as will be discussed later, the Act imposes duties on many more persons besides occupiers. In this regard, s 10(*a*) provides that the Act may impose duties or liabilities on a person at any one time under two or more capacities. For instance, a person may incur liability as an employer and also as an occupier of a workplace. This is important as the duties vary according to the capacity of the person. If not for this section, if a person has committed a wrong in two different capacities, the question may arise whether both sections can be applicable or whether one section should take precedence over the other. But this makes it clear that both sections can indeed apply. Under the former Factories Act, as stated since the obligations were generally only imposed on the occupiers of the factories and not others, it was not necessary to deal with this issue. However, the question may also arise: What if a person has committed an offence under two different capacities, but arising out of the same set of facts, can he be subject to two sets of penalties as a result of s 10(*a*)? It is suggested that the section deals with "duties or liabilities" and not the "extent of duties or liabilities" as such. It is also suggested that given this is a penal statute, any ambiguity should be

24 However, see also n 47.
25 *Chang Fah Lin v United Engineers (M) Sdn Bhd* [1978] 2 MLJ 259.

construed in favour of the accused person.[26] In addition, it is suggested that if s 10(*a*) were interpreted otherwise, this would be tantamount to exposing the defendant to double jeopardy.[27]

9 Further, s 10(*b*) provides that a duty or liability imposed by the Act on any person is not diminished or affected by the fact that it is imposed on one or more other persons, whether in the same capacity or in different capacities. Thus if the employee is guilty of an offence under the Act, he cannot escape liability by saying that it was also the fault of his employer. While the duty or liability is not diminished, the question may arise whether the extent of penalty that has to be paid in the event of a breach can depend on the extent of culpability. For instance, if two parties such as the occupier and employer, have breached the Act, but the employer is more blameworthy, in deciding the amount of penalty to be paid, can the amount of culpability matter? As stated earlier, it is suggested that the section deals with "duty or liability" and not the "extent of duty or liability" and that hence it should be possible to vary the extent of liability according to the culpability. Again given this is a penal statute, it is suggested that any ambiguity should be construed in favour of the accused person[28] and hence that culpability should be relevant in relation to the issue of determining the amount of penalty.[29] In the UK, the extent of liability clearly varies with culpability,[30] but there is no provision similar to s 10(*b*) under the UK Health and Safety at Work *etc* Act.

10 Secondly, as already alluded to, unlike the former Factories Act, a breach only results in criminal liability. It does not result in civil liability. This is provided for by s 60.

11 Thirdly, under the former Factories Act, many of the provisions did not depend on the lack of care. Even if there was due care, there could still have been liability.[31] This somewhat draconian position has now been

26 See generally, *Forward Food Management Pte Ltd v PP* [2002] 2 SLR 40.

27 See also Art 11(2) of the Constitution of the Republic of Singapore, though in this context, there is no question of being "tried again" as both the convictions arise out of the same trial.

28 See n 26.

29 Reference may also be made to the *Singapore Parliamentary Debates* (vol 80 (17 January 2006) at col 2215) where the Minister of Manpower in moving the Bill stated, "the penalty, in any given case, will be applied taking into account all the relevant circumstances, including the culpability of the offender", though this was not specifically stated with respect to the situation where there are multiple defendants.

30 See for instance, *Balmoral Group Ltd v HM Advocate* (1996) SLT 1230.

31 See for instance, *Davis v Massy Ferguson Perkins Ltd* [1986] ICR 580.

changed under the Act[32] and the standard is one of "reasonable practicality".[33] This standard is likely to be, at the very least, same as the standard of "reasonable care" in common law.[34] This could also possibly explain why the Act does not allow civil proceedings for a breach as the standard is likely to be, at the very least, the same as that in common law.

12 Fourthly, unlike the former Factories Act, the duties under the Act are phrased in a much broader fashion. The former Factories Act was restricted to having very detailed and specific provisions relating to all sorts of matters. Due to the ever changing nature of industry and practice, it may not be feasible for legislation to cover every aspect of health and safety by having detailed provisions.[35] Hence, the new approach of the Act is to be welcomed. However, since a breach invokes criminal liability, having general provisions may result in the persons concerned not ever being sure whether what they are doing will run foul of the Act. This may be viewed as a drawback. However, it must be mentioned that the current position is not unique to Singapore and several other jurisdictions such as the UK and Sweden have long since moved away from specific to general provisions.[36] Such an approach is likely also to create a mindset amongst persons responsible that they have to take an active step in ensuring health and safety at the workplace. It would not suffice to merely follow preset rules without having regard to other safety issues not expressly covered by the rules.[37] Further, the Commissioner of Workplace Safety and Health has the power to issue or approve Codes of Practice[38] and make regulations.[39] Hence in many instances the persons responsible for health and safety may have some guidelines after all.[40]

32 Subject to n 50.
33 Notably, this is also the standard under the International Labour Standard's C155, Occupational Safety and Health Convention, 1981, though Singapore has yet to ratify this convention.
34 See, Frank B Wright, *Law of Health and Safety at Work* (Sweet & Maxwell, 1997) at p 51. See also *Chugg v Pacific Dunlop Ltd* [1988] VR 411 and *R v Associated Octel Co Ltd* [1994] 4 All ER 1051 at 1059 (there was an appeal from this decision ([1996] ICR 972), though not on this point).
35 See also *Singapore Parliamentary Debates*, vol 80 (17 January 2006) at cols 2211–2212.
36 *Ibid*.
37 This is unlike the position taken under the former Factories Act. See for instance, *Bohman v Jurong Town Corp* [1980–1981] 1 SLR 167.
38 Section 39, though see n 59.
39 Section 65.
40 See indeed for instance, Workplace Safety and Health (General Provisions) Regulations 2006 (S 134/2006) under which many of the former Factories Act provisions have been reproduced. Some of these regulations apply only to factories

III. The specific duties

A. *Duties of the occupier*

13 Section 11 provides for the duties of the occupier of a workplace. It provides that it is his duty to ensure, so far as it is reasonably practicable, that —

(a) the workplace,

(b) all means of access to or egress from the workplace; and

(c) any machinery,[41] equipment, plant, article or substance kept on the workplace

are safe and without risk to health to every person within those premises, whether or not the person is at work or is an employee of the occupier.

14 The occupier is defined in s 4(1) of the Act and it means —

(a) where a certificate of registration or a factory permit has to be obtained in relation to the premises pursuant to any regulations – the person who is, or is required to be, the holder of the certificate or permit; and

(b) in the case of any other premises – the person who has charge, management or control of those premises either on his own account or as an agent of another persons, whether or not he is also the owner of those premises.

15 Thus it would appear that if a developer has obtained the certificate of registration or factory permit and he assigns the entire construction work to a main contractor, who then sub-contracts various parts of the work, the main contractor would not be considered to be the occupier of the workplace (unlike under the former Factories Act[42]). However, the main contractor could fall under the definition of a "principal contractor" or "self-employed person" as will be discussed

and not to other workplaces. In this regard, the question may arise whether, if some safety standard set out in these regulations is not followed, but the workplace is not a factory, could there still be a breach of the main Act. It is suggested the answer may still be in the affirmative; see n 47.

41 The term "machinery" is defined in s 4(1).

42 See s 7(1) of the former Factories Act.

later.[43] Further since it is much more likely for the main contractor to take out the registration or permit as compared to the developer, such a problem is unlikely to arise in practice.

16 In relation to s 4(1)(*b*) the question could also arise whether two or more persons can be considered to be occupiers or only one person can be considered to be an occupier. For instance, an owner may decide to renovate his premises and this may amount to using the premises as a factory in so far as building works or works of engineering construction are carried out. Yet it may not be necessary in certain circumstances to register it as such[44] and hence s 4(1)(*a*) may be inapplicable. In such a situation, the question may arise whether the owner or the main contractor alone or both could be occupiers. In this regard, reference must be made to s 10(*b*) which provides that the Act may impose the same duty or liability on two or more persons, whether in the *same* or different capacities. Hence, it would appear that in the example given above, both can be considered to be occupiers. However, even if the owner in the above example could be considered to be an occupier, if the problem relates to the contractor's system of work it may not be that difficult for the owner to discharge this duty.[45]

17 Moving on to the specifics, under the former Factories Act, it was not clear if the occupier of a factory incurred obligations in relation to persons who were not working. For instance, in *Napieralski v Curtis (Contractors) Ltd*,[46] the court held that an employee who stayed back after work to use a machine for a private purpose was not *employed* or *working* on the premises. However, in so far as a breach of s 11 is concerned, since s 11 specifically provides that the occupier is liable "whether or not the person is at work", it is most certain that the stand taken in *Napieralski*'s case will not be followed.[47] In fact, the words are so general that the

43 See pp 38 and 39.

44 See reg 2 of the Workplace Safety and Health (Registration of Factories) Regulations 2006 (S 135/2006)

45 See p 36 and n 100.

46 [1959] 2 All ER 426. *Cf Uddin v Associated Portland Cement Manufacturers, Ltd* [1965] 2 QB 582.

47 However, strangely, under reg 12 of the Workplace Safety and Health (General Provisions) Regulations, the duty of the occupier is phrased as only being owed to every person "at work". Thus the position under the former Factories Act may possibly apply. Even if that is so, since a breach of the regulations creates a separate offence (see s 65(3) of the Act and reg 45 of the said regulations), this will not affect liability under s 11 of the Act. Thus on the facts of *Napieralski's* case, while there may not be liability under reg 12 of the said regulations, there could still be liability under s 11 of the Act.

protection would even extend to members of the general public.[48] In *R v Lightwater Valley Ltd*[49] for instance, where an accident had occurred in a fair ground due to the lack of care on the part of the appellant company, the appellant company was held criminally liable for the injuries that had been sustained by three members of the public who had used a particular device known as the "Hell Slide".

18 In addition, as stated earlier, liability is based on not taking "reasonably practicable"[50] measures. In this regard, the prosecution has to establish a *prima facie* case of a breach[51] and following that the defendant has the onus of proving that he had taken reasonably practicable measures.[52] However, ultimately while the prosecution has to prove its

48 See also *Singapore Parliamentary Debates* vol 80 (17 January 2006) at cols 2209–2210. In fact the term is so wide, it could even be argued that it includes trespassers, the argument being, not that trespassers should be protected, but rather that if trespassers could be affected, there is a also a risk that others lawfully there could be affected.

49 (1990) 12 Cr App Rep (S) 328.

50 However strangely, under the Workplace Safety and Health (General Provisions) Regulations, while some obligations are breached only if there is a failure to take reasonably practical measures (see for instance, regs 7, 9 and 10) other obligations appear to create strict liability (see for instance, regs 11 and 12). Thus if there is a failure to undertake such an obligation which creates strict liability, while there may not be liability under the Act, there could be liability under the said regulations. See also nn 47 and 70.

51 The prosecution can establish this by showing that the intended purpose of the Act was not achieved, for instance, there was an accident at the workplace; see *Lockhart v Kevin Oliphant Ltd* (1992) SCCR 774; *Maersk Co Ltd v Vannet*, 1997 SLT 1097.

52 See s 47 which provides that where in any proceedings for an offence under any provision in this Act, it is alleged that any person failed to comply with a duty to do something so far as reasonably practicable, it shall be for the accused to prove that (a) it was not reasonably practicable to do more than what was in fact done to satisfy that duty; *or* (b) there was no better practicable means than was in fact used to satisfy that duty. The term "practicable" is likely to provide for a higher standard than reasonably practicable (see for instance *Marshall v Gotham Ltd*, [1954] AC 360 at 372–373) so it is rather strange that two different standards are referred to. As stated earlier, the Act is based on the UK Health and Safety at Work Act. The two different terms also appear in the UK Health and Safety at Work Act (see s 40 of the said Act). However, when the UK Health and Safety at Work Act was passed it did not intend to repeal all other existing legislation at once, but rather it intended to progressively replace them (see s 1(2) of the said Act). And in some of the existing legislation there was reference to the term "practicable" instead of "reasonable practicability". Hence the UK Health and Safety at Work Act referred to both standards. Thus the reference to "practicable" instead of "reasonable practicable" in s 47(*b*) is puzzling. But whatever it is if indeed there are two different standards, it is difficult to see why the defendant would try to proof his case under s 47(*b*) rather than 47(*a*). Thus this paper would proceed on the assumption that s 47(*b*) is likely to be used more often in practice. Alternatively, this paper would proceed on the assumption that both standards are the indeed the same, which appears to be the position taken in Australia (see *Chugg v Pacific Dunlop Ltd*, [1988] VR 411).

case beyond reasonable doubt, the defendant has only to prove his case on a balance of probabilities.[53] Subject to showing that measures that were reasonably practicable were taken, the Act creates an offence of strict liability.[54]

19 As to the term "reasonably practicable", in *Edwards v National Coal Board*,[55] the court stated the following:

> "[R]easonably practicable" is a narrower term than 'physically possible' and seems to me to imply that a computation must be made by the owner, in which the quantum of risk is placed on a scale and the sacrifice involved in the measures necessary for averting the risk (whether in money, time or trouble)[56] is placed in the other, and that, if it be shown that there is a gross disproportion between them – the risk being insignificant in relation to the sacrifice – the defendants discharge the onus on them. Moreover, this computation falls to be made by the owner at a point of time anterior to the accident. The questions he has to answer are: (a) What measures are necessary and sufficient to prevent any breach of [the section]? (b) Are these measures reasonably practicable?

20 In this regard, as in common law,[57] the fact that the rest of the industry is not taking some measure, while relevant,[58] may not necessarily mean that the defendant has not breached his duty.[59]

21 Further, in weighing the risk against the cost of averting it, if the risk is something which is unknown or unexpected at the time the alleged offence had taken place, there may not be liability. In *Marshall v Gotham*

53 See for instance, *R v Dunbar* [1958] 1 QB 1, *R v Carr-Briant*, [1943] KB 607.

54 See for instance, *R v Board of Trustees of the Science Museum* [1993] 3 All ER 853 at 859; *Austin Rover Group Ltd v HM Inspector of Factories* [1988] Crim LR 752.

55 [1949] 1 KB 704 at 712.

56 In determining whether a certain amount of time, money or trouble should have been taken to avert a risk, the resources and size of the organisation and the competence and experience of employees could be relevant factors; see, the Court of Appeal decision in *R v Associated Octel Co Ltd* [1994] 4 All ER 1051 at 1063. There was an appeal from this decision ([1996] ICR 972), but not on this point.

57 See for instance, *Brown v John Mills & Co* (1970) 8 KIR 702.

58 See for instance, *Martin v Boulton & Paul (Steel Construction) Limited* [1982] ICR 366.

59 *Ibid*. See also, s 40 of the Act which effectively provides that where there is a code of practice, while the code will be relevant, a person shall not be liable to any criminal proceedings by reason *only* that he has failed to observe any approved code of practice. See also, *Tudhope v City of Glasgow District Council*, (1986) SCCR 168. Likewise, it is suggested that just because he has complied with a code, that should not mean there can be no liability.

Co Ltd,[60] for instance, a miner was killed due to a "slickenslide" which was a rare geological fault which had not occurred in the respondent's mine for at least twenty years before the accident in question. As such it was held it was not reasonably practical to have anticipated it and taken measures against it. This case also illustrates the point made earlier in *Edward*'s case that where there has been an accident, the time of assessing risk and determining what was reasonably practicable, is the time before the accident and not the time subsequent to that.

22 It must also be noted that liability can result based on the presence of risks as s 11 specifically refers to it, unlike the former Factories Act which did not refer to risk *per se*. Thus there does not have to be any actual injury. In *R v Board of Trustees of Science Museum*[61] for instance, the board of trustees of a museum were charged with an offence when health and safety inspectors found a certain bacteria which could cause a rare form of pneumonia, in the water of the air cooling system. The prosecution did not prove that the bacteria had actually escaped from the air cooling system. Nonetheless, the court held that there was a risk that it could and that was sufficient to impose liability. Similarly, in *Bolton Metropolitan Borough Council v Malrod Insulations Ltd*,[62] the respondents were contractors who were engaged to strip asbestos insulation from another firm's premises. In order to do their work the respondents had to use a decontamination unit. But before the work could be done, health and safety officers inspected the unit and found various defects which could give rise to serious injury. The court held that they were rightly prosecuted even if no injury had occurred and work had not started, as it would suffice if there was merely a risk.

B. Duties of the employer

23 The employer owes duties to his employees and others. The duties owed to his employees would first be considered.

(1) Duties to employees

24 Section 12(1) provides that it is the duty of every employer to take, so far as it is reasonably practicable, such measures as are necessary

60 [1954] AC 360. See also, *Austin Rover Group Ltd v HM Inspector of Factories*, [1988] Crim LR 752 where the court held that the risk must be a foreseeable risk. See also s 16(7).

61 [1993] 3 All ER 853.

62 [1993] ICR 358.

to ensure the safety and health of his employees at work. Section 12(3), provides that,

25 For the purposes of sub-s (1), the measures necessary to ensure the safety and health of persons at work include -

> (a) providing and maintaining for those persons a work environment which is safe, without risk to health, and adequate as regards facilities and arrangements for their welfare at work;
>
> (b) ensuring that adequate safety measures are taken in respect of any machinery,[63] equipment, plant, article or process used by those persons;
>
> (c) ensuring that those persons are not exposed to hazards arising out of arrangement, disposal, manipulation, organisation, processing, storage, transport, working or use of things –
>
> > (i) in their workplace; or
> >
> > (ii) near their workplace and under the control of the employer;
>
> (d) developing and implementing procedures for dealing with emergencies that may arise while those persons are at work; and
>
> (e) ensuring that the person at work has adequate instruction, information, training and supervision as is necessary for that person to perform his work.

26 The first question that may arise is whether s 12(3) creates an offence, independent of s 12(1). The issue appears not to have been considered in the UK, but arose for consideration in the Australian case of *Chugg v Pacific Dunlop Ltd.*[64] In this case, the Supreme Court of Victoria was considering the Victoria Occupational Health and Safety Act.[65] Section 21(1) of the said Act provided: "An employer shall provide and maintain so far as is practicable for employees a working environment that is safe and without risks to health". Section 21(2) of the said Act provided: "Without in any way limiting the generality of sub-

63 For the definition of the term "machinery" see s 4(1).
64 [1988] VR 411.
65 Occupational Health and Safety Act, 1985.

s (1), an employer contravenes that sub-section if the employer fails" to do a number of things. Section 47 of the said Act provided that any person who contravened any provision of said Act would be guilty of an offence. In the circumstances, the court held that s 21(2) did not create a separate offence as it was not independent and that it was merely with reference to s 21(1).

27 In Singapore, like s 47 of the Victoria Occupational Health and Safety Act, s 20 of the Act provides that any contravention of any provision of this Part which imposes a duty on a person, that person shall be guilty of an offence. Nonetheless, in so far as s 12(3) refers to "for the purposes of sub-s (1)", it is suggested that the position taken in *Chugg v Pacific Dunlop Ltd* should equally apply in Singapore and this paper would proceed on the assumption that that is indeed the case.

28 Next, it may be noted that s 12(3) is clearly not exhaustive in so far as it refers to the word "include". Thus if the measures stated in s 12(3) are not relevant to the factual situation at hand, there can be still a breach of s 12(1). However, what if the measures stated in s 12(3) are relevant; can there nonetheless still be a breach of the s 12(1) even if the standards set out in s 12(3) are met? There certainly could be such situations and how many such situations there could be, could turn on how widely or narrowly the term "relevant" is in turn defined. Some such instances are considered below.[66] The position would have been clearer had the wording used in s 2(2) of the UK Health and Safety at Work *etc* Act (the equivalent provision to s 12(3) of the Act) been adopted. The said s 2(2) provides "*without prejudice to the generality of an employer's duty under the preceding subsection,* the matters to which that duty extends include in particular" [emphasis added] and then proceeds to list the various specific measures.[67] Nonetheless, considering the general purpose of the Act to promote health and safety at the workplace[68] it is suggested that s 12(1) should still be applicable to such situations.

29 In relation to s 12(3)(*b*), under the former Factories Act, it was held that the protection conferred by the relevant provisions was only in respect of machinery *used* in the factory as opposed to machinery *made*

66 See for instance, n 78.
67 See also, Victoria Occupational Health and Safety Act referred to above.
68 Such a general purpose was taken into account in interpreting an ambiguity in the UK Health and Safety at Work *etc* Act in *R v British Steel PLC* [1995] 1 WLR 1356.

in the factory.[69] In so far as s 12(3)(*b*) talks about "used by those persons", it is likely the position is the same under that section, though liability may still arise under s 12(1), subject to the problem discussed in the preceding paragraph. It has also been held in the context of the former Factories Act that the provisions relating to fencing protected employees in so far as they came into direct contact with the machinery and that they did not protect them from objects that came flying out of the machinery.[70] It is not clear if such a situation can be covered by ss 12(3)(*b*) or 12(3)(*c*). Nonetheless, it may be covered by s 12(3)a (as that may make the work environment unsafe) or liability may arise still arise under 12(1) of the Act.

30 In relation to se 12(3)(*c*), it would appear that the section refers to, the arrangement of things, the disposal of things, the manipulation of things, the organisation of things, the processing of things, the storage of things, the transport of things, the working of things and the use of things. This would for instance mean that if an employee is injured while working but not while working a thing, s 12(3)(*c*) would not be applicable. In relation to s 12(3)(*c*) it may also be recalled that in *Soon Pook Seng Arthur v Oceaneering International Sdn Bhd*,[71] decided under the former Factories Act, where an employee fell in a courtyard outside the workshop while shifting a steel cabinet in the course of his employment, the court held that the area outside the workshop was not a factory as that area was not used for making or repairing articles. However, now under s 12(3)(*c*) in so far as the employee is transporting things in his workplace or near his workplace (which is under the control of the employer), the employer would be under a duty to take reasonably practicable measures.

31 In relation to s 12(3)(*e*), what is adequate would of course depend on the circumstances. For instance, in *Chua Ah Beng v C & P Holdings Pte Ltd*,[72] decided under the former Factories Act, the court stated that: "Employers are only obliged to provide training and warning

69 *Parvin v Molton Machine Co* [1952] AC 515. Though it is not clear, it would appear that this could also be the position under reg 12 of the Workplace Safety and Health (General Provisions) Regulations which is quite similar to ss 18 to 22 of the former Factories Act.

70 *Teoh Gor Hua v Camel Plywood Corp Ltd* [1968] 2 MLJ 147. Though it is not clear, it would appear that this could also be the position under reg 12 of the Workplace Safety and Health (General Provisions) Regulations which is quite similar to ss 18 to 22 of the former Factories Act. But see nn 47 and 50.

71 [1993] 3 SLR 600.

72 [2001] 3 SLR 106 at 115.

when they are needed. An employer is not required to instruct his carpenter how to use a hammer, or warn him not to strike before ensuring that his fingers are out of the way." Though this was said with respect to the former Factories Act, it is likely to hold true in respect of the Act as well. Further in relation to s 12(3)(*e*), at times it may not be adequate to only give instructions. As in common law,[73] it may also be necessary to ensure that those instructions are followed by means of supervision.[74]

32 The question could also arise whether the employer could be under a duty to instruct not only his employees, but also others such as independent contractors, if the failure to do so results in injury or risk of injury (subject to what is discussed below) to his own employees.[75] The issue arose for consideration in *R v Swan Hunter Shipbuilders and Telemeter Installations Ltd.*[76] In this case, the defendant company in question carried out certain repair works in a ship. During the works, if there was a build up of oxygen, there was a possibility of a fire. As a result, the defendant company came up with a set of instructions in relation to this and gave them to their employees. However, the actual work was done by the defendant company's employees together with its sub-contractor's employees. The defendant company did not give that set of instructions to its sub-contractor's employees. A fire occurred because of the negligence of a subcontractor's employee as a result of which, some of the defendant's own employees were killed. The court held that in the circumstances of the case, the defendant was liable for failing to give safety instructions to its sub-contractors' employees. However, in the context of the Act, this would not be covered by s 12(3)(*e*) as the latter relates to the employer's duty in relation to "persons at work" which in this context refers to employees.[77] Rather only s 12(1) may be relevant, subject again to the problem discussed earlier.[78]

73 See for instance, *Bux Slough Metals Ltd* [1974] 1 All ER 262.

74 *Pope v Gould (H M Inspector of Health and Safety)*, (QBD, 20 June 1996) (unreported).

75 The employer is clearly under a duty to give prescribed information to the others if so required to do so by the regulations, if the way in which he conducts his undertaking could affect *their* (as opposed to his employees') safety or health while those persons are at his workplace; see s 12(4). However, there appear to be no such regulations as yet.

76 [1982] 1 All ER 264.

77 Since s 12(2) and s 12(4) relate to the employer's duty in relation to non-employees, the term "persons at work" in s 12(3) and s 12(3)(*e*) must refers to employees. Further, s 12(3) is with reference to s 12(1) which clearly restricted to employees.

78 As stated earlier, it may be argued that since ss 12(3)(*e*) and 12(4) [see n 75] are specifically relevant, there cannot still be liability under s 12(1). It may also be argued

33 It may also be noted that while s 12(1) does not expressly refer to the term risk, s 11 does. Thus the doctrine *expressio unius est exclusion alterius* may suggest that s 12(1) should not cover risks. However, s 12(3)a does refer to risk and as stated, s 12(3)a relates to s 12(1) and does not exist independently.[79] Even that aside, it is suggested that s 12(1) does impliedly cover risk in so far as the section instead of placing liability for "causing injury" places liability for failing to take reasonably practicable "measures as are necessary to protect health and safety".[80] It is also difficult to see why an occupier should be liable for risks[81] but not an employer. In any case, even in the unlikely event that s 12(1) does not cover risks, an employer who is an occupier could be liable under s 11 in his capacity as occupier for any risks created.

34 Coming back to s 12(1), cases decided in common law relating to the negligence of the employer may throw some light on the extent of duty or on whether there has been a breach of that duty.[82] While cases relating to industrial matters could be relevant,[83] the question may also arise whether s 12(1) is wide enough to cover other non-industrial

that if s 12(3)e was intended to cover non-employees, the section should have been worded in a more general way such as s 2(2)(*c*) of the UK Health and Safety at Work *etc* Act, which provides "the provision of such information, instruction, training and supervision as is necessary to ensure, so far as is reasonably practicable, the health and safety at work of his employees". As can be seen s 2(2)(*c*) of the UK Health and Safety at Work *etc* Act, does not specify to whom the information or instructions has to be given.

79 See p 29.

80 See also *Singapore Parliamentary Debates* vol 80 (17 January 2006) at col 2206.

81 See p 27.

82 While the cases decided in common law may be relevant in determining the extent of duty or on whether there has been a breach, they may not be relevant in terms of other matters such as causation. For instance, if an employee died because he did not have a safety belt on and if it is proved that even if he had been given one, he would not have worn it, causation would not have been established and there may not be liability in common law (see for instance, *Cummings v Sir William Arrol & Co*, [1962] 1 All ER 623). However under the Act as generally there does not have to be an injury and the presence of a risk itself would suffice (subject to what was discussed in the preceding paragraph) and hence on facts above, there could still be liability.

83 See for instance *Parno v SC Marine Pte Ltd* [1999] 4 SLR 579. However needless to say, ultimately reference must be made back to the Act. For instance, in *General Cleaning Contractors Ltd v Christmas* [1953] AC 180 it was held that the employer may have a duty even in a situation where the employee has been sent to work over a place over which the employer has no control (such as a private residence of a customer). However, under s 2(1) of the Act, the Act only applies to workplaces within the class or description of workplaces specified in the First Schedule. Hence if the place where the work is carried out does not fall within the definition of the workplaces under the Act, the employer would not be liable.

matters such as psychiatric harm[84] (arising out of stress for instance) or harassment.[85] This might be a theoretical question as it is more likely for a civil action to be brought in relation to a claim involving psychiatric harm or harassment rather than a criminal action. Nonetheless, since s 12(1)[86] is couched is very general terms, arguably this may be possible.

35 Further, as in common law,[87] the question of whether there is a breach has to be looked at not only in relation to employees as a whole but also in relation to the particular employees who may be suffering from special disabilities.[88]

36 The question may also arise whether the employer would be liable if the employee was not *working*. Sections 12(1) and 12(3) speak of the employer's liability in respect of employees "at work". The term "at work" is defined in s 4(1) of the Act to mean:

> in relation to an employee, all times when the employee is performing work in connection with any trade, business, profession or undertaking carried on by his employer, wherever that work is carried out.

37 This definition may be contrasted with the position under the Workmen's Compensation Act[89] where liability is based on the accident occurring "in the course of the employment".[90] In the context of the Workmen's Compensation Act, it has been said:

> [A] man's work does not consist solely in the task which he is employed to perform, it includes also matters incidental to that task. Times during which meals are taken, moments during which the man is proceeding towards his work from some portion of this employer's premises to another, and periods of rest may all be included.[91]

84 As for the common law position, see for instance, *Barber v Somerset County Council* [2004] 2 All ER 385.
85 As for the common law position, see for instance, *Waters v Commissioner of Police Metropolis* [2000] IRLR 720.
86 In relation to harassment, as regards to the liability of the employee who carries out such harassment see s 15(3) which may also arguably apply.
87 *Paris v Stepney Borough Council* [1951] AC 367, *Cross v Highlands and Islands Enterprise* [2001] IRLR 336 at 353.
88 See for instance, *Page v Freight Hire (Tank Haulage) Ltd* [1981] ICR 299.
89 Cap 354, 1998 Rev Ed.
90 See s 3(1) of the Workmen's Compensation Act. Under the UK Health and Safety at Work *etc* Act, the term "at work" refers to the "course of his employment": see s 52(1) of the said Act.
91 *Per* Lord Porter in *Weaver v Tredegar Iron and Coal Co Ltd* [1940] AC 955 at 990.

38 The term "performing work" is likely to be narrower than the term "in the course of the employment". Thus if an employee is resting during a break, it would be easier to classify that as happening during the course of employment than to state that the employee is "performing work". Nonetheless, this may not be really significant. This is so because of two reasons. Firstly, even if the employee is not performing work at the time when the accident happened, if there is a risk[92] (subject to what was discussed earlier)[93] that the accident could have happened while he was performing work, there could still be liability. Further, the employer could face liability in some other capacity such as that of an occupier. As stated earlier, an occupier would face liability whether or not the person was an employee and whether or not the persons are at work.[94]

39 It may also be noted that unlike in the UK,[95] s 12(3) does not directly refer to safe means of access or egress from the workplace, though it could be indirectly referred to in s 12(3)(*c*) as alluded earlier.[96] It may also be argued that it is indirectly covered under the very general s 12(1). Even than, s 12(1) and s 12(3)(*c*) apply only in so far as the employee is "at work", which as stated, refers to performing work. Hence if the employee is injured while entering or exiting the premises and he is not "performing work" at that time (such as coming in from or going out for a tea-break), then there may not be any liability under those sections. Nonetheless, in so far as there is a risk that their health and safety could be affected while so entering or exiting the premises while performing work, there could still be liability based on risk, subject to what was discussed earlier. Further, there could also be liability under s 11, which specifically refers to access and egress, in so far as the employer is the occupier.

(2) Duties to others

40 It may also be noted that s 12(2) provides that it is duty of the employer to take, so far as is reasonably practicable, such measures as are

92 In this regard, the question may also arise whether the term "risk" refers to a risk present at the time of the offence or a risk present at some other time. For instance, if an employee is injured whilst not working but thereafter the problem is ratified such that there is no more risk to employees at work, can there still be liability based on the past risk. It is suggested that the point for determining whether there was a risk, is the time of the offence and hence there should still be liability.

93 See p 32.

94 Subject to n 47.

95 See s 2(2)(*d*) of the UK Health and Safety at Work *etc* Act.

96 See p 30.

necessary to ensure the safety and health of persons (not being employees) who may be affected by any undertaking carried on by him in the workplace. The employer's duties to his employees and others are provided under different sections. The reason for this is that the standard for the duties is not identical. The standard of what is reasonably practicable is likely to be much higher in relation to an employee as compared to a person who is not an employee.

41 The term "undertaking" in s 12(2) has not been defined and the question may arise whether the undertaking refers to the principal work undertaken by the employer. For instance, if an employer hires an independent contractor to do some repair or cleaning work in his factory and the employer does not take any reasonably practical measures and an accident occurs, causing a person other than an employee to be injured, can the employer be liable under s 12(2)? The issue arose for consideration in *R v Associated Octel Co Ltd.*[97] In this case the appellant operated a large chemical plant which was designated by the UK Health and Safety Executive as a "major hazard site" and for a number of years, had used a small firm of specialised contractors for certain repairs on its plant. The contractor's employees had to fill up a form for every job stating what was going to be done and to obtain authorisation from the appellant's engineers, who decided what safety precautions were needed and issued a "safety certificate" imposing conditions under which the work was to be done. All this was part of the safety procedures that were required by the UK Health and Safety Executive. While undertaking the repairs on one occasion, one of the contractor's employees met with an accident and was badly burnt. The House of Lords held that the relevant section in the UK Health and Safety at Work *etc* Act (which was similar to s 12(2) of the Act) was wide enough to cover activities of independent contractors carrying out cleaning, repair and maintenance which were necessary for the conduct of the employer's business. Hence the appellant was held liable. But it was said in passing that if the repair was done at the independent contractor's premises,[98] it would be going too far to attach

97 [1996] ICR 972. See also *R v Mara* [1987] 1 All ER 478. *Cf RMC Roadstone Products Ltd v Jester* [1994] 4 All ER 1037. *Cf* also, *Singapore MRT Ltd v Moh Puay Kheng* [1993] 3 SLR 914, though the case was decided under another statute in a totally different context.

98 However, in the UK it is clearly established that there can be other circumstances whereby an undertaking can extend beyond the premises in which the employer principally operates (see for instance, *BOC Distribution Services v The Health and Safety Executive*, [1995] JPIL 128, where an accident occurred while the employee was driving at another place other than his principal place of work). It may also be noted that in Singapore, s 12(2) applies only in respect of an undertaking that is

liability to the employer. The court also stated that the fact that the employer could not control the work did not mean there was no duty.[99] So long as it was part of his undertaking, he had a duty to do what was reasonably practicable, though in determining what was reasonably practicable, the fact that the employer may not be able to control the work of the contractor may be relevant.[100] Section 12(2) aside, in Singapore, liability may also arise under s 11,[101] in so far as the employer is an occupier.

(3) Defences

42 In relation to the issue of defences, it is unlikely that the employer would be able to escape liability on the basis that there would be no risk or injury had the employee or some other person been careful. This is likely to be so for as stated in *R v Sanyo Electrical Manufacturing (UK) Ltd*,[102] the purpose of the legislation is to "protect employees against the consequences of doing things by reason of inadvertence or inattention which they would not normally do". There was also some suggestion in *R v Rhone-Poulenc Rorer Ltd*,[103] that even if the risk or accident had occurred only because the employee disobeyed an instruction given to him, the employer could still be liable, though the matter was not conclusively determined.[104]

carried on by the employer "in the workplace". It is not clear if "in the workplace" refers to any workplace or the workplace in which the employer principally operates. But it is likely that it refers to the former, for or else an employer who carries on construction at a worksite would not owe duties under this section which is unlikely to be the intention of Parliament.

99 The question may arise whether such a construction is possible in Singapore because of the presence of s 14 (see below) which makes the principal liable for the actions of his contractors only when the latter is working under the direction of the former (see below). But as stated earlier, under s 10(*a*) it is provided that a person may incur liability in one or more capacities. It is suggested implicit in it is the fact that it is possible for there to be liability in one capacity but not in another. Further even if the position were otherwise, it may noted that *R v Associated Octel Co Ltd*, did not involve a principal and his subcontractor as such. Rather it involved an employer and his independent contractor.

100 *R v Associated Octel Co Ltd* [1996] ICR 972 at 979. This was a House of Lords decision. See also the earlier Court of Appeal decision ([1994] 4 All ER 1051 at 1063) which was affirmed on appeal, wherein the court stated that in fact in *most* cases since the employer cannot control the independent contractor, it may not be reasonably practicable for him to do anything other than rely on the independent contractor.

101 Subject to n 98.

102 (1992) 156 JP 863 at 865.

103 [1996] ICR 1054.

104 However even if that is so, similar to the principles applicable under vicarious liability, it is possible, that if the employee was on a "frolic of his own" and there was a risk or injury, the employer may not be liable. See below.

43 It is also likely that as in common law,[105] delegation of duty whether to an employee or an independent contractor[106] is not a defence. If the rule were otherwise, it may be easy for liability to be avoided and the legislation may be "emasculated".[107] In *R v Gateway Foodmarkets Ltd*,[108] whenever there were minor faults with lifts, employees at a local supermarket would set it right itself. This practice was unauthorised by the head office and no one there was aware of it. On one particular occasion while carrying out a repair work in the lift, an employee died. The company argued that it was not liable. It contended that liability would only attach if the lack of reasonable care was exhibited by members who can be said to be the directing mind and will of the company. However, the Court of Appeal rejected this argument and held having regard to the purpose of the legislation there would be liability unless there were reasonable precautions taken by the company or "on its behalf". However, the court stated in obiter that if it was a case of an injury or risk caused by junior employee who was on "a frolic of his own, and where there was no failure to take reasonable precautions at any other level",[109] there may not be liability.

105 *Wee Peng Whatt v Singapore Transport Supply Services Pte Ltd* [1975–1977] SLR 641; affirmed in [1978] 2 MLJ 234. See also *Chozi v Chitrasenan* [1964] MLJ 367.

106 See *R v Associated Octel Co Ltd* [1996] ICR 972, discussed above.

107 *R v British Steel Plc* [1995] 1 WLR 1356 at 1363.

108 [1997] ICR 382. See also *R v British Steel Plc* [1995] 1 WLR 1356.

109 [1997] ICR 382 at 388. *Cf R v Nelson Group Services* [1998] 4 All ER 331. In this case, an isolated act of negligence on the part of two junior employees created a health risk. Even though the employees were not on a frolic of their own, the court held that the employer was not precluded from raising the defence of reasonable practicability. In this regard, the court stated that if the employer managed to show that he had done everything reasonably practicable to see that the person doing the work had the appropriate skill and instruction, laid down a safe system of doing work, adequately supervised the employee and had provided him with safe plant and equipment for the proper performance of work, there may not be liability on the part of the employer. The court distinguished *R v Gateway Foodmarkets Ltd* on the basis that this case unlike the former was concerned with the isolated act of negligence on the part of junior employees. One of the reasons why the court was prepared to reach this conclusion that under s 7(a) of the UK Health and Safety at Work *etc* Act, the employees in question would have been criminally liable. Hence the court reasoned that the public would be sufficiently protected. However, unlike s 7(*a*) of the UK Health and Safety at Work *etc* Act, s 15 of the Act is more limited in scope in that it does not cover mere carelessness (see p 41) and the actions of the employees in *R v Nelson Group Services* may not have exposed them to criminal liability in Singapore if those actions had taken place in Singapore. As such it is suggested that position taken in *R v Gateway Foodmarkets* is to be preferred. In addition, it may be argued that lack of culpability at the top while perhaps relevant to the issue of the amount of penalty to be imposed (see p 21), should not be relevant in relation to the issue of whether there is liability to begin with. See also, *Rex v GH Kiat* [1938] MLJ Rep 145.

C. *Duties of principals*

44 Section 14 relates to the duties of the principals.[110] Section 14(1) provides that subject to sub-s (2), it shall be the duty of every principal to take, so far as reasonably practicable, such measures as are necessary to ensure the safety and health of —

(a) any contractor engaged by the principal when at work;[111]

(b) any direct or indirect subcontractor engaged by such contractor when at work; and

(c) any employee employed by such contractor or subcontractor when at work.

45 Section 14(2) provides that the duty imposed on the principal in sub-s (1) shall only apply where the contractor, subcontractor or employee referred to in that subsection is working under the "direction" of the principal as to the manner in which the work is carried out. The question may arise whether the direction has to be "specific" or "general". Firstly, it must be noted that the direction has to be in relation to the "manner in which the work is carried out". This suggests that the direction has to be specific. Secondly, s 14(4) lists down some very specific measures and these are similar to the obligations of employers under s 12(3) discussed above. This suggests that the principal is expected to have some degree of control over contractor[112] just as an employer would have control over his employee. This is also suggests that the direction must be specific before liability can arise. Thus if the contractor, simply hands over a job to a subcontractor with the job specifications without controlling the manner of work, it is suggested that this section may not be applicable. Such an approach is also in line with what was said by the Minister in moving the Bill in Parliament[113]

> Clause 14 covers principals who engage contractors for specialised tasks or the services of workers from third-party labour suppliers. In such situations, there is no contract of employment between the principal and the contractor or the worker supplied. Traditionally, a principal

110 For definition of principals, see s 4(1). The term may not only include main-contractors but also sub-contractors who engage other contractors.

111 For definition of the term "at work", see s 4(1) and p 33.

112 In common law too, there must be control before the principal can be liable, see for instance, *Awang Bin Dollah v Shun Shing Construction & Engineering Co Ltd* [1997] 3 SLR 677.

113 See *Singapore Parliamentary Debates* vol 80 (17 January 2006) at 2209.

> who engages a contractor would be engaging the specialist services of the contractor, and would not be directing the contractor on how to do the work. However, today the situation is different. Principals often engage "contractors" and third-party labour not for their specialist expertise, but precisely so that they can avoid entering into a direct employment relationship, for organisational or other reasons. In such situations, the principal, in terms of supervision, takes on the role of an employer. The Bill thus places on him responsibility for the worker's safety and health as if he were the employer. If this were not the case, then the duties under the Act could be simply circumvented by a careful crafting of legal relationship.

46 Section 14(3) provides that it is the duty of every principal to take, as far as is reasonably practicable,[114] such measures as are necessary to ensure the safety and health of persons (other than those referred to in s 14(1)) who may be affected by any undertaking[115] carried on by him in the workplace.[116] Going back to the definition of the term "occupier" discussed earlier,[117] even in the unlikely event that a main contractor is not an occupier or even if the main contractor does not fall under s 14(1), he would still owe duties by virtue of this sub-section.

47 It will also be noticed that other than for s 14(4)(*a*), there is no direct reference to risk in s 14(1) or s 14(3). Nonetheless, as mentioned earlier,[118] it is suggested that it is indirectly covered.

D. Duties of self-employed persons

48 Similar to s 14(3), s 13(1) provides that it shall be a duty of every self-employed person (whether or not he is also a contractor or subcontractor) to take, so far as is reasonably practicable,[119] such measures as are necessary to ensure the safety and health of persons (not being his employees) who may be affected by any undertaking[120] carried on by him in the workplace.[121]

49 The term self-employed, in defined in s 4(1) to mean "a person who works for gain or reward otherwise than under a contract of service,

114 As to reasonable practicability; see p 25.
115 As to undertaking, see p 35.
116 As to workplace, see p 16.
117 See p 23.
118 See p 32. See also *Singapore Parliamentary Debates* vol 80 (17 January 2006) at col 2209.
119 As to reasonable practicability; see p 25.
120 As to undertaking; see p 35.
121 As to workplace; see p 16.

whether or not employing others".[122] The term "person" is not defined in the Act. However, it is defined in s 2 of the Interpretation Act[123] to *include* "any company or association or body of persons, corporate or unincorporate". Thus going back to the definition of the term "occupier" discussed earlier,[124] even in the unlikely event that a main contractor is not an occupier, the main contractor would fall under the definition of a self-employed person.

50 That aside, it will also be noticed that in s 13, there is no direct reference to risk. Nonetheless, as mentioned earlier,[125] it is suggested that it is indirectly covered.

E. Duties of persons at work

51 The Act also imposes duties on persons at work.[126] Section 15(1) provides that it shall be the duty of every person at work to

> (a) use in such manner so as to provide the protection intended, any suitable appliance, protective clothing, convenience, equipment or other means or thing provided (whether for his use alone or for use by him in common with others) for securing his safety, health and welfare while at work; and
>
> (b) to co-operate with his employer or principal and any other person to such extent as will enable his employer, principal or other person, as the case may be, to comply with the provisions of the Act.

52 A breach results in a commission of an offence under s 15(4). In relation to 15(1)(*a*) above, if the employer or principal does not emphasis the need to use such equipment and makes it optional, the employee or person working could still be liable for as provided in s 10(*c*) a duty or liability is not diminished or affected by the fact that it is imposed on one

122 In the UK, by virtue of s 53(1) of the UK Health and Safety at Work *etc* Act, self-employed persons refers to individuals and hence corporations are excluded.
123 Cap 1, 1999 Rev Ed.
124 See p 23.
125 See p 32. See also *Singapore Parliamentary Debates* vol 80 (17 January 2006) at col 2209.
126 As to "at work"; see p 33. The term "persons at work" is not restricted to employees. In this regard see also, s 15(1)(*b*). Hence, this is wider than ss 80 and 81 of the former Factories Act.

or more other persons. However, presumably the prosecution would exercise its discretion in such circumstances in deciding whether or not to bring an action against the employee.

53 It is also an offence for a person at work to wilfully[127] or recklessly[128] interfere with or misuse any appliance, protective clothing, convenience, equipment or other means or thing provided (whether for his use alone or for use by him in common with others) pursuant to any requirement under this Act for securing the safety, health and welfare of persons (including himself) at work.[129] It is also an offence for any person at work to without reasonable cause, wilfully or recklessly do any act which endangers the safety and health of himself or others.[130] As can be seen, the latter provision is broader than the former which relates only to matters which are "provided". It may also be mentioned that these provisions are unlike the position in UK where the employee can face criminal liability on the ground of a mere failure to take reasonable care.[131]

54 As stated earlier, if the employee or person working has committed an offence, this would clearly not affect the employer's or any other person's criminal liability.[132] However that aside, the question may arise whether, if the employee has committed an offence, that would affect the employer's or some other person's civil liability. In this regard, s 60(1)(*b*) provides that nothing in the Act shall be construed as conferring a defence to an action in any civil proceedings or as otherwise affecting a right of action in any civil proceedings. Since it is provided that the right will not be affected, there can be a civil action. Further, in the civil action, while the commission of the crime *per se* would not be a defence, if there is contributory negligence on the part of the employee,

127 In *Charles v Smith (S) and Sons (Engineering) Ltd* [1954] 1 WLR 454, Hilbery J stated, "In my opinion the words 'wilfully interfere and misuse' in the context, more particularly the words 'or misuse' are intended to mean something more than merely 'touch or misplace'. I think they mean something in the nature of perverse intermeddling with the appliance; and the use of the word 'wilful' in our language can and often does convey that meaning." See also, *R v Senior* [1899] 1 QB 283 at 290.

128 See for instance, *R v Bates* [1952] 2 All ER 842 at 845, "The term 'recklessly', I think, does not really give rise to much difficulty. It means something more than mere negligence or inadvertence. I think it means deliberately running an unjustifiable risk."

129 Section 15(2).

130 Section 15(3).

131 See s 7(*a*) of the UK Health and Safety at Work *etc* Act.

132 Section 10(*c*).

then in a common law action for negligence, the employee's damages may be reduced.[133]

F. *Duties of others*

55 Unlike the former Factories Act, manufacturers[134] and suppliers[135] of machinery, equipment or hazardous substances for use at work,[136] are also covered. However, this is limited to the categories of machinery, equipment and hazardous substances listed in the Fifth Schedule to the Act[137] such as fork lifts and power presses. If covered by the Fifth Schedule, *inter alia*, s 16(1) provides that it shall be a duty of any person who manufactures or suppliers any machinery, equipment or hazardous substance for use at work, to as far as is reasonably practicable, provide various information relating to precautions or health hazards if any and ensure that the machinery, equipment or hazardous substance is safe and without risk to health when properly used.

56 Persons who erect, install or modify machinery or equipment for use at work (such as third party maintenance contractors) are also covered.[138] The obligation is to as far as reasonably practicable ensure that

133 See s 3(1) of the Contributory Negligence and Personal Injuries Act (Cap 54, 2002 Rev Ed). See also for instance, *Mohamed Yeanikutty v Far East Trucks Inc Manufacturing Pte Ltd* [1984] 2 MLJ 91.

134 Unlike in the UK (see s 6 of the UK Health and Safety at Work *etc* Act), designers are not intended to be covered. They are not referred to in section 16(1) or the heading thereto. See also *Singapore Parliamentary Debates* vol 80 (17 January 2006) at col 2245. However, oddly they are referred to in s 16(5) and s 10(*a*)(vii).

135 Section 16(2)(*c*) makes it clear that supply includes sale, transfer, lease or hire. However, there are exceptions in relation to hire-purchase (see ss 16(3) and 16(4)). Further, s 16(8) states that supplier includes the importer. The question may also arise whether the supplier can be relieved of liability if he had relied on the information supplied by the manufacturer and if it was reasonable in the circumstances for him to have done so. It would seem, this is possible. See for instance, *Thorp v CA Imports Pty Ltd* (1990) ATPR 40-996, though this was in respect of a different statute. See also ss 16(6) and 17(3)(*b*).

136 The definition of the term "at work" in s 4(1) would suggest that if a person were to use the machinery, equipment or hazardous substances listed in the Fifth Schedule for personal purposes such as at his home (though this is highly unlikely given the nature of the items) and not for the performance of his work, there will no liability, though of course, if there is a risk that persons at work may similarly be harmed while using it at work, there could still be liability under the Act based on risk. See also generally, *McKay v Unwin Pyrotechnics Limited* [1991] Crim LR 547.

137 Section 16(9). However, in the UK, there is no such restriction under the UK Health and Safety at Work *etc* Act.

138 Section 17(1). However, this is only in respect of such activities that are part of a person's trade, business, profession or undertaking (s 17(2)).Thus for instance, an employee who installs will not face liabilities under this section, though he *may* face liabilities under s 15 if he works in a workplace covered under the Act.

the machinery or equipment is erected, installed or modified in such a manner that it is safe, and without risks to health when properly used.[139] However again, this obligation is only in respect of machinery and equipment specified in Part 1 of the Fifth Schedule to the Act.[140]

57 Under the Act, owners or hirers[141] of machinery moved by mechanical power and used in any workplace are also under a duty *inter alia* to ensure so far as reasonably practicable, that the machinery is maintained in a safe condition.[142] There are also specific duties such as those relating to lifts in certain common areas[143] imposed on the occupiers[144] of the common areas.

IV. Power to issue remedial or stop work order

58 Another important aspect of the Act is the ability of the Commissioner to issue a remedial order or stop work order, though there was a similar possibility under the former Factories Act[145] as well. Under the Act, the Commissioner may issue a remedial or stop work order if he is satisfied that —

> (a) any workplace is in such condition, or is so located, or any part of the machinery, equipment, plant or article in the workplace is so used, that any process or work carried on in the workplace cannot be carried on with due regard to the safety, health and welfare of persons at work;
>
> (b) an person has contravened any duty imposed by the Act; or
>
> (c) any person has done any act, or has refrained from doing any act which, in the opinion of the Commissioner, poses or is

139 Section 17(1). However, if the persons had relied on information supplied by certain others such as the designers or manufacturers and it was reasonable for them to rely on that information, there may be a defence (see, s 17(3)). See also n 135.
140 Section 17(7).
141 However where the machinery is hired out, it is the hirer who would be under the duty and not the owner; see s 17(5).
142 Section 17(4).
143 Section 19(2).
144 As defined in s 19(3).
145 See s 49 of the former Factories Act, though the penalties for a breach of an order under the Act are more severe. See ss 21(6) and 21(7).

likely to pose a risk to the safety, health and welfare of persons at work.[146]

59 The orders can be imposed in respect of:

(a) any person who is in control of the workplace, or the process or work carried out in the workplace;

(b) any person whose duty under the Act is to ensure the safety, health and welfare of any person at work in the workplace; or

(c) any person who poses or is likely to pose a risk to the safety, health and welfare of any person at work in the workplace.[147]

60 It would appear that in practice, if there was a risk, but no accident has yet to happen yet, a remedial order is more likely that a prosecution for a breach.[148] Where an order has been imposed, an appeal lies from the order of the Commissioner to the Minister within 14 days of the service of notice of the order.[149] In the UK an appeal lies to an industrial tribunal.[150] Since complicated issues could be involved such as whether a certain set of measures are reasonably practical, it may if better if the matter was heard before a tribunal where there can be a full hearing. That aside, it may also be noted that once the order itself is not challenged, it cannot be challenged at a later stage such as when sued for a breach of the order.[151]

V. Offences and penalties

61 In relation to offences and penalties, it may be noted that s 48(1) provides that where an offence under the Act has been committed by a body corporate,[152] an officer of the body corporate shall be guilty of the

146 Section 21(1).
147 Section 21(2).
148 See *Singapore Parliamentary Debates* vol 80 (17 January 2006) at col 2242.
149 Section 22(1).
150 Section 24(2) of the UK Health and Safety at Work *etc* Act.
151 *Deary v Mansion Hide Upholstory Ltd*, [1983] ICR 610.
152 This includes a limited liability partnership (see s 48((5)). There are similar provisions applying to partnerships (s 48(3)) and other unincorporated associations (s 48(4)).

offence and shall be liable to be proceeded against and punished accordingly unless he proves that

> (a) that the offence was committed without his consent[153] or connivance, and
>
> (b) he had exercised all such diligence to prevent the commission of the offence as he ought to have exercised having regard to the nature of his functions[154] in that capacity and to all the circumstances.

62 In relation to penalties it may also be noted that compared to the former Factories Act, the Act provides for far greater penalties in order to act as a deterrent. The general penalties are set out in s 50. In this regard, in *R v F Howe & Son (Engineers) Ltd*[155] the court considered the various factors which may be relevant is determining the exact amount of liability. The court held that aggravating factors included, death resulting in consequence of a breach; a failure to heed warnings; and a risk run specifically to save money. Mitigating factors included, the prompt admission of responsibility and a timely plea of guilty and a good safety record. Other relevant factors included the degree of risk and extent of the danger created by the offence; the extent of the breach, and the defendant's resources and the effect of the fine on its business. The court also stated that while it was impossible to lay down any tariff or to say that a fine should bear any specific relationship to the turnover or net profit of the defendant,[156] since the objective of prosecutions for health and safety offences in the workplace was to achieve a safe environment for those who work there and for other members of the public who may

153 See generally, *Attorney General's Reference (No 1 of 1995)* [1996] 4 All ER 21, though this was in respect of another statute.

154 See also, *Wotherspoon v HM Advocate* (1978) JC 74.

155 [1999] 2 All ER 249. See also, *R v Fresha Bakeries* [2002] EWCA Crim 1451; *R v Yorkshire Sheeting & Insulation Limited* [2003] 2 Cr App Rep 548; *R v Jarvis Facilities Ltd* [2005] EWCA Crim 1409; *R v Transco* [2006] All ER 416.

156 In this regard, the court stated *(id* at 254): "Difficulty is sometimes found in obtaining timely and accurate information about a corporate defendant's means. The starting point is its annual accounts. If a defendant company wishes to make any submission to the court about its ability to pay a fine it should supply copies of its accounts and any other financial information on which it intends to rely in good time before the hearing both to the court and to the prosecution. This will give the prosecution the opportunity to assist the court should the court wish it. Usually accounts need to be considered with some care to avoid reaching a superficial and perhaps erroneous conclusion. Where accounts or other financial information are deliberately not supplied the court will be entitled to conclude that the company is in a position to pay any financial penalty it is minded to impose."

be affected, a fine needed to be large enough to bring that message home where the defendant was a company, not only to those who manage it but also to its shareholders. Moreover, whilst in general a fine should not be so large as to imperil the earnings of the employees or create a risk of bankruptcy, there may be cases where the offences were so serious that the defendant ought not to be in business.

VI. Conclusion

63 Though there are various uncertainties, compared to the Factories Act, the Act clearly advances health and safety protection at the workplace. The only real drawback[157] appears to be that while the coverage of the Act is likely to be extended progressively, it may not cover all premises even in the long run. It is hoped that this would change and all premises would eventually be covered as safety and health issues, as already stated, can arise in any context and every person deserves equal protection.

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157 The other minor drawback is that some aspects of the Workplace Safety and Health (General Provisions) Regulations 2006 are couched in terms similar to the former Factories Act (see nn 47, 50 and 70) instead of following the Act more closely, which may result in uncertainty.