

SOSHCo in UiTM PAHANG : DUTY, RELEVANCE AND DIRECTION

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ABSTRACT

All institutions of higher learning in Malaysia in many ways are undeniably intersected with the potential legal liabilities. No person who are directly connected with a higher education institution, whether student, staff or visitor is, outside the influence of tort and statutory law. Highly correlated with these legal liabilities are the potential hazards. UiTM Pahang, like other higher learning institutions, are highly exposed to numerous potential hazards. These hazards can be reduced or at least contained in many ways with or without incurring costs. The Sub Occupational Safety and Health Committee or SOSHCo is a committee formed to manage the risk of safety and health as a result of the requirement from the Occupational Safety and Health Committee, Shah Alam in their meeting dated July 13th 2004. The idea to form the SOSHCo committee was initiated from there and now this committee is needed in every department, faculty and the branch campus. This article examines and highlights the potential ambit of liability faced by UiTM Pahang and the roles played by the SOSHCo committee with reference to several aspects, including amongst others, the availability of the risk control incentives.

INTRODUCTION

Universities, as with any other existing with profit-oriented organisation, are forced into a more commercial competitive environment and with such environment, the vulnerability to suit is made more noticeable. Students nowadays perceive their role more as clients rather than students and their willingness to litigate for perceived and actual defects in the delivery of educational services are possible. The students, and also the public in general, have become more aware of their rights to litigate for the tort of negligence. These potential litigations may arise as a result of common law actions as well as the breach of statutory law such as the Occupational Safety and Health Act 1994 (Act 514) or OSHA. Litigations, if initiated by the potential claimants, can be highly costly and because of that, an effective risk control mechanism should be put in place and the SOSHCo committee is entrusted indirectly to manage this risk control mechanism with an aim of having zero tolerance for defective educational services.

What is SOSHCo?

The first policy and declaration for health and safety in UiTM was initiated by the then vice chancellor, Dato' Ir. Dr Hj Ahmad Zaidee Laidin in 1987 and was then followed by the establishment of the Risk Management unit. However, no significant steps were taken since, to raise awareness on the importance of safety by the Risk Management unit until the appointment of an external consultant, Top Point Binary Sdn Bhd in 2001 to advise on the issues of Health and Safety in the UiTM main campus. The external consultant wasted no time in taking necessary steps to study the situation and eventually suggested the establishment of the Main Occupational Safety and Health Council (MOSHCo) and Occupational Safety and Health Committee (OSHCo) as required under Section 30 of the Occupational Safety and Health Act 1994.

Section 30(1)(a) of the Occupational and Safety Health Act 1994 reads:

'Every employer shall establish a safety and health committee at the place of work accordance with this section if there are forty or more persons employed at the place of work'.

On the 27th November 2002, the first officer responsible for governing matters relating to safety and health was appointed by the vice chancellor to comply with the provision of Section 29 of the Occupational and Safety Health Act 1994.

Section 29(2) of the Occupational and Safety Health Act 1994 reads:

'An occupier of a place of work to which this section applies shall employ a competent person to act as a safety and health officer at the place of work'

The Sub Occupational Safety and Health Committee or SOSHCo at branch campuses is basically formed to complement the roles of OSHCo and implementing policies and decisions related to health and safety matters at the campus level. As in the main campus, a safety officer is also required to be appointed and should be given the role to head the SOSHCo committee. At UiTM Pahang, the first safety officer appointed is Encik Ahmad Fadhil Ismail Ikram, who is an engineer and the head of the maintenance department. The campus director himself is the chairman of the SOSHCo committee. The SOSHCo committee is further divided into two groups. One group comprises of representatives for the employer and another for the employee. Following major incidents around the South East Asia region such as the earthquake in Sumatra which struck and affected the whole nation on the 26th December 2004, the OSHCo committee has drafted an emergency plan for execution in case of major disaster in the future. All UiTM campuses are required to come out with their own plan to suit the potential major hazards in each campus.

The objective of the plan is to prepare students, staff and their families to properly respond in extraordinary emergency situations. This plan contains proactive steps to be taken before anticipated emergencies which may affect the behaviour of the students and staff both during and after the event. This plan aims to increase the awareness of the students and staff on the potential of emergency situations such as a major earthquake, fire, flood and severe weather and to allow them to gain the knowledge they need to properly prepare, respond and recover.

This emergency response plan includes, amongst others, the emergency response structure, which identifies the personnel (who will respond to the emergency), the emergency response procedures (which outlines the responsibilities of the response personnel) and the emergency response resources (which identifies the facilities and equipment needed in order to respond effectively to an emergency). A list of related agencies with names, address and telephone numbers of those to be called in an emergency is also included. It shall also be noted that a Safety Committee under Department or SCUD has been formed under the SOSHCo committee and the members of SCUD are clustered into several groups and headed by a supervisor who is also a member from the SOSHCo committee.

Legal and liability issues to be considered in UiTM Pahang

Liability deals with consequences - the consequences of actions and decisions, particularly when other people think they were wrong and you were wrong or careless to have made them. It shall be reasonable to assume that the students and employees of the university have a right to expect a reasonable level of care and service from the providers itself, which is UiTM. Failure to provide a reasonable level of care might give rise to an action of negligence. Basically, there are two broad areas of potential litigation for negligence against the university and their staff. The first potential liability which is the subject of this article relates to negligence by the university or its staff causing physical injury or death to students and the employees of UiTM themselves. The second category of potential claims for educational negligence against the UiTM and their staff may involve a more specific form of identifiable negligent acts or omissions which might cause pure economic losses such as loss of employment, lost of wages and a wide more range of potential careless acts in the delivery of tertiary education which is outside the scope of this discussion paper.

So in a simple notion of negligence, UiTM Pahang owes its employees and students a duty of care in providing a safe workplace and a safe environment to study. In other words, as owners and occupiers of the premises, the management of UiTM Pahang is under a duty to keep the university premises safe.

'It is settled law that a school teacher is under a duty to exercise supervision over his pupils when they are in the school premises, either in the classroom or the playground. The degree of

supervision depends on the circumstances of each case, such as the age of the pupils and what they were doing at the material time. If the teacher knows that the pupils are engaged in daring acts which are likely to cause injuries to one another, the teacher is under a duty to take steps to ensure the safety of the acts'

(Tun Salleh Abas, 1991¹)

The above was the dictum delivered in a case involving a negligent act of a school authority back in the year 1981. Although the dictum is related to the provision of safe place and environment to study for students in school, it could also be equally applicable to the authorities of higher learning institutions such as UiTM. Accidental cases involving death or personal injuries such as a recent case involving a student, who suffered a compound fracture of left little finger while using a machine in the course of her study on September 2004 should serve as a warning or a wake up call to the university and the SOSHCo committee in particular to observe the level of care required by the common law. Unfortunate incidents, if occur, could be attributed to the university if the link of causation can be proven and it is proximately caused by the negligence act of the university itself.

Legal liabilities towards the students, employees and the visitors shall be carefully understood under the heading of occupier liability. The common law divides this duty into three broad categories of groups. First, a duty to ensure the safety of an invitee, of which, the students and employees of UiTM are the invitee, as far as the common law category is concerned. The students and employees are two groups of people who enter into the UiTM premises with the consent of UiTM and they have a community of interest with the occupier. At common law, an occupier owes a duty of care to an invitee to exercise reasonable care to prevent harm arising from any danger that the occupier knows or reasonably expected to know (Harpwood 2003). UiTM as the occupier of the premises is reasonably expected to know that, for instance, dangerous machines without safety guard might cause injury to students and must properly exercise due care not to cause any incident which may subsequently lead to physical injury or death.

Secondly, a duty against the licensees, such as the visitors entering into the university premises with permission. These visitors are a group of people whose presence in the UiTM premises is also with consent of the occupier but they do not have a community of interest with the occupier. Visitors in UiTM Pahang could be in different forms and purposes. Most of these visitors are the parents of the students studying here. Some of these visitors come to pay a social visit to their friends and relatives residing inside the UiTM compound and they are the licensees within the definition of common law. At common law, an occupier has a duty to warn them of any hidden danger that the occupier actually knows¹ (Harpwood 2003). However, the common law duty of care imposes upon the occupier to the licensee in less heavy or onerous than the duty owes to the invitee.

Another category of people which requires careful invigilation is the persons who enter the UiTM premises pursuant to a contract. The existence of outsiders inside the campus is almost common everyday. These are people who enter to carry out work such as maintenance, contractor works and so on. Employees of the contractor hired by UiTM are also included under the same group. Basically, UiTM is required to provide a safe place for these invitees to work. However, no duty of care owed by UiTM to safeguard them against usual danger or something that can be reasonably foreseeable in the course of their employment².

UiTM Pahang is vicariously liable to the negligent act of its employee

Under the principle of vicarious liability (Harpwood 2003), not only the wrongdoer of the negligent act may be liable but also UiTM as employer and a statutory body corporate can be held liable for the torts

¹ Mohamed Raihan bin Ibrahim & Anor v Govt of Malaysia & Ors (1981) 2 MLJ 27, quoted in Nathan, R.K., (1998), 'Nathan on Negligence', Malayan Law Journal Sdn Bhd, page 76.

¹ Refer also to the case of Datuk Bandar, Dewan Bandaraya Kuala Lumpur v Ong Kok Peng & Anor (1994) 1 SCR 14, quoted in Dass, S.Santhana., (1998), 'Personal Injury Claims', Alpha Sigma, page 173.

² Refer also to the case of Lee Lau & Sons Realty Sdn Bhd v Tan Yah (1983) 2 MLJ 51, quoted in Hingun, M., and Ahmad. Wan. A., (1998), 'Principles of the Law of Tort in Malaysia', Malayan Law Journal Sdn Bhd, page 95.

of its employees. An employee of UiTM might sustain injury through the carelessness of another fellow employee. In such situation, the injured employee may sue the fellow employee for negligence. He may also, if he wishes to do so, to sue the employer. The injured employee may sue UiTM not because UiTM has been negligent but because UiTM is the employer of the employee who caused the injury and this explains the simple concept of vicarious liability. It shall be carefully noted here that litigation against the university or its employees can have significant ramifications on the profile of the university. Such adverse publicity can have significant consequences to the student enrolments across the university. This possibility demands the SOSHCo committee to design some sorts of instruction and guidance for the employees to minimize the risk of negligence in the course of employment.

The need for a proper risk assessment and classification of hazards in UiTM Pahang

The potential hazards in the Jengka Campus of UiTM Pahang are mainly classified as fire and explosion, environmental incidents and accident hazards. The campus is clustered around several buildings and the followings are the main buildings or areas which can be highly exposed to the above mentioned hazards: chemical laboratories, wood technology workshop and plantation area adjacent to the wood technology workshop.

Hazard is the potential to cause harm. Many work activities have the potential to cause harm to employees, students and the public. Risk Assessment generally means an assessment of the likelihood of something going wrong or affecting somebody or something in a way which could cause them harm or damaging their property etc. (Pet 2003). It is also a logical approach to reviewing the dangers in a job, activity or event and determining the consequences. If the dangers of a job or activity are considered to be too great, then the activity should not be undertaken unless control measures are put in place. In order to know what the hazards and risks are in respect of a specific job activity, the SOSHCo committee in UiTM Pahang will need to assess the job so as to be able to identify them.

Preliminary risk assessment in several departments in UiTM Pahang had been carried out recently. This assignment was taken out to identify the perceptions of workers in their respective department on the importance of managing and understanding risk and the scope of hazards in their workplace. A few of the departments chosen in the assignment are the wood technology workshop, the plantation department, the library, the chemical laboratories, computer laboratories and the civil engineering laboratories. The preliminary risk assessment sheet was not put in detail and the second round assessment should be constructed in a more detail manner in order to extract more information.

The risk control mechanism

Williams, Smith and Young (1998) define risk control as the;

'Techniques, tools, strategies and processes that seek to avoid, prevent, reduce or otherwise control the frequency or magnitude of loss and other undesirable effects of risk; risk control also includes methods that seek to improve understanding or awareness within an organisation of activities affecting exposure to risk'.

In statistical terms, risk reduction or control is an attempt by company management to change the probability distributions of loss frequency and loss size into a preferred form. If the possibility of loss is completely eliminated, i.e. frequency equals to zero, there will be a perfect risk or loss prevention. However, this is rarely possible (Miller 1998).

The ultimate aims of risk control activities are amongst others, to reduce the variability of total losses, to reduce the external impact of risk and most importantly to reduce the expected value of loss. A reduction in the expected value or mean of loss size or frequency implies that the relevant probability distribution is shifted to the left. Obviously any expenditure on risk reduction should be undertaken if it is less than the immediate saving in total expected losses since this is simply a removal of a source of inefficiency (Schneider 1992).

Risk control can also be classified in a number of ways. In the theoretical literature (Williams et al. 1998; Miller 1998; Schneider 1992), the conventional distinction is between measures which reduce the

loss frequency or probability and those which reduce loss size of confusingly termed as self insurance. This distinction is necessary because in an expected utility framework, risk control has different effects depending on whether it is applied to the probabilities or the self insurance.

Risk control can also be viewed as an attempt to influence the process by which losses are caused. One method is to model this process using a decision tree that identifies the sequence of interdependent actions that combine to produce the loss as illustrated in the following diagram:

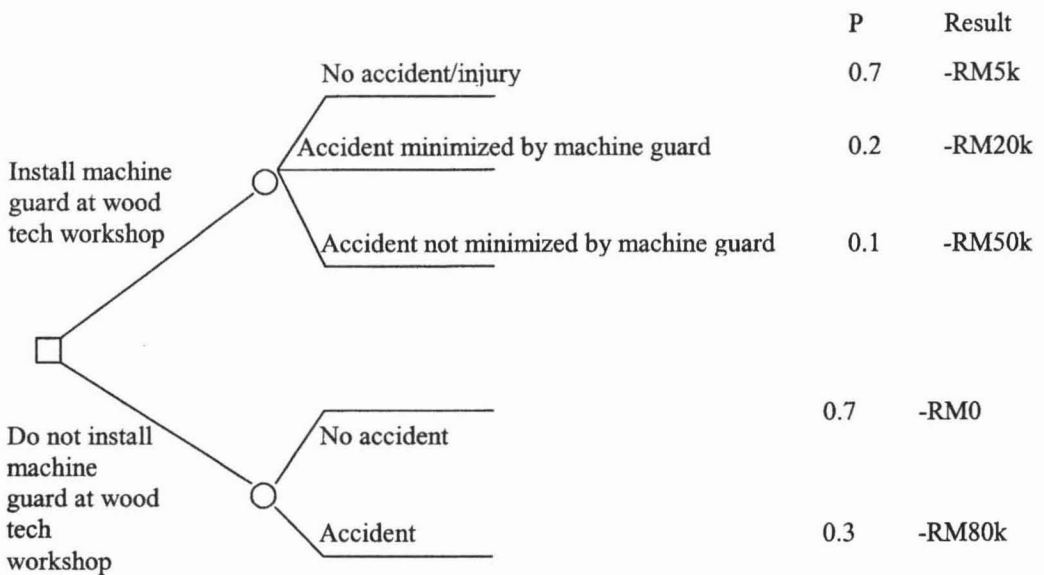


Diagram 1: A sample model of decision tree for the risk of accidental injury at wood technology workshop in UiTM Pahang adopted from Hess (1993).

The above decision tree analysis is constructed in a simple manner but in a real situation, it could be rather complicated than the above. Decision tree analysis is useful to the UiTM and the SOSHC0 committee in particular, in choosing the various courses of action when the choice or sequence of choices will ultimately lead to some uncertain consequences.

Over view of the Occupational Safety and Health Act (OSHA) 1994

The incident of Bright Sparkles in 1992 has led the government to introduce the Occupational Safety and Health Act (OSHA) in 1994 replacing the Factories and Machinery Act of 1967 which was said to be limited in the scope in workers safety, very prescriptive in nature and too dependent on government on guidance and regulating the machines. The responsibilities to ensure safety and health at the workplace lie with those who create the risk and with those who work with the risk. Thus, OSHA is considered more comprehensive with provisions that enable self-regulations, employer-employee consultation and the requirement for workers cooperation and participation. OSHA protects all persons at work in all economic activities including public and statutory authorities with the exception of those working on board ships or the Armed Forces.

OSHA objectives are to secure the safety, health and welfare of persons at work and to protect persons (other than persons at work) at a place of work against hazard. It also aims to promote the occupational environment adaptable to the person's physiological and psychological needs and to provide the means towards a legislative system based on regulations and industry codes of practice

Salient features of OSHA include the establishment of the National Council for occupational safety and health. It also includes the provision on the general duties of those parties involved in creating the hazards; employers and self-employed, designers, manufacturers and suppliers. The general duties are

also extended to the employees. The Act also requires a place of works that is safe and without risks to health including the means of access and egress, provides and maintains a working environment that is safe and without risks to health with adequate welfare facilities.

Employee has the responsibilities to take reasonable care at work for the safety of his own self and other persons, cooperate with the employer or any other person in the discharge of any duty, under the act or regulations, wear or use any protective equipment and clothing, comply with any instruction or measure on occupational safety and health as required under the Act or regulations. Designer, manufacturer and suppliers are required to : ensure that the plant or substances is safe and without risks to health when properly used; carry out or arrange for carrying of necessary testing and examination on the plant or substances; provide adequate information about the use of such plant or substances so that it will be safe and without risk to health when properly used.

The main clause of the Act that requires attention is laid in Part IV. Section 15 (a) and 15 (2) must be given proper attention since these are the main provision which industries and responsible parties may breach. This include failure to provide and maintain plant and safe systems of work that are safe and without risks to health; make arrangements for ensuring safety and health in connection with the use or operation, handling storage and transportation of plants and substances; provision of information, instruction, training and supervision to ensure employees perform their work in a safe manner and without risks to health

OSHA introduces several requirements to assist and supplement the role of Department of Safety and Health (DOSH). This include for a need of Safety and Health Officers and other competent persons such as Technician Hygiene and Chemical Assessor. It also provides for a need of creating a Safety and Health Organisation, the Safety and Health Committee, reporting of accident, dangerous occurrence, occupational poisoning and diseases, prohibition of the use of plant or substance, creating industry code of practice, establishing stringent enforcement and investigation, creating liability for offences, offering appeals avenues and setting stiffer penalties. The advantage of compliance to OSHA is the integration of safety and health in overall management and that safety and health will be managed as a business entity.

Incentives for controlling health and safety risks

The incentives for risk control come from the threat of litigation and common law liability but arguably these are inadequate. Hence statutory regulation is an extra incentive. Before considering the regulation such as the OSHA 1994 as an extra incentive, this paper shall first look at the factor such as the firm size as an incentive for risk control. We may hypothesize that injury rates are higher in large establishments such as UiTM. This is possible considering various factors such as bureaucracy, lack of worker autonomy, poor communication and low morale.

However, there is evidence that injury rates are lower in large establishments (Fenn and Ashby 2001). There are reasons why large firms and establishments may have better records. For example, they have health and safety committees. Furthermore, large firms are keen to control the costs of workers' compensation. In doing so, their insurance premiums are more likely to be reduced if there is evidence of a good record and they are more likely to be targeted by health and safety inspectors (Fenn and Ashby 2001).

As mentioned earlier, the Factory and Machinery Act 1967 is perceived by many to be a bit too limited and restrictive as it began to crack under the strain and stress of technological progress (Aini et al. 2001). OSHA 1994 came into existence to put in place factors such as self-regulation, consultation and workers cooperation and involvement in improving the standards of safety and health. OSHA 1994 emphasizes on five main areas, which are, the provision of safe plant, safe systems of work, safe premises, adequate instruction, training and supervision and written safety policies. Employers, therefore, have a statutory duty to safeguard, as far as reasonably practicable, the health, safety and welfare of employees and also ensure that the general public is not adversely affected by their activities (Section 24 OSHA 1994). The same obligation is placed on the self-employed.

Employees have a duty to take reasonable care to avoid injury to themselves or to others and must cooperate in meeting the OSHA requirements. OSHA 1994 is enforced by the Department of

Occupational Safety and Health (DOSH). In a situation whereby an inspector or a safety officer discovers a breach of a statutory provision, he or she may seize, neutralize or destroy dangerous substances, issue an improvement notice to remedy the fault within a specified time, issue a prohibition notice to require an activity to cease immediately and not resume until the fault is rectified and bring a prosecution that may result in a fine or imprisonment (Section 49 OSHA 1994).

The above matters explain on the possible incentives provided by the OSHA 1994 to deter the act of negligence or omission but does the legislation work as an incentive for firms to invest in safety? Genn (1993) commented on the effectiveness of safety regulation by providing an enlightening discussion on the importance for firms to attach to health and safety regulation in the UK. The fundamental issue is that firms will only invest in workplace risk control if it is effective to do so. Genn (1993) conducted a survey and discovered that employers in the largest and most hazardous sites knew their obligations under the act and they invested time, money and effort in improving standards. She also revealed that some firms took a proactive attitude to compliance, others were merely reactive.

The general feeling is that effective regulation does make a difference but lax of enforcement may enable firms to avoid investing in safety. Fenn and Ashby (2001) claimed that the incentives for firms depend on the probability of an inspection, the expected number of violations per inspection and the average penalty per inspection. The big question for us to answer now is, do we, as a higher learning institution with lesser hazardous activities, have this incentive to comply with the safety and health requirements of the OSHA 1994?

Where do we go from here?

The authors believe that the Malaysian liability system does provide some sort of incentives for safety and health. However, employers facing potential litigation from the employees can at least insure themselves, or in the case of semi-government body such as the UiTM, some employees are already being covered by the SOCSO for employment injury and invalidity. We are doubtful that insurance mechanism, be it private or public, could motivate employers to invest in safety but will further attenuate any incentives to reduce risks.

The appetite to control risk shall not be left alone on the shoulder of the committee but it is actually in the hands of the management to respond and decide. It is clearly stated throughout this paper that health and safety risks can be controlled by legislation such as the OSHA 1994 but managerial responses to these risks are very important. There are a number of reasons mentioned earlier why the upper management of UiTM Pahang shall be interested in controlling and investing in safety. First, hazards, which create safety and health risks may physically destroy the assets of the university or produce economic losses through lawsuits. Second, they may harm reputations of the university and may lower the quality of educational service, and third, they may produce personal liabilities and diminish personal rewards and prospects.

The upper management of UiTM Pahang can adopt a variety of approaches designed to reduce and control health and safety risks. These approaches can be in favour of a 'safety culture'³ approach to risk management and the ability of the university to control risks should be related to three basic themes : first, the leadership of the campus director and commitment of the upper management level; second, the involvement of all employees through openness of communication thus reducing the element of bureaucracy; and third, the university should demonstrate care and concern for those affected by its operation.

More importantly, control of such risks requires proper training and resourcing, the setting of achievable targets, the proper investigation of incidents, the monitoring and auditing of safety behavior and swift remedying of deficiencies and the flow up to date information to the campus director. The monitoring and auditing of safety behavior and environment is currently being required to be carried out by the SCUD members in their respective area once a month but this requirement seems to be ineffective and dormant. The safety officer shall seriously monitor the implementation of safety auditing in a more consistent manner. We believe that the lack of commitments by the SCUD members

³ Safety culture is a sub-facets of organisational culture which is thought to affect members' attitudes and behaviour in relation to an organisations ongoing health and safety performance (Cooper 2000).

can be attributed to several factors but most importantly, this might be caused by the fact that most of us perceive that the university itself is always a safe place to work and potential hazards are not real or not visible in work areas, which is, a sign of complacency in their attitudes toward risks. The strategies above, we believe, are consistent with the total quality approach currently being practiced by the university which seeks to generate a highly motivated workforce, committed to producing high quality educational services and participation in corporate cultures and learning.

CONCLUSION

This paper in general discusses on the potential areas of liability that could be faced by UiTM Pahang and the justification on the existence of SOSHCo as a committee entrusted to design and implement a safety policy that applies to all the workers and students of the university. Basically, the grey areas of potential liability that shall be considered are the threat of litigation as a result of breach of common law duty of care and the breach of statutory duty. UiTM Pahang is said to be greatly exposed and vulnerable to both possibilities.

This paper also discusses on the incentives provided by the OSHA 1994 as the main regulation in controlling the risk of safety and health in UiTM. OSHA 1994 should not be able to completely prevent accidents but at least it would set a minimum good standard for the university to practise a safety culture. Since a university is arguably a safe place to work and it does not involve major accident hazards such as those in certain industrial activities, serious efforts in controlling safety and health risks at workplace can be questionable. Furthermore, OSHA 1994 is not considered by many in the university to be relevant since most of us believe that it is a legislation to cater industrial related works. This perception is truly misleading.

This article also highlights the importance to safeguard students against any adverse event which may give rise to accidental death or injury. In common law, an occupier of a premise could be held liable for their negligent acts under the maxim of occupier liability and the law enforces upon the occupier a heavy duty of care to protect the students against all foreseeable hazards. The rationale of conducting risk assessment in various departments of the university is explained and a simple method of risk assessment is being suggested.

Overall, we believe that the scope of duty of the SOSHCo committee is wide in the sense that they have to blend with the upper management and the security department to safeguard not just the employees but the students, against any identifiable hazard in UiTM Pahang. The SOSHCo committee is here to stay for many years to come and they are here to propagate the culture of safety in the university premises. This propaganda of health and safety risks in UiTM Pahang is non-rhetorical but is a real sense of approach and the health and safety issues should not be seen in isolation from other management issues. The SOSHCo committee shall view its role as not just a policy maker but a defender of safe working ethics and a deterrent agent for faulty negligent acts or omissions.

This paper has been suggestive, not exhaustive. There are a few more areas need to be discussed especially in the context of identifiable negligent acts such as liability with regards to dissemination of information using e-mail provided by the university, failure to provide competent lecturers, substandard level of tertiary educations and others that may fall outside the scope of duty of the SOSHCo committee. Perhaps, future discussions and researches on the potential liability of a university should take into consideration all of the above matters.

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