

ADVOCATE'S IMMUNITY IN NEGLIGENCE ACTION: COMPARISON BETWEEN UK AND MALAYSIA

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Abstract

The doctrine of advocates' immunity renders advocates immune from civil claims in professional negligence for any act or omission which arises honestly in the conduct or management of a proceeding in court, and for any out of court act or omission that is intimately connected with in court proceedings. The general principle that barristers are entitled to some immunity was established, or re-established, in the United Kingdom by the House of Lords. It was argued that barristers should enjoy no greater immunity than other professional men. But that argument was rejected: barristers, it was firmly held, have a special status, just as a trial has a special character: some immunity is necessary in the public interest, even if, in some rare cases, an individual may suffer loss. The paper contemplates advocate's defence of immunity against negligence action especially when the "negligence" arose due to conduct of the advocate in court. Comparison is made between application of the defence of immunity in the Malaysian perspective as well as in the United Kingdom.

Keywords: *barrister, advocate, defence of immunity, negligence.*

1.0 INTRODUCTION

The doctrine of advocate's immunity or defence of immunity lays down the general perception that litigation lawyers such as barristers and advocates are immuned or privileged from being liable for negligence's claims by clients in respect of their conduct while "performing" their duties in court. The main reason of origin for such immunity is based on public policy as follows. First, duty to the court whereby the administration of justice required that a barrister should be able to carry out his duty to the court fearlessly and independently, which might be affected if he owed a conflicting duty to his client. Second, to avoid re-litigation whereby actions for negligence against barristers would involve retrying the original actions. This would prolong litigation, and create the risk of inconsistent decisions, which would bring the administration of justice into disrepute. Third, based on 'cab rank' rule whereby barrister was obliged to accept any client, however difficult, who sought his services. It would encourage breaches of this rule if barristers did not have this immunity. And fourth, involves other immunities whereby a barrister's immunity for what he says and does in court is part of the general immunity which attaches to all persons participating in court proceedings: judges, court officials, witnesses, parties and solicitors.

2.0 BARRISTER IMMUNITY

Once, it was well stated rule that a barrister was totally immune from action for negligence even unconnected with litigation, and that a solicitor was wholly liable for negligence even if it was in the court room.¹

This rule was applied in the case of *Rondel v Worsley*² whereby, Nobby Rondel was charged for causing grievous harm to Manning. He was not given legal aid, but after the case had proceeded for some time, he was afforded the facility of a dock brief, and he chose a barrister by the name of Worsley to represent him. The case eventually ended in a conviction, confirmed by the Court of Appeal, and Rondel underwent a sentence. Nearly six years later, he issued a writ against Worsley, claiming damages for alleged professional negligence in the conduct of his duty. The writ was dismissed by Court of Appeal and further appeal to House of Lords, it was hold by unanimous reasoning that: -

*“The immunity of counsel from being sued for professional negligence in the conduct of a cause, criminal or civil, is based on public policy, not on his contractual incapacity to sue for fees, and it is in the public interest that the immunity should be retained, one factor being that counsel owes a duty to the court for the true administration of justice.”*³

In *Somasundaram v M Julius Melchior & Co*⁴, the respondent firm acted for the appellant who was charged with causing grievous bodily harm with intent to cause hurt on his wife. The appellant was eventually convicted, therefore he brought a suit against the respondent firm on the ground of negligence that the respondent failed to forward various matter of mitigation on his behalf. Moreover it was alleged that appellant was persuaded to change the story to plead guilty. The Court of Appeal strucked off the appellant claim as on the ground that an action for negligence against a barrister or solicitor in respect of the conduct of either criminal or civil proceeding would be struck out if involved an attack on the conviction on the Crown Court. Court of Appeal in upholding the decision reinstated that immunity from the suit in respect advice given to the client is so intimately connected with the conduct of cause of court that it is covered by immunity applying to the conduct of litigation and such immunity extend not only to barrister but also a solicitor when acting as advocates, but it does not apply to solicitor when a barrister has also been engaged to advise.

The above cases illustrate the need to balance the risks and benefits of removing the counsels' immunity. However the privilege of immunity could not be interpreted to cover everything that lawyers do. The extent of such immunity was considered in the case of *Saif Ali v Sydney Mitchell & Co*⁵ whereby it was held that: -

“So for instance in the English system of a divided profession where the practice is for the barrister to advise on evidence at some stage before the trial his protection from liability for negligence in the conduct of the case at trial is not to be circumvented by charging him with negligence in having previously advised the course of conduct at the hearing that was subsequently carried out. It would not be wise to attempt a catalogue of before-trial work which would fall within this limited extension of the immunity of an advocate from liability for the way in which he conducts a case in court. The work which the barrister in the instant case is charged with having done negligently, viz, in advising as to who was to be a party to an action and settling pleadings in accordance with that advice, was all done out of court. In my view, it manifestly falls outside the limited extension of the immunity which I have just referred to.”

However in the case of *Arthur J S Hall & Co v Simons*⁶, whereby in three separate cases, clients brought claims for negligence against their former solicitors. In each case, the solicitors relied on the immunity of advocates from suits for negligence, and the claims were initially struck out as unsustainable. However, the Court of Appeal subsequently held that the claims fell outside the scope of the immunity and that accordingly they should not have been struck out. On the solicitors' appeals to the House of Lords, their Lordships considered whether the immunity should be abolished or whether it could still be justified on public policy grounds, particularly the public interest in preventing collateral attacks on court decisions and in ensuring that advocates respected their overriding duty to the court. It was held that: -

“Advocates no longer enjoyed immunity from suit in respect of their conduct of civil and criminal proceedings. Such immunity was not needed to deal with collateral attacks on criminal and civil decisions. Rather, the public interest was satisfactorily protected by independent principles and powers of the court. A collateral civil challenge to a subsisting criminal conviction would ordinarily be struck out as an abuse of process, but the public policy against such a challenge would no longer bar an action in negligence by a client who had succeeded in having his conviction set aside. Similarly, the principles of res judicata, issue estoppels and abuse of process as understood in private law should be adequate to cope with the risk of collateral challenges to civil decisions. Nor was the immunity needed to ensure that advocates would respect their duty to the court. In that respect, a comparison with other professionals was important. Doctors, for example, were sometimes faced with a tension between their duties to their patients and their duties to an ethical code, but nobody argued that they should have an immunity from suits in negligence. Furthermore, experience in other jurisdictions, particularly Canada, tended to demonstrate that it was unduly pessimistic to fear that the possibility of actions in negligence would undermine the public interest in advocates respecting their duty to the court. Moreover, benefits would be gained from ending the immunity. It would bring to an end an anomalous exception to the basic premise that there should be a remedy for a wrong, and there was no reason to fear a flood of negligence suits against barristers.”

Although it seem that courts have took different orientation that such immunity is not absolute neither have abolished, but yet court still not willing to entertain the argument that every negligence vitiate such immunity. A plaintiff may suffer damage, but it is of no consequence unless the defendant negligently caused it. If the damage would have happened anyway, then the defendant cannot be held liable for it. For liability upon a defendant's, it must be proved that but for his negligence the harm would not have happened. But, the inferences to be drawn from any given set of circumstances may establish causation.

In the case of *Wilsher v. Essex Area Health Authority*⁷, the defendant hospital, initially acting through an inexperienced junior doctor, negligently administered excessive oxygen during the post-natal care of a premature child who subsequently became blind. The Court of Appeal applied the "material increase of risk" test, and found that since the hospital breached its duty and thus increased the risk of harm, and that the plaintiff's injury fell within the ambit of that risk, the hospital was liable despite the fact the plaintiff had not proved the hospital's negligence had caused his injury. However House of Lords reversed the decision on the ground as follows: -

“Where a plaintiff's injury was attributable to a number of possible causes, one of which was the defendant's negligence, the combination of the defendant's breach of duty and the plaintiff's injury did not give rise to a presumption that the defendant had caused the injury. Instead the burden remained on the plaintiff to prove the causative link between the defendant's negligence and his injury, although that link could legitimately be inferred from the evidence. Since the plaintiff's retinal condition could have been caused by any one of a

number of different agents and it had not been proved that it was caused by the failure to prevent excess oxygen being given to him the plaintiff had not discharged the burden of proof as to causation.”

Clearly it is well stated principle that advocate could not be held liable against all damage which happen against his client. His duty is to persuade the court in the interest of his client. It would be unreasonable to contemplate that all argument by the advocate would be accepted by the court. Such observations on the duty of an advocate in regard to the taking of doubtful points of law were observed in the case of *Abraham v Jutsun*⁸, by Lord Denning MR whom stated: -

“But I think it only fair to the appellant to say that his evidence on affidavit, which is not challenged, makes it quite plain that he was not in the least degree guilty of any misconduct. The points which he took were fairly arguable. The one point on the word “brought” had a good deal to be said for it. The other point on the word “laid” had much less to be said for it; and the appellant said much less. The long delay gave merit to points which would otherwise appear unmeritorious. As it turned out, both points were bad points; but the appellant was not the judge of that. The magistrates had their clerk to advise them on the law. He was to advise them whether the points were good or bad. It was not for the advocate to do so. Appearing, as the appellant was, on behalf of an accused person, it was, as I understand it, his duty to take any point which he believed to be fairly arguable on behalf of his client. An advocate is not to usurp the province of the judge. He is not to determine what shall be the effect of legal argument. He is not guilty of misconduct simply because he takes a point which the tribunal holds to be bad. He only becomes guilty of misconduct if he is dishonest. That is, if he knowingly takes a bad point and thereby deceives the court.”

However it is maintain that duty of advocate must dispose in accordance to the requirement of law. In the case of *Barnett v Chelsea & Kensington Hospital Management Committee*⁹, whereby three men attended at the emergency department but the casualty officer, who was himself unwell, did not see them, advising that they should go home and call their own doctors. One of the men died some hours later. The post mortem showed arsenical poisoning which was a rare cause of death. Even if the deceased had been examined and admitted for treatment, there was little or no chance that the only effective antidote would have been administered to him in time. Although the hospital had been negligent in failing to examine the men, there was no proof that the deceased's death was caused by that negligence. The court adopted the principle that: -

“where anyone is engaged in a transaction in which he holds himself out as having professional skill, the law expects him to show the average amount of competence associated with the proper discharge of the duties of that profession or trade or calling, and if he falls short of that and injures someone in consequence, he is not behaving reasonably.”

It is clear that under the common law the term negligence generally describes damage causing conduct that arises because of the defendant's carelessness or failure to take reasonable care. On this subject, in the case of *Munnings v Hydro-Electric Commission*¹⁰, Alderson B famously said: -

“Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.”

The extent of liability and failure to abide of such fiduciary duty is discussed in the case of *Henderson v Merrett Syndicates Ltd*¹¹. The Plaintiffs who were members of syndicates was either 'direct names', in which

names belonged were managed by the members' agents themselves, acting as combined members' and managing agents, or 'indirect names', in which case the members' agents placed names with syndicates managed by other agents and entered into sub-agency agreements with the managing agents of those syndicates under which the managing agents were appointed to act as sub-agents in respect of the names' business. The relationship between them was regulated by the terms of agency agreements. In respect of underwriting agreements entered into agency and sub-agency agreements in the form prescribed by Lloyd's By-law No 4 of 1984. Clause 2(a) of such agency agreements provided that: -

“...the agent shall act as the underwriting agent for the name for the purpose of underwriting at Lloyd's for the account of the name such classes and descriptions of insurance business ... as may be transacted by the Syndicate.”

The plaintiffs brought proceedings against the defendants alleging that the defendants had been negligent in the conduct and management of the plaintiffs' syndicates, and wished, for limitation purposes, to establish a duty of care in tort and contractual duty owed by the defendants. On appeal to the House of Lords; which was later dismissed for the following reasons: -

“Where a person assumed responsibility to perform professional or quasi-professional services for another who relied on those services, the relationship between the parties was itself sufficient, without more, to give rise to a duty on the part of the person providing the services to exercise reasonable skill and care in doing so. Accordingly, managing agents at Lloyd's owed a duty of care to names who were members of syndicates under the agents' management, since the agents by holding themselves out as possessing a special expertise to advise the names on the suitability of risks to be underwritten and on the circumstances in which, and the extent to which, reinsurance should be taken out and claims should be settled, plainly assumed responsibility towards the names in their syndicates. Moreover, names, as the managing agents well knew, placed implicit reliance on that expertise, in that they gave authority to the managing agents to bind them to contracts of insurance and reinsurance and to the settlement of claims. The fact that the agency and sub-agency agreements gave the agent 'absolute discretion' in respect of underwriting business conducted on behalf of the name did not have the effect of excluding a duty of care, contractual or otherwise...”¹²

An assumption of responsibility by a person rendering professional or quasi-professional services coupled with a concomitant reliance by the person for whom the services were rendered could give rise to a tortious duty of care irrespective of whether there was a contractual relationship between the parties. In consequence, unless the contract between the parties precluded him from doing so, a plaintiff who had available to him concurrent remedies in contract and tort was entitled to choose that remedy which appeared to him to be the most advantageous. In the case of direct names their contract with their members' agents did not operate to exclude a tortious duty, since it was an implied term that the agents would exercise due care and skill in the exercise of their functions as managing agents under the agreement and that duty of care was no different from the duty of care owed by them to the names in tort. Accordingly, it was open to direct names to pursue either remedy against the agents. Likewise, indirect names were not prevented by the chain of contracts contained in the agency and sub-agency agreements from suing managing agents in tort. In particular, the fact that the managing agents had, with the consent of the indirect names, assumed responsibility in respect of the relevant activities to another party, i.e. the members' agents, under a sub-agency agreement did not prevent the managing agents assuming responsibility in respect of the same activities to the indirect names;¹³

It followed that members' agents were responsible to the names for any failure to exercise reasonable skill and care on the part of managing agents to whom underwriting was delegated by the members' agents."

3.0 IMMUNITY UNDER MALAYSIA JURISDICTION

The position in Malaysia is best illustrated in the case of *Miranda v Khoo Yew Boon*¹⁴, whereby Khoo Yew Boon had retained Miranda as his advocate and solicitor whom failed in his defence action and was instructed to pursue appeal. An action for negligence against Miranda founded on the failure to file the memorandum in time, the trial judge finding that this failure clearly constituted a breach of duty to exercise proper care. Miranda in his appeal argued that as he was an officer of the court public policy required that he should be protected from suits brought by disgruntled litigants. In dismissing the appeal, the court made observations on the liability of an advocate and solicitor in a fused profession and observed: -

*"Under section 60 Advocates and Solicitors Ordinance 1947 it is provided that a practitioner may make an agreement in writing with his client respecting the amount and manner of payment of his costs in respect of business done or to be done by such practitioner. In other words, he may make an agreement in reference to the payment of his costs. He is therefore under a contractual duty to use care and this extends to the conduct of a cause as well as an advocate as anything else. Therefore if he is negligent he can be sued. Indeed section 63 Advocates and Solicitors Ordinance 1947 provides that any provision in any such agreement that the practitioner shall not be liable for negligence so that he shall be relieved of any such responsibility to which he shall be subject as such practitioner, shall be wholly void."*¹⁵

It is therefore submitted that there is, in Malaysia, a contractual relationship between an advocate and solicitor and a client. The contractual relationship requires the advocate and solicitor to carry out the duties upon him with due care and skill. Any shortcomings on the part of the advocate and solicitor in doing so would necessarily allow a client to commence a suit in negligence against the said advocate and solicitor.

The extent of such duty of care was well discussed in the case of *Syarikat Siaw Teck Hwa. Realty & Developments Sdn Bhd v Malek & Joseph Au (sued as a firm)*¹⁶, the defendant had represented the plaintiff in a civil suit in the Kuantan High Court. In the suit, the court had decided against the plaintiff. As such, an appeal was made to the Federal Court. The appeal was struck off as the defendant had failed to appear in court. The plaintiff then commenced this suit against the defendant for professional negligence. In deciding the case the court held that: -

*"It is settled law that a solicitor has a very high duty imposed upon him to his client. Lord Reid in his judgment in the case of *Rondel v Worsley* [1967] 3 All ER 993 at p 998 made the following pronouncement: Every counsel has a duty to his client fearlessly to raise every issue, advance every argument, and ask every question, however distasteful, which he thinks will help his client's case."*

Further authority in the case of *Wong Sin Chong & Anor v Bhagwan Singh & Anor*¹⁷, whereby neither the respondents nor their firm solicitor was present at the hearing of civil suit on behalf of their client, the Wongs, which resulted in default judgment. Subsequently, with the consent of the respondents, the Wongs engaged Messrs Wrigglesworth & Co to replace the respondents. The application to set aside the judgment was heard together with a fresh application by the Wongs' to extend time, since the application to set aside had been filed outside the seven days from the service of the order of default judgment. Both the applications were dismissed. An appeal to the Federal Court by Dato' Wrigglesworth was also dismissed, ending any hope of the Wongs to set aside the default judgment. The Wongs instructed Dato' Wrigglesworth

to commence action against the respondents for professional negligence. In the hearing of the suit, the first respondent issued a writ of subpoena for Dato' Wrigglesworth to give oral evidence for the defence. It was held that: -

“It has been said that the retainer of a solicitor is prima facie an entire contract. In our view, a solicitor is bound to see the case through even though the clients fail to pay him sufficient advances. It is his duty, if properly instructed and provided with funds out of pocket, to act for his client throughout the litigation. Generally speaking, however, the duty of a solicitor to do justice, if he is a material witness to a case, is of greater paramount than his duty to represent a client. In our opinion, that duty is the rationale behind r 28(a) of the Legal Profession (Practice and Etiquette) Rules 1978 to which our attention has been drawn by both counsel. And if Dato' Wrigglesworth were to be blamed wholly or partly for the professional negligence alleged by the Wongs, then he should properly be joined as a party in the proceedings and not merely called as a witness.”

To establish negligence against a counsel, the same elements of causation as under the common have to be proven. In *Lim Soh Wah & Anor v Wong Sin Chong & Anor & Another Appeal*¹⁸, whereby the appellant advocate delivered a defence but failed to appear in court on the day fixed for the trial of the action. He also did not inform his clients (the respondents) of the trial date. Judgment was then entered against the respondents. An application to set aside the judgment failed before Mohamed Zahir J, *inter alia*, on the ground that the defence raised no triable issue. A subsequent appeal also failed. The advocate has seized upon the finding made by Mohamed Zahir J. His counsel argued that even if the advocate had informed the respondents and they all had been present at the date of hearing it would have made no difference to the respondents' case. It would have been lost anyway. So it all goes back to causation. It was held that: -

“We formed the view that causation had been established. As pointed out by counsel for the respondents, this is a case where the clients lost an opportunity to convince the judge by way of oral testimony and documentary evidence that they had a complete answer to the claim that had been brought against them. In fact, Dato' Wrigglesworth was able to demonstrate to a conviction that the appellant had not prepared his clients' case with the care and attention it deserved. Vital links in the evidence were omitted by a singular failure to pursue the proper line of inquiry, especially in regard to the relevant documentary evidence. If the appellant solicitor had informed the respondents of the hearing date and had prepared himself properly for the trial, he would have been able to persuade the judge that they had a complete answer to the claim that had been brought against the respondents. Accordingly, this is a case where the respondents lost a valuable right – the right to persuade a judge of first instance by way of oral and documentary evidence – by reason of the appellant's oversight of the notice of hearing that had been given by the court. It is an unfortunate turn of events which we are certain the solicitor did not wish upon his clients. But it happened. And for that the solicitor must answer in a claim for negligence. Advocates and solicitors undertake an onerous task when they agree to act for a client. There is an assumption of responsibility by the solicitor coupled with reliance by the client on the skill of the solicitor. The solicitor's duty to exercise reasonable care and skill is imposed both by contract and by the law.”

Further in the case of *Megat Najmuddin bin Megat Khas & Ors v Perwira Habib Bank Malaysia Berhad*¹⁹, whereby the appellants were retain as solicitors for the respondents, a local bank, for the execution of charge over the land, as security for an overdraft facility (OD). At the same time the landowner had entered into a sale and purchase agreement to sell the land to Land Holdings Sdn. Bhd. which holds the custody of the title to the land. The letter of offer from the bank and the title had been deposited by the purchaser with the bank,

was given by the bank to the solicitors. Since there was subject to a restriction in interest of the State Authority, the borrower proposed the creation of a lien holder's caveat (LHC) on the land. The solicitors' advice that a LHC would be sufficient security for the disbursement of the first OD and that the solicitors had duly perfected the security over the land, by way of the LHC, for the first OD; the borrower could be allowed to utilize the facility. Subsequent the borrower required further overdraft facility therefore the bank instructed the solicitors to create a fresh LHC; since the earlier LHC did not stipulate a named sum, that LHC was sufficient to secure the extra RM 500,000 ("the second OD"); and to withdraw the LHC and to lodge a fresh LHC to enable the transfer of the land from the landowner to the purchaser. Unfortunately consent to transfer was not obtained nor sale and purchase was proceeded. The bank commenced legal action to enforce the LHC against the landowner and the purchaser.

In first instance the trial court held that applying the test of a reasonable man whereby the plaintiff were liable for negligence of loss suffered by respondent in respect of the overdraft facility. As the applicant had advised and thus authorized the release of RM 700,000 although they knew well that the State Authority's consent had not been obtained²⁰. On appeal, it was held that: -

"Although the learned judge did not place any emphasis on the real question of legal causation, the CA was satisfied, on the facts, that the advice of the solicitors, that the LHC would be sufficient security, was the cause of the bank disbursing the balance of the first OD, and subsequently the whole of the second OD, to the borrower, to its detriment. There was an absence of causation only in respect of the first RM 200,000 because the solicitors' advice was not the cause of its release."

In the case of *Anthony Ting Chio Pang v Wong Bing Seng*²¹, the respondent had earlier brought an action against the appellant, a legal assistant in the employ of the 2nd defendant who was practising under the legal firm, for negligence on three grounds. First as the appellant had failed to practise the standard of care of a reasonably competent solicitor in ascertaining the identity of the person who claimed to be the owner of the land; second the land search conducted by the appellant was improper or inadequate; third the appellant was acting below the standard of a reasonably competent and careful solicitor in releasing the respondent's cheques to the alleged owner of the land before the registration of the memorandum of transfer. It was affirmed by the High court that: -

"The Sessions Court was right in holding that the appellant was negligent in failing to ascertain the identity of the person who claimed to be the owner of the land and conduct a proper and an adequate land search. Had he done so, the transaction might not have taken place and the respondent might not have suffered the loss"

However in the case of *Dato' Leong Pow Kue & Ors v Gan Kim Sing*²², the court have emphasised that not all fact could constitute negligence on the part of solicitor. In this case the plaintiffs wanted to purchase a piece of land and engaged the defendant, a solicitor, to act on the purchase. The plaintiffs subsequently brought an action against the defendant in negligence when they ended up purchasing the land minus 5,790 square feet. The plaintiffs contended that the defendant failed to exercise all reasonable care, skill, diligence and competence as a solicitor in acting for the plaintiffs in the sale and purchase of that land. They submitted that the defendant was negligent in, inter alia, failing to carry out adequate searches and enquiries to ascertain that the plaintiffs could be registered as the proprietors of the piece of land, and failing to inform them that there was a notice of intended acquisition endorsed on the document of title in respect of that

5,790 square feet of land. The court laid the obligations of an advocate and solicitor as well the law and its perspectives as follows: -

“That retainer imposes an obligation on the part of the defendant to be both skillful and careful. In Spector v Ageda [1971] 3 All ER 417, the court held that a solicitor must put two things at his client's disposal: skill and knowledge. I may add that a solicitor holds himself out as having adequate skill and knowledge (Pearson v Pearson (Queen's Proctor showing cause) [1969] 3 All ER 323) to conduct whatever business he undertakes be it contentious or non-contentious. Without a doubt, a solicitor owes a duty to his client both in contract and in tort.”²³

What if the solicitor is in breach of his contractual duty to his client, or if that solicitor fails to use proper care and his client suffers a loss, would that solicitor be liable in damages? The answer is in the positive even if the claim in negligence is for purely financial loss. The case of Pilkington v Wood [1953] 2 All ER 810 is a striking example. There the purchaser refused to complete the sale because of a defect in title and the damages recovered by the vendor against the solicitors who acted for him when he bought the property were the difference at the time of the original purchase between the value of the property with a good title and its value with the defect. But where the solicitor conducted the action negligently²⁴ or for that matter negligently fails to bring an action, the measure of damages would be the amount the plaintiff might have recovered in the action in the event the solicitor had exercised due diligence²⁵. Negligence of a solicitor to bring an action within the limitation is exemplified in the case of Buckley v National Union of General and Municipal Workers & Anor [1967] 3 All ER 767. But a word of caution, not all facts would constitute negligence. Thus, it is a correct proposition of the law to say that a solicitor is not guilty of negligence if he merely acted on his client's instructions in the reasonable belief as to its correctness (Lewis v Collard (1853) 14 CB 208). In Griffiths v Evans [1953] 2 All ER 1364; [1953] 1 WLR 1424, the court held by a majority that a solicitor would not be negligent in failing to advise a workman who was in receipt of a workman's compensation that he had an alternative claim in common law.

The solicitor too would not be negligent if: he had explained fully the legal position to his client and the client still instructed him to proceed²⁶; he had committed an error of judgment in regard to matters of discretion²⁷; he had committed an error of judgment in regard to matters of law²⁸; he had acted on solicitor's advice²⁹ towards this end the solicitor must show that the counsel was a competent person³⁰ and the solicitor must have carried out to the fore what counsel had accordingly advised³¹.”

Moreover in the case of *Mohd Nor Dagang Sdn Bhd v. Tetuan Yusof Endut & Associates*³², whereby there was an appeal of the plaintiff's claim for general and special damages against the defendant for professional negligence. The plaintiff alleged that the defendant as its retained advocate and solicitor was negligent in not exercising due care, skill and diligence in preparation of a reasonable defence for the plaintiff in a particular suit. The court ruled that inter alia: -

“I must quickly add in qualification, that the limited immunity defence succeeded here in view of the particular factual background as founded on the evidence adduced before this court. This court maintains the view that an advocate and solicitor who holds himself as possessing reasonable competence in his vocation owes a duty to his client to exercise that duty with reasonable care and competence. Events may turn out to prove that an advocate and solicitor had been wrong in making a decision but this does not mean that he had been negligent. His is only a duty to exercise reasonable care and competence, there is no duty to be right.”

Clearly as the law requires the solicitor and advocate to dispose the duty by reasonable care and skill which otherwise would amount to negligence. In the case of *Neogh Soo Oh & Ors v G. Rethinasamy*³³, the plaintiffs had engaged the defendant advocate and solicitor to act for them in the purchase of land. The defendant had prepared a sale agreement but the said land had been acquired by the government however the plaintiffs were awarded by the government for the acquisition of the said land. But due to dissatisfaction, they alleged they had suffered damage as to the amount which they had paid for the said land. Subsequent they decided to sue the defendant for negligence on the ground that defendant did not make a search at or enquiry in the Land Office. The court held that: -

“I considered and found as a fact that the defendant had failed in his duty to use reasonable care and skill in giving his advice and taking such action as the facts of this particular case demanded of a normally competent and careful practitioner here. I considered that apart from a search in the Interim Register he should have also, like other normally competent and careful solicitors, also made a search at or an enquiry with the land office concerned. In the circumstances of this case I considered that he was therefore liable to compensate his clients for the loss caused by his breach of contractual duty as their solicitor. As regards liability in tort, the defendant was a professional man professing special skill who gives assistance to another and owed a duty of care, quite independent of contract, to that other person or persons who to his knowledge relied on his skill³⁴.”

Moreover the extent of such liability could be extended as ruled in the case of *Ali Jais v Linton Albert & Anor*³⁵. The plaintiff's claim was on grounds of negligence and breach of contract by the defendants, particularly failure to file or advice the plaintiff to file appeal within the three months period from 21 November 1991, when the decision of the Assistant Settlement Officer was gazetted in the Sarawak Government Gazette; and neglecting or failure to give full or proper care and attention to the conduct of the land appeal case. The defendants do not deny that the first defendant did owe a duty of care to the plaintiff on being instructed to handle the matter. However, it was submitted that there was no breach of duty or lack of reasonable care on the part of the first defendant as he had made an honest mistake which did not amount to negligence. It was held by the court inter alia: -

*“It is pertinent at this stage to remind myself of what was said by Syed Agil Barakbah FJ in *Yong & Co v Wee Hood Teck Development Corp* [1984] 2 MLJ 39 at p 45 that: The liability of a solicitor may be viewed in two aspects. At common law the retainer imposes upon him an obligation to be skilful and careful and for failure to fulfil this obligation he may be made liable in contract for negligence whether he is acting for reward or gratuitously. On the other hand, like any other individual, a solicitor is liable for his wrongful acts and if the circumstances justify the charge, he may be made liable to his client in tort.³⁶ He owes a duty not to injure his client by failing to do that which he had undertaken to do and which his client has relied on him to do.*

It is settled law that a retainer of the defendants by the plaintiff would put into operation the normal terms of the contractual relationship of solicitor and client..... It was the duty of the defendants after being retained by the plaintiff to exercise due care, skills, expertise and attention in the handling of the land appeal case in the session's court. It was the defendants' duty to file the appeal to the sessions court within the prescribed time, and by not filing the said appeal within the prescribed time, the defendants were clearly in breach of their obligation to give a full and proper care and attention to the conduct of the said land appeal and to

protect the plaintiff's interest. The appeal in the land appeal case has become useless. As such, I hold that the defendants are also liable in contract for negligence."

In the case of *Wong Song & Ors v. Hiap Lee Manufacturing Industries Sdn Bhd*³⁷, it was observed as follows: -

"Once the solicitor and client relationship has been established the relationship becomes onerous as the solicitor must act professionally in the discharge of his fiduciary duty (Bird v. Harris [1881] WN 5 CA). "Negligence" is an ugly word. In contentious matters counsels are well advised to tread cautiously. It is now well established by authorities that negligence existed in the following set of circumstances:

- 1) *Where before instituting the action, and this includes preparing the pleading, counsel failed to investigate with meticulous care into the cause of action*³⁸.
- 2) *While preparing the pleading counsel knew that his client had done some act which would preclude that client from recovering but counsel, all the same, neglected to address this point to the knowledge of the client or to point this out to the client*³⁹.
- 3) *Where counsel knew that success was improbable yet counsel advised his client to enter into litigation*⁴⁰
- 4) *Where counsel relied and proceeded under a wrong statute or section of a statute*⁴¹ *or failed to refer to the correct statute.*
- 5) *Where an action was filed in the wrong court, for example in the Malaysian context where the action was filed in the Sessions Court whereas it should have been before the High Court*⁴².
- 6) *Where the action was filed in an inferior court (like the Magistrate's Court) although counsel knew all along that the cause of action was outside the jurisdiction of that inferior court*⁴³.
- 7) *Where there was a failure to issue the writ or renew the writ in time to prevent the application of (in the local context) the Limitation Act 1953 (Revised 1981) Act 254. A rather consistent flow of authorities emerged from time to time and reference may be made to Hunter v. Caldwell [1874] 10 QB 69; Yardley v. Coombes [1963] 107 Sol Jo 575; Kitchen v. RAF Association [1958] 2 All ER 241, [1958] 1 WLR 563 CA; and Malyon v. Lawrance, Messer & Co [1968] 2 Lloyd's Rep. 539. It is interesting to note that in Malyon's case the solicitor's delay had caused severe anxiety to the plaintiff with the consequential loss to his business and the court there held that the plaintiff should rightly recover damages from that solicitor.*
- 8) *Where counsel dragged his feet causing not only delay but inexcusable delay in instituting the claim in the court of law*⁴⁴.
- 9) *Where counsel failed to prepare the case properly for trial. (Manley v. Palacke [1895] 73 LT 98, PC; Roe v. Robert McGregor & Sons Ltd [1968] 2 All ER 636, [1968] 1 WLR 925, CA. It is interesting to ponder that the court there held that there was no duty on the defendant's solicitor to interview a passenger in the plaintiff's car. Perhaps the rationale for this judgment would be to avoid the pitfalls of what I have said in Syarikat Pengangkutan Sakti Sdn Bhd v. Tan Joo Khing T/ A Bengkel Sen Tak [1997] 3 CLJ 754). It is instructive to read the case of Dickinson v. Jones Alexander & Co [1990] Fam Law 137 where there was a negligent advice given to a wife in regard to an ancillary relief.*
- 10) *Where counsel failed to note the presence of a material witness whom his client had wanted to call was present in court and consequently that material witness was not called to the stand with the result that the client lost the case*⁴⁵.
- 11) *Where the counsel knew that there was a good defence to the action but counsel simply allowed the plaintiff to obtain judgment by default*⁴⁶.
- 12) *Where counsel miserably failed to issue execution*⁴⁷.
- 13) *Where there was an offer to compromise but counsel failed to communicate to his client*⁴⁸.

- 14) Where counsel knew that the appeal was bound to fail yet he advised his client to proceed with that appeal⁴⁹.
15) Where counsel totally neglected and failed to file a pending action when directed⁵⁰.

Further example could be derived from the case of *Tetuan Bakar & Partners v Malaysian National Insurance Bhd & Ors*⁵¹. The appellant whom firm of advocates and solicitors were retained to act for Tenaga Nasional Bhd as the defendant in the suit between Prorak Sdn Bhd and Raja Lope and Tan Co. However the appellant's lawyer was not punctual in court, resulting in a default judgment being entered against TNB. Filing of application to set aside the judgment in default against TNB was also struck out as again the appellant's lawyer was not punctual at the hearing. As Federal Court refused the application for leave to appeal, TNB had to pay the judgment sum of RM 9,740,720.48 to the plaintiff therein demanded indemnity for the said amount from the appellant. It was held that: -

“In the Tetuan Bakar & Partners case (supra) the default of the assured spanned three policies period from 22.7.1997 to 7.1.2000. During the term of the 1st policy, the assured had firstly not only negligently allowed but on 13.8.1997 further negligently failed to get a default judgment set aside which resulted in the assured's client facing liability for the judgment sum of RM9.7 million by 21.10.1997. Secondly, on 1.6.1998 when the assured on behalf of their client appealed to the Court of Appeal, the clients appeal was dismissed and confirming the High Court decision not to reinstate the application (to set aside the default judgment) which had been struck out through the assured's negligence.”

The extend of such negligence liability was well stated in the case of *Victor Cham & Anor v Loh Bee Tuan*⁵². The first appellant was at all material times a registered shareholder, director and company secretary of the first defendant. The second appellant was acting as solicitors for both the respondent and the first defendant in the sale and purchase property on a land. Subsequent the land was charged to Sabah Bank Bhd. before the execution of the sale and Purchase Agreement. The property, was subsequently foreclosed by Bank and sold to a third party. The respondent filed this action against the first appellant on tort for alleged fraudulent misrepresentation. The respondent contended that the second appellant as her solicitor owed her a duty to exercise proper skill, professional care and diligence in or about the sale and purchase transaction in making proper searches on the title as to encumbrances and as regard the redemption of the relevant charges. The learned High Court judge allowed the plaintiff's claim. The first and second appellants appealed. It was held: -

“Liability in Contract:

*Given the fact that the second appellant was acting as solicitor for both the vendor and the end financier on the one hand and the purchaser on the other, we agree with the observation of the learned judge that the standard of care required of the second appellant is, in the circumstances, indeed high.*⁵³

Liability in Negligence:

Apart from his liability under the retainer, the learned judge in the alternative found the second appellant liable to the respondent in tort on the principle in Hedley Byrne v Heller [1964] AC 465. He held that the second appellant is liable in negligence to the respondent in making the wrongful representation in the SPA, that the subject property was free from any encumbrance, which was not true. Had it not been for this representation, the respondent would not have proceeded with the purchase of the subject property at all. By giving the wrong representation in the SPA, the second appellant had thereby induced the respondent to act to his detriment.

The learned judge further held the second appellant is liable in tort on the direct application of the neighbour principle in Donoghue v Stevenson [1932] AC 562. In Ross v Caunters [1980] 1 Ch 297, Megarry J held that 'a solicitor who is instructed by his client to carry out a transaction that will confer a benefit on an identifiable third party owes a duty of care towards that third party in carrying out that transaction'. In the present case, we agree with the learned judge that the second appellant in failing to secure the redemption agreement on behalf of the end financier would expose the respondent to the risk of losing the subject property in the event of a foreclosure being taken by the chargee, as had happened here. Further, PW4, in his testimony stated that it is a standard conveyancing practice for solicitor acting for end financier to enter into redemption agreement with the chargee in order to protect the interest of the end financier. The second appellant failed to do just that. This had caused resultant loss on the respondent. On the evidence before us, we hold there is sufficient proximity between the second appellant and the respondent as to render the second appellant liable to the respondent for his omission to take the necessary measure to secure the redemption agreement from the chargee."

In another case of *GT Rajan v. Lee Yoke Lay & Anor*⁵⁴, the respondents were registered owners of a piece of land which they sold to two purchasers under a sale and purchase agreement dated 28 July 1989. Rajan was the solicitor for the respondents in this transaction. The purchasers were represented by their own solicitors. The parties entered into sales and purchase agreement whereby it was agreed that the balance of the purchase price under the sale and purchase agreement was to be paid within one year from the date of the sale and purchase agreement. When the balance of the purchase price was paid by the purchasers to Rajan, the respondents requested that this amount be deposited into a fixed deposit interest earning account. Rajan was of the view that as he was a stakeholder of the said money, he need not accede to the request of the respondents. Eventually when the balance of the purchase price was released to the respondents some four months after Rajan had received the same from the purchasers, it was without any interest. This prompted the respondents to complain to the State Bar Committee about the conduct of Rajan which ended up with an enquiry by the Disciplinary Committee. In such case, issue raised was whether Rajan a solicitor for the respondents or a stakeholder? The court held that Rajan was a stakeholder of the balance of the purchase price received from the purchasers until subsequently released to the respondents, he is then entitled to keep for himself any interest earned on the said sum. It was further contended that: -

"It is without doubt that Rajan first appeared on the scene of this transaction as a solicitor acting for the respondents. In that capacity, he was an agent of the respondents. However, when the sale and purchase agreement was executed between the purchasers and the respondents, Rajan's role as an agent was somewhat transformed with an added duty and responsibility. The proviso in clause 2 of the sale and purchase agreement provides that Rajan shall receive the balance of the purchase price and not release the same until the registration of the transfer into the names of the purchasers, their nominee or nominees. This places a responsibility on Rajan to keep the said money in his own hands or to put it on deposit with a bank. In the event that registration of the transfer into the name of the purchasers or their nominee or nominees cannot be registered, he has to return the said sum to them. On the other hand, without the money being placed with him, the respondents as vendors would have refused to allow the release of the document of title and the memorandum of transfer to the purchasers. In the opinion of this court, Rajan was therefore placed in the position of a trustee where he was accountable to both the purchasers and the respondents. If he was an agent as submitted by the respondents' counsel, then he is not accountable to the purchasers but, as one can see, this is not the case. The terms in clause 2 are clear and they were inserted to protect the interests of both the parties to the agreement. In order to do so, Rajan in the opinion of this court, was clearly a

stakeholder in this situation. Though the word 'stakeholder' is not expressly stated in the agreement, the circumstances are clear to imply that he was to play the role of such a character in this transaction."

4.0 CONCLUSION

One common theme of the arguments made in support of the abolition of advocates' immunity is that they fail to take account of the peculiar position that advocates occupy in the legal process. Advocates are officers of the court. Ultimately, they are also servants of the court. In this capacity, they are subject to special duties, and where those duties conflict with any obligations owed to the client, an advocate is bound to accord priority to any duty owed to the court. For this reason the analogy between advocates' immunity and the immunities granted to other participants in legal proceedings is particularly attractive, because it places advocates under the same protective umbrella that applies to these other participants. Furthermore, the immunity removes advocates from potential conflicts in the duties that he or she may owe to the court and the client. No other participant in legal proceedings faces potentially conflicting duties of this nature. The unique position that advocates occupy as the connection between the court and the client provides additional support for retaining advocates' immunity, as special care should be taken to avoid the imposition of a tortious duty of care to enforce one of these duties.

REFERENCE

¹ Michael Zander (1979). *The Scope of an Advocate's Immunity in Negligence Actions*, Vol 20. Wiley Press, p.319.

² (1969) 1 AC 191.

³ However at the same time House of Lord in obiter dictum propose that although such immunity extends to work done in the conduct of litigation, criminal or civil, at the trial, to work where litigation is pending, to drawing pleadings and to conducting subsequent stages; but it does not extend to other advisory work or work in drafting or revising documents.

⁴ [1989] 1 All ER 129.

⁵ [1978] 3 All ER 1033.

⁶ [1999] 3 WLR 873.

⁷ [1988] 1 All ER 871.

⁸ [1963] 2 All ER 402.

⁹ [1968] 3 All ER 1068.

¹⁰ (1971) 125 CLR 1.

¹¹ [1994] 506.

¹² *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1963] 2 All ER 575 applied.

¹³ *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1963] 2 All ER 575 applied; *Midland Bank Trust Co Ltd v Hett Stubbs & Kemp (a firm)* [1978] 3 All ER 571 approved.

¹⁴ [1968] 1 MLJ 161.

¹⁵ *Pari materia* with section 117(4) of Legal Profession Act 1976.

¹⁶ [1999] 5 MLJ 588.

¹⁷ *Anor* [1993] 3 MLJ 679.

¹⁸ [2001] 2 CLJ 344.

¹⁹ [2003] 4 MLJ 65.

²⁰ *Perwira Habib Bank Malaysia Berhad v Megat Najmuddin Bin Megat Khas & Ors* [2003] 4 MLJ 65.

²¹ [1997] 2 CLJ 831.

²² [1998] 7 MLJ 133.

²³ *Midland Bank Trust Co Ltd & Anor v Hett, Stubbs and Kemp (a firm)* [1979] Ch 384; *Clarke & Anor v Kirby-Smith* [1964] Ch 506; *Bagot v Stevens Scanlan & Co Ltd* [1966] 1 QB 197; *Cook v S* [1967] 1 All

ER 299; [1967] 1 WLR 457; *Heywood v Wellers (a firm)* [1976] QB 446 and *White & Anor v Jones & Anor* [1995] 2 AC 207; [1995] 1 All ER 691.

²⁴ *Godefroy v Dalton* (1830) 6 Bing 460.

²⁵ *Harrington v Binns* (1863) 3 F & F 942.

²⁶ *Lee v Dixon* (1863) 3 F & F 744, 176 ER 341.

²⁷ *Hill v Finney* (1865) 4 F & F 616 at p 625 and *Faithful v Kesteven* (1910) 103 LT 56.

²⁸ *Shilcock v Passman* (1836) 7 C & P 289; *Hart v Frame* (1839) 6 CI & Fin 193; and *Purves v Landell* (1845) 12 CI & Fin 91; 8 ER 1332.

²⁹ *Francis v Francis and Dickerson* [1955] 3 All ER 836; and *Cook v S* [1966] 1 All ER 248) and 1998 7 MLJ 133.

³⁰ *Chapman v Chapman* (1870) LR 9 Eq 276; 22 LT 145; 18 WR 533.

³¹ *Godefroy v Dalton* (1830) 6 Bing 460; *Potts v Sparrow* (1834) 6 C & P 749 and *Andrews v Hawley* (1857) 26 LJ Ex 323.

³² [2010] 4 MLJ 493.

³³ [1984] 1 MLJ 126.

³⁴ *Midland Bank Trust Company Limited case* [1978] 3 All ER 571 582 & 611; *Hedley Byrne and Company Ltd v Heller and Partners Limited* [1963] 2 All ER 575.

³⁵ [1999] 6 MLJ 304.

³⁶ See 36 Halsbury's Laws of England (3rd Ed) p 96, para 131.

³⁷ [1998] 1 CLJ 1001.

³⁸ *Gill v. Lougher* [1830] 1 Cr. & J 170; and *Ottley v. Gilby* [1845] 8 Beav 602.

³⁹ *Jacks v. Bell* [1828] 3 C & P 316.

⁴⁰ *Re Clark* [1851] 1 De GM & G. 43.

⁴¹ *Hart v. Frame* [1839] 6 CI & Fin. 193, HL.

⁴² (*Lee v. Dixon* [1863] 3 F & F 744; and *Barker v. Fleetwood Improvement Comrs* [1890] 62 LT 831 which was later affirmed by the Court of Appeal vide 6 TLR 430, CA). A classic example would be *Heywood v. Wellers (a firm)* [1976] QB 446; [1976] 1 All ER 300 CA, where proceedings which were more suitable to the Magistrates' Court were begun in the High Court.

⁴³ *Williams v. Gibbs* [1836] 5 Ad & E 1208 and *Cox v. Leech* [1857] 1 CBN 617.

⁴⁴ *Fitzpatrick v. Batger & Co Ltd* [1967] 2 All ER 657, [1967] 1 WLR 706, CA; and *Allen v. Sir Alfred McAlpine & Sons Ltd* [1968] 2 QB 229, [1968] 1 All ER 543 CA.

⁴⁵ *Reece v. Righy* [1821] 4 B & Ald 202; *Jatch v. Lewis* [1861] 3 F & F 467 at 472 and *Price v. Bullen* [1824] 3 LJOS KB 39.

⁴⁶ *Godefroy v. Joy* [1831] 7 Bing 413 and *Cooke v. Swinfen* [1967] 1 All ER 299, [1967] 1 WLR 457 CA.

⁴⁷ *Ridley v. Tiplady* [1855] 20 Beav 44; *Fray v. Foster* [1859] 1 F & F 681; and *Harrington v. Binns* [1863] 1 F & F 942.

⁴⁸ *Sill v. Thomas* [1839] 8 C & P 762.

⁴⁹ *Harbin v Masterman* [1896] 1 Ch. 351 CA.

⁵⁰ *Plant v. Pearman* [1872] 41 LJ QB 169.

⁵¹ [2010] 4 MLJ 493.

⁵² [2006] 5 MLJ 359.

⁵³ *Muoat v Clark Boyce* [1992] 2 NZLR 559.

⁵⁴ [1994] 2 MLJ 315.