

# PROFESSIONAL LIABILITY IN CONSTRUCTION CONTRACTS – A LEGAL PERSPECTIVE

## 1. INTRODUCTION

Disasters in the construction industry are a common occurrence. In the construction sector disasters may be avoided if due care and caution are practised by the persons involved in building projects.<sup>1</sup> This paper examines the legal duties and responsibilities of parties in the construction industry, with particular emphasis on the duties of professionals or contract administrators<sup>2</sup>.

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<sup>1</sup> In a construction contract, to ensure the successful completion of a particular project, a number of agreements and contracts are executed. For example, first there is the contract of employment between the employer and the contract administrator who may be an engineer or an architect (professional). Next, the contract of works is executed between the employer and the main contractor. Thirdly, there will be a number of sub-contracts, executed between the main contractor and either the nominated or domestic sub-contractors.

<sup>2</sup> A professional in a construction industry is bound by two contracts: the terms of his contract of employment and to observe his duties and obligations as reflected in the main contract between the employer and the main contractor. If the professional is not a party to the main contract, there are bound to be difficulties in defining and ascertaining roles, responsibilities, and ascertaining the legal position. The International Conference on Disaster Management – The International Conference on Disaster Management – Lessons to be Learnt April 29-30, 2000 Langkawi Kedah

<sup>3</sup> A contract is executed between two parties. If one party has failed in its obligations, the innocent party may recover damages for the loss occasioned by the failure of the other party to comply with its obligations.

<sup>4</sup> Under the law of contract, liability and responsibilities of the parties is governed by the doctrine of privity of contract. That doctrine may not operate successfully in a construction contract considering the chain of parties involved in carrying out the works. The main contractor and the employer enter into the contract of works. The professional, who is responsible for the administration of the contract, has to observe the duties and responsibilities that appear in the main contract. The common law doctrine of privity of contract establishes that only the parties to a contract can sue and be sued on it. It can neither confer rights nor impose liabilities on persons who are not parties to the contract.

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## 1. INTRODUCTION

Disasters in the construction industry are a common occurrence. In the construction sector disasters may be avoided if due care and caution are practised by the persons involved in building projects.<sup>1</sup> This paper examines the legal duties and responsibilities of parties in the construction industry, with particular emphasis on the duties of professionals or contract administrators<sup>2</sup>.

The rights of disaster victims arise under the law of contract<sup>3</sup> where the requirements of privity of contract<sup>4</sup> are met and/or under the law of torts. Malaysian courts have for long recognized the liability of tortfeasors for personal injury and death claims and for claims of property damage. There was, however, a reluctance to found liability for pure economic loss.

This position appears to have changed of recent. A number of developments in the area of recovery for pure economics have been made in the Commonwealth region. The court has, following the developments in other jurisdictions, shown a willingness to found liability for pure economic loss.

<sup>1</sup> In a construction contract, to ensure the successful completion of a particular project, a number of agreements and contracts are executed. For example, first there is the contract of employment between the employer and the contract administrator who may be an engineer or an architect (professional). Next, the contract of works is executed between the employer and the main contractor. Thirdly, there will be a number of sub-contracts, executed between the main contractor and either the nominated or domestic sub-contractors.

<sup>2</sup> A professional in a construction industry is bound by two contracts: the terms of his contract of employment and to observe his duties and obligations underlined in the main contract between the employer and the main contractor. It is inevitable that when parties are locked into such an embrace, there are bound to be difficulties in defining and distinguishing roles, responsibilities, and ascertaining the legal position of the parties involved. There are two ways to resolve this tangle: the third party could function on behalf of one or the other party to the contract; or it could occupy an independent position between the parties, with duties to both of them. In a standard form of building contract, a professional takes the latter position.

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<sup>4</sup> Under the law of contract, liability and responsibilities of the parties is governed by the doctrine of privity of contract. That doctrine may not operate successfully in a construction contract considering the chain of parties involved in carrying out the works. The main contractor and the employer enter into the contract of works. The professional, who is responsible for the administration of the contract, has to observe the duties and responsibilities that appear in the main contract. The common law doctrine of privity of contract establishes that only the parties to a contract can sue and be sued on it: it can neither confer rights nor impose liabilities on persons who are not parties to the contract.



There is an urgent need to define duties and extent of liability of professionals considering the increasing development in the construction industry. The question of liability and responsibility is an issue that must be handled with great caution. Imposing liability on a person or an organisation will have grave consequences. However, the issue of greater importance is human life and safety. When the two are balanced, there is no doubt that the scales must tip in favour of ensuring that human errors and negligence should not be allowed to endanger human lives.

This paper describes the liability in Malaysian law, of professionals and contract administrators for losses incurred by disaster victims. The discussion begins with a definition of the duties of a professional and continues to explore concurrent liability in contract and tort imposed upon the professional. Finally, the discussion examines the right of a plaintiff to recover for pure economic loss, where there is no injury to person or property. The words "architect", "engineer" and "professional" are used interchangeably in this paper and they all mean a contract administrator.

## 2. DUTIES

### 2.1 *Duties under the standard forms of contract*

The duties of a professional are spelt out under the standard forms of contract used in the building industry. In Malaysia, two standard forms are used in most projects.<sup>5</sup>

### 2.2 *General duties of professionals*

The available literature is exhaustive on the duties of professionals. Gajria<sup>6</sup> considers that the architect has a duty to inspect the site and advise the owner about its suitability or otherwise.<sup>7</sup> Apart from advising the owner about site conditions, the professional was also under a duty to prepare plans,<sup>8</sup> drawings, specifications, estimates and other necessary details according to the requirements of the owner; to prepare the tenders; and to supervise the construction work up until the completion of the building. Hudson<sup>9</sup> is even

<sup>5</sup> Parties in the private sector use the PAM/ISM Form 169 and the PWD Form 203 is used in contracts to which the Government of Malaysia is a party. Since March 1998, the new PAM 1998 Form is in use.

<sup>6</sup> Gajria G.T., *Law Relating to Building and Engineering Contracts in India*, 3<sup>rd</sup> edition, Tripathi Private Ltd, Bombay, 1985, p. 70.

<sup>7</sup> *Pullen & Anor v Gutteridge, Haskins & Davey Ptd Ltd*, [1992] APCLR 91.

<sup>8</sup> *Vermont Construction Inc. v Beatson*, 67 DLR (3d) 95. In the same case, the dissenting judgement held that an architect is liable for damage caused by his defective plans just as the supplier of a defective product is liable for damage caused by it.

<sup>9</sup> Anthony May, *Keating on Building Contracts*, 5<sup>th</sup> edition, Sweet & Maxwell, London, 1991, at p. 318, citing from *Hudson's Building Contracts*, 7<sup>th</sup> ed. 1926 at p. 9.

more emphatic in holding that the architect's duty begins before the tender is called.<sup>10</sup>

Some of the duties of an architect include informing an owner whether any restrictive covenants or rights of adjoining owners bound the land. This calls for him to be familiar with statutes and by-laws that might affect the works to be executed.

An architect should also supply the builder with copies of the contract drawings and supervise the project works.

Where a contractor was not proceeding with the work "regularly and diligently", an architect has a duty to first issue a notice to the contractor specifying his default. If an architect fails to issue such a notice and subsequently the contractor is terminated, then the clients, due to the non-action of the architect, will be in breach of duty.<sup>11</sup>

Finally, an architect was responsible for issuing interim and final certificates that the work was completed to his satisfaction.

Abrahamson<sup>12</sup> feels that an engineer's duty should include the giving of advice to the client on the choice of the form of contract, to avoid increases in prices due to inflation but to include any expected disruption claims which may be made by the contractor. Where a client wished to economise, an engineer ought not to merely mention the risk of cutting costs but he should also state that the job was not guaranteed.<sup>13</sup>

### 2.3 Standard of Duty

From the above definitions, it is apparent that the architect owes a duty of care to both the employer and the contractor. It then follows that the next issue is the standard of such duty.

The standard is that of an ordinary competent architect. If a responsible body or architects would have acted as this architect had done that is sufficient for his purpose: he is not to be condemned as negligent merely because some other body of architects would have acted differently.<sup>14</sup> The criteria to be applied was that a professional, when he undertakes work, assures that the work will be completed to a proper and workman like standard, to administer

<sup>10</sup> *Walter Cabbot Construction Ltd v The Queen*, 44 D.L.R. (ed) 82.

<sup>11</sup> *West Faulkner Associates v London Borough of Newham* [1995] 11 Const. LJ 157.

<sup>12</sup> Max W. Abrahamson, *Engineering Law and the I.C.E. Contracts*, 4<sup>th</sup> edition, Applied Science Publishers, London, 1979, p. 376.

<sup>13</sup> *City of Brantford v Kemp & Wallace-Carruthers & Associates Ltd*, 23 DLR (2d) 640 Can.

<sup>14</sup> *Nye Saunders and Partners v Alan Bristow* (1987) 37 Build. LR 92.



the contract, to render his services in a professional manner and to meet the recognised standards of his profession.

### 3.1 CONCURRENT LIABILITY

A person performing professional services may be liable concurrently in contract and in negligence unless the terms of the contract precluded the tortious liability. There was no sound basis for reading an implied term into every contract to the effect that the relationship of the parties was to be governed by the law of contract only. However, the parties may, by virtue of the terms of their contract, exclude or modify the common law duty. Any contractual exclusion of a duty of care needs to be explicit or to emerge in the contract as a matter of necessary implication.

The question of whether a professional adviser may be held liable concurrently in both contract and negligence has been the subject of a vast amount of legal writing. Many judges have toiled with the problem and many more academics have commented upon their efforts. The main impediment to the acceptance of concurrent liability has been lawyers' deep-rooted but misplaced deference to the primacy of contract.

Decisions and literature are overwhelmingly in favour of concurrent liability. This preponderance of support for concurrent liability reflects the merits of the following contention. A person who has performed professional services may be held liable concurrently in contract and in negligence unless the terms of the contract preclude the tortious liability.

The broad view is that where persons have entered into a contractual relationship their liability is to be governed by the terms of the contract and nothing else. Such a view was based on the notion that the parties intended, or must be presumed to have intended, that the contractual terms, which they agreed to, would be definitive of their liability one against the other. This perception of the parties' presumed intention has led to judicial decisions that have permitted concurrent liability to be invoked. But again, these decisions have held that the duty in negligence must arise so independently of the contract that it must be able to be established without reference to or proof of the contract.<sup>15</sup> It has also been suggested that the contractual duty and the tortious duty must be at least slightly different or non-coextensive before concurrent liability can exist.

Causes of action have overlapped for centuries and will no doubt continue to do so. When this overlap happens and a plea in both contract and tort is entered plaintiffs should not be treated differently; and they should be entitled to choose the particular cause of action that is most favourable to them. At the same time, it must be

<sup>15</sup> *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465; *Esso Petroleum Co Ltd v Mardon* [1976] QB 801.

accepted that the parties may, by virtue of the terms of their contract, exclude or modify the common law duty.

### 3.1 Concurrent Liability in the Building Industry

In Malaysia, the architect derives his powers from two documents: the agreement executed between him and the employer and the Standard Forms of Building Contracts.<sup>16</sup> This is a strange phenomenon – he is appointed by only one of the parties to the construction contract, i.e. the employer to whom he is contractually bound by his contract of employment, and yet he has to assume independent duties to both parties under the construction contract. This obligation exists although he does not have any legal relationship with the contractor and other third parties. Not only is he under a contractual obligation to the employer but also owes a duty of care to other persons who were his “neighbours” and where he had accepted a voluntary assumption of responsibility.<sup>17</sup>

In *Pacific Associates Inc and Another v Baxter and Others*,<sup>18</sup> the extent of an engineer’s contractual and tortious liability was discussed. The defendants were an engineering partnership and the contract between the contractors and the employer provided that the defendants would be responsible to supervise the work. The trial judge held that the defendants were the employer’s agents. They did not owe a duty of care towards the plaintiffs for the acts for which, under the contract, the employer could be held liable. It can be seen that where the contractual mechanisms provided for adequate remedies, the courts are slow to impose tortious liability upon the wrongdoer.

However, if the courts were to be allowed to continue to flow along this tide of thought, it would mean that a person may be allowed to defend a claim in negligence made against him by a third party by saying that he was working under a contract for his employer and that the only duty he owed was his contractual duty to his employer. In *Voli v Inglewood Shire Council*<sup>19</sup> Windeyer J clearly stated:

... neither the terms of the architect’s engagement, nor the terms of the building contract, can operate to discharge the architect from a duty of care to persons who are strangers to those contracts. Nor can they directly determine what he must do to satisfy his duty to such persons. That duty is cast upon him by law, not because he made a contract, but because he entered upon the work.

<sup>16</sup> Clause 2 of the PWD Form 203 Government Contracts Form and Condition 2 of the PAM/SM 69 Private Contracts Form for architects.

<sup>17</sup> See the judgement of Lord Denning in *Esso Petroleum Co Ltd v Mardon* [1976] 2 WLR 595.

<sup>18</sup> [1990] 1 QB 993.

<sup>19</sup> (1963) 110 CLR 74 at p. 85.



The tort of negligence duty in building projects was examined thoroughly in the NZ case of *Bowen v Paramount Builders*.<sup>20</sup> The Court of Appeal (Wellington) held that:

*Contractors, architects and engineers were all subject to a duty to use reasonable care to prevent damage to persons whom they should reasonably expect to be affected by their work.*

A builder or architect could not defend an action for negligence made against him by a third person on the ground that he had complied with the requirements of his contract with the owner. The nature of his contractual duties, however, may have considerable relevance in deciding whether he has been negligent or not.

In the United States of America, the courts have recognised that the general principles of negligence apply to builders and architects. The matter is discussed in *Prosser's Law of Torts* (4<sup>th</sup> ed) 680-682.

*One important limitation recognized in several cases is that the contractor is not liable if he has merely carried out carefully the plans, specifications and directions given him, since in that case the responsibility is assumed by the employer, at least where the plans are not so obviously defective and dangerous that no reasonable man would follow them. Where this is the case, there appears to be no doubt that there will be liability.*<sup>21</sup>

However, it is not always that an architect may be held concurrently liable in contract and in tort. Where there was adequate machinery under the contract between the employer and the contractor to enforce the contractor's rights thereunder and no good reason at tender stage to suppose that such rights of machinery would not together provide the contractor with an adequate remedy, then, in general, a certifying architect or engineer would not owe to the contractor a duty in tort co-terminous with the obligation in contract owed to the contractor by the employer.<sup>22</sup>

Whether or not a duty of care existed between the parties is ultimately a question as to what is just and reasonable. It is not suggested that the existence of a contractual relationship was an absolute bar to a duty of care being found to exist in tort beyond the ambit of the contract. However, it would be unusual, where the obligation is not expressly or impliedly stated in the contract, to hold that one of the contracting parties had an additional obligation in tort.<sup>23</sup>

<sup>20</sup> [1977] 1 NZLR 394.

<sup>21</sup> *Prosser's Law of Torts* (4<sup>th</sup> ed) at p. 681.

<sup>22</sup> *Leon Engineering & Construction Co Ltd v Ka Duk Investment Co Ltd* (1989) 47 BLR 139.

<sup>23</sup> *Sinclair Horder O'Malley & Co v National Insurance Co of NZ*, [1992] 2 NZLR 706.

3.2 In *Michael Sallis & Co Ltd v Calil and William F Newman & Associates*<sup>24</sup>, the court considered the potential liability of an architect to a contractor under a contract similar in terms to the current Malaysian PAM and Hong Kong standard forms and the former Singapore SIA 79 form.

It was there held that an architect owed a duty of care to the contractor to act fairly as between him and the employer in matters such as the issue of certificates and the grant of extensions of time. If the architect had acted unfairly in respect of matters in which the contract required him to act impartially, a contractor might recover damages from him to the extent that the contractor was able to establish damage resulting from the architect's unfairness and so might recover purely economic loss.

There is still no doubt that the architect or engineer is under a duty to act fairly and impartially as between the contractor and the employer in matters such as certificates and extensions of time, but in *Pacific Associates Inc v Baxter*<sup>25</sup>, the Court of Appeal in England exhaustively reviewed the duties owed by architects and engineers to contractors and appears to have put paid to the traditional view and expressly doubted the correctness of the holding in *Michael Sallis & Co Ltd v Calil*<sup>26</sup>.

The narrow interpretation of the decision is that whether an engineer acting as certifier under an engineering contract owes a duty of care to the contractor will depend on all the circumstances, including the terms of the contract between the employer and the contractor, the contractual background and the presence or absence of an arbitration clause enabling the engineer's decisions to be reviewed. In that case, too, the form of contract was based on the FIDIC International Civil Engineering Conditions, 2<sup>nd</sup> edition, 1969, which contained a number of clauses not usually found in building contracts and rare even in engineering forms. In particular, there was an express special condition, which provided that:

"Neither any member of the employer's staff nor the engineer nor any of his staff, nor the engineer's representative shall be in any way personally liable for the acts or obligations under the contract, or answerable for any default or omission on the part of the employer in the observance or performance of any of the acts, matters, or things which are herein contained": *Pacific Associates Inc v Baxter*, (1988) 16 ConLR 90.

#### 4.1 Policy Considerations

The time-old reason for disallowing economic loss was the "floodgates" argument. The concern was with the unfairness involved in holding

<sup>24</sup> (1987) 13 ConLR 68.

<sup>25</sup> [1990] 1 QB 993.

<sup>26</sup> (1987) 13 ConLR 68.

(1977) 76 DLR (3d) 721.



### 3.2 Apportionment of Liability

Liability may be apportioned according to the person who performed the tasks. In *District of Survey v Church*<sup>27</sup>, the defendant was an architect engaged by an engineering firm to conduct soil studies on site. The engineers on two occasions recommended that more extensive soil investigations should be undertaken but were told by the architect, without justification, that the plaintiff owner "would not go for it". Subsequently the building inspector requested a soil report and under pressure from the architect, the engineers sent a letter suggesting that the soil was adequate to support the proposed building. On this basis, the design and construction of the building proceeded.

The completed building subsided because of soil conditions which would have been revealed if the soil conditions were not examined merely superficially. The Court held that both the architect and engineers were liable to the owners for the damage sustained; the architect was liable for breach of contract and the engineers liable in tort for negligence.

## 4. PURE ECONOMIC LOSS

The most controversial area of recovery in the tort of negligence, especially in building disputes is the recovery of pure economic loss. As observed by Stapleton,<sup>28</sup> economic loss claims in negligence has continued to confound the courts. The House of Lords has for several years appeared to have been intent on a U-turn away from liability for such loss. According to Stapleton, the result was a lopsided protectionism: courts were increasingly generous and plaintiff-centred where they saw no danger to the sphere or contractual relations, "but unsympathetic and defendant-parallel in the economic loss cases of today."

The law is clear: pure economic loss was not recoverable in tort in the absence of a special relationship of proximity between the tortfeasor and the claimant whereby a duty of care would be imposed on the tortfeasor to safeguard the claimant from economic loss.<sup>29</sup> What then is the position of plaintiffs who wish to recover for pure economic loss in building claims? Can such a plaintiff be denied a remedy merely because there is no proximity between the tortfeasor and him?

### 4.1 Policy Considerations

The time-old reason for disallowing economic loss was the "floodgates" argument. The concern was with the unfairness involved in holding defendants liable to an indeterminate number of claimants and/or for claims

<sup>27</sup> (1977) 76 DLR (3d) 721 (Canada).

<sup>28</sup> Jane Stapleton, "Duty of Care and Economic Loss: A Wider Agenda", [1991] 107 LQR 249.

<sup>29</sup> See *Murphy v Brentwood District Council* [1990] 3 WLR 414, 435.

of indeterminate size. Courts were reluctant to extend the liability of professionals to cover instances of pure economic loss due to policy considerations especially in trying not to impose liability "in an indeterminate amount for an indeterminate time to an indeterminate class".<sup>30</sup> But whether this principle of reducing possible future actions would be acceptable in modern-day situations is questionable.

Another reason for the court's reluctance to allow recovery for pure economic loss was the perception that, in a competitive world where one person's gain was commonly another's loss, a duty to take reasonable care to avoid causing mere economic loss to another, as distinct from physical injury to another's person or property, would be inconsistent with community standards in relation to what was ordinarily legitimate in the pursuit of personal advantage.<sup>31</sup>

If there is a straightforward case in favour of the plaintiff, then a court should not decide the case against the dictates of justice because of foreseeable troubles in future in cases that are more difficult. On the practical side, there ought to be boundaries as to the limits of remedies allowed by the courts. But each case would have to be decided on its own facts, as and when it arises before the courts and not decided in advance.

#### 4.2 Law of obligations or assumption of responsibility

The combined effect of the two distinct policy considerations was that the categories of cases in which the requisite relationship of proximity with respect to mere economic loss was to be found were properly to be seen as special. Such cases would involve the element of reliance<sup>32</sup> or the assumption of responsibility or a combination of the two.<sup>33</sup> This is what may be called the law of obligations.<sup>34</sup>

Under the law of obligations, a plaintiff trying to cast an obligation on to a defendant in contract must be able to show that the defendant had assumed that obligation either expressly or by clear and necessary implication. In tort and equity, however, an obligation may be imposed essentially because the law sees it as just, reasonable and sound in principle that such obligation be imposed.

<sup>30</sup> *Ultramares Corporation v Touche* [1931] 174 NE 441, 444.

<sup>31</sup> *Sutherland Shire Council v Heyman* [1985] 157 CLR 503.

<sup>32</sup> *Simaan Contracting Co v Pilkington Ltd* (No. 2).

<sup>33</sup> *Hawkins v Clayton* [1988] 164 CLR 539 at 545, 576, 593.

<sup>34</sup> There are two branches to what might be called the law of obligations. The first branch is where obligations are voluntarily or consensually assumed. The second branch is where law imposes them. The first branch represents the field of contract and the second branch the field of tort and equity.



When the parties have already assumed by contract voluntary obligations, it may be unjust for the law to impose additional obligations in tort. Where it was just, reasonable and sound in principle, then irrespective of the contractual obligations, the law must impose the duty. However, where the asserted duty did not exist in contract because it had not been voluntarily assumed either expressly or by implication, then the law should not strive to impose the equivalent duty in tort.

The reluctance of the courts in imposing such a duty was seen in *Edgeworth Construction v Lea & Associates*.<sup>35</sup> The court, in this case, followed the principle of contractual relationships and proximity while in *Bolam v Friern Hospital Management Committee*<sup>36</sup> it was held that a doctor was not negligent if he had acted in accordance with a practice accepted at the time as proper by a responsible body of medical opinion even though other doctors had adopted a different practice.<sup>37</sup> Although this was a case pertaining to medical negligence, the same principles were applied by the High Court in a case involving an architect.<sup>38</sup>

4.3 *The Commonwealth Direction – Effect on Malaysia?*  
In the Malaysian case of *Chin Sin Motor Works Sdn Bhd v Arosa Development Sdn Bhd*<sup>39</sup>, the court had to consider whether the architect who issued a final certificate owed a duty of care to his client. Should the architect have known that the client would solely rely on his certification to make payments to the first defendant (developer)?

The court referred to *Hedley Byrne & Co Ltd v Heller & Partners*<sup>40</sup> where the decision was that there was a duty of care whenever 'the party seeking information or advice was trusting the other to exercise such a degree of care as the circumstances required, where it was reasonable for him to do that and where the other gave the information or advice when he knew or ought to have known that the inquirer was relying on him'. The principle was advanced further in *Dutton v Bognor Regis Urban District Council*<sup>41</sup> where an inspector of the defendant council who had negligently failed to discover that the foundations were inadequate and had given approval for the building of the house to proceed. It was held the defendants were liable. The liability of the defendant was established once it was found that they owed a duty of care in giving the approval to proceed with the building of the house. The duty extended to the purchaser of the house.

<sup>35</sup> (1991) 54 BLR 11.

<sup>36</sup> [1957] 1 WLR 582.

<sup>37</sup> Barbara McDonald and Jane Swanton, in "The Common Lawyer", *The Australian Law Journal*, Vol. 67, 1993, p. 145.

<sup>38</sup> *Florida Hotels Pty Ltd v Mayo* [1965] 113 CLR 588.

<sup>39</sup> [1992] 1 MLJ 23.

<sup>40</sup> [1964] AC 465.

<sup>41</sup> [1972] 1 QB 373.

The court then concluded that the architect owed a duty of care to the client when he issued certificates of final payments. He ought to have known that the client would solely rely on its certification to make payments to the first defendant.

However, in *Kerajaan Malaysia v Cheah Foong Chiew and Ors*,<sup>42</sup> the court held that the defendant was only responsible for his actions as towards his employer in contract and was not responsible in tort to the plaintiff. The damage suffered by the plaintiff was pure economic loss and the defendant could not be held liable in tort for the loss suffered since there was no personal injury nor was other property damaged as a result of the alleged negligence. The court relied on the decision of the HL in *Murphy v Brentwood District Council*<sup>43</sup> and other cases decided subsequently. There had been no negligent misstatement or advice given to the plaintiff by the defendant to bring the case within the reliance principle of *Hedley Byrne*.<sup>44</sup>

#### 4.3 The Commonwealth Direction – Effect on Malaysia?

However, the *Anns*<sup>45</sup> liability in tort, abolished by the House of Lords in *Murphy v Brentwood District Council*,<sup>46</sup> decided as “reasonable and proper” in *Kerajaan Malaysia v Cheah Foong Chiew and Ors*<sup>47</sup> has once again been the subject of heated debate in a trilogy of cases in the Commonwealth.

In *Invercargill City Council v Hamlin*,<sup>48</sup> the New Zealand Court of Appeal held that councils were liable to house owners and subsequent owners for defects caused by the building inspectors’ negligence. The court observed that in New Zealand there was a relationship incorporating a duty of care because of the degree of reliance by house owners on councils to ensure compliance with building codes and full recognition of that reliance by local authorities.

In Canada, the Supreme Court of Canada recognised in *Winnipeg Condominium Corp. No. 36 v Bird Construction Co. Ltd.*<sup>49</sup> that the negligence posed “a real and substantial danger” to the occupants of the

<sup>42</sup> [1993] 2 MLJ 439.

<sup>43</sup> [1990] 3 WLR 414.

<sup>44</sup> *Hedley Byrne v Heller & Partners Ltd* [1963] 2 All ER 575, a case where the defendants, in response to a request by the plaintiffs, had made a representation about the financial standing of a certain corporation. The plaintiffs had relied upon this representation and subsequently suffered financial loss.

<sup>45</sup> *Anns v Merton London Borough* [1972] 2 All ER 492.

<sup>46</sup> [1990] 3 WLR 414.

<sup>47</sup> [1993] 2 MLJ 439.

<sup>48</sup> [1994] 3 NZLR 513.

<sup>49</sup> Unreported decision delivered by the Supreme Court of Canada on 26 January 1995.



building and that the cost of putting the building back into a non-dangerous state was recoverable in tort by the occupants. The rationale for the decision was that persons participating in the construction of a large and permanent structure which has the capacity to cause serious damage to other persons or property should be held to a reasonable standard of care.<sup>50</sup> The court, adopted the minority view expressed in *Rivtow Marine Limited v Washington Ironworks*,<sup>51</sup> a case decided some 232 years ago. In arriving at this conclusion, the court was also guided by the *dictum* of Lord Macmillan in *Donoghue v Stevenson*<sup>52</sup> and *Junior Books Ltd v Veitchi Co Ltd*.<sup>53</sup>

The High Court of Australia in *Bryan v Maloney*<sup>54</sup> had to decide whether under the law of negligence, a professional builder who constructed a house for the then owner of the land owed a *prima facie* duty to a subsequent owner of the house. The duty was to exercise reasonable care to avoid the foreseeable damage, which the respondent had sustained in the present case i.e. a diminution in the value of the house when a latent and previously unknown defect in its footings or structure became manifest.

The court held that clear relationship of proximity existed between the appellant and the first owner with respect to ordinary physical injury to self or property. He was under a duty to exercise reasonable care in the building

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<sup>50</sup> Ian Duncan Wallace, Q.C. in "*Murphy Rejected: Three Commonwealth Landmarks*", (1995) 11 *Const. L.J.* 249-253, 250.

<sup>51</sup> [1974] SCR 1189, 1217. The majority of the Supreme Court endorsed the view that liability for the cost of repairing damage to the defective article itself and for the economic loss flowing directly from the negligence, is akin to liability under the terms of an express or implied warranty of fitness and as it is contractual in origin cannot be enforced against the manufacturer by a stranger to the contract.

However, Laskin J, dissented and his argument was as follows: "the case is not one where a manufactured product proves to be merely defective (in short, where it has not met promised expectations), but rather one where by reason of the defect there is a foreseeable risk of physical harm from its use and where the alert avoidance of such harm gives rise to economic loss. Prevention of threatened harm resulting directly in economic loss should not be treated differently from post-injury cure".

<sup>52</sup> The *dictum* of Lord Macmillan is found at p. 610 of the judgement and reads as follows: "The fact that there is a contractual relationship between the parties which may give rise to an action for breach of contract does not exclude the co-existence of a right of action founded on negligence as between the same parties, independently of the contract, though arising out of the relationship in fact brought about by the contract. Of this the best illustration is the right of the injured railway passenger to sue the railway company either for breach of the contract of safe carriage or for negligence in carrying him ... And there is no reason why the same set of facts should not give one person a right of action in contract and another person a right of action in tort.

<sup>53</sup> [1983] 1 AC 520. This case held that a common law duty of care may be created by a relationship of proximity that would not have arisen but for a contract.

<sup>54</sup> [1995] 2 CLJ 503.



work to avoid a foreseeable risk of such injury. That relationship of proximity and consequent duty of care extended to mere economic loss sustained by the first owner when the inadequacy of the footings became manifest.

In Malaysia, the learned judge James Foong, did a remarkable dissection of the Commonwealth cases when deciding *Dr. Abdul Hamid Abdul Rashid & Anor v Jurusan Malaysia Consultants (sued as a firm) & Ors*<sup>55</sup> made the following observation:

*Now that the court has found that a claim for pure economic loss can be entertained, we shall return to the circumstances of our case*<sup>56</sup>.

His Honour observed that **Invercargill City Council** had rightly refused to follow **Murphy v Brentwood District Council** where the defendant's council had approved the design on the foundation of a house which was found by a subsequent purchaser to be defective. The House of Lords in **Murphy** ruled that the defendant's council owed no duty of care to the plaintiff in respect of the damage.

**Murphy** was decided in a country which has a piece of legislation called the Defective Premises Act 1972. In Malaysia, there was no similar legislation. To adopt the decisions of **Murphy** and **D & F Estates**, both decisions of a jurisdiction with a specific piece of legislation, would be of no application here. To do so, meant that the entire group of subsequent purchasers in this country would be left without relief against errant builders, architects, engineers and related personnel who were found to have discharged their duties negligently. Furthermore, the local authorities are protected from suit under the provisions of section 95 of the Street, Drainage and Building Act 1977. There was no fear that the local authorities' coffers would be drastically reduced through claims for pure economic loss. To adopt the principles in **Murphy** and **D & F Estates** and to deny parties the right to a remedy would be tantamount to meting out gross injustice and that cannot be condoned.

The learned judge duly considered the Malaysian cases of **Kerajaan Malaysia v Cheah Foong Chiew & Anor**<sup>57</sup> and **Teh Khem On & Anor v Yeoh & Wu Development Sdn Bhd & Ors**<sup>58</sup> and observed that the court in the former case had approved **Murphy** while the learned judge in the latter case had adopted the decisions in **Murphy** and **D & F Estates**. The court, in **Teh** was of the view that its decision was founded in the fear of extending the

<sup>55</sup> [1997] 3 MLJ 546.

<sup>56</sup> Ibid at p. 565.

<sup>57</sup> [1993] 2 MLJ 439.

<sup>58</sup> [1995] 2 MLJ 663.



scope of liability “for an indeterminate class”.

In respect of indeterminate class, the learned judge in **Dr Abdul Hamid Abdul Rashid** felt that the High Court Justices in *Bryan v Maloney* best put it<sup>59</sup> as follows:

*The similarities between the relationship between the builder and the first owner and the relationship between builder and subsequent owner as regards the particular kind of economic loss are of much greater significance than the differences to which attention has been drawn, namely the absence of direct contract or dealing and the possibly extended time in which liability might arise. Both relationships are characterized, to a comparable extent by the assumption of responsibility on the part of the builder and likely reliance on the part of the owner. No distinction can be drawn between the two relationship in so far as the foreseeability of a particular kind of economic loss is concerned; it is obviously foreseeable that loss will be sustained by whichever of the first or subsequent owners who happen to be the owner at the time when the inadequacy of the footing becomes manifest.*

## 5. CONCLUSION

It is said that the architect's profession is a growing one and that standards of negligence, care and skill should change as circumstances change. There are new skills and it is necessary for the architect to keep pace with modern developments. The fact remains that if he takes upon himself the design of a building, he cannot escape liability for that design by delegating his duty to the contractor who is going to do the building. When he approves plans submitted by a contractor, he becomes responsible for those plans. If they are not plans that an architect using proper care and skill should have passed, then he remains responsible for those defects that exist in them.<sup>60</sup>

To avoid the creation of liability “for an indeterminate amount for an indeterminate time to an indeterminate class” because it would open numerous claims has merits. On the other hand, community's expectation and demand of responsibility and accountability by third parties who have undertaken a task, to carry out that task with reasonable care and skill and compliance with relevant statutory provisions and by-laws is a moral duty to be fulfilled. Deprivation of relief for pure economic loss suffered by any person is far from upholding this moral expectation.

Any person, professional or non-professional, should and must be held responsible where there was evidence of insufficient regard shown in the discharge of his duties. Policy considerations that ensure the right to life and right to safety must override legal dictates. Courts have an important role to play in formulating the direction of the law in this regard. They must not deny a party a relief because to deny an

<sup>59</sup>(1995) 128 ALR 163.

<sup>60</sup>*London Borough of Hounslow v Twickenham Garden Developments Ltd* (1970) 3 All ER 326.

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effective remedy in an obvious case would seem to imply a refusal to acknowledge the professional's role in the community. In practice, the public relies on professionals and other persons who assume to undertake certain tasks to carry out their duties as is expected of them. Judges will have to fashion an effective remedy for any breach of duty in such a way as to repair the injustice suffered by the disappointed third person.

Grace Xavier  
Langkawi  
29 April 2000



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