CRITERIA IN ASCERTAINING PROFESSIONAL NEGLIGENCE

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. . . . .To my beloved family and friends. . . .

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Abstract

Professional negligence can be defined as malpractice by a professional that not according to reasonable skill and care. Negligence among construction professional may result in damage to property and person or loss of life. It is therefore important for the construction professional to exercise reasonable skill and care when carrying their work in order to minimize the possibility of being charged with negligence. How does the judge determine whether a professional man has exercise the necessary skill in carrying out their work? What are the criteria or the general outline for negligence to be established? The objective of this research is to identify criteria that judges determine whether a professional man is negligent or not when discharging their duty. For the purpose of this study ten case law of negligence from United Kingdom, Malaysia and Singapore has been carefully chosen for the analysis. Case law between 1980 to date was chosen to make sure that the principle of negligence use is up to date. The study suggested that the first method for the judge is to determine the relationship between the plaintiff and defendant and whether they owed a duty of care to the plaintiff. Several criteria on proving duty of care like relationship in tort and contract, proximity, foreseen ability, causation and the qualification of the professional. Then the judge will see whether defendant has breach that duty. The first criteria are the court will check whether the professional has exercise reasonable skill and care, requirement and regulation, assists with expert evidence and regulatory bodies of the relevant profession. The last one is whether the damage must be actual and resulted from the defendant breach. The important from this element is if one of the element is failed to be proved by plaintiff, the negligence cannot be establishes.

Abstrak

Kecuaian professional boleh didifinisikan sebagaik kesalahan praktik oleh professional yang tidak mengikuti piawaian dan tanggung jawab yang berpatutan. Kecuaian oleh profesional dalam industry binaan akan menyebabkan kerosakan kepada harta benda dan kecederaan malah kehilangan nyawa. Oleh itu adalah penting bagi professional pembinaan untuk melakukan kerja mengikut tahap piawaian dan tanggung jawab yang berpatutan untuk meminimunkan kebarangkalian untuk dikenakan tuduhan melakukan kecuaian. Bagaimanakah hakim menentukan sama ada seorang professional telah melakukan kerja dengan mengikuti tahap piawaian dan tanggung jawab? Apakah kriteria atau panduan umum bagi menentukan kecuaian? Objektif kajian ini adalah untuk menentukan kriteria yang digunakan oleh hakim untuk menentukan sama ada seorang profesional cuai dalam melakukan tugasnya. Untuk tujuan kajian ini 10 kes undang-undang dari United Kingdom, Malaysia dan Singapura telah dipilih untuk analisis. Kes undang-undang dalam lingkungan tahun 1980 hingga kini dipilih agar prinsip dan teori bagi kecuaian adalah yang terkini. Kajian menunjukkan bahawa langkah pertama hakim adalah dengan menentukan hubungan antara plaintif dan defendan dan sama ada dia mempunyai tanggung jawab kepada plaintif. Beberapa kriteria dalam membuktikan kecuaian adalah tanggung jawab dalam tort dan kontrak, proximity, foreseenablity, causation dan kelayakan profesional tersebut. Seterusnya hakim akan menilai sama ada defendan telah memecahkan tanggung jawab mereka. Kriteria pertama yang akan dikenalpasti oleh mahkamah dalam menilai sama ada seorang profesional telah melaksanakan kerjanya dengan tahap piawaian dan tanggung jawab yang berpatutan, peraturan dan keperluan, bantuan dari bukti pakar atau badan-badan profesion yang berkaitan. Yang terakhir adalah kerosakan yang berlaku mestilah kerosakan yang sebenar dan berpunca dari defendan memecahkan tanggung jawabnya. Kriteria ini sangat penting kerana jika salah satu darinya tidak dapat dibuktikan oleh plaintif, kecuaian tidak dapat dibuktikan.

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Chapter 1

Introduction

1.1 Background of study

A professional may be described as a person whose work is skilled and specialized. He holds some special qualifications derived from training or experience and conforms to high standard of performance and work ethics. He normally belongs to a regulatory body which prescribes common rules of conduct and standards of practice. Less technically, it may also refer to a person having impressive competence in a particular activity. Because of the personal and confidential nature of many professional services and thus the necessity to place a great deal of trust in them, most professionals are held up to strict ethical and moral regulations.

Professional negligence in the construction industry is an area of developing jurisprudence. Professional negligence involves tedious construction of facts, precedent, industry standards and statutory regulations. It is crucial to comprehend the underlying

legal principles of negligence and how those principles apply to construction professionals[1].

Most construction disputes exhibit the failure of professional men to exercise reasonable skill and care over and above the alleged breach of a specific term of contract. It follows that a project manager who fails to secure adequate insurance coverage, a quantity surveyor who under-estimates the cost of a project, an engineer who fails to warn of an eminent risk and an architect who delivers a faulty design are all in breach of their contractual duty under their respective contracts of engagement, however most importantly they are equally answerable for a breach of their professional obligation to exercise reasonable skill and care in tort[2].

But where there is a situation that involves the use of some special skill or competence, then the test whether there has been negligence or not is not the test of the man on the top of a Clapham omnibus, because he has not got this special skill. The test is the standard of the ordinary skilled man exercising and professing to have that special skill. A man need not possess the highest expert skill at the risk of being found negligent[3].

The usual rules rely on establishing that a duty of care is owed by the defendant to the claimant, and that the defendant is in breach of that duty. The standard test of breach is whether the defendant has failed to match the abilities of a reasonable person. But, by virtue of the services they offer and supply, professional people hold themselves out as having more than average abilities. This specialized set of rules determines the standards

[1] Saraswathy Shirke, 2009 Article, Professional Negligent in Construction Industry, The Malayan Law Journal Article, Accessed on 4 May 2010, <www.Lexisnexis.com>
[2] Ibid
[3] Ibid

against which to measure the legal quality of the services actually delivered by those who claim to be among the best in their fields of expertise.

It is well established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art. Professional negligence is the failure to come up to the standard of a reasonable skilled man of the relevant profession. This is known as the professional standard of care. One of the most important legal principles that affect professional negligent is that of the Bolam test, which has been in use for almost fifty years[4].

Judgment by McNair J in the celebrated case of *Bolam v Friern Hospital Management Committee*[5], namely:

> *"A doctor is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art. A doctor was not guilty if he was acting in accordance with that practice merely because there was a body of opinion which would take a contrary view"*

This is the precursor for the future of professional negligent cases as whereby the Bolam Test is used. When making a decision as to how to treat a patient, a doctor often has more than one choice. The result in the Bolam case stated that even if the doctor chose the least popular of these choices, it did not necessarily amount to medical negligence if support could be found for it. However, this ruling meant that a doctor accused of medical negligence need only to find an expert who would testify to having

[4] You Claim, The role of Bolam test in Medical negligent claims, Accessed on 2 May 2010, <http://www.youclaim.co.uk/Medical-negligence-the-Bolam-test.htm>
[5] [1957] 1 WLR 582

done the same thing. Over the year, the Bolam test sustained significant criticism for being overly reliant on medical testimony[6].

A strong endorsement of this test was provided in the House of Lords by Lord Scarman in the case of *Maynard v West Midlands Health Authority*[7] his Lordship stated:

> *"I have to say that a judge's 'preference' for one body of distinguished professional opinion to another also professionally distinguished is not sufficient to establish negligence in a practitioner whose actions have received the seal of approval of those whose opinions, truthfully expressed and honestly held, were not preferred. ...For in the realm of diagnosis and treatment negligence is not established by preferring one respectable body of professional opinion to another"*

The reason for his Lordship taking such a view is that there are, and always will be, differences of opinion and practice within the medical profession. One answer exclusive of all others is seldom the solution to a problem that requires professional judgment. A court may prefer one body of medical opinion to another, but that does not amount to a conclusion of negligence[8].

The decision in *Bolitho v City and Hackney Health Authority*[9] created a modification to the ruling in Bolam. A Lord Browne-Wilkinson gave the following two statements, which somewhat restrict the boundaries of the Bolam test[10]:

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[6] Op cit, You Claim.
[7] [1985] 1 All ER 635
[8] Ash Samantha and Jo Samantha, Legal Standard of care: A shift from the traditional bolam test, Accessed on 2 May 2010, <psychrights.org/Countries/UK/BolamTest2003.pdf>
[9] [1998] AC 232
[10] Op cit, You Claim.

1. The court should not accept a defense argument as being 'reasonable', 'respectable' or 'responsible' without first assessing whether such opinion is susceptible to logical analysis.
2. However, where there is a body of medical opinion which represents itself as 'reasonable', 'responsible' or 'respectable' it will be rare for the court to be able to hold such opinion to be other than represented.

This Bolitho ruling means that testimony for the medical professional who is alleged to have carried out the medical negligence can be found to be unreasonable, although this will only happen in a very small number of cases[11].

1.2 Statement of Problem

In the vast majority of cases where allegations of professional negligence are made against construction professionals liability will depend upon whether the professional has been proven by all the elements in negligence. What does this mean and how does a Judge, who almost certainly will have no qualifications as a professional decide whether this standard has been achieved?

Because of the Bolam test is also widely used in construction negligence, judges may have a different ground and basis on determining if the negligent is establish. Because of the new cases that modified the Bolam test and using a new principle in determining negligent, does that has any changes on how the judge establish negligent for

[11] Ibid

the construction professional. Then what are the criteria on how the judge establishes whether the professional is negligent or not in carrying their duties and responsibilities? It is important to establish the basis that the judge used because of the different between medical negligent and construction professional negligent that involves more technical issues.

It is noteworthy that unlike doctors, construction professionals are engaged under an express appointment contracts by their clients. Their duty to exercise reasonable skill and care is both contractual and tortuous. Traditionally when assessing a doctor's alleged breach of duty, the court would employ the Bolam direction or test. However in assessing liability of construction professionals for breach of duty the Malaysian courts exhibit a tendency to avoid methodical reference to the Bolam test. Therefore where negligence is assessed based on professional undertakings as per the contract and standard code of ethics or practices of the profession, a detailed analysis of the Bolam tes*t* is unnecessary as the outcome would inevitably be the same[12].

1.3 Previous Study

In the previous research by Chai Voon Chiet in 2004, title Professional liability of the civil engineers. The research was to examine and classify the nature of fault in claims of negligence act by civil engineers. The research only covered the liability of civil engineers and not others professionals and did not really explain on how the court establish negligent[13].

[12] Op cit, Saraswathy Shirke.
[13] Chai Voon Chiet (2004), Professional Liability of Civil Engineers, Master Dissertation, Faculty of Build Environment, UTM.

1.4 Objective of the study

The Objective of this study is to identify the criteria for determining professional negligence among construction professional.

1.5 Scope and limitation

This study is limited only to cases relating to construction professionals and extent only in professional negligence area. The scope of the study will focus to ten case-laws that are relevant to construction cases due to limited time-frame constraint, which will be covering popular known English case-laws, commonwealth country case-laws and Malaysian cases.

1.6 Significance of the study

Merely being under a duty to take care does not of itself give rise to liability in negligence. There must be unreasonable behavior as measured by the court's interpretation of the standard of care demanded of the professional in question. Legally, not every judgment or decision that in the end happens to be proved wrong will amount to negligence. Measurement of the boundary between mistakes or oversights and actionable negligence rests upon the court's perception of what the reasonable professional should have done in a particular set of circumstances. It is the purpose of this

study that trying to establish the common fault against negligence claim that could help to alert the construction professional in their works. This study will help construction professional to understand the legal aspect of their work in the area of negligence. The case analysis that I have discussed here merely provides a general guide and it is unsafe to assume that it offers concrete rules in relation to professional negligence.

1.7 Research Methodology

Methodology of study is vital as a guideline for author to ensure a study can be carried out systematically to achieve the objective. Given the legalistic nature of this study, the approach adopted in this research is case law based. The study will be carried out in two approaches using literature review and case-laws study. Firstly, all literature review consisting of books, journal, article and internet sources will help to identify the legal meaning of the pertinent issues that involved in professional negligence so as to provide a platform from which the developments of professional in construction industry can be explained and assessed. From the issue, then the objective of the study is identifying the criteria for determining professional negligence among construction professional.

To give more understanding on the theory and principle of professional negligence, collecting more information regarding the subject matter is important. The entire book or article regarding the theory of and principle of negligence, liability and professional is taken from PSZ UTM and internet sources. All law cases will be taken from Lexis Nexis via Malayan Law Journal. It is important to know the background of this study and the implication to construction professional.

The case-laws analysis, on the other hand, will help to give a better understanding of the judicial interpretation in assessing whether a particular default is subject to negligence in any given situation. Ten law cases are chosen between years 1980 to 2010 in order for the theory or principle in professional negligence is up to date. The law cases are taken from United Kingdom, Malaysia and Singapore in the area of professional negligence. By going through the case law it help in providing a more precise view on the approach in determining professional negligence by the court and achieving the objective of this study.

This study is consisting of five chapters. The first chapter is an introduction of background of study, statement of problem, objective, scope of study and methodology is located. In the second chapter contained all the legal principle of negligence, case law and principle of professional negligence by case law. The third chapter it is consisting of the definition of professional and the liability in the profession. The fourth chapter is an analysis of selected law cases in determining the criteria for negligence. The fifth and last chapter is the conclusion from the previous chapter. In addition, recommendation and further study will be suggested. The author will also review the whole process of the study to identify whether the objective of the study have been achieved.

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