

**PROFESSIONAL LIABILITY OF CIVIL ENGINEER**

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## ABSTRAK

Sejauh mana tahap berjaga-jaga yang munasabah dalam industri pembinaan merupakan isu yang subjektif. Secara umumnya, makkamah akan menguruskannya berpandukan kes-kes terdahulu sebagai asas keputusan mereka berdasarkan situasi kes masing-masing. Jadi, adalah sukar untuk menggariskan sempadan dan mengaplikasikan keputusan sesuatu makkamah secara menyeluruh untuk menjustifikasikan setiap kes. Kes perundangan berkembang daripada satu kes kepada kes berikutnya berpandukan kes yang terdahulu, dari itu keputusan setiap mahkamah adalah terhadap pelbagai kes praktikal dan pada kapasiti yang berlainan adalah fleksibel untuk memastikan liabiliti yang ditanggung oleh jurutera awam adalah setara dengan tingkah laku yang sepatutnya. Tesis ini bertujuan untuk menyiasat kriteria tuntutan terhadap kelalaian jurutera awam dengan mengkaji sepuluh buah kes yang popular dalam bidang ini. Latarbelakang kesalahan yang telah disenaraikan menunjukkan kesalahan yang biasa berlaku dalam perlakuan jurutera awam. Secara umum, apa yang telah diperolehi dari kajian ini membuktikan bahawa enam daripada sepuluh buah kes melibatkan isu-isu kesilapan penyiasatan tapak dan tidak melakukan ujian tanah. Empat buah yang lainnya adalah berkaitan dengan isu kegagalan menasihati klien, di mana separuh daripadanya bertujuan untuk mengurangkan kos pembinaan. Manakala isu-isu berkaitan rekabentuk dan mengewal selia, ianya jarang difailkan. Walaupun banyak kes-kes terdahulu yang dirujuk untuk menentukan tahap berjaga-jaga yang munasabah tetapi adalah sukar untuk menginterpretasi kes mana yang diikuti oleh hakim untuk meramal keputusannya. Kesimpulannya, mengamalkan praktis yang munasabah seperti yang biasa dilakukan oleh professional yang setaraf dan tidak memandang ringan sebarang proses adalah penyelesaian yang bijaksana.

## ABSTRACT

The extent of the standard of care in construction is a subjective issue. The court would deal with it on a case to case basis in respect to the circumstances of each case. It is therefore hard to draw a line and apply it generally to justify the action in question. The case-law, develop from case to case under the guidance of previous precedents, thereby has provides the flexibility in handling the infinite variety of practical problems and the capacity to keep liability in touch with prevalent expectations of conduct. This thesis is seeks to examine the nature of claim for negligence act against the civil engineer by study ten popular cases in the field. The nature of the fault would be listed out to show the most common fault to be found in the action. Generally, the finding showed that six out of ten cases were involved in the issue of site examination and were generally found in related to an omission to conduct soil investigation. Four other cases were involved in the issue of failure to advice the client, for which half of it were in fact trying to cut down the construction cost for the client. In term of design and supervision, these issues were among the least involved in the action filed. Although extensive precedents would be referred in judging the standard of care but the reinterpretation by the judges, however, would be difficult to predict on the outcome of the negligence cases. To summarize, keep abide to the normal practise without taking lightly of any procedure is a foolproof solution.

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## CHAPTER 1

### INTRODUCTION

#### 1.1 Background

In *Eckersly v. Binnie & Partners*,<sup>1</sup> in a passage which could be applied equally to any construction professional, Bingham LJ commented on the required standard of performance for consulting engineers thus:

*“A professional man should command the corpus of knowledge which forms part of the professional equipment of the ordinary member of his profession. He should not lag behind other ordinarily assiduous and intelligent members of his profession in knowledge of new advances, discoveries and developments in his field. He should be alert to the hazards and risks inherent in any professional task he undertakes to the extent that other ordinarily competent members of the profession would be alert. He must bring to any professional task he undertakes no less expertise, skill and care than other ordinarily competent members would bring but need bring no more. The standard is that of the reasonable average. The law does not*

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<sup>1</sup> [1988] 18 Con LR 1.

*require of a professional man that he be a paragon combining the qualities of polymath and prophet.”*

Civil Engineers, is among the professionals, involved in the construction business in the design of buildings and structures. It is the wish of all the professionals in the construction industry that their effort in the design after years of training and practicing would become a product that wholly recognized and acknowledged by the society. However, it would not be difficult to foresee the situation for which a faulty design could bring to the engineer. It will be sure that no engineer would consciously design a bridge or a multi-storey block of flats liable to collapse, but sometimes the effects of a design or construction problem can come to light in a most dramatic way, like the Highland Tower Case in Kuala Lumpur, which is actually due to negligence of act of omission in doing reasonable skill and care that required to be on any of the professionals.

After all, negligence is defined as the absence of the care which a prudent and reasonable man would take in the circumstances. But in fact, Erle C.J. in *Ford v. London & South-Western Rly. Co*<sup>2</sup>. has said:

*“Negligence is not to be defined under the circumstances of each case and also because it involves some inquiry as to the degree of care required under the circumstances of each case and also because there are always so many qualifications to every general statement of legal doctrine, that a definition leaves too many things undefined.”*

But the definition given by Baron Alderson in the earlier case of *Blyth v. Birmingham Water Works Co.*<sup>3</sup> has a more general way to apply:

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<sup>2</sup> [1862] 2 E. and F.730

<sup>3</sup> [1850] 11 Exch.781

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

The duty to take care to avoid doing injury is owed to all who are likely to suffer injury if the duty is neglected, whatever form the injury takes.<sup>4</sup> In *Caswell v. Powell Etc Collieries*<sup>5</sup> Lord Wright said:

*“Negligence is the breach of that duty to take care, which, the law requires, either in regard to another’s person or his property, or where contributory negligence is in question of the man’s own person or property and the degree of want of care which constitutes negligence must vary with the circumstances. What that degree is, is a question for the jury or the court in lieu of a jury. It is not a matter of uniform standard. It may vary even in the case of the same man. Thus a surgeon doing an emergency operation on a cottage table with the light of a candle might not properly be held guilty of negligence in respect of an act or omission which would be negligence if he were performing the same operation with all the advantages of the severe atmosphere of his operating theatre; the same holds good of the workman. It must be a question of degree. The jury have to draw the line where mere thoughtlessness or inadvertence or forgetfulness ceases, where negligence begins.”*

The consequences of the problems resulted from negligence act, or as a breach of duty to take care resulting damage to another, can be severe in both human and term of cost. In the event of any court case regard to defective building that hold the direct responsibility of the engineer, the case-laws are then used to judge the nature of the legal duties to which professional engineers might owe to their clients and to other persons, and the extent to which professional might be held liable to pay

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<sup>4</sup> *Cunard & Anor. V. Antifyre Ltd.* [1932] All ER Rep. 558

<sup>5</sup> [1939] 3 All ER 722, 737

damages, and of the special rules which the law would allowed certain kinds of claims to be made and to prevent certain kinds of claims being made in certain circumstances.

## 1.2 Problem Statement

Negligence actions against the professionally qualified have multiplied in recent years<sup>6</sup>. This could be the trend as a reflection of the growing expectations of the general public and the greater awareness of ways to challenge situations seen as unsatisfactory.

Although there has been considerable statutory activity with regard to the construction industry, most of the law of negligence remains a judicial creation. This fact proves both a strength and a difficulty when trying to assess whether a particular engineer is subject to liability in any given situation. Allowing the law to develop from case to case under the guidance of previous precedents should provide flexibility in handling the infinite variety of practical problems and the capacity to keep liability in touch with prevalent expectations of conduct. However, the reinterpretation of the judges on previous precedents by drawing distinctions which may be artificial can make predicting the outcome of negligence cases a chancy business.<sup>7</sup>

The extent of the “standard of care” is a subjective issue that could in fact induce a significant effect when come to decision in the court case involve in the law of negligence. It is the focus of this study to establish the nature of the common

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<sup>6</sup> Ben Pattern on Professional Negligence In Construction. (2003)

<sup>7</sup> Ray Cecil on Professional Liability (2<sup>nd</sup> Ed)

negligence liability that arisen in the aspect of engineering practice which would concern the engineers and the society.

### **1.3 Objective of the study**

The purposed of this study is to examine and classify the nature of fault in claims against negligence act by civil engineer through the studying of ten case-laws.

### **1.4 Scope and limitation**

The scope of the study will focus to ten case-laws that are relevant to building engineering cases due to limited time-frame constraint, which will be covering popular known English case-laws, commonwealth country case-laws and Malaysian cases. Although duty of care in this particular field involving much of issues like pure economic loss, damages assessment, breach of warranty, privity of contract and etc., but only standard of care in engineering practice is of the concern in this study.

## **1.5 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 behaviour 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 civil engineer in their works.

## **1.6 Research Method**

The study will be carried out in two approaches via literature review and case-laws study. Firstly, the literature review will help to identify the legal meaning of the pertinent issues that involved in professional liability so as to provide a platform from which the developments in Malaysian engineer's liability can be explained and assessed.

The case-laws study, on the other hand, will help to give a better understanding of the judicial interpretation in assessing whether a particular engineer is subject to liability in any given situation. By going through the precedents tend to help in providing a more precise view on the approach of the court.

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