Judges: "Lions under the throne"

"The judges are not beholden politically to any Government. They owe no loyalty to ministers. They have longer professional lives than most ministers. They, like civil servants, see Governments come and go.

They are "lions under the throne" but that seat is occupied in their eyes not by Kings, Presidents or Prime Ministers but by the law and their conception of the public interest.

It is to that law and to that conception that they owe their allegiance. In that lies their strength."

—HRH Sultan Azlan Shah
The Right to Know

The courts and Rule of Law

> “ The courts will serve both the judicial tradition and the Malaysian people most usefully when it keeps to a path of duty more consistent with its real expertise—insisting upon a due regard to the Rule of Law, enforcing the plain command of the Constitution, but respecting the judgment of the other branches of government always and most especially in those matters of high political decision that are the peculiar responsibility of the legislative and executive authorities. ”

—HRH Sultan Azlan Shah
Checks and Balances in a Constitutional Democracy

HRH Sultan Azlan Shah

His Royal Highness as Royal Patron

His Royal Highness Sultan Azlan Shah is the Royal Patron, amongst others, of the following student, graduate or professional associations: The Malaysian Law Society in Great Britain and Eire; The British Graduates Association of Malaysia; and The Academy of Medicine of Malaysia.

Recently, in 2004, His Royal Highness became the Royal Patron of LawCare, a benevolent fund to help members of the Bar Council and their families.

"A doctor's duty to prevent the spread of contagious diseases may outweigh his duty to a particular patient. An accountant, certifying the accounts of a firm of solicitors or auditing the accounts of a public company may find himself obliged to act contrary to the immediate interests of his clients. Similarly, a lawyer is under a professional obligation to draw the court's attention to relevant authorities, even if they are adverse to his client's case. Architects have a responsibility for public safety and environmental considerations, which go beyond their immediate duty to the client. "

—HRH Sultan Azlan Shah
Engineers and the Law: Recent Developments

8 Engineers and the Law: Recent Developments

Second Public Lecture
Institution of Engineers, Malaysia
Kuala Lumpur, 31 March 1989

I am indeed honoured to be invited by your Institution to deliver this Second Public Lecture this evening. I am given to understand that the speaker for your First Public Lecture was Tun Hussein Onn. For your Second Public Lecture, you have again invited another member of the honourable profession. This seems to suggest that engineers have a high regard for the law and therefore speaks well for the future of the profession.

I was asked to address you tonight on the topic "Engineering and Law" but on reflection, I have decided to change the topic slightly to "Engineers and the Law: Recent Developments" as some of the points which I wish to address this evening are not only current but topical.

Ethical conduct

Every professional practising his profession is expected to comply with certain standards or norms which are regarded as the proper conduct expected of him in the discharge of his duties as a member of a profession. These standards and norms are the basis for the ethics of the profession. These so-called ethics are however different from statutory rules and regulations in force which regulate the practice of a profession and the conduct of the professional. Whilst a breach of these rules or regulations results in some form of sanction which are normally spelt out in the rules or regulations, the breach of a particular ethical conduct does not. This is so because a particular conduct by a member of the profession, which may be regarded as improper by others in the profession, may not amount to a misconduct as it does not contravene any of the specified rules and regulations.

Every professional practising his profession is expected to comply with certain standards or norms which are regarded as the proper conduct expected of him in the discharge of his duties as a member of a profession.

Unlike rules and regulations, the parameters of ethical conduct are not capable of being clearly defined. Ethics depend on the good conscience of an individual. This, of course, means that in most cases, what conduct amounts to a breach of ethics become a matter of subjective interpretation.

This uncertainty invariably results in the formulation by professional bodies of guidelines which are regarded as the proper

basis for the conduct or exercise of the profession. However, there are major limitations in the formulation of these codes of ethics. It is indeed difficult to define in detail every act or conduct of the practice of the profession which is to be regarded as unethical. The variegation and complexities of human behaviour and conduct often prove incapable of being ascertained with certainty. No sooner is a set of conduct spelt out as being unethical than new situations which were not anticipated arise.

It is difficult to define in detail every act or conduct of the practice of the profession which is to be regarded as unethical. The variegation and complexities of human behaviour and conduct often prove incapable of being ascertained with certainty. No sooner is a set of conduct spelt out as being unethical than new situations which were not anticipated arise.

Furthermore, changes in circumstances, values and more recently the rapid development of technology have contributed to the difficulty in the formulation of a comprehensive code of ethics to govern any profession. Professional bodies have therefore to be content with drafting codes of ethics in broad terms. Most of them stipulate, without spelling out the details, that every member of the professional body should conduct himself in an ethical manner so as not to bring disrepute to the profession.

I notice that the Institution of Engineers Malaysia has also made Regulations on Professional Conduct,[1] and whilst admitting that the Regulations are "written in general terms expressing broad ethical principles", it enumerates 15 different situations which all

1
The Institution of Engineers, Malaysia, Constitution and By-laws (1984), pages 23 and 24.

engineers need to comply with. It points out that these 15 situations are those which are "frequently encountered". In situations not covered by the Regulations, the Regulations provide that:

> Members are required to order their conduct in accordance with the principle that, in any conflict between a member's personal interest and [the] fair and honest dealing with other members of the community, his duty to the community must prevail.

Tonight, I wish to emphasise on two important aspects of ethical conduct, particularly relating to engineers:

(a) engineers' personal interest and his duty to others; and
(b) conflict between engineers' interest and his duty to the community.

Engineers' personal interest and his duty to others

The Regulations rightly point out that many ethical issues are a consequence of conflict between "a member's personal interest and his duty to others". This duty, of course, is not limited to that of a fellow engineer or to his employer. Such a duty, I would add, extends to all others whom the engineer knows or is likely to know would be affected by his particular conduct in the particular situation.

For example, of some concern in recent years has been the infringement of the copyright laws in connection with plans and drawings. Though the Copyright Act 1987 [2] makes it an offence to infringe a copyright belonging to another, there may arise situations which, though not amounting to an infringement under the Act,

2 Act 332.

affect the rights of the owner of the copyright or some third party adversely. In such cases, the engineer or the architect should adopt a course of action which does not adversely affect the rights of the copyright owner, although such person is not his employer or fellow engineer.

> Many ethical issues are a consequence of conflict between "a member's personal interest and his duty to others". Such a duty, I would add, extends to all others whom the engineer knows or is likely to know would be affected by his particular conduct in the particular situation.

In this connection the decision of the Privy Council in the recent case of *Interlego AG v Tyco Industries Inc & Ors*[3] may be of particular interest to you.

In this case, the appellant company owned the intellectual property rights for a well-known children's model-building system consisting of interlocking plastic bricks called *Lego*. The appellant had purchased those rights from the estate of the originator of the system and its associate companies manufactured and marketed the system throughout the world. In 1983 the respondents, by a process known as reverse engineering, copied elements of the appellant's system with the aim of manufacturing and marketing a compatible but competing system. The respondents' reverse engineering indirectly copied the drawings from which the appellant's bricks were made. The respondents, through a subsidiary, notified the appellant of their intention to manufacture their competing system in Hong Kong and the appellant brought an action in Hong Kong seeking an injunction restraining the respondents from infringing copyright in its design drawings.

3 [1988] 3 All ER 949.
See also *Dronpool Pty Ltd v Hunter* (1984) IPR 310, decision of the Supreme Court of New South Wales;
Manfal Pty Ltd v Longuet (1983) 3 BCL (Australia) 105, decision of the Supreme Court of Queensland; and
British Leyland Motor Corporation Ltd v Armstrong Patents Co Ltd [1986] AC 577, HL.

Leaving aside the technical issues relating to the Copyright Act, one of the issues which the Privy Council had to consider was whether a copy of a design was capable of attracting copyright. Lord Oliver of Aylmerton who delivered the judgment of the Privy Council, after considering a number of leading cases, pointed out that:

> Originality in the context of literary copyright has been said in several well-known cases to depend on the degree of skill, labour and judgment involved in preparing a compilation.[4]

He however cautioned that:

> To apply that, however, as a universal test of originality in all copyright cases is not only unwarranted by the context in which the observations were made but palpably erroneous. Take the simplest case of artistic copyright, a painting or a photograph. It takes great skill, judgment and labour to produce a good copy by painting or to produce an enlarged photograph from a positive print, but no one would reasonably contend that the copy, painting or enlargement was an "original" artistic work in which the copier is entitled to claim copyright. Skill, labour or judgment merely in the process of copying cannot confer originality.[5]

The Law Lord therefore concluded that copying per se, however much skill or labour may be devoted to the process, could not make the copy an original work. "A well executed tracing", he added, "is the result of much labour and skill but it remains what it is, a tracing".[6]

This case illustrates the point that a copy of another's design does not attract copyright. In other words, by making a copy of a

4
[1998] 2 All ER 949 at 971.

5
Ibid.

6
Ibid at 972.

design or drawing, one cannot claim originality. It still remains the work of another and not the copier's, though for purposes of the relevant copyright laws applicable in the instant case, the owner of the copyright was held, for technical reasons, not to hold the copyright any longer.[7] However, the case raises certain important ethical issues: whether it is ethical for another to copy an original design merely on the grounds that no copyright exists. Is it ethical for someone else to exploit the fruits of labour of another?[8]

This situation is merely one example of a conflict which an engineer may probably face. I am sure that you may think of numerous other situations where an engineer is put in conflict between his own interest and that of not only his employer or fellow engineer but of some other third party whom the engineer concerned may not even have a link with. Such issues are of course ethical ones which can only be resolved by the exercise of fair and honest judgment on the part of the engineer. I believe that every engineer in the exercise of his profession should always be conscious of the consequences of any course of action which he chooses to adopt in any particular situation. Through such efforts, he will be able to make a rational decision which may not transgress on the rights or interests of other parties.

Conflict between engineer's interest and his duty to the community

Sometimes the conflict which the engineer encounters may not be a conflict of his own interest to that of the interests of some defined third party. It may also arise against the State or the community. I have in mind the interest of the nation in the preservation of its natural resources. The wasteful destruction of the natural

7
See also "Copyright and Architecture", (1987) 3 *Building and Construction Law* (Australia) 94.

8
See generally, Flint, Thorne and Williams, *Intellectual Property: The New Law*, chapter 7, "Moral Rights", 1989, Butterworths; and Hodson, *The Ethics of Legal Coercion*, 1983, Reidel Publishing Company, Holland.

resources, the destruction of wild life and the damage to the environment which inevitably affects the enjoyment of life of the people of the nation should also be borne in mind. Sometimes in the name of development, we tend to lose sight of some of these aspects of the environment. I know that in certain cases, some fine old buildings which have been part of our national heritage had been destroyed to make way for a multi-storey modern building. With such destruction, we lose a part of the nation's heritage. We are not living in a country where land is regarded as scarce. We are blessed with plentiful land which can be developed without the destruction of its natural beauty or of our own heritage.

The wasteful destruction of the natural resources, the destruction of wild life and the damage to the environment which inevitably affects the enjoyment of life of the people of the nation should also be borne in mind. Sometimes in the name of development, we tend to lose sight of some of these aspects of the environment.

Let me give you another example on how the actions of certain professionals have affected the enjoyment of life of many others. I have in mind the pollution of the sea in certain popular holiday seaside resorts. I understand that as a result of the designs and plans of the hotels constructed on the seaside resorts, the waste from these hotels is discharged into the sea. As a consequence, the beaches and the sea around it have become so polluted that families are no longer able to enjoy the clean and clear water which formed part of the natural beauty of the place. Professionals who are involved in the construction of such hotels by the sea owe a duty to ensure that no such damage is caused to the environment.

They should not always take a particular course of action merely because it is expedient or because it reduces the construction costs. The long term effects have always to be taken into consideration.

I chose to give these examples because I regard these as important ethical issues. We tend to associate ethical issues only with those situations in which a person has a conflict as to whether to take a certain course of action which would either directly or indirectly be of immediate benefit to him alone, or with cases where the conflict has been resolved by the exercise of a judgment which results in a personal monetary gain to the person concerned. But as we know, the obtaining of a personal benefit is only one aspect of the ethical issues involved in the conduct of your profession.

In this regard, I may point out that many of the ethical issues encountered by doctors relate to the question of values rather than one of personal benefit. The conflict as to whether to conduct an abortion, switch off the life-support machine or the issue of euthanasia and many others relate to the question of society's attitude towards life and the importance of it. These issues do not pertain to any conflict encountered by doctors as to their own personal interests, but rather one of the patient and society.

> All professionals, be they engineers, doctors, lawyers and others, should be committed to certain moral principles which go beyond the general duty of honesty.

Therefore in conclusion, I would emphasise that what I have said is applicable not only to engineers but to all professionals, be they engineers, doctors, lawyers and others who should be

committed to certain moral principles which go beyond the general duty of honesty. They are expected to provide a high standard of service for its own sake. They are expected to be particularly concerned about the duty of confidentiality. Their wider duty to the community may on occasions transcend the duty to a particular client or patient. For example, a doctor's duty to prevent the spread of contagious diseases may outweigh his duty to a particular patient. An accountant, certifying the accounts of a firm of solicitors or auditing the accounts of a public company may find himself obliged to act contrary to the immediate interests of his clients. Similarly, a lawyer is under a professional obligation to draw the court's attention to relevant authorities, even if they are adverse to his client's case. Architects have a responsibility for public safety and environmental considerations, which go beyond their immediate duty to the client.[9]

Registration

Let me now move on to another area of the law relating to engineers. That is the requirement of registration of engineers.

Like many other laws relating to the practice of professionals, the Registration of Engineers Act 1967[10] provides that only registered professional engineers may practise or carry on the business as an engineer.[11] This, of course, means that any person who is not registered under the Act cannot render any service for remuneration in his professional capacity as an engineer. A person who practises as an engineer but who is not registered as an engineer under the Act commits an offence under section 25 of the Act.

9
Examples taken from Jackson and Powell, *Professional Negligence*, 2nd edition, 1988, Sweet & Maxwell.

10
Act 138, Revised 1974, as amended by the Registration of Engineers (Amendment) Act 1987, Act A662.

11
See section 7.

One of the problems which has arisen relating to non-registered engineers has been the practice of employing foreign engineers during the rapid expansion of the construction industry, especially the construction of multi-storey buildings. Foreign engineers having wide expertise in the construction of such buildings were appointed by certain owners as consultant engineers to these projects. These engineers were employed in addition to the local engineers. In some other situations, some professionals were employed from abroad particularly to deal with mechanical and electrical works of preparing plans and drawings.

The question arises as to the effect of such contracts of employment: is the contract of employment between the foreign engineer (or for that matter any person who is not registered as an engineer under the Act), and the employer illegal such that the engineer is not entitled to recover his fees from the employer?

Two cases from Singapore appear to provide the answers to these questions. In *Raymond Banham & Anor v Consolidated Hotels Ltd*,[12] the plaintiffs, partners of a firm of consulting mechanical and electrical engineers practising in Hong Kong, rendered professional services in respect of the construction of the Hotel Sheraton project owned by the defendants. This was pursuant to a contract made between the plaintiffs and the defendants. The plaintiffs, the engineers, brought the present action claiming the sum of about $110,000 being 85% of the value of the work completed by them. The defendants refused to pay the said sum and contended that the said contract was illegal and unenforceable as the plaintiffs were not registered under the Professional Engineers Act of Singapore.[13]

The court held that though the drawings and plans were prepared in Hong Kong, the plaintiffs must be regarded as having

12
[1976] 1 MLJ 5, HC.

13
Cap 225.

been engaged to provide professional engineering work in Singapore. The Hong Kong engineers, not having been registered, were held to have contravened the Professional Engineers Act and as such, it was held the services performed by the plaintiffs under the said contract were illegal and the contract unenforceable, notwithstanding the defendants' own participation in the illegal contract. The court accordingly held that the plaintiffs were not entitled to recover the said sum of money. The court in delivering the judgment pointed out:

> … to hold that the contract is illegal ab initio may appear to be harsh but such is the position with regard to illegal contracts where both parties have contravened the law and the plaintiffs … are left without remedy. Ignorance of the law or even innocent participation in such a contract cannot avail the plaintiffs … It should be remembered that even an overseas lawyer who intends to appear in one case only in Singapore has to be admitted to practise as an advocate and solicitor under section 18 of the Legal Profession Act (Cap 217).[14]

Similarly in *John B Skilling & Ors v Consolidated Hotels Ltd*,[15] the Singapore Court of Appeal also held that the agreement between the respondent, a registered company incorporated in Singapore and the appellants, a firm of consultant engineers practising in the United States of America and who were not registered under the Singapore Professional Engineers Act, was illegal. As such, the claim of the appellants for their fees for professional services rendered to the respondents was dismissed as it was based on an illegal contract.

There is no doubt that these decisions may appear to be harsh decisions. However, it appears that the plaintiffs in these two cases

14
[1976] 1 MLJ 5 at 8.

15
[1979] 2 MLJ 2. See comments on this case in (1988) Mal LR 420.

should have succeeded on a quantum meruit claim. It may be said that though the contract was made in contravention of the Act, the plaintiffs had conferred on the defendants some benefit for the services rendered and such benefits were of considerable value. Whilst the plaintiffs were rightly allowed not to profit from the contract by its enforcement, a claim in quantum meruit, which is essentially a restitutionary claim for the work done, should have been allowed.

Harsh as it may seem to be, the cases should be considered as a warning to engineers who are not registered under the Registration of Engineers Act. In this regard, the provisions of section 10A of the Registration of Engineers Act which was introduced in 1987 by an amendment[16] providing that foreign engineers may obtain temporary registration under the Act before providing professional services, should be brought to the attention of foreign engineers who intend to provide services on an ad hoc basis to employers in Malaysia.

Professional negligence

I would now like to move on to another aspect of the law which I think is of growing importance. This is the question of professional negligence and liability generally.[17]

Unlike doctors or lawyers who are often given prominence in the media for any professional misconduct, one rarely hears or reads of an engineer who is being sued for professional negligence. You would agree with me that this is not because engineers are never negligent but more so because of the very nature of the profession: the services of an engineer become part of the services of a team

16
Act A662.

17
See generally Partlett, *Professional Negligence*, 1985, Law Book Company Ltd (Australia);
Jackson and Powell, *Professional Negligence*, 2nd edition, 1987, Sweet and Maxwell, London;
Buckley, *The Modern Law of Negligence*, 1988, Butterworths, London;
Dugdale and Stanton, *Professional Negligence*, 2nd edition, 1989, Butterworths.

of other professionals, like architects, surveyors, contractors. An individual who needs the services of a doctor or a lawyer usually enters into a one-to-one relationship with the other. However, especially in construction contracts, where an engineer's services are required, the employer would necessarily have to employ the services of architects, surveyors and contractors all at the same time for the same project.

One rarely hears or reads of an engineer who is being sued for professional negligence. You would agree with me that this is not because engineers are never negligent but more so because of the very nature of the profession: the services of an engineer become part of the services of a team of other professionals.

This does not mean that there is no individual liability imposed on any one of these professionals who form the team. Besides a separate contractual relationship which exists amongst the parties, there is also the general duty of care imposed on each of the parties. However, in reality, where for example there has been a defect in a building, the client would have been advised (by his lawyers, no doubt) that the client should sue all parties concerned so that if liability cannot be established against one, there may be the likelihood that he may succeed against the others. It is for this reason that in building contracts, the owner does not institute legal proceedings against the engineer alone.

In order to determine the liabilities of the various parties to a construction contract, it is necessary to analyse in detail the entire

contractual matrix in a construction operation, and to determine the intentions of the various parties, to decide whether a duty of care is owed by one person in the matrix to another who has no contractual relationship with him. I shall, however, restrict our discussion in the main to consider the liabilities of the engineer alone. What are the circumstances under which an engineer may be held liable?

The term engineer as provided for in the Registration of Engineers Act 1967 [18] refers to a civil, electrical, mechanical or structural engineer who is registered under the Act. The contract of employment of each of them would, of course, be different, depending on the nature of the services to be rendered. For example, the duties of a civil engineer under a building contract would be different from that of an electrical engineer employed by a computer company.

I do not propose to deal with the liability of engineers under the various types of contracts which they may possibly enter into. However, what I propose to do is to spell out the broad principles of law which are generally applicable to most of these contracts.

The professional liability of engineers falls into two categories:

(i) liability in contract; and
(ii) liability in tort for negligence.

The main difference between these two types of liabilities is that whilst the liability in contract is limited only to the contracting parties, a liability in tort is wider in that any person who has suffered damage as a consequence of the engineer's negligence may have a cause of action against him.

18
Act 138, Revised 1974, as amended by the Registration of Engineers (Amendment) Act 1987 (Act A662).

Another difference which may have important practical consequences between liability in contract and liability in tort is the application of the period of limitation. There are specific rules applicable to the law of limitations. As these tend to be rather technical, I only wish to draw your attention to the Limitation Act 1953[19] which contains the different periods of limitation for the various causes of action.[20] For purposes of convenience, I shall consider the liability of an engineer, first towards his client and secondly to other third parties.

Liability to client

An engineer's duty to his client may arise in contract or independent of contract. Usually the rights and obligations (duties) will be spelt out expressly in the contract entered into between the engineer and the employer. Clearly, any breach of these duties will give rise to a claim. Therefore where an engineer had been engaged to advise, examine the site, prepare designs, drawings and plans and to supervise the project, any failure on the part of the engineer to perform any of these duties will enable the employer to sue him for breach of contract.

Implied duties

Though, of course, most of the duties will clearly be spelt out in the contract, I would like to stress that the engineer's duties may not always be restricted to those expressly provided for in the contract. Other duties may be implied through the application of the common law rules for the implication of the terms of a contract. For example, in the absence of a provision to the contrary, there may be an obligation upon the engineer who contracts to design and supervise the execution of his design, to review his design as

19
Act 255, Revised 1981.

20
See also the important case of *Pirelli General Cable Works Ltd v Oscar Faber & Partners* [1983] 2 AC 1, HL, a case dealing with the liability of a firm of consulting engineers.

and when necessary until the works are completed.[21] A further term which is commonly not expressly provided for in contracts but which is always implied in contracts where professionals are employed for a specific purpose is that the professional will achieve the result for which he has been engaged for. As Lord Scarman, relying on *Samuels v Davis*,[22] pointed out:

> One who contracts to design an article for a purpose made known to him undertakes that the design is reasonably fit for the purpose.[23]

> The engineer's duties may not always be restricted to those expressly provided for in the contract. Other duties may be implied through the application of the common law rules for the implication of the terms of a contract.

In *Independent Broadcasting Authority v EMI and BICC Construction Ltd*,[24] a television aerial mast, which had been designed by the defendant structural engineers, collapsed. Three members of the House of Lords were inclined to the view that the designers, who were held liable for negligence, would still have been liable even if they had not been negligent. The clearest statement to this effect was again made by Lord Scarman. He referred with approval to *Samuels v Davis* and expressed himself as follows:

> The extent of the obligation is, of course, to be determined as a matter of construction of the contract. But, in the absence of a clear, contractual indication to the contrary, I see no reason why one who in the course of his business contracts to design, supply, and erect a television aerial mast is not under an obligation to

21 See *Chelmsford DC v Evers* (1983) 25 BLR 99.

22 [1943] KB 526.

23 *Independent Broadcasting Authority v EMI and BICC Construction Ltd* (1980) 14 BLR 1 at 48.

24 (1980) 14 BLR 1, HL.

> ensure that it is reasonably fit for the purpose which he knows it is intended to be.[25]

The law also implies a term in every contract entered into by a professional that he will exercise reasonable skill and care. Though this common law principle has now been embodied in section 13 of the Supply of Goods and Services Act 1982 in England, it still remains a term implied by the common law of Malaysia. In the case of *Greaves & Co v Baynham Meikle*[26] (a claim against consulting engineers) Lord Denning MR stated:

> Apply this [principle] to the employment of a professional man. The law does not usually imply a warranty that he will achieve the desired result, but only a term that he will use reasonable care and skill. The surgeon does not warrant that he will cure the patient. Nor does the solicitor warrant that he will win the case.[27]

Malaysian common law

At this stage, I wish to digress from the main topic under discussion to say a few words on the common law.

It is often thought that any reference to the common law in Malaysia especially in the field of commercial transactions still means the common law of England. I would like to point out that such a view is erroneous. It must be stressed that in the present day context, any reference to the common law in Malaysia must mean the common law of Malaysia—that is the body of law which over the years since a structured legal system was introduced in Malaysia has been applied in Malaysia as part of the laws of Malaysia.

25
Ibid at 47–48.

26
[1975] 1 WLR 1095, CA.

27
Ibid at 1100.

Whilst it may be true to say that in the early days of the development of Malaysian law, reliance was placed, by virtue of the Civil Law Act, on English law, this is no longer the position. When the Civil Law Act was first introduced in 1878 to the Straits Settlements,[28] the courts were then compelled in some situations to rely on English law as there was no local law applicable on that particular aspect of the law. Even then, English law was not applied in toto. English law was relevant only to the extent that it was made subject to modifications and adoption to suit local conditions. Once applied through this process, it became Malaysian law. Therefore, over the past hundred years or so, through the judicial process, almost every branch of the law in Malaysia was developed. In some areas, legislation was introduced.

> In the present day context, any reference to the common law in Malaysia must mean the common law of Malaysia—that is the body of law which over the years since a structured legal system was introduced in Malaysia has been applied in Malaysia as part of the laws of Malaysia.

In the light of the above, it may now be said that sections 3 and 5 of the Civil Law Act 1956 are of limited application. As pointed out earlier, many aspects of Malaysian law which remain unwritten ought to be regarded as the Malaysian common law and not the English common law. It may be similar to English law, but the important point to bear in mind is that it is Malaysian law and not English law which is applicable.

This is also the position in all the other countries whose legal systems are based on the common law. Though they share

28 See now Civil Law Act 1956, Act 67, Revised 1972.

a common heritage, that is their legal systems were similar to the English legal system, it cannot be said that English law continues to apply in these countries. In the United States, India, Pakistan and Australia, the law applicable in these countries is now regarded as their own laws and not the English law. For example, Lord Devlin in the Privy Council decision of *Chan Cheng Kum v Wah Tat Bank Ltd*[29] on an appeal from Singapore in determining whether certain customs relating to mercantile law were applicable in Singapore first considered whether such customs were in fact part of the common law of Singapore. He correctly pointed out:

> The common law of Singapore is in mercantile matters the same as the common law of England, this being enacted in the [Civil Law Act], section 5.[30]

A fortiori by virtue of section 5 of the Malaysian Civil Law Act 1956, the common law of Malaysia on certain aspects of mercantile law is the same as the common law of England.

Let me give you an illustration of the application of common law in the context of the law relating to implied terms.

Implied terms

As a general rule, the terms of a contract will be expressly incorporated in a written contract. However, some important terms which are not expressly provided for may be implied by:

(a) custom and usage pertaining to a particular type of transaction;
(b) by the courts, based on the intention of the parties; and

29 [1971] 1 MLJ 177, PC.

30 Ibid at 179.

(c) certain provisions in statutes.

Where a particular custom is well accepted, such custom or usage will be implied to be part of the agreement even though there is no express mention of it. The basis for such implication is that the parties did not intend to express in writing these customs and usages at the time the contract was entered into but were willing to be bound by such custom or usage which were accepted in transactions of that nature.

However, such customs or usage which are inconsistent with the express terms of the contract will not be implied. For example in the case of *Hamzah & Yeang Sdn Bhd v Lazar Sdn Bhd*,[31] the Federal Court refused to accept the existence of a custom that building plans belonged to the architect and not to his employer.

Similarly, in the case of *Cheng Keng Hong v The Government of the Federation of Malaya*,[32] I pointed out, whilst sitting as a High Court judge, that:

> The incorporation of a trade usage is, however, subject to well defined principles of law which must be reasonable and not so as to contradict the tenor of the contract as a whole.[33]

In this case, I held that there was no custom that if any work was done by an architect according to drawings which were not set out in the specification, the architect was entitled to extra payment. This I held on the interpretation of the said agreement. In so doing, I further stated:

> In my judgment the alleged custom was not only a blind confidence of the most unreasonable description but also repugnant to the

31
[1985] 1 MLJ 45, FC.

32
[1966] 2 MLJ 33, HC.

33
Ibid at 37.
See also the Privy Council decision in *Chan Cheng Kum v Wah Tat Bank Ltd* (on appeal from Singapore) [1971] 1 MLJ 177.

terms and tenor of the contract and as such was not a trade custom but merely a long established irregularity.[34]

Once a particular aspect of the law has been applied in Malaysia, it becomes Malaysian law.

This case which I decided has now become part of the common law of Malaysia insofar as it establishes the principle of law that a custom or trade usage which is inconsistent with the written terms of a contract will not be implied by the courts.[35] The Malaysian courts in applying this principle of law in subsequent cases no longer apply the English common law. Through a case like this, this aspect of the law on implied terms has now become part of the common law of Malaysia. It may be similar to the English common law but quite clearly it cannot be said that on this aspect of the law, we still apply the English common law.

Furthermore, certain terms of a contract may be implied where parties have expressly made reference to such implication in their contract. For example, it is not uncommon in building contracts for parties to refer to the Scale of Charges as prescribed by the Institute of Surveyors for payment for the work to be done by a firm of quantity surveyors or to the Conditions of Engagement and Scale of Professional Charges prepared by the Malaysian Institute of Architects for a contract engaging a firm of architects for their professional services.[36]

In *Udachin Development Sdn Bhd v Datin Peggy Taylor*,[37] the Federal Court implied a term in the contract between an architect and the employer for professional services to be rendered

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[1966] 2 MLJ 33, HC at 38.

35
See also *Pembangunan Maha Murni Sdn Bhd v Jururus Ladang Sdn Bhd* [1986] 2 MLJ 30, SC.

36
See *Udachin Development Sdn Bhd v Datin Peggy Taylor* [1985] 1 MLJ 121, FC and *KC Lim & Associates Sdn Bhd v Pembenaan Udarama Sdn Bhd* [1980] 2 MLJ 26, FC.

37
[1985] 1 MLJ 121, FC.

by the architect, that the architect was entitled to remuneration in accordance with the Scale of Professional Charges prepared by the Malaysian Institute of Architects when the employer abandons the project.[38]

In *KC Lim & Associates Sdn Bhd v Pembenaan Udarama Sdn Bhd*,[39] one of the issues raised in the Federal Court to resist an application for summary judgment was whether in the absence of an express term in the contract between the architect and the developer, there was an implied term in the architect's employment that the developer would be able to carry on with the project at or reasonably near the architect's estimated cost.

The implication of terms is only one aspect of the application of the common law. There are many areas of the law where there are no written laws applicable but which over the years have become the established law (unwritten) of Malaysia. One such area, of course, is the law of torts where much of it is unwritten as there is no specific legislation dealing with most aspects of this law.

It does not, therefore, follow that whenever there is no written law in existence on a particular aspect of the law, the Malaysian courts continue to rely on the English common law. The courts merely apply the law of Malaysia as interpreted by the Malaysian courts in some earlier decisions on this aspect of the law. Once a particular aspect of the law has been applied in Malaysia, it becomes Malaysian law and the Malaysian courts when called upon to determine certain new issues relating to this aspect of the law merely apply and develop the already existing laws of Malaysia. This the Malaysian courts do by considering not necessarily the position under English law but also the law in other jurisdictions where the common law applies.[40]

38
See also the Singapore case of *Soon Nam Co Ltd v Archynamics Architects* [1979] 1 MLJ 212, CA.

39
[1980] 2 MLJ 26, FC.

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In the case of *The Chartered Bank v Yong Chan* [1974] 1 MLJ 157, FC at 160, in delivering the judgment of the then Federal Court, I observed: "In arriving at this view I have been greatly assisted by two Commonwealth cases which seem actually to cover the point. I realise that both these cases do not bind this court, but I know of no reason why I should not welcome a breath of fresh air from the Commonwealth."

In *Raja Mokhtar bin Raja Yaakob v Public Trustee, Malaysia* [1970] 2 MLJ 151 HC, I also observed: "Although decisions of Commonwealth courts are not binding, they are entitled to the highest respect."

For this matter, even the English courts consider the decisions from other jurisdictions in determining certain aspects of the law. For example, the House of Lords, in the recent case of *D & F Estates Ltd & Ors v Church Commissioners for England & Ors*[41] which I shall refer to later, considered American, Canadian, New Zealand and Australian decisions.[42]

Thus is the genius and the strength of the common law—it can adapt to changes to suit the needs without having the constraints which are attached to written laws.

This is how the common law of every country works. Until statutory laws are introduced, in certain areas of the law, a corpus of unwritten laws continue to co-exist. The broad principles of law on a particular aspect of the law, once applied by the Malaysian courts, become part of the common law of Malaysia. These broad principles are then, by judicial development of the law through adaptation and application, extended to situations to which they had not previously been applied. The process involves the gradual distilling of principles from the facts of concrete cases. In a strict sense, it is not new law but merely the application of established principles adapting to the changing circumstances in any country.

Thus is the genius and the strength of the common law—it can adapt to changes to suit the needs without having the constraints which are attached to written laws. It is for this reason too that for the development of the laws in Malaysia, we need well-reasoned, written judgments of the court, especially the final court of appeal which is bestowed with the duty of developing the laws of our nation.

41
[1988] 2 All ER 992.

42
See notes 72 and 73, below.

Concurrent liability

Reverting to the liability of an engineer towards his client, some uncertainties prevail in the law as to whether the fact that there is an existing contractual liability on the part of the engineer precludes the existence of a concurrent duty of care in tort independent of the contractual duties being owed by the engineer to the client. In this connection, it is important to bear in mind that the limitation period, particularly as to the accrual of the cause of action, may be of particular importance to a plaintiff in determining whether to pursue a cause of action in tort or in contract.[43] Therefore in some cases, the employer's claim against the engineer or any other professional in contract may be defeated by a defence of limitation but if, however, tortious liability exists independent of contact, the client may still be able to institute proceedings in tort.[44]

> The existence of a contract between the professional and his client does not preclude a concurrent duty of care in tort independent of contract being owed by a professional, like an architect or an engineer to the client.

Some of the older cases decided that a professional was only liable in contract and that no other liability existed in tort. However, about ten years ago, this view was swept aside and the liability in tort was expanded and developed so as to impose a concurrent duty on the professional in tort independent of contract. It may be said that the factor alluded to earlier, namely the limitation period, may be the driving force in influencing the courts to extend the liability of the professional. These cases firmly established the principle of law that the existence of a contract between the professional and his client does not preclude a

43
See *Midland Bank Trust Co Ltd v Hett Stubbs and Kemp* [1979] Ch 384.
See generally Jackson and Powell, *Professional Negligence*, 2nd edition, paragraphs 1.17 and 2.12–2.18, and Buckley, *The Modern Law of Negligence*, 1988, paragraphs 11.28 and 15.17.

44
See, for example, *London Congregational Union Inc v Harriss and Harriss* [1985] 1 All ER 335; *Kensington and Chelsea and Westminster AHA v Wettern Composites Ltd* [1985] 1 All ER 346.

concurrent duty of care in tort independent of contract being owed by a professional, like an architect or an engineer to the client.[45] It therefore became the standard practice for clients to institute actions both in contract and tort in a single action by pleading the breach in the alternative.

Retreat from concurrent liability

Over the past three years a new judicial trend seems to be emerging: the courts, since the decision of the Privy Council in *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd*,[46] appear to be moving away from the concurrent liability theory back to the contractual liability theory.

In *Tai Hing*, Lord Scarman cautioned against "searching for a liability in tort where the parties are in a contractual relationship". It is said that the liabilities of both the parties should necessarily be limited to those contained in the contract alone.

The position now appears to be unclear on this point though the better opinion seems to be that a concurrent liability exists.[47] The Malaysian courts have not had the opportunity to decide on this issue as yet. Whether they will adopt the approach of a broader liability of a professional or one based only on contract remains open. The contractual basis may be restricted in its application to situations where the contract incorporates precise and detailed terms, whereas the concurrent liability principle may be made applicable to others where a detailed contract has not been made. For example, the terms of a contract entered into by an engineer or an architect tend to be more precise and detailed than one entered into by a doctor or a lawyer.

45
See generally Jackson and Powell, *Professional Negligence*, 2nd edition paragraphs 1.17 and 2.12.

46
[1986] AC 80.

47
See Buckley, *The Modern Law of Negligence*, 1988, paragraph 15.17; Dugdale and Stanton, *Professional Negligence*, 2nd edition, 1989, paragraphs 5.04–5.05 and 9.

Liability to third parties

An architect or an engineer cannot be held liable to a third party in contract, as the contract between the professional and the client is not binding on the third party. This is generally so because of the rules pertaining to privity of contract. However, more so than in any other profession, the works executed by an architect or an engineer affects third parties. The construction of a block of flats affects all subsequent purchasers of the flats. Likewise, the construction of a bridge or a road affects all users. It is therefore not surprising that the liability of an architect or an engineer towards third parties has been the subject matter of much litigation.

An architect or an engineer cannot be held liable to a third party in contract, as the contract between the professional and the client is not binding on the third party. However, more so than in any other profession, the works executed by an architect or an engineer affects third parties.

Over the past few years particularly, the liability of builders (contractors), architects, engineers and surveyors has come to the forefront. This liability which I am talking of here is, of course, based on the law of negligence. That professionals involved in the construction business owe a duty far beyond that owed to their immediate clients alone is well-established.[48] Lord Denning MR in *Dutton v Bognor Regis United Building Co Ltd*[49] made this observation:

> If he [an architect or engineer] designs a home or a bridge so negligeably that it falls down, he is liable to everyone of those who are injured in the fall … Beyond doubt, the architect or engineer would be liable.[50]

48
But see discussion below.

49
[1972] 1 All ER 462, CA.

50
Ibid at 473.
But see views of Lord Oliver in *D & F Estates Ltd v Church Commissioners for England* [1988] 2 All ER 992 at 1010(g).

In *Rimmer v Liverpool City Council*,[50] the defendants were held liable when a panel of excessively thin glass, which had been negligently incorporated by their architects into the design of a council flat, broke and injured the plaintiff.

That professionals involved in the construction business owe a duty far beyond that owed to their immediate clients alone is well-established.

Though I had earlier said that the contract between the professional and his client is not binding on third parties, the terms of the contract may be relevant in determining the responsibilities of the professional towards third parties. The nature of the duty of care owed by the professional to a third party may depend on the responsibilities undertaken by the professional under the contract with his client. The contract may indicate whether a particular responsibility fell on the engineer or on some other who was also involved in the project. For example, in the case of *Clayton v Woodman & Sons (Builders) Ltd*[52] and *Oldschool v Gleeson (Contractors) Ltd*,[53] which involved claims against architects and consulting engineers respectively, the defendants were absolved from liability on the ground that their alleged carelessness amounted to no more than a legitimate refusal to interfere with responsibilities which had been allocated not to them but to the building contractors themselves.

However, the extent to which the law imposes such a liability on these professionals has now been considered in some important cases. It should be emphasised that when one talks of third parties, one is not necessarily referring to an innocent bystander. The third party in the context of the law relating to construction may

52
[1985] QB 1.

53
[1962] 2 QB 533.

be the employer, the contractor and employees of the contractor, or subsequent purchasers and users. A structural engineer, for example, who is engaged and paid by the architect owes a duty of care to the employer. Likewise, an engineer or an architect even in the absence of a contract may owe a duty of care to the contractor or his employees. This duty of care to a contractor may relate to the design and supervision of the work. Though a contractor cannot seek to pass blame or responsibility for incompetent work on to the consultant engineer, it has been said that if the design was so faulty that a competent contractor in the course of executing the works could not have noticed the resultant damage, then on principle the consultant engineer responsible for that design must bear the loss.[54]

An illustration of the duty of care owed by an engineer to a contractor or his employees can be seen in the case of *Driver v William Willet (Contractors) Ltd*[55] where the engineers employed by building contractors as safety and inspecting consulting engineers were held to owe a duty of care to the plaintiff, a labourer employed by the contractors, who was injured by the collapse of a scaffold board from a hoist. He fell within the class of persons whom the engineers should reasonably have foreseen would be injured if they failed to advise the contractors as to the safety precautions to be taken. They were in breach of that duty in failing to advise the contractors to have the hoist enclosed by wire mesh. The contractors were also held liable and responsibility was apportioned in the ratio of 40% to the contractors and 60% to the engineers.

Finally, a contractor or engineer, as seen earlier, owes a duty of care to subsequent purchasers and users of a building arising out of his design or supervision of its construction.

54
See Stabb J in *Oldschool v Gleeson Construction Ltd* (1976) 4 BLR 103.

55
[1969] 1 All ER 665.

It is not possible for me within the purview of this lecture tonight to explore these developments in any great detail. What I propose to do is to highlight only some aspects of the law in the light of recent developments. I should, perhaps, also draw to your attention that in most cases involving liability of a professional in the construction industry, the loss suffered by the injured party is economic loss[56] rather than personal injury. It is important to bear in mind this point as it was the basis for some of the decisions of the courts on the question of liability in the cases which I shall revert to shortly.

The modern law of negligence can be said to have its origin in the case of *Donoghue v Stevenson*,[57] a decision of the House of Lords made in 1932. The House of Lords in this case, which arose all because of a snail in a ginger beer bottle, decided that the manufacturer of the ginger beer was liable in negligence for any damage caused to the ultimate consumer. It should be noted that as there was no contract in existence between the manufacturer and the consumer, no cause of action could arise in contract. Therefore, until the decision of the House of Lords in this case, the consumer who suffered personal injury was without legal redress. The rule in *Donoghue v Stevenson* was subsequently extended to all manufacturers of goods. Soon after this case, the principle was applied by the Privy Council to hold a manufacturer of under-garments liable for the injury caused to the consumer who contracted dermatitis.[58]

The basis for such liability was that the manufacturer of such products owed a duty of care to the ultimate consumer. Such manufacturer, it was said, should have foreseen that any defect in the manufacture of the products would lead to personal injury to the ultimate consumer. The law was soon extended by giving a broader definition to the term "manufacturer". It was held to cover repairers, suppliers of goods and more recently to builders.

56
See discussion below. See also the recent cases of *Greater Nottingham Co-op Society Ltd v Cementation Ltd* [1988] 2 All ER 971, CA and *Department of Environment v Thomas Bates & Sons Ltd* [1989] 1 All ER 1075, CA.

57
[1932] AC 562, HL.

58
Grant v Australian Knitting Mills Ltd [1936] AC 85, PC.

Of particular relevance to us this evening is the liability of professionals, be they architects, engineers, surveyors or builders, to third parties for defective construction. The question which arises is whether any of these professionals is liable in negligence, for example to a purchaser of a flat or house for any defects in the construction. Defects in construction, particularly of houses, may have two effects:

(i) as a result of the defect, the owner, a visitor or any third party may suffer physical damage, for example if he has a fall or if the ceiling collapses, or

(ii) though there may be no physical injury caused because the defect was discovered before any damage was caused, the owner would either incur pecuniary loss insofar as the cost of repairs is concerned or the defect may cause diminution in the resale value.

The latter situation is, of course, pure economic loss.[59]

Over the past decade, a number of cases were brought before the courts in which owners of houses brought actions against the builder, surveyor, engineer and in most cases, the local authority for defects in the construction of the houses. For example, in the case of *Dutton v Bognor Regis United Building Co Ltd*,[60] to which I have already referred earlier, the plaintiff who had purchased a house from the previous owner brought an action against the local council for having passed the foundations of the house as being adequate even though it was built on the site of an old rubbish tip. In this case the foundations were proved to be inadequate and the plaintiff had to spend a large sum of money on repairs and underpinning. She successfully sued the council for negligence claiming that the public duty imposed on the council by statute also imported a

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Editor's note:
See further notes at the end of chapter.

60
[1972] 1 All ER 462, CA.

private duty to protect individual members of the public against loss which would not have occurred if the powers had been properly exercised.

Similarly in the leading case of *Anns v Merton London Borough Council*,[61] an action was brought by lessees of seven flats against the local authority for damages for negligence. The lessees claimed that there was structural movement which resulted in cracks in the walls and the sloping of the floors of the flats, and that the appellants were negligent in allowing the builders to construct the block of flats upon foundations which were only two feet six inches deep instead of three feet or deeper as required by the deposited plans, or alternatively in failing to carry out the necessary inspections carefully.

The House of Lords took the opportunity in this case to consider in detail the basis and extent of liability in negligence of the local authority in such cases.

The House of Lords approved the decision in *Dutton*'s case and further held that though the council was under no obligation to exercise its powers to inspect the foundations before or after the building was constructed, if it did exercise such powers before the building was constructed, it was under a legal duty to the plaintiff to use reasonable care and skill in making the inspection.

The effect of cases like *Dutton* and *Anns* was far reaching. It is said:

> Its first practical effect was to produce a significant increase in public authority insurance premiums but also, and more

61
[1978] AC 728; [1977] 2 All ER 492, HL.
See further notes at the end of chapter.

> importantly, in building costs. Local authorities up and down the country became so alarmed at the prospects of incurring liability for carelessly passing building plans that they took to imposing more and more stringent, and in many cases excessive, requirements for foundations of buildings, strengthening of roofties and so on, the cost of which, in the end, was inevitably passed on to the consumer.[62]

It should again be pointed out that the loss in *Anns*' case was economic loss.

However, from a study of the recent cases, a new trend appears to be emerging. This trend may be referred to as the "retreat from *Anns*' case".[63] In *D & F Estates Ltd & Ors v Church Commissioners for England & Ors*[64] Lord Oliver of Aylmerton observed:

> The decision of this House in *Anns v Merton London Borough Council* introduced, in relation to the construction of buildings, an entirely new type of product liability, if not, indeed, an entirely novel concept of the tort of negligence. What is not clear is the extent of the liability under this new principle.[65]

The cases I have referred to mainly concern the liability of statutory bodies. They are, however, indicative of the recent attitude of the courts towards the expansion of the law of negligence relating to the liability of third parties. That such a similar approach will be adopted by the courts even in cases not concerning statutory bodies may be seen in the most recent House of Lords decision concerning the liability of contractors to purchasers of houses. This is the case of *D & F Estates Ltd & Ors v Church Commissioners for England & Ors*,[66] decided in 1988.

62
Lord Oliver of Aylmerton, *Judicial Legislation: Retreat from Anns* [1988] 1 SCJ 249, 267.
Now see *The Sultan Azlan Shah Law Lectures: Judges on the Common Law*, 2004, Professional Law Books and Sweet & Maxwell, chapter 3.

63
Editor's note:
See Lord Mustil, "Negligence in the World of Finance", in *The Sultan Azlan Shah Law Lectures: Judges on the Common Law*, 2004, Professional Law Books and Sweet & Maxwell, chapter 6.

64
[1988] 2 All ER 992, HL.

65
Ibid at 1010.
See Duncan Wallace, "Negligence and Defective Buildings: Confusion Confounded", (1989) 105 LQR 46–78.

66
[1988] 2 All ER 992.
See also the following recent cases: *Greater Nottingham Co-operative Society Ltd v Cementation Piling and Foundations Ltd* [1988] 2 All ER 971, CA;
Department of Environment v Thomas Bate & Sons Ltd [1989] 1 All ER 1075, CA;
Norwich City Council v Harvey (1989) 139 NLJ 40, CA;
Pacific Associates Inc v Baxter (1989) 139 NLJ 41, CA.

At this juncture, it may also be relevant to consider the liability of a professional for the negligence of a third party. We have thus far considered the liability of a professional to a third party, for example, the liability of an engineer to a house buyer. But what is the consequence to the engineer or contractor of the negligence of a sub-contractor? This issue is pertinent especially in construction contracts where it is normal practice to sub-contract the work to specialist sub-contractors. Does the main contractor remain liable for the negligence of the sub-contractors? This issue was also decided in *D & F Estates Ltd & Ors v Church Commissioners for England & Ors*.

In *D & F Estates Ltd*, the builders (third defendants) were the main contractors for the construction of a block of flats which were owned by the first defendants. The builders engaged a sub-contractor to carry out the plastering work on the block. The builders reasonably believed the sub-contractor to be skilled and competent but in fact the sub-contractor carried out the work negligently. The plaintiffs were the lessees and occupiers of a flat in the block. Some 15 years after the flats were constructed, and again some three years later, the plaintiffs found that the plaster in their flat was loose. The plaintiffs brought an action against, inter alia, the builders claiming the cost of the remedial work already done and the estimated cost of future remedial work.

The House of Lords held:

(i) that in the absence of a contractual relationship between the parties, the cost of repairing a defect in a chattel or structure which was discovered before the defect had caused personal injury or physical damage to other property was not recoverable in negligence

by a remote buyer or hirer or lessee of the chattel or structure from the manufacturer of the chattel or the builder of the structure responsible for causing the defect, because the cost of repair was pure economic loss which was not recoverable in tort. It followed that since the cost of repairing the plaster was economic loss the builders, whatever their vicarious liability, were not liable for the cost of the remedial work; and

(ii) the builders were not liable for the negligence of their sub-contractor in carrying out the plastering because the builders' only duty was to employ a competent plasterer, which they had done, and any further liability could not accrue under a general and non-delegable duty to all the world to ensure that the building was free from dangerous defects, and the law did not recognise any such duty.

The effect of this House of Lords decision is as follows:

(a) *Actual damage*

As pointed out earlier, the House of Lords in the leading case of *Donoghue v Stevenson* had said that a manufacturer owed a duty of care to the consumer to ensure that the goods manufactured can be used in the manner intended without causing physical damage to persons or their property. This decision was based on the wider principle of law which provided that when a person can or ought to appreciate that a careless act or omission on his part may result in physical injury to other persons or their property, he owes a duty to all such persons to exercise reasonable care to avoid such careless act or omission.[67]

67 See Lord Brandon's dissenting speech in *Junior Books Ltd v Veitchi Co Ltd* [1983] 1 AC 520, 549 which was approved and applied by the House of Lords in *D & F Estates Ltd v Church Commissioners for England* [1988] 2 All ER 992 at 1003.

The point which must be stressed at this stage is that a wrongdoer is liable in negligence to pay damages if the innocent person had suffered physical injury to persons or their property. The House of Lords in *D & F Estates Ltd* clarified two important aspects of this injury.

It was not sufficient merely to establish that the product was defective and had the potential of causing injury. In other words, the existence of danger or the threat of danger to physical damage to persons or their property was insufficient.

First, the innocent party must have suffered actual injury. It was not sufficient merely to establish that the product was defective and had the potential of causing injury. In other words, the existence of danger or the threat of danger to physical damage to persons or their property was insufficient. Neither could an action be brought to recover the cost of repairing the defect if the defect in the product had been discovered before it had actually caused any injury. Lord Bridge, in dealing with this aspect of the law observed:

> But if the hidden defect is discovered before any such damage is caused, there is no longer any room for the application of the Donoghue v Stevenson principle. The chattel is now defective in quality, but is no longer dangerous. It may be valueless or it may be capable of economic repair. In either case the economic loss is recoverable in contract by a buyer or hirer of the chattel entitled to the benefit of a relevant warranty of quality, but is not recoverable in tort by a remote buyer or hirer of the chattel.[68]

68 [1988] 2 All ER 992 at 1006.

Applying these principles to consider the liability of a builder for the construction of defective buildings, Lord Bridge further observed:

> If the same principle applies in the field of real property to the liability of the builder of a permanent structure which is dangerously defective, that liability can only arise if the defect remains hidden until the defective structure causes personal injury or damage to property other than the structure itself. If the defect is discovered before any damage is done, the loss sustained by the owner of the structure, who has to repair or demolish it to avoid a potential source of danger to third parties, would seem to be purely economic.[69]

Lord Oliver in considering the same issue said:

> For my part, therefore, I think the correct analysis, in principle, to be simply that, in a case where no question of breach of statutory duty arises, the builder of a house or other structure is liable at common law for negligence only where actual damage, either to person or to property, results from carelessness on his part in the course of construction. That the liability should embrace damage to the defective article itself is, of course, an anomaly which distinguishes it from liability for the manufacture of a defective chattel but it can, I think, be accounted for on the basis that, … in the case of a complex structure such as a building, individual parts of the building fall to be treated as separate and distinct items of property.[70]

In so deciding, the House of Lords expressed doubts on the correctness of its own previous decision on this point in *Anns*' case.[71]

69
Ibid.

70
Ibid at 1012.

71
See [1988] 2 All ER 992 at 1006 and 1010.
See also further notes at the end of chapter.

The second clarification relates to product liability. It was clarified that any injury to property must be to some other property and not to the defective property itself. In other words, the phrase injury to persons or their property was qualified to mean property other than the defective property, in most cases chattels. An injury to the product itself only has the consequence of the owner suffering economic loss, that is, the injury only affects the value of the product or the cost of repair of the product (monetary loss).

The House of Lords also pointed out that a similar view had been adopted by the US Supreme Court in *East River Steamship Corp v Transamerica Delaval Inc*[72] and the Supreme Court of Canada (majority decision) in *Rivtow Marine Ltd v Washington Iron Works*.[73]

The Law Lords did point out that the application of this principle of law may cause some difficulties in cases dealing with complex chattels or complex structures, particularly so if a product comprises many different parts or elements, for example the construction of a house.

In *D & F Estates Ltd* itself, the only hidden defect was in the plaster which only resulted in the cost of cleaning the carpets and "other possessions damaged or dirtied by the falling plaster: £50". The defective plaster by itself could not be said to have caused damage to "other property". However, their Lordships did not rule out the possibility that in certain situations, a defect in the construction of part of a building which causes other damage or "injury" to the same building may be regarded as damage being caused to "other property" even if the defective part and the damaged part of the building related to the same building. Lord Bridge said:

72
(1986) 106 S Ct 2295.

73
[1974] SCR 1189.

> However, I can see that it may well be arguable that in the case of complex structures, as indeed possibly in the case of complex chattels, one element of the structure should be regarded for the purpose of the application of the principles under discussion as distinct from another element, so that damage to one part of the structure caused by a hidden defect in another part may qualify to be treated as damage to "other property", and whether the argument should prevail may depend on the circumstances of the case.[74]

However, his Lordship said that "it would be unwise and it is unnecessary for the purposes of deciding the present appeal to attempt to offer authoritative solutions to these difficult problems in the abstract".[75] Lord Oliver in his speech pointed out:

> The proposition that damages are recoverable in tort for negligent manufacture when the only damage sustained is either an initial defect in or subsequent injury to the very thing that is manufactured is one which is peculiar to the construction of a building and is, I think, logically explicable only on the hypothesis that in the case of such a complicated structure the other constituent parts can be treated as separate items of property distinct from that portion of the whole which has given rise to the damage, for instance, in *Anns*' case, treating the defective foundations as something distinct from the remainder of the building. So regarded this would be no more than the ordinary application of the *Donoghue v Stevenson* principle.[76]

Lord Oliver then gave the following illustration:

> … damage caused to other parts of the building from, for instance, defective foundations or defective steel-work would ground an

74
[1988] 2 All ER 992 at 1006–1007.

75
Ibid at 1007.

76
Ibid at 1010.

> action but not damage to the defective part itself except in so far as that part caused other damage, when the damages would include the cost of repair to that part so far as necessary to remedy the damage caused to other parts. Thus, to remedy cracking in walls and ceilings caused by defective foundations necessarily involves repairing or replacing the foundations themselves.[77]

(b) *Liability of builder for acts of sub-contractor*

As seen earlier, the House of Lords held that the builder was not liable for the negligence of their sub-contractor in carrying out the plastering. The basis for reaching this decision was that the builder, as employer was under no liability in law for the negligence of the sub-contractors. Lord Bridge said:

> It is trite law that the employer of an independent contractor is, in general, not liable for the negligence or other torts committed by the contractor in the course of the execution of the work. To this general rule there are certain well-established exceptions or apparent exceptions.[78]

The law is not always clear nor comprehensive on every issue. The duty is then imposed upon us to conduct ourselves with certain self-restraints.

However, the employer may be held liable for the negligence of the sub-contractors if the employer had been in breach of some duty which he personally owed to the plaintiff. In the instant case, it was held that the employer was under no such duty as there was no legal principle to which such an assumption of duty can be related.[79] However, Lord Bridge gave the following possibility:

77 Ibid at 1012.

78 Ibid at 1008.

79 Ibid at 1008.

> If in the course of supervision the main contractor in fact comes to know that the sub-contractor's work is being done in a defective and foreseeably dangerous way and if he condones that negligence on the part of the sub-contractor, he will no doubt make himself potentially liable for the consequences as a joint tortfeasor.[80]

The House of Lords further pointed out that as no liability could be imposed on the builder for the negligence of the sub-contractor under the common law, legislation was necessary to extend the liability of the builder.[81]

Conclusion

I have this evening attempted, within the constraints of a public lecture, to highlight certain current legal issues relating to engineers. These are issues which not only affect engineers in the practice of their profession but more broadly, they affect the general public. All professions serve a wider interest: the interest of the community in general. It is for this reason that the law imposes certain obligations upon all of us who provide professional services to the public, be it lawyers, doctors, engineers, architects or others. However, as we have seen, the law is not always clear nor comprehensive on every issue. The duty is then imposed upon us to conduct ourselves with certain self-restraints. We should maintain standards by observing certain ethics—ethics which are either of general application or which are peculiar to our particular profession. But whatever they are we must, at all times, aspire to serve the community with dignity and integrity.

80
Ibid.

81
But see the New Zealand case of *Mount Albert BC v Johnson* [1979] 2 NZLR 234, a decision which was not followed in *D & F Estates Ltd v Church Commissioners* [1988] 2 All ER 992, 1009.

Editor's notes

***Anns*' case:** This case was overruled by the House of Lords in *Murphy v Brentwood District Council* [1990] 2 All ER 908, HL.

***Dutton v Bognor Regis United Building Co Ltd*:** This case was also overruled by the House of Lords in *Murphy v Brentwood District Council* [1990] 2 All ER 908, HL.

Position in other common law jurisdictions: Courts in some other common law countries like in Australia, Canada and New Zealand have refused to follow the more recent trend of the English courts. For example, the Privy Council, on appeal from New Zealand in the case of *Invercargill City Council v Hamlin* [1996] 1 All ER 756, PC, held that the law as stated by the English courts was "unsuited to a single solution applicable in all common law jurisdictions regardless of differing local circumstances". In so holding, the Privy Council refused to follow *D & F Estates Ltd v Church Commissioners for England* [1988] 2 All ER 992, and *Murphy v Brentwood District Council* [1990] 2 All ER 908.

Economic loss: As to the position on economic loss in Malaysia, see the Court of Appeal decision in *Arab-Malaysian Finance Bhd v Steven Phoa Cheng Loon & Ors and other appeals* [2003] 1 MLJ 567, CA. See generally, Norchaya Talib, *Law of Torts in Malaysia*, 2nd edition, pages 115-137 where other Malaysian cases are discussed.

As to economic loss generally, see 4(3) *Halsbury's Laws of England*, 4th edition, paragraph 254, and 33 *Halsbury's Laws of England*, 4th edition, paragraph 613. See also *McGregor on Damages*, 17th edition, 2003, paragraph 4-004; *Chitty on Contracts*, *General Principles*, Volume 1, 28th edition, paragraphs 1-112 to 1-119; and

Chitty on Contracts, *Third Cumulative Supplement to the Twenty-Eighth Edition*, 2003, where some of the more recent cases are discussed.

The right to choose

> " Any form of pressure or arbitrary limits imposed on the people in their free exercise of the right to choose their own government will be a clear abrogation of any parliamentary system of government. "

—HRH Sultan Azlan Shah
Parliamentary Democracy