

**CIVIL LITIGATION NEGLIGENCE AND  
THE MALAYSIAN ADVOCATE  
PART 2 AND PART 3\***

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**PART 2**

**PREPARATION OF THE CIVIL CASE AND THE  
AVOIDANCE OF NEGLIGENCE AND THE MALAYSIAN  
ADVOCATE**

The fused profession advocate has to prepare *and* present the case himself. This article is concerned with the basics of preparation mainly preparing to present<sup>1</sup> the case requires that the advocate works hard, is disciplined and manages his time well and has the integrity not to cheat even when no one is looking which is why an advocates needs to be by nature an honest person and not so only when he fears being caught out as he has to take many decisions alone without any one's knowledge.

He starts by obtaining the most complete instructions; and investigates, as well as making full use of the facilities<sup>2</sup> given by the law of civil procedure, to substantiate with evidence-human and documentary,

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\* For part 1 of this article, see Baharuddeen Abu Bakar, '*Civil Litigation Negligence and the Malaysian Advocate*,' IIUM Law Journal, Vol. 20 No. 1, (2012), at p.29; both parts 2 and 3 feature in this edition – Vol. 20 No. 2, 2012.

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have a working knowledge of the rules of civil procedure and, of course, following the sequence suggested by the rules of procedure and observance of the time table. He must also make use of the means allowed by the law to sharpen the focus of the case and to present it effectively and efficiently.<sup>3</sup>

To assist the advocate, the article deals with instances of negligence, mainly of solicitors in England, whose work is the same as that of fused profession advocates, and follows the sequence of the steps taken in preparing a typical case for trial.

### **INSTANCES OF NEGLIGENCE IN CIVIL LITIGATION, AND ITS AVOIDANCE**

The duties of the advocate which may result in liability to the client in advocacy work may be divided into three:<sup>4</sup> i) taking instructions from and giving advice to the client;<sup>5</sup> ii) preparing the case for presentation to court; iii) presenting the case to the court.

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<sup>1</sup> Young advocates, pupils and undergraduates would benefit immensely by Prof. Gurdial Singh Nijar's excellent book *Trial Advocacy*. As far as advocacy books from overseas are concerned, those written by solicitors in Australia, New Zealand and Canada are to be preferred as they are also involved in the preparation as well as presentation of their cases. A good book from England is solicitor Sir David Napley's *Technique of Trial Advocacy*. Advocacy books by barristers are generally more entertaining than instructive.

<sup>2</sup> Discovery and Inspection of Documents; Further and Better Particulars of Pleadings; Notice to Admit; Exchange of Witness Statements and, in rare cases, Interrogatories.

<sup>3</sup> Agreed Bundle of Documents; Witness Statements; Affidavits, and facilities for creating Demonstrative Evidence.

<sup>4</sup> Rule 25: "An advocate..at the time of his being retained shall disclose to the client all the circumstances of his relation to the parties, and any interest in connection with the controversy, which may influence the client in the selection of counsel."

<sup>5</sup> Rules 2 (the 'cab rank' rule); 4; 5; 6; 8; 9; 10; 12; 13; 14; 16; 18; 24; 25; 27; 28; 34; 35; and 57.

### **i) Advice to the Potential Client; Pre-retainer advice**

The spirit of the pre-retainer duty to advise,<sup>6</sup> whether it is in exercise of the cab-rank rule<sup>7</sup> or as a form of legal aid,<sup>8</sup> should at the very least, mean that every person who needs it is entitled to receive preliminary legal advice.<sup>9</sup> If the advice given to such clients is to be of any use, the advice must be accurate and reliable for the would-be client to make any decision.

May an action for negligence arise from the advice given even at the pre-retainer stage? In *Hedley-Byrne & Co Ltd v Heller & Partners Ltd*<sup>10</sup> the rule was established that irrespective of contract, if someone possessed of a special skill undertakes to apply that skill for the assistance of another person who relies on such skill, a duty of skill and care will arise. In the writer's view such cases of negligence should be dealt with as cases of misconduct for obvious public policy grounds.

The law does not require an advocate who has not been bloodied by litigation yet or has not done a particular matter to restrain from doing so; if that were the case no advocate would gain any experience much like the chicken-and-egg conundrum. However an advocate is expected to be honest and frank about his experience and his qualifications; it may be the basis of an 'informed consent' defence in the future.

### **ii) Taking Instructions<sup>11</sup>**

One of the most important of an advocate's duties to the client is to take complete instructions from the client. If the information is from another

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<sup>6</sup> Rule 25.

<sup>7</sup> Rule 2.

<sup>8</sup> Rule 8: "Subject to any Rules of Court made in this behalf, an advocate ...assigned as ....advocate...in any civil or criminal matter shall not ask to be excused for any trivial reason and shall always exert his best effort in that assignment."

<sup>9</sup> Some law firms may refer such clients to their new lawyers who have not dealt with any client before to gain experience.

<sup>10</sup> [1963] 2 All ER 575 [1964] AC 465.

<sup>11</sup> All that the client tells the advocate, which is relevant to the case, is 'instructions.' 'Instructions' is not to be taken in the teaching sense. It

source it should be verified with the client.<sup>12</sup> It is meant to be taken at face value and acted on without the advocate being required to vouch for its accuracy; hence ‘allegations’. The advocate is not an eye witnesses and has to go by what the client tells him. The advocate is not to be held liable if it turns out to be otherwise provided the advocate had no hand in the invention.<sup>13</sup> The advocate is under no duty to interrogate his client to ensure that the instructions is true except where it is highly improbable; the advocate should of course advise the client about the importance of honesty and accuracy, including the need to prove the instructions.

From time to time, the instructions will have to be updated, and all instructions should be confirmed in writing<sup>14</sup> to the client so that the client knows how the advocate has understood the instructions. The client’s instructions, as expressed by him, should be reduced to writing and the client should, as a matter of precaution, be required to sign it.

The advocate should maintain a proper record of the meetings with the client. In *Lie Hendri Rusli v Wong Tan and Molly Lim (a firm)*<sup>15</sup> V K Rajah was unabashedly didactic:

*“This case should serve as both an invaluable and a practical reminder...to*

- a) document the nature and scope of the retainers with clients;*
- b) maintain reliable minutes of discussions with clients; and*
- c) carefully consider whether to document through correspondence significant advice rendered.”*

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is to be taken to mean ‘information’ from the client or the allegations of fact.

<sup>12</sup> In *Johnson v Bigley, Dyson & Fury* [1997] PNLR 392 a solicitor had received instructions from the client’s son which was contrary to the client’s position and which he did not verify. The solicitor was found to be negligent.

<sup>13</sup> Rule 17: An advocate and solicitor shall not practise any deception on the Court.

<sup>14</sup> In *SMO Othaman Chettiar v Ang Gee Bok* the learned judge advised the profession about the importance of regularly confirming instructions and advice.

<sup>15</sup> [2004] 4 SLR 594.

*Unlike some other jurisdictions there are currently no mandatory legal provisions specifically prescribing such practices; however, observing such practices, even for routine matters, would be an exercise in precaution and prudence. The defendant has been exonerated in this case simply by dint of the plaintiff's lack of credibility. Nonetheless, it has been unpleasantly subjected to and sorely tested by a montage of variegated claims, not to mention the embarrassment of adverse publicity. With the benefit of hindsight it is now apparent that these proceedings could perhaps have been thwarted in limine if reliable written records of what had transpired had been maintained. Would it be too much to expect members of the legal profession to take this case as a cue to exercise future by maintaining satisfactory written records of dealings with and for their clients."*

### **iii) Instructions as authority to act/retainer/<sup>16</sup> Warrant to Act<sup>17</sup>**

The retainer/Warrant to Act is the advocate's authority to act. No advocate should act without instructions as evidenced by the retainer.<sup>18</sup> Acting

<sup>16</sup> It is the contract of engagement for professional services. It should be between the client and the firm, and not any member of the firm even where the client has indicated a clear preference. It should deal with: i) identify the client; ii) spell out the subject matter nature and the extent to which the service is needed; and state the amount of fees or manner of billing; and the space for the signatures of both parties signifying offer and acceptance.

<sup>17</sup> It is the term for retainer in Subordinate Court civil matters. As it is proof of the advocate's authority to act in a matter it is considered important enough to be required to be reduced to writing. O 11 R7 Subordinate Courts Rules 1980. Failure to produce it, in the rare event that an advocate's authority to act is challenged by the advocate on the other side, is prima facie evidence of acting without authority.

<sup>18</sup> It is proof of the advocate's authority to act in the matter, and is considered important enough to be required to be reduced to writing at

without such authority is a form of misconduct and the proceedings are invalid against the purported client and the other side, and may be set aside.<sup>19</sup> The advocate may be ordered to pay costs to the other side for the aborted part of the proceedings. The advocate may also be sued for breach of warranty of authority.

Once the retainer comes into existence, an advocate is under a duty of skill and care as much to his very first client<sup>20</sup> - such an advocate should satisfy himself that he has at least trained<sup>21</sup> competence, as competence gained from experience cannot be expected - as to his last.

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least in subordinate court civil matters. O 11 R7 Subordinate Courts Rules 1980.

<sup>19</sup> *Tan Lian Hong v Min Ngai Knitting* [1974] 1 MLJ 76.

<sup>20</sup> The duty of skill and care cannot be postponed till the advocate gains sufficient experience which may otherwise result in a chicken-and-egg situation; if because he has no skill gained from experience he is not to be allowed to conduct cases, how is he going to gain experience and skill if he is not allowed to do cases. The best defence available to such an advocate would be one of the 'informed consent' of the client; if a client is informed by the advocate that he has never done a trial before, as he is expected to do under Rule 25.

<sup>21</sup> All law schools, the Law Qualifications Board (as it should be properly called) and the Malaysian Bar Council need to ensure that all new entrants to the profession are trained to handle competently such matters as they may be reasonably expected of them during the initial period of practice as the duty of skill and care is owed even to their very first client. If not a question may well arise as to their responsibility: May these institutions be sued for negligent misstatement on the ground that by conferring a law degree on an obviously incompetent person, the institution has held out to the litigating public that the advocate in question has the competence to handle their matters when in fact he is not? Another competency issue is poor English; may such an advocate be expected to read and understand all the materials he has to deal with to conduct a case or give an opinion?; and is the affirmative action policy a ground for a lower standard or even a defense?

#### **iv) Instructions as allegations of fact**

The allegations of fact given by the client with such documentary evidence as are in the client's hands and names of witnesses are the bare bones of the case which the advocate has to flesh out. The advocate would, and indeed, has the right to rely on the client for assistance for such things as names of witnesses and the location of documentary evidence though the client has the right to rely on the advocate for advice on expert's who are needed, and demonstrative evidence. The advocate is expected to make a preliminary investigation of the evidence, human and otherwise before initiating proceedings.

An advocate is duty-bound to carry out the instructions personally, except where there is discretion according to the practices of the profession. Handing over a matter completely to another advocate or to the extent only of having another advocate as leader<sup>22</sup> should not be done without the client's consent.

#### **v) Instructions as to the client's desired outcomes; alternative dispute resolution**

These will have to be within the range of remedies which is within the court's jurisdiction and powers. In trying to achieve these for the client, the advocate has to be mindful of what the client is entitled to, eligible for

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<sup>22</sup> In such a case, the relationship between the two advocates is similar to the English position: barrister and solicitor- on -record. The retainer is between the client and the first advocate, and the first advocate and the leader. In fused professions, it is possible for the leader to have a direct contractual relationship with the client and it is safe to properly describe the scope of work of the leader e.g. conduct of the case in court or the appeal. The writer prefers the usage in India and Pakistan: advocate and advocate-on-record; to be consistent with the description that all litigation lawyers are advocates and the fused nature of the profession where there is no solicitor's role in litigation. 'Record' refers to the cause papers which bear the name and address of the firm of solicitors handling the matter, and who are as far as the court is concerned responsible for all matters affecting the case.

or simply desirous of having whether or not deserving. It is the advocate's duty to choose and advise on a mode of dispute resolution that is likely to give a remedy which approximates to the client's wants.

It is important to remember that the client's wants need not be achieved by litigation only. The client should also be advised about alternative dispute resolution.<sup>23</sup> The advocate has to keep his mind open throughout the litigation and forward to the client every proposal for settlement that he receives, with his own advice. The advocate may be sued for negligence for wrong advice on the effect of a settlement even one at-the-door- of- the-court.

#### **vi) Advice<sup>24</sup>**

##### **a) The prospect of success**

There is no duty to achieve success in litigation only to strive for it, and therefore success should not be promised. It is the court that gives the verdict not the advocate. Over-optimistic forecasts of their clients' prospects of success may not be achieved and the litigation lawyer deserves his client's wrath when things turn out otherwise.<sup>25</sup>

#### **vii) Opinion on the law and negligent misstatement**

As an advocate will not know whether his opinion on the law is correct or not till the court passes judgment, he cannot be held liable for negligence just for being wrong unless the proposition of law in question is basic and

<sup>23</sup> Compromise or Settlement: Rule 6 "The lawyer should advise and encourage the client to compromise or settle a dispute wherever possible on a reasonable basis and should discourage the client from commencing or continuing useless legal proceeding." (Canadian) Code of Professional Conduct 1987 There is no equivalent Malaysian rule.

<sup>24</sup> All that the advocate tells the client, which is relevant to the case, is 'advice.'

<sup>25</sup> It was negligent of the solicitor to initiate proceedings which were not likely to succeed notwithstanding advice; *Re Clarke* (1851) 1 De GM &G43.

ought to be known; as good as legal fact and not an opinion.<sup>26</sup> In *Miranda*, the learned chief justice said: “Now it is not the duty of a solicitor to know the contents of every statute of the realm. But there are some statutes which is his duty to know”<sup>27</sup> And these are those which come into play in a case, even more so those which are adjective in nature as they govern the civil litigation process. In *Fletcher & Son v Jubb, Booth and Helliwell*<sup>28</sup> the solicitor did not seem to have taken into account the provisions of the Public Authorities Protection Act, 1893, as such entities are often parties to litigation, he ought to know the law relating to the matters that he handles including what he recognizes to be matters that he needs to look up. He should know the substantive law applicable to the case he handles. If the matter falls within an area of law that the advocate is not familiar with he should advise the client about it with the undertaking to become conversant with it.<sup>29</sup>

Generally, the same standard of knowledge should not be expected with respect to the laws of England and other Commonwealth countries which are relevant and applicable but not binding except where it is a matter of settled law in Malaysia. If a matter is adequately dealt with in Malaysian law,<sup>30</sup> there would usually be no need to extend one’s research into other jurisdictions. An important issue is with respect to English and Commonwealth law decisions where the trend has been to diverge from Malaysian law; the advocate would be expected to be

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<sup>26</sup> In *Dickinson v Jones Alexander & Co* [1990] Fam Law 137 wrong advice was given on ancillary relief to a wife.

<sup>27</sup> *Miranda* at p 164 [A-E].

<sup>28</sup> [1920] 1 KB 274 quoted in *Miranda* pp. 162[I]-163 [A-D].

<sup>29</sup> In any case it is expected that if such matters fall within the Rule 25 situation there is a possibility of an ‘informed consent’ defense as in cases of clinical negligence.

<sup>30</sup> A provision which is fraught with peril is sec 5 of the Civil Law Act 1956 particularly to lawyers in the former colonies of Penang and Malacca, Sabah and Sarawak where it is expected that English commercial law is to be applied as it is in England today, in the manner of an English court and as if the transaction had taken place in England, not Malaysia. The matter has been complicated by England’s entry into the EU; English law harmonized with Brussels law will have to be applied in Malaysia because that is what an English commercial court would apply today!

familiar with it in case a Malaysian court decides to follow it. Where the opinion on Malaysian law relies on English and Commonwealth law to fill gaps in Malaysian law on crucial points, the advocate should advise the client that it may become Malaysian law only if the Malaysian court accepts it; that it is not necessarily binding.

The fact that the advocate had carried out his research in a methodical and comprehensive manner referring to all relevant sources, only that his interpretation was wrong, or that the question was a novel or complex on which there was not yet a sufficient body of case-law to state authoritatively what the correct position was are extenuating if not exculpatory circumstances. It is therefore necessary to develop a research method that produces a comprehensive, reliable and up-to-date product which would normally be quite evident from the written opinion. Records of the research must be kept in case of a suit for negligence. Liability will depend in such cases on the research method and industry of the advocate. Where appropriate it would also be good practice to advise the client about the uncertainties with respect to the evidence. With respect to the law, the advocate should not eschew giving his view, and advise the client to take a second opinion rather than resorting to a disclaimer.

### **viii) Duty to act promptly**

This appears to be by far the most common complaint against advocates. It may be due to lack of knowledge or experience in the matter or an extremely busy practice or plain sloth. It is a form of negligence and may even be misconduct. In *Cheong Yeo & Partners & Anor v Guan Ming Hardware & Engineering Pte Ltd*<sup>31</sup> a law firm which had filed a defective application for summary judgment but did not rectify it in time was sued for the negligence in the form of delay before the debtor company was subject to winding up or receivership as the plaintiffs lost the chance of obtaining judgment ahead of the other creditors.

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<sup>31</sup> [1997] 2 SLR 729; inexcusable delay in the prosecution of a claim: *Fitzpatrick v Batger & Co Ltd*. [1967] 2 All ER 657, [1967] 1 WLR 706, CA; *Allen v Sir Alfred McAlpine & Sons Ltd* [1968] 1 All ER 543, CA.

A more serious form of delay is an advocate allowing a matter to become time-barred. There have been a number of such instances, and the advocate is usually unable to defend himself. As soon as an advocate is given a matter to handle by initiating a suit he should first of all make sure of the cause of action; whether it is complete; when it became complete so that proceedings may be initiated; and how much time is left to initiate proceedings from the time the matter was put in his hands. The client will have to be advised about such matters, and the advocate should, of course, initiate proceedings well within time. An advocate in whose hands a matter has become time-barred should not, of course, advise the client on the matter of negligence, he should advise the client to seek independent advice. The conflict of interest is obvious.

### ix) Preparation for trial

The advocate has the responsibility to prepare and present the case for trial.<sup>32</sup> The adversary system in civil litigation (unlike criminal litigation) in Malaysia, places the advocate for each side on an equal footing with the other in terms of the rules for the preparation and presentation of the case. The advocate has not only the facility but also the duty to gather all relevant evidence from his client for the client's benefit and also for the benefit of the opposite side. The discovery process greatly facilitates this as it is available to each side against the other particularly, in obtaining documentary evidence in the possession of the other side and to make use of it to advance its own case and to undermine the other side's, and to make one's client's documents available to the other side. Doing only a perfunctory job of the discovery process may result in one's advocate being taken by surprise at the trial, and even lose the case.

Having taken the fullest instructions, he should set about gathering evidence: names of potential witnesses and their whereabouts as early as possible,<sup>33</sup> and gather documentary evidence. Ideally, this should be

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<sup>32</sup> On the issue of failure to prepare the case adequately for trial: see *Lim Soh Wah & Anor v Wong Sin Chong & Anor* [2001] 2 AMR 2001, p 2008 [35]; *Manley v Placke* (1895) 73 LT 98, PC.

<sup>33</sup> No duty to interview a passenger in the car. *Roe v Robert MacGregor & Sons* [1968] 2 All ER 636; [1968] 1 All ER 543 CA.

done before initiating proceedings. It has been held to be negligence not to do so.<sup>34</sup> They should interview all potential witnesses<sup>35</sup> to make certain of their testimony (bearing in mind that no more than one potential witness should be interviewed at a time.) If a witness appears to be objective and truthful, he may be rehearsed; put through the paces of an examination in chief and cross examination; but not coached. As the adversary system requires each party to prove his case, each side has the responsibility to call witnesses who are objective and favourable. Unfavourable evidence from one's own witness can be more harmful than such evidence from the opposite side's witness. The advocate should then decide on the best witnesses for adducing each item of documentary evidence. They should be sequenced and advised on court procedure in taking evidence from witnesses; conduct in court particularly communication with other witnesses and with the advocate who is calling them, and the post-testimony position. Once the final selection of witnesses is done the witnesses should be subpoenaed. The advocate should inform the client and witnesses of the hearing date which should be diarized, and the advocate himself attend court.<sup>36</sup>

In the later stages the forensic strategy should be reviewed and finalized, and cooperation of the client and witnesses is most important. The advocate should also consider the short-cuts to the presentation of the case to the court. These are the Statement of Agreed Facts, Notice to Admit and the mandatory Agreed Bundle of Documents. These will

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<sup>34</sup> *Gill v Loughter* (1830) 1 Cr.J 179 and *Otley v Gilby* (1845) 8 Beav 602 the solicitor was held to be negligent for not investigating which would have shown that the client had by his conduct forfeited the cause of action.

<sup>35</sup> It is at this stage that an advocate encounters one of the most serious weaknesses of the adversarial process which has surprisingly not received attention and that is that there is no law that requires a potential witness to be available to be interviewed by an advocate who wishes to engage him. It is unwise to threaten witnesses with subpoenas, and in any case, that would only ensure the attendance of the witness in court but not enable the advocate to find out before hand what the effect of the testimony would be. Payment of money is a delicate matter with serious implications for the truthfulness of the testimony.

<sup>36</sup> *Lim Soh Wah & Anor v Wong Sin Chong & Anor* [2001] 2 AMR 2001, pg 2004.

reduce the number of witnesses and length of the trial and thereby the expense to the client, satisfy the duty to the court to make the most efficient use of curial resources particularly time. Demonstrative evidence may be prepared for a more effective presentation of the case.

A question may arise as to whether an advocate has to take all the steps that could be taken. Shouldn't other factors such as the means of the client be taken into account? However the client should not be left to think that all the steps that could be taken have been taken when in fact that is not the case; the client should be advised about the steps not taken with the reasons.

## x) Negligence in Procedure

Advocates are more likely to be faulted for their lack of knowledge of points of procedural law, for not taking procedural steps promptly or for taking the wrong step than for omissions or commissions in the presentation of the case. As an advocate is not expected to initiate any proceeding without making certain of the adjective law applicable to his case<sup>37</sup> failure to comply with such law is easily proved to be negligence. Such matters of procedure<sup>38</sup> are usually specific, prescribed, and even mandatory leaving no room for interpretation<sup>39</sup> or differences of opinion. In *Miranda*, the allegation of negligence was that the memorandum of appeal had not been filed within the time limit. In the English adversary system where a solicitor plays an auxiliary role to the barrister, such matters fall within

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<sup>37</sup> Failing to advise the trustee of a bankrupt that if he initiated proceedings without the consent of the creditors he may end up paying the costs from out of his own pocket: *Allison v Rayner* (1827) 7 B& C 441 at 443.

<sup>38</sup> Interestingly, such matters are dealt with by solicitors in England and by the Malaysian advocate as part of advocacy work so that in the area of liability for failing to observe procedural requirements one finds in the fused profession a vindication of the English division of the profession.

<sup>39</sup> In *Ali bin Jais v Albert Linton & Anor* [1999] 6 MLJ 304 the Court rejected a reasonable interpretation by the advocate that the appeal that he had filed ahead of time should be regarded as substantial observance of the rule actuated by the fear of not missing the Gazette notification which was the commencement date for filing appeals.

the scope of work of the solicitor; in Malaysia's fused advocacy system it is the work of the advocate. (If immunity is to be extended to litigation lawyers anywhere, it should be in respect of matters which require the exercise of forensic skill and judgment of the kind the adversary system requires, not for procedural lapses).<sup>40</sup>

### **xi) Judicial interference in Case Management**

A potentially serious impediment to preparation is the pre-trial case management though not intended to be.

In Malaysia case management has introduced an unfathomable, unique (in the proper dictionary sense of the word) and complicating factor in terms of the judge's powers vis-à-vis the independence of the advocate. In suits begun by writ, O 34 r4 rr2 Rules of the High Court 1980 states that the parties are to have, "the concurrence of the Judge"<sup>41</sup> as to the issues which require determination at the trial." Does this mean that issues that the judge does not agree with may not be raised even if it arises from the client's instructions and there is evidence to support it? Is the advocate under any duty to drop issues at the behest of the court? It is out of character for any procedure dealing with adversary system litigation to empower a judge to reject certain questions; it goes against the independence of the advocate, and his duty to his client.<sup>42</sup> If the client sues the advocate for negligence for not raising such issues, may the advocate invoke the judge as a third party?<sup>43</sup>

<sup>40</sup> *D'Orta-Kenaike v Victoria Legal Aid* (2005) 79 AJLR 755.

<sup>41</sup> There is no such rule in the English case management. See Atkin's Court Forms, Second Edition, Civil Procedure 1999: The Court's Case Management Powers p.48.

<sup>42</sup> *Re Zainur Zakaria* [1999] 2 MLJ 577.

<sup>43</sup> The question is, of course, subject to sec 14 (1) of the Courts of Judicature Act 1964.

## **xii) Presentation of the Case to the Court or forensic advocacy**

### **a) The Advocate's Duties to the Court**

The duty to the court must be performed, even if the client gives instructions to the contrary. It has been said that a barrister's duty to the court influences "the course of litigation and it depends on the exercise by counsel of an independent discretion or judgment in the conduct and management of a case in which he has an eye, not only to his client's success, but also to the speedy and efficient administration of justice. In selecting and limiting the number of witnesses to be called, in deciding what questions will be asked in cross-examination, what topics will be covered in address and what points of law will be raised, counsel exercises independent judgment so that the time of the court is not taken up unnecessarily, notwithstanding that the client may wish to chase every rabbit down every burrow. The performance by counsel of his paramount duty to the court will require him to act in a variety of ways to the possible disadvantage of his client. Counsel must not mislead the court, cast unjustifiable aspersions on any party or witness or withhold documents and authorities which detract from his client's case."

### **b) Independence of the litigation lawyer**

The advocate is chosen, instructed and paid by the client, between whom there is a retainer, to represent the client in the client's cause, and the advocate is expected by the client to carry out the client's instructions, and at any rate, achieve victory for the client.

The fundamental question of whether an action should be brought or defended or settled are essentially for the client. The allegations of fact instructed by the client determine the cause of action or defence to be relied on and the remedies. The optional interlocutory procedures available are essentially matters where the advocate will have to advise but will require the client's instructions, in the sense of consent, before acting as they will ultimately impact on the client financially.

The advocate will have a greater discretion, and may only need to keep his client informed on, the principles of law, and their interpretation and authorities to be relied on; and the advocate has a choice in terms of

evidence to be adduced including the selection, numbers and sequencing of witnesses; to apply for, to allow or nor to allow adjournments; and the question of remedies which are to be pressed for or abandoned; and matters of strategy are all matters where a prudent advocate would consult his client about but retain the final say. The advocate has the dominant role and does not expect to be second-guessed by the client and certainly not countermanded, and certainly not judged by hindsight which is what any litigation for negligence, after the results are known, may be.

However, the client has no right to the obedience of the advocate in matters which are illegal, unethical and involving breach of etiquette, and cannot interfere with the advocate's duties to the court as the litigation lawyer is an officer of the court.

In matters of forensic advocacy (as distinct from preparation before the trial), the advocate being skilled in court craft on which the client clearly relies (otherwise there is no need for the advocate), has *carte blanche* on how the case is to be formulated and presented. The litigation lawyer has been likened to a film director with a threadbare script. Just as a director is expected to interpret the script and present it to the best possible effect that his creativity would allow so must the litigation lawyer. Neither should he be straitjacketed; the director by the producer and the censors and the advocate by the client and the court. "In (the) adversarial system, the mode of presentation of each party's case rests with counsel. The judge is in no position to rule in advance on what witnesses will be called, what evidence should be led, what questions should be asked in cross-examination. Decisions on matters such as these, which necessarily influence the course of a trial and its duration, are made by counsel not by the judge."

Sir David Napley, a litigation solicitor, gives a more practical reason for the independence of the advocate, and its limits: "(W)hereas barristers and solicitors are agents of their client, ...the nature of their engagement is such that they cannot reasonably be expected constantly to stop the course of proceedings in order to take instructions on every aspect of the conduct of the case. It probably arises by implication, into the solicitor's contract of retainer and the terms of the barrister agency that, in pursuit of the advocacy, each of them is free to conduct the proceedings in such way as he, in his proper discretion, considers appropriate; however, on any particular matter the client has given express instructions to the advocate not to pursue a particular course, then,

whether he be barrister or solicitor, he cannot override those instructions. If he is justifiably unwilling or unable to comply with them, it his duty to advise the client that he cannot accept the instructions and that he must determine his retainer and withdraw from the case.”

The court, though authorized to control proceedings, is not expected to exert a direct and tight control over the advocate except in the event of egregious misbehavior which amounts to abuse of the latitude he is given, resulting in defeating the very ends of justice. It is felt that the judge should exercise only such a degree of control<sup>44</sup> as to ensure a level playing field for each side to present its case and not as if to guide the proceedings to a certain pre-determined conclusion.

### **xiii) Advice in the event of negligence**

An advocate who has done or omitted to do anything which may give the client a cause of action for negligence has a duty to advise the client to seek independent advice as the advocate would be conflicted in advising his client about the advocate’s own negligence.<sup>45</sup>

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<sup>44</sup> An interesting matter for comparative empirical study between the adversary system of different jurisdictions is how they impact on members of the fused profession, solicitors and barristers, and their relationships with the courts. The latter is not subject to the same degree of curial control for forensic excesses as the advocate and the solicitor are. This may be due to the fact that solicitors originated as officials of the court and then graduated to officers of the court, and the barrister is not an officer of the court to the same extent, and this may have an intimidating effect on forensic performance. As an officer of the court, the advocate and the solicitor owe a duty to defer to and obey the court where his duty to the client conflicts with his duty to the court. This may result in client feeling aggrieved and, if they lose, blame their defeat on that and try to make the advocate the scapegoat. Fear of suits for negligence may cause advocates to conduct cases self-defensively. Between barristers and advocates and solicitors, barristers who are regarded as most concerned with litigation, are given the greatest latitude.

<sup>45</sup> *Ho Kon Min v Lim Geok Kim, Betsy & Ors* [2001] 4 SLR p [367-H]-[368 A-I] [369-A-C].

In advising an aggrieved client on a negligence claim, in addition to proving the acts or omissions needed to succeed, the advocate will also have to show not only that poor advocacy resulted in an unfavourable outcome he will face the very great obstacle of showing that a better standard of advocacy could have resulted in a more favourable outcome.<sup>46</sup>

## CONCLUSIONS

- i) It is obviously not enough to teach civil procedure alone; it has become imperative to teach civil litigation skills by means of role play.
- ii) The provisions of the Legal Profession Act 1976 which allow a phase by phase involvement in litigation during pupillage should be taken the fullest advantage of by pupils.
- iii) Universities should invite practitioners to conduct civil litigation courses.
- iv) Law teachers and members of the Bar involved in training should pay more attention to the work done by litigation solicitors in England and elsewhere as the work they do, and their manner of training for it is more relevant to the needs of fused professions such as Malaysia's. The Bar in England is not the same as the Bar in Malaysia.
- v) The law of negligence discourages junior advocates from punching above their weight unless the advocate makes the effort necessary to overcome his limitations and, in any case, the client should be fore-warned.

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<sup>46</sup> *Hall v Simon* at 683 [f-g].

### PART 3

## DEFENSES TO CIVIL LITIGATION NEGLIGENCE AND THE MALAYSIAN ADVOCATE

In the absence of immunity, some of the grounds for immunity may well constitute defenses in Malaysian law, along with other defenses. The peculiarities of fused profession advocacy need to be taken into account in determining the standard of the duty of skill and care. The tendency to readily apply cases from England should be avoided in view of the obvious differences, as the Canadian High Court did in *Demarco*.

The following instances of defenses involve litigation solicitors and may be relied on by advocates, as barristers had until recently enjoyed immunity.

#### i) Client's Instructions

If after being advised as to the pitfalls of a particular course of action, a client instructs his solicitor to proceed in a certain way, it is an adequate defense against any action the client may bring against the lawyer. In *Dutfield v Gilbert H. Stephen & Sons*<sup>47</sup> the client had been advised by the solicitor not to settle with her husband without checking his assets, she did not accept the advise but sued her solicitor; the court held that she had been advised by her solicitor not to settle, and it was not part of his duty to ensure acceptance of the advice by the client.

#### ii) Duty to the court

“The mere doing of his duty to the court by the advocate to the detriment of his client could never be called negligent. Indeed if the advocate’s conduct was bona fide dictated by his perception of his duty to the court there would be no possibility of the court holding him to be negligent.”<sup>48</sup>

<sup>47</sup> [1988] FamLaw 473.

<sup>48</sup> *Hall v Smith* at p 683 b-c.

### iii) **Judicial Interference**

A more direct and serious form of judicial interference, than that discussed under case management,<sup>49</sup> took place in Malaysia recently when the then Chief Justice Tun Zaki Azmi decided to clear the backlog of civil cases in the High Court. He instructed trial judges to forcefully short-shrift hearings: hearing days were reduced; a number of cases were fixed for hearing in one day; advocates were ordered to reduce the number of witnesses; and examinations in chief were required to be in writing and even cross-examination questions were required to be in writing and served on the opposite party in advance of the hearing; all of these regardless of what the court itself had ordered during the case management stage. None of these cases could be said to have been conducted competently,<sup>50</sup> and have been appealed. If any of their clients had sued their advocates for negligence, would the interference by the judges<sup>51</sup> amount to a defence?

### iv) **Counsel's Advice**

In those cases where an advocate had taken advice of a senior or expert counsel or presumably was led by another advocate such as a QC in an ad hoc admission situation, may the advocate who has had the benefit of the QC's advice and followed it and advised the client about it, take it as a defense? In *Locke v Camberwell Health Authority*<sup>52</sup> it was held that a solicitor who had no specialist knowledge had acted properly if he had taken advice of senior counsel. However, he also had to make some

<sup>49</sup> See Part 3 xi Judicial Interference in Case Management.

<sup>50</sup> For instance, in *Jones v National Coal Board* the fact that the trial judge had interfered with the presentation of the case by the barristers, not by preventing them from asking questions but by taking over the examination of witnesses from the barristers, was considered serious enough for the judgment to be set aside on the complaint of both the barristers including the successful one, and for the trial judge to be asked to resign; so entrenched is the role of barristers in the adversarial system.

<sup>51</sup> Judicial immunity may protect the judges.

<sup>52</sup> (1991) 2 Med L R 249.

effort to find out for himself and not leave matters entirely to the senior counsel. In *Davy-Chiesman v Davy-Chiesman*;<sup>53</sup> a wasted costs order was made against the solicitor for failing to alert the Legal Aid Board as to the error of the senior counsel.

However, the mere fact that a senior counsel had been engaged does not constitute the defense unless there was clear reliance on the senior counsel in respect of the matter at hand as the advocate would in such cases be regarded as the solicitor on record following English practice and would be regarded as responsible for all procedural matters in connection with the court except for forensic advocacy.<sup>54</sup>

#### v) **Informed consent**

This is a form of defence better known to medical negligence cases and may be extended to litigation negligence as it may be likened to voluntary assumption of risk in tort law. However it is expected that the court would require that the risk the client was taking should have been specifically brought to the client's attention, and his consent at least tacitly given.<sup>55</sup> The defence provides an incentive to the scrupulous observance of Rule 25.

#### vi) **The difference in abilities between advocates**

The standard of the duty of skill and care has been laid down as what may be expected from any reasonably skilled advocate without any subjective element. However, advocates do vary in terms of their skill, experience and knowledge and specialization, and are chosen for such reasons particularly their expertise in certain areas of law. And shouldn't the standard vary according to the nature and magnitude of the suit? Shouldn't an advocate have the level of competence needed for the work he has undertaken to do? In other words, does the legal position

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<sup>53</sup> [1984] Fam 84.

<sup>54</sup> *Tan Hock Tee v C S Tan & Co* [1997] 1 SLR 358@ p 364[H-I].

<sup>55</sup> *Ibid* at 361 [I]-366-[A] Though the expression 'implied consent' was not used, the case proceeded along those lines.

that all advocates are to be judged by the same standard justify any advocate doing work above his league?

By the same token, if a foreign litigation lawyer is retained and admitted ad hoc for his much-vaunted “special qualifications or experience of a nature not available amongst advocates in Malaysia,”<sup>56</sup> and paid accordingly (not to mention other additional expenses), isn’t a higher standard should be expected? In *Duchess of Argyll v Beuselinck* it was held that a solicitor who claimed to have special expertise was to be held to a standard of reasonable competence of a professional of such expertise; QCs are to be judged by QC standards, not by Malaysian standards as they have abilities not available among Malaysian lawyers.

### **vii) The difference in standards between different adversarial systems**

While there have been studies on the benefits or otherwise of fusion, and comparisons between the inquisitorial and adversary systems, there has been none, to the knowledge of the writer, on how litigation lawyers operating under different professional structures fare in the varying forms of the adversarial system. So far the courts in weighing decisions from various jurisdictions on what constitutes negligence do not seem to have taken into account the structure of the profession prevailing in a jurisdiction in terms of how it may affect advocacy, and the standard of the duty of skill and care.

Where the Bar is divided as in England, a barrister appears with a solicitor in the same case. It may be said that litigation is a team effort with each having his part of the case to do, the work is shared, and thereby reduced and there is the obvious benefit of consultation and specializations. The solicitor also does advocacy work alone in the lower courts, and they most resemble the advocate in the fused profession except that they do not represent their clients in litigation at all levels of court including appeals. And the ‘solicitor advocate’ in England is essentially a solicitor who has acquired advocacy qualifications and is given rights of audience in higher levels of court and is often a member of a firm of solicitors.

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Sec. 18 Legal Profession Act 1976; Admission in Special Cases.

Some of the states of Australia, New Zealand and Canada operate a semi-fused profession. Though the lawyer is a barrister and solicitor, some lawyers prefer to practise only as barristers accepting work (mainly) from solicitors and are subject to the same rules as barristers are in England but may be members of the same firm as the solicitors they appear with in court. In New Zealand such barristers (barrister sole) may practice in their own firms without solicitors but may employ other barristers, which is different from the English position. How the litigation lawyers benefit from this system is not difficult to guess or they would not have recognized advocacy as a discrete skill even when resorting to these permutations.

In Malaysia, advocacy is defined comprehensively both in terms of the work and the adjudicatory bodies involved, in sec. 3 of the Legal Profession Act 1976. A unified approach to litigation work is taken as it must of necessity as the profession is fused. This should make for a less complicated understanding of what constitutes advocacy, and negligence. This comprehensive definition makes for advocacy as one integrated service whether it is for the purpose of determining negligence or for the purpose of remuneration and the right to a lien; and is therefore termed 'an entire contract.' As stated by Azmi C.J. (Malaya): "In the circumstances it is immaterial whether the act of negligence committed by a practitioner is an act normally done by a solicitor or a barrister in England,"<sup>57</sup> but an appropriate standard of skill and care has to be applied. Malaysian courts will have to look at the case law of other jurisdictions not as laying down the standards for us but as representing only the germ of the idea which will then have to be considered in light of local circumstances as to whether they are applicable here; making for a law of comparative professional negligence. One of the important elements

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The fused profession is spared the (vexatious) distinctions that may have to be made in England between the solicitor's part and the barrister's part; and it is 'court work' only if it is done in court, and that which is done outside court is not court work, except when it is intimately connected with it. (Even in the case of the split Bar, Lord Upjohn had suggested such an integrated approach combining the work of barristers and solicitors in litigation, "the immunity of counsel in relation to litigation should start at the letter before action where taxation of party and party costs starts.")

which will have to be considered in this respect is the constitution of the legal profession in the country of origin of the particular case law vis-à-vis Malaysia.

In developing a Malaysian standard of skill and care, our courts will have to take into account the circumstances in which adversary system litigation is practiced here. The work of the advocate in civil litigation, unlike criminal litigation, is characterized by an abundance of paper work; number of deadlines to meet in filing and serving cause papers and in various responses to the other side on a daily basis, making the KIV diary an indispensable tool of the advocate's work.

As the advocate also prepares and presents the case in court unlike the solicitor and his 'partner' the barrister, this also means that the advocate cannot easily hand over his case, even to another advocate in the same firm, where a clash of hearing dates occurs or where a case overruns the period initially fixed for its hearing, and given the court practice of hearing cases continually rather than continuously, the advocate's work is crowded by organizing adjournments and stop-start preparations as he rushes from one part heard case to another. And if his practice mixes contentious and non-contentious matters, which junior, salaried lawyers have to do to maintain a certain level of billing to make it as partner, so much the worse for him. Among all the types of litigation lawyer, the advocate is perhaps the most stressed.

A nuanced approach to meet the conditions of a fused profession is necessary. Determining the appropriate standard for an advocate, also involves a discerning attitude in applying decisions from other jurisdictions on what constitutes litigation lawyer negligence may, if certain important differences between common law jurisdictions, are not held at the fore of one's mind, result in injustice to the advocate. The writer regards adversary system litigation (with its "peculiar characteristics")<sup>58</sup> and as practiced by the fused profession as perhaps the more burdensome.

### **viii) Demands of Forensic Advocacy; error of judgment**

Forensic advocacy as opposed to the stage of preparing a case for preparation involves exigencies which do not allow the advocate time to

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<sup>58</sup> *Per Rondel's barrister Louis Blom-Cooper.*

think and plan his moves; decisions have to be made on the spot and well prove to be unwise. And alleging negligence may be more a matter of hind sight wisdom or second-guessing the advocacy of the defendant advocate. “Indeed, I find it difficult to believe that a decision made by a lawyer in the conduct of a case will be held to be negligence as opposed to a mere error of judgment. But there may be cases in which the error is so egregious that a court will conclude that it is negligence.”<sup>59</sup>

As Lord Reid put it: “Every counsel in practice knows that daily he is faced with the question whether in his client’s interest he should raise a new issue put another witness in the box, or ask further questions from those he is examining or cross-examining. That is seldom an easy question...But the client does not know that. To him brevity may indicate incompetence or negligence and sometimes stopping too soon is an error of judgment.”<sup>60</sup>

## **ix) Extenuating circumstances; mitigation of damages**

### **a) Honest mistake**

In *Ali bin Jais v Linton Albert & Anor*<sup>61</sup> the defendant advocate had contended that he had made an “honest mistake” in filing the appeal prematurely because he was afraid he might miss the date for doing so (presumably, because that would have involved monitoring the Gazette for the notification of the date for filing the appeal) and that he had thereby substantially complied with the law. The court was not moved.

It is not certain whether the court should take into account the fact that the client had knowledge of the lack of experience of the advocate which had been disclosed to him at the very outset of the advocate-client relationship to the extent of an ‘informed consent’ defense<sup>62</sup> or merely a mitigating circumstance; standing of the advocate; the amount of time for preparation; and the amount of fees the client could afford to pay. Also relevant are the complexity and novelty of the

<sup>59</sup> *Demarco* at p 405.

<sup>60</sup> [1969] 1 AC 191, [G].

<sup>61</sup> [1999] 6 MLJ 304.

<sup>62</sup> See footnote No. 61.

law and the magnitude in terms of the evidence which had to be gathered, studied, marshaled and presented to the court.

### x) **Alternatives to Negligence**

An action for negligence may sometimes smack of sledge-hammer and a milder solution may be preferable.

### xi) **Wasted costs<sup>63</sup>**

In England wasted costs was introduced to ameliorate immunity. It was introduced by the Supreme Court Act 1981 s 51 (6). Wasted costs may be ordered against a solicitor or a barrister including the client's own for negligence which has to be of a milder nature than negligence as a tort. It was not meant to be developed as a cause of action for discrete litigation but to be dealt with in the main suit, to be disposed of by the trial judge as one of the issues of the case but, preferably, at the end of the main suit.

Section 51(7) of the Act defined the occasion for a wasted costs order as when costs was incurred

- a) “As a result of any improper, unreasonable or negligent act or omission on the part of any legal or other representative or any employee of such representative; or
- b) Which, in the light of any such act or omission occurring after they were incurred, the court considers it unreasonable to expect that party to pay?”

The provision was interpreted in the case of *Ridehalgh v Horsefield*.<sup>64</sup> ‘Negligent’ should be understood in an un-technical way to denote failure to act with the competence reasonably to be expected of ordinary members of the profession.

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<sup>63</sup> Liability for wasted costs may be the “any other responsibility” referred to by section 117(4) of the Legal Profession Act 1976.

<sup>64</sup> (1994) Ch 205 (CA).

Negligent handling of a client's case is not enough: the lawyer's conduct must also be a breach of the duty to the court: *Persaud v Persaud*.<sup>65</sup>

A wasted costs order will only be made if there is something akin to a legal representative being guilty of an abuse of process: *Radford and Co v Charles*.<sup>66</sup> A failure to achieve professional standards will not involve liability; it has to be a breach of duty to the court. There must be causal link between the legal representative's behavior and the wasted costs: *Ridehalgh v Horsefield*<sup>67</sup> and *Brown v Bennet*.<sup>68</sup>

This would be the appropriate way to deal with the matter whether the case was won or lost and as it may be dealt with in the original proceedings, it would not involve re-litigation of decided issues, and it may be brought against one's own advocate. Lord Bingham MR said in the context of 'wasted costs orders' applies:

“(Any judge who is invited to make or contemplates making an order arising out of an advocate's conduct of court proceedings must make full allowance for the fact that an advocate in court, like a commander in battle, often has to make decisions quickly and under pressure, in the fog of war and ignorant of developments on the other side of the hill. Mistakes will inevitably be made, things done which the outcome shows to have been unwise. But advocacy is more an art than a science. It cannot be conducted according to formula. Individuals differ in their style and approach. It is only when, with all allowances made, an advocate's conduct of court proceedings is quite plainly unjustifiable that it can be appropriate to make a wasted costs order against him.”<sup>69</sup>

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<sup>65</sup> [2003] EWCAC iv 394, [2003] PNLR 519.

<sup>66</sup> [2003] EWHC 3180 (Ch) 2004] PNLR 25.

<sup>67</sup> [1994] 3 All. E. R. 848.

<sup>68</sup> (No. 2) [2002] 1 WLR 713 (Civil Practice 2009).

<sup>69</sup> *Ridehalgh v Horsefield* [1994] 3 All ER 848 at 865 per Lord Bingham MR.

However, the idea is not unknown to Malaysian civil litigation. Order 59 Rule 8, Rules of the High Court 1980 says that the Court may order an advocate whom it considers personally responsible for incurring costs “improperly or without reasonable cause or are wasted by undue delay or by any other misconduct” to pay the costs personally but only after he has been given a reasonable opportunity to show cause.

### **xii) Negligence as misconduct**

“Gross disregard of the client’s interests” is under sec 94 (3) (n) of the Legal Profession Act 1976 a form of misconduct. Disregard of a client’s interest is wider than negligence; however to the extent that it is wide enough to include ‘negligence’ as understood in tort law, is this provision an alternative to a suit for negligence per se or under the rules of court? Is there an element of double jeopardy? The three courses of action, though tending to duplicate in substance, are not identical. The concept of negligence as provided under the rules of civil procedure, is not a substantive procedure for relatively simple situations and will not yield more than costs. The misconduct procedure is more disciplinary in nature, and will not result in damages to client. Only a course of action for negligence is likely to yield substantial damages if justified. In any case as the three provisions turn on the advocate’s conduct of the case, the question of competence will arise, and with it, the question of double jeopardy. However, only sec 94 is a punitive; the other three are compensatory; and a court is bound to take into account compensation already awarded where it centres on the same act or omission, so double jeopardy or double recovery will not arise.

## **CONCLUSIONS**

- i) The grounds for immunity may in some instances constitute defences e.g. abuse of process.
- ii) There may be a case for allowing immunity in respect of pre-retainer advice and legal aid cases, however disciplinary action for negligence or misconduct should remain.

- iii) The standard of skill and care should take into account the greater burden on the advocate that belonging to the true fused profession imposes.
- iv) A distinction has to be made between omissions and inadequate preparation before trial and decisions made 'in the heat of battle', strategy and other steps in the face of the court, and matters of judgment and discretion of the advocate.
- v) Malaysian courts should take into account interference by the judge in the case management stage where this is clearly the problem.