

ENGINEERS AND ENGINEERING CONTRACTS

Liabilities and Powers

1.0 Who is an Engineer?

1.1 A loose term, no common law definition.

1.2 Vague and circular definition given in section 2, Registration of Engineers Act, 1967 (“Engineers Act”):

“Engineer” means a Civil Engineer, Electrical Engineer, Mechanical Engineer or Structural Engineer or other person qualified to be registered under this Act.

1.3 First question first: liability attaches to an engineer, not to the company which he is employed even though the company is a body corporate within the meaning of section 7A of Engineers Act. Section 7A of Engineers Act allows, subject to the approval of the Board of Engineers, Malaysia (“BEM”) and other conditions imposed by BEM and/or Engineers Acts, a body corporate to practise as consulting engineers.

Implication: limited liability of body corporate (Sdn Bhd) vs unlimited liability of an individual? Any real implication?

1.4 In this talk, “Engineer” is used in the sense of a “Registered Engineer” within the meaning of Engineers Act.

2.0 What is Legal Duty? Legal Liability?

2.1 Legal duty and legal liability are both sides of the same coin: without the existence of legal duty there cannot arise any legal liability.

2.2 With respect to an engineer, the two main categories of liability are:

2.2.1 contractual liability; and

2.2.2 tortious liability (mainly negligence).

2.3 By entering into a contract, the two contracting parties acquire rights and possible liabilities against the other. In the case of an engineer, the contract for the provision of professional services is such an example.

2.4 Tortious liability is imposed by law, the two parties need not have a contract for the liability to be imposed; or, putting it differently, for a duty of care to arise.

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- 2.5 With respect to an engineer, a common strand of both contractual liability and tortious liability is negligence (professional negligence/professional liability).
- 2.6 Duty of care: *Donoghue v. Stevenson* [1932] AC 562.
- 2.7 Duty of care: in tort and in contract. Can there be a simultaneous and concurrent duty in both tort and contract?

Yes, see *Henderson v. Merrett Syndicates Ltd* [1995] 2AC 145

3.0 Contractual Duty to Take Care

- 3.1 See BEM Form (1999) Revised Model Form of Agreement: Conditions of Engagement - Clause 5.1

“The Consulting Engineer shall exercise all reasonable skill, care and diligence in the discharge of the professional services agreed to be performed by him. If in the performance of his professional services the Consulting Engineer has a discretion exercisable as between the Client and the Contractor, the Consulting Engineer shall exercise his discretion fairly.”

4.0 Tortious Liability – Negligence

- 4.1 Modern law of negligence develops substantially from construction laws cases. Subsequent developments and the position of pure economic loss claims.

- 4.1.1 *Anns v. Merton LBC* [1978] AC 728.

- 4.1.2 *Dutton v. Bognor Regis UDC* [1972] QB 373.

- 4.1.3 *D & F Estates v. Church Commissioners* [1989] AC 718.

- 4.1.4 *Pacific Associates v. Baxter* [1990] QB 995

- 4.1.5 *Murphy v. Brentwood* [1991] AC 398.

- 4.2 Developments in Malaysia

- 4.2.1 *Kerajaan Malaysia v. Cheah Foong Chew* [1993] 2 MLJ 43.

- 4.2.2 *Chin Sin Motor Works v. Arosa Development* [1992] 1 MLJ 2.

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4.2.3 *Teh Khem On v. Yeoh & Wu Development Sdn Bhd* [1995] 2 MLJ 663

4.2.4 *Dr Abdul Hamid Abdul Rashid v. Jurusan Malaysia Consultants* [1997] 3 MLJ 546

4.2.5 *Steven Phoa Cheng Loon v. Highland Properties Sdn Bhd* [2000] 4 MLJ 200

4.3 Development in Other Commonwealth Countries

4.3.1 Australia *Bryan v. Maloney* (1995) 128 ALR 163

4.3.2 Canada *Winnepeg Condominium Corporation v. Bird Construction* (1995) 121 DLR (4th) 193

4.3.3 New Zealand *Invercagill CC v. Hamlin* [1994] 3 NZLR 513

4.3.4 Singapore *RSP Architects Planners and Engineers v. Ocean Front Pte Ltd* [1996] 1 SLR 113

4.4 Professional negligence: *Hedley Byrne v. Heller & Partners* [1964] AC 465. Concept of reliance.

5.0 Legal Powers

5.1 “Power” implies discretion: exercise of some authority by the engineer who is conferred with the power

5.2 Despite any wordings conferring absolute power, no power can be absolute and unfettered: per Azlan Shah CJ in *Pengarah Tanah dan Galian, WP v. Sri Lempah Enterprise Sdn Bhd* [1979] 1 MLJ 135:

“Every legal power must have legal limits, otherwise there is dictatorship ...; where it is wrongly exercised, it becomes the duty of the courts to intervene.”

5.3 Reasonableness in the exercise of powers: *Associated Provincial Picturehouse v. Wednesbury Corporation* [1948] 1 KB 22

6.0 Some General Points

6.1 Duty and power compared and contrasted

6.1.1 “Duty” is associated with “shall”; “power” is associated with “may”.

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- 6.1.2 “Duty” is imposed by law; “power” is acquired/conferred by e.g. contract.
- 6.1.3 “Duty” cannot be delegated whereas “power” can be delegated.
- 6.1.4 The legal consequences that can arise from the performance of a “duty” (and hence the liability that may arise) and that from the exercise of a “power” are different.
- 6.2 The various roles of an engineer in an engineering contract
 - 6.2.1 engineer as designer
 - 6.2.2 engineer as supervisor / inspector
 - 6.2.3 engineer as certifier
 - 6.2.4 engineer as contracts administrator / agent to employer
 - 6.2.5 engineer as a quasi-arbitrator
- 6.3 A central thesis of this talk is thus
 - 6.3.1 an engineer may incur professional liability not because he is an engineer: it depends on which role he is playing in an engineering contract;
 - 6.3.2 in certain role, an engineer is performing a legal duty; in other roles an engineer may be exercising the power conferred upon him;
 - 6.3.3 the legal consequences of these two are different;
 - 6.3.4 if legal duty or legal liability is envisaged, then answers to the following questions are pertinent:

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- (a) to whom is the duty owed?
- (b) breach of that duty: is the test in *Bolam v. Friern Hospital Management Committee* [1957] 1 WLR 582, i.e. the so-called “*Bolam*” test still applicable in Malaysia?
- (c) quantum of compensation

7.0 The Various Roles of an Engineer in an Engineering Contract

7.1 Engineer as designer

7.1.1 fitness for purpose: Sale of Goods Act, 1957

Young & Marten v. McManus Childs Ltd (1968) 9 BLR 77

7.1.2 buildability / practicality of design

7.1.3 duty to reconsider or revise design

Merton LBC v. Lowe (1981) 18 BLR 130

7.1.4 innovative design

IBA v. EMI & BICC (1980) 14 BLR 1

7.2 Engineer as supervisor

7.2.1 negligent inspection

7.3 Engineer as certifier

7.3.1 negligent certification

Pacific Associates v. Baxter [1989] 2 All ER 159; development of potential liability

7.4 Engineer as contracts administrator / agent to employer; fiduciary duty of an agent

7.5 Engineer as quasi-arbitrator?

8.0 Extent of Liability and Power

8.1 An engineer in an engineering contract is *functus officio* when he issues the final

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certificate i.e. he no longer has any power under the contract. However, his *duty* remains.

8.2 For how long does an engineer remain liable for his work?

8.2.1 Limitation Act, 1957, section 6: 6 years

8.2.2 When does the time start to run for an action in

(a) breach of contract?

(b) tort of negligence? *Pirrelli Cable Works v. Oscar Faber* [1983] 2 All ER1

8.3 If liability established, what next?

8.3.1 If he is a Professional Engineer or Graduate Engineer within the meaning of Engineers Act, strike off or suspend his registration. If he is a member of Institution of Engineers, Malaysia, same. Rule(s) of natural justice must be observed.

8.3.2

Compensation to claimant

(a) in contract: if a provision is stated in the contract to limit the amount of damages upon breach, is this subject to section 75 Contracts Act, 1950?

(b) in tort: unliquidated damages - should a limit be imposed? If so, method of quantification of this limit?

9.0 Professional Indemnify Insurance

9.1 PI Insurance: to be made compulsory for all engineers? In legal profession it is compulsory.

9.2

Premium reduction if *Murphy v. Brentwood* is applicable in Malaysia?

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