(2012) 20 IIUMLJ 29

CIVIL* LITIGATION NEGLIGENCE AND THE MALAYSIAN ADVOCATE** PART 1

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ABSTRACT

Civil litigation negligence now stands on a surer footing following cases from Canada, England and elsewhere which lay emphasis on the adversarial system rather than the structure of the profession, and immunity has now been almost completely abolished by judicial decisions. In Malaysia, the basis of legal professional liability is expected to be

* The writer is of the firm view that criminal cases should be considered separately from civil cases because of the difference in the law of procedure relating to the preparation of a case for presentation in court and the public policy considerations peculiar to each type of case as seen in the approach taken by the House of Lords in *Arthur J.S. Hall v Simons* in which separate judgments were delivered for each type of case. And in *Rees v Sinclair* [1974] 1 NZLR 180, a civil case, in which the New Zealand Court of Appeal did not consider the position in criminal cases.

** For the purposes of this article an 'advocate' refers to the Malaysian (and Singaporean) lawyer, who as a member of a 'true fused' profession, engages in litigation or 'contentious business' as defined in s. 3 of the Legal Profession Act 1976.

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re-aligned to be consistent with the other common law countries that have abolished immunity. The questions that necessitate consideration are therefore acts that would constitute negligence and those that are excusable, the relevant defences, and, of course, the alternative sanctions to civil litigation for this type of negligence. The fused nature of the profession in Malaysia, perceived to be more burdensome to its members, raises the question of the appropriate standard of the duty of skill and care.

Keywords: Adversarial system, civil litigation, professional negligence, basis of liability.

KECUAIAN LITIGASI SIVIL DAN PEGUAM MALAYSIA BAHAGIAN 1

ABSTRAK

Kecuaian litigasi sivil sekarang berdiri atas tapak yang lebih pasti berikutan kes-kes dari Kanada, England dan tempat-tempat lain yang memberi penekanan kepada sistem pertentangan, bukannya struktur profesion, dan kekebalan sekarang telah hampir dihapuskan sepenuhnya oleh keputusan kehakiman. Di Malaysia, asas liabiliti profesion undang-undang dijangka dijajarkan semula untuk menjadi selaras dengan negara-negara lain yang telah menghapuskan kekebalan. Oleh sebab itu, persoalan yang memerlukan pertimbangan ialah tindakan-tindakan yang membentuk kecuaian dan tindakan-tindakan yang boleh dimaafkan, pembelaan yang berkaitan, dan, tentunya, sanksi alternatif kepada litigasi sivil untuk jenis kecuaian ini. Sifat lakur profesion ini di Malaysia, dirasakan lebih membebankan ahlinya, menimbulkan persoalan

tentang piawai kewajipan mengguna kemahiran dan berjaga-jaga yang sewajarnya.

***Kata kunci*:** sistem pertentangan, litigasi sivil, kecuaian profesional, asas liabiliti.

INTRODUCTION

Significantly for the Malaysian advocate *Rondel v Worsley*[1] arose from a dock brief.[2] It was one of a very limited category of cases where a barrister could appear without an instructing solicitor. He is retained directly by the client for a fixed fee; he interviews the client and prepares the case and presents it himself in court; very much like the litigation solicitor in the 'split profession' of England and the advocate in the fused profession in Malaysia. All three types of litigation lawyer operate according to the adversary system. Having recognized adversary system advocacy[3] as the heart of the matter for determining negligence, and the accompanying public policy grounds as the justification for immunity, the House of Lords had to acknowledge that it was not the status - barrister or solicitor - that mattered, and extended immunity to litigation solicitors as well.[4]

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1 [1969] 1 AC 191 at 470 [G], 471 [A]; [1967] 3 All E. R. 993 (H.L) It arose from a criminal case; the accused later sued his barrister for negligence by means of a civil suit.

2 A defunct form of criminal legal aid available in the lower courts of England.

3 In the Malaysian context, 'litigation' is taken to mean all 'contentious business' as defined in s. 3 Legal Profession Act 1976: It means business done by an advocate and solicitor, in or for the purpose of proceedings begun before a court of justice, tribunal, board, commission, council, statutory body or an arbitrator." The concept of curial body is widened to include any organization to which the advocate represents his client and which is required to act in a judicial or quasi-judicial manner. The profession itself being fused, the distinction between solicitor's work and barrister's work is inapplicable and therefore irrelevant, and 'advocacy' combines both and is to be taken in a unitary sense.

4 It is still governed by the immunity of barristers. Section 62, Courts and Legal Services Act 1990 (UK) provides: "(1) A person-(a) who is

The true significance of *Rondel* to the Malaysian advocate is not immunity, short-lived in England for litigation solicitors, but the clarity it initiated in the thinking about adversary system advocacy, or more precisely, the elements constituting it as the proper basis for determining negligence.

ADVERSARY SYSTEM LITIGATION AND BARRISTERS

The barrister, and his predecessors,[5] developed the common law[6] and with it the adversary system for both civil and criminal matters, and in later stages, were granted immunity.

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not a barrister: but (b) who lawfully provides any legal service in relation to any proceedings, shall have the same immunity from liability for negligence in respect of his acts or omissions as he would have if he were a barrister lawfully providing those services."

(2) No act or omission on the part of any barrister or other person which is accorded immunity from liability for negligence shall give rise to an action for breach of any contract relating to the provision by him of the legal services in question."

The provision is a codification of the position of solicitors as spelt out by Lord Upjohn: "So I think the general result is likely to be that a solicitor acting as advocate will be immune from the consequences of his negligence while he is acting as advocate in court on behalf of his client or settling the pleadings." (at 285 B-C) "In other words, the immunity of solicitors will follow the fortunes of the immunity of barristers or track it." Per Lord Bingham in *Arthur J.S. Hall v Simons* [2000] 3 All ER 673 at 684 [G-H].

5 "The common law of England was developed chiefly by an elite body of advocates and judges who belonged to the order of serjeants-at-law; a body which, in nearly seven centuries of history, numbered less than one thousand men, one quarter of the size of the present practising bar." Baker, J.H, *An Introduction to English Legal History;* Chap. 10 *The Legal Profession*, 2nd ed. (London: Butterworths, 1979). The serjeants-at-law were succeeded by Queen's Counsel.

6 The conquering Normans of 1066 did not wish to worsen the displeasure of the conquered English by imposing Norman laws on them. As a political expedient they allowed the English to have their own laws in exchange for recognizing the political authority of the Norman King in London, particularly his power to appoint judges. (See 'Common Law,' Oxford Dictionary of Law; 6th ed. Oxford Dictionary Press; Martin A., Elizabeth & Law, Jonathan Eds.

The process of litigation gave rise to an adjective law and juridical values catering to the adversary system, (the 3rd characteristic); and the (rather obsequious) relationship between barristers and judges (nearly all former barristers) and dealings between barristers themselves, and between barristers and solicitors, lay clients and witnesses and opposite parties resulting in the development of a distinctive brand of ethics and etiquette, (the fourth characteristic) all evolving into the 'adversarial system' which made for a legal culture and exclusive territory known as 'legal London' (inhabited only by barristers in their chambers and by some judges in their apartments; and their places of recreation the inns which in time evolved into places of legal education and training and are professional bodies in their own right (Inns of Court) with their own traditions and practices).

With barristers having the starring role in developing and operating the common law system, and with their education and social background,

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In the absence of royal decrees laying down the law, the common law evolved by the resolving of disputes in court by the application of local customs and practices, and with it the legal profession and the adversary system. It was left to parties to initiate and prove their own cases, (the first characteristic). Right from the beginning it emphasized the role of barristers whose contentions shaped the law with London-based judges giving it their imprimatur. Such local customs and usages, as were recognized and applied by the judiciary, acquired the status of law.

Peripatetic judges fanned out from London to other parts of the country (and their routes became the six circuits which have survived to this day), and applied similar laws wherever they went making it a law common to the whole country (hence 'common law'). As it had to be referred to and applied in other parts of the country, it had to be kept in a portable and accessible form, so records of cases which had been authenticated by judges by applying it, became the law reports and ripened into case-law (its second characteristic) an authoritative source of law peculiar to the common law system.

The need to apply the case law in a discerning manner gave rise to an internal system for the evaluation of case law comprised in the doctrine of precedent (the third characteristic): hierarchy of case law; *ratio decidendi* and *orbiter dicta*; and subsidiary rules such as *curia advisari vult or cur. adv. vult. (c.a.v.);* 'overruled,' 'reversed' and the like.

they came to enjoy an exalted status in English society.[7] Immunity which they had enjoyed for about two hundred years, before it was done away with, is one of the privileges of their class.[8] The abolishment of immunity of the elite of this class is recognition of the rise of the consumer / proletariat class which was no longer willing to tug at its forelock, and the adaptability of the common law.

It needs to be said right at the outset that notwithstanding the high-profile role of the English barrister in litigation, as far as the fused profession is concerned it is the manner in which the solicitor[9] conducts litigation, with all the attendant rules, practices, standards of competence, and ethics and etiquette, *and without immunity*, which is relevant for being most alike, and worth adapting. Solicitors acting alone account for undertaking 75% of civil cases according to the adversarial system in the lower courts of England.

IMMUNITY

a) Immunity, generally

Immunity is not a defence per se against a claim of negligence. It is actually a judicial prohibition of claims for negligence based on public policy grounds. Immunity means that the barrister cannot be sued even

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7 "In the days before films and television, the most eminent lawyers were often the 'stars' of the day. Their careers were as well known to the public as those of stars of the entertainment world are now….." Rivlin, George.

8 In his submission for Rondel, his counsel, Louis Blom-Cooper, cited the case of *Thorn v Evans* (1742) 2 Atk. 330, 332 where the judge had asked: "Can it be thought that this court will suffer a gentleman of the Bar to maintain an action for his fees….?" It could also be read as: "Would we allow this gentleman of the Bar to be sued for negligence?" *Ibid*., at 198 B The dignity of the Bar seems to be the first of the grounds for immunity to be discarded: "In 1967 when the House decided *Rondel v Worsley* the dignity of the Bar was no longer regarded as a reason which justified conferring immunity on advocates whilst withholding it from other professional men" per Lord Steyn in *Arthur J S Hall v Simons* 672 at 678 b-c.

9 *Rondel*, at 200 D-E.

when he is clearly negligent[10] and a suit alleging immunity will not be heard on its merits but struck out at the threshold of the court (*in limine*).[11] In *Rondel*, Lord Denning categorically stated: "I desire to say at once that, if an action does lie against a barrister for negligence in the conduct of a case, the draft statement of claim does disclose a cause of action."[12]

And where there is no immunity it will be heard on its merits and may be defeated by a defence which is not very different from the grounds of immunity e.g. abuse of process. Immunity is the result of the recognition by the courts in England of certain public policies pertaining to suing barristers and solicitors for their negligence in the preparation and presentation of a case. As summarized by Lord Bingham: "(a) to prevent the re-litigation, otherwise than on appeal, of issues already concluded adversely to the plaintiff by court decision; (b) as part of the general immunity from civil liability which attaches to all persons who participate in proceedings before a court of justice; and (c) because an advocate owes a duty to the court as well to his client and should not be inhibited, through apprehension of an action by his client, from performing his duty fearlessly and independently."[13]

b) Immunity in Civil Cases in Malaysia

For Malaysia, the immunity issue was, at least as far as civil cases are concerned, apparently resolved in *Miranda v Khoo Yew Boon*[14] (FC).

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10 *D'Orta-Kenaike v Victoria Legal Aid* (2005) 79 AJLR 755.

11 *Rondel* was an interlocutory matter and went to all the stages of appeal in that form.

12 [1966] 3 All ER at 661[E] At the earlier stage, Lawton J stated that *Rondel*'s allegation that his counsel had failed to cross examine any prosecution witness to the effect that the injuries could not have been caused by a knife, was capable of disclosing a case of negligence (at 470 A-B).

13 *Hall v Simons* [2000] 3 All ER [673].

14 [1968] 1 MLJ 161. The original litigation from which *Miranda* arose is civil involving dishonour of a cheque. However, it needs to be stated that the particular act of negligence was not an act or omission in the preparation for or presentation at the trial of the civil case but in failing to take a specific, well-known and mandatory procedural step namely, filing the notice of appeal within time.

The former (and intermediate) Federal Court of Appeal stated that the advocate enjoyed no immunity as his position was similar to that of the solicitor in England: "In my view, since the profession of a barrister in this country is combined with that of a solicitor, the question must be dealt with differently. It is necessary in my view, to refer to the provisions of our own law dealing with this matter namely the Advocates and Solicitors Ordinance 1947." He supported his conclusion by stating: "Under section 60 it is provided that a practitioner may make an agreement in writing with his client regarding the amount and manner of payment of his costs in respect of business done or to be done by such practitioner."

He then spliced the duty of skill and care: "He is therefore under a contractual duty to use care and this extends to the conduct of a cause as …an advocate as well as anything else."[15] He then added: "Indeed section 63 provides that any provision in any agreement …" (with the client for remuneration in a contentious matter) "that the practitioner shall not be liable for negligence so that he shall be relieved of any such responsibility to which he shall be subject, as such practitioner, shall be void." There was no such provision in the retainer[16] assuming there was a written retainer.[17] In other words, the position of a practitioner is exactly that of a solicitor; as stated by Azmi C.J. (Malaya):[18] "In the circumstances it is immaterial whether the act of negligence committed by a practitioner is an act (or omission which arises from work) normally done by a solicitor or by a barrister in England."[19] While the learned judge's characterization of the fused profession in Malaysia, and indeed the finding of negligence cannot be faulted, the court did not consider the implications of the adversary system and the public policy grounds for immunity as a common

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15 *Miranda*, at 165.

16 As the Legal Profession Act 1967 prohibits any limitation or exoneration of liability by contract, one should not expect to find any provision in a Malaysian retainer which may be taken only as evidence of the advocate's *locus standi* (as distinct from the right of audience) and the question of the duty of skill and care and also of immunity may be left to the common law.

17 In fact the defendant / appellant's defence was that there was no advocate-client relationship. *Ibid* at 163 G-H.

18 *Miranda* at 165 [A-G].

19 *Miranda* at 165 [G].

law question, as the defendant-advocate (typically of the England-trained considered himself a barrister) stood pat on immunity[20] as his defence.[21] However, when the former Federal Court, decided *Miranda*, it did not have the benefit of the House of Lords' decision in *Rondel*; it had only the Court of Appeal decision which maintained the distinction between barristers and solicitors with respect to immunity. Is it possible that with immunity being extended to the solicitor, the advocate in the fused profession being in a similar position qualifies for the benefit of immunity? Singapore decided to that effect in *Majid v Muthusamy*[22] which came about after the House of Lords' *Rondel* decision.

If *Miranda* comes to be re-considered on the question of immunity, the following issues may be raised:

i) As the Advocates and Solicitors Ord. 1947 prohibits immunity and reduction of liability only by contract,[23] is the court justified in applying the 'prohibition of retainer immunity' provision as if it excludes the common law?[24]

ii) What is the relevance of the retainer which deals with how the relationship between client and solicitor is to be conducted to the question of competence? The duty of skill and care is implied by law whether or not there is any agreement with respect to fees; one does not necessarily depend on the other.

iii) In Australia,[25] a semi-fused profession jurisdiction, the High Court has maintained immunity on the basis of the adversary

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20 He did say that there was no retainer, no instructions to proceed with the appeal and no fees.

21 *Miranda* at 164 [F-G].

22 [1968] 2 MLJ 89, at 90 C.

23 The Advocates and Solicitors Ord. s. 63 states: "A provision in any such agreement that the practitioner shall not be liable for negligence, or that he shall be relieved from any responsibility to which he would otherwise be subject as such practitioner, shall be wholly void."

24 The Singapore court did not consider the 'no immunity by contract provision' at all. See Starforth, Hill G, *The Liability of an Advocate & Solicitor for Negligence in the course of his Professional Duties* [1968] 2 MLJ xvi.

25 *Giannarelli v Wraith* (1988) 165 CLR 543.

system and the same public policy grounds dealt with in *Rondel*, even after considering the Canadian case of *Demarco v Ungaro*[26] and the House of Lords decision in *Hall v Simons.*[27]

iv) In *Rees v Sinclair*[28] the New Zealand Court of Appeal held that the fact that the profession was fused[29] was no reason for not granting immunity as the same public policy considerations applied.[30]

v) As the Malaysian advocate conducts litigation according to the adversary system the same way as the solicitor in England does where he appears alone, the analogy to the solicitor's position in England should be extended to the advocate as he too appears alone.

vi) The duty of skill and care should be based not on contract but the law of negligence and is implied in all lawyer-client relationship.

vii) The difference in the constitution of the legal profession in England where it is divided and in Malaysia where it is fused is not the relevant justification for immunity but the adversary system and the concomitant public policy considerations which are applicable in Malaysia.

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26 (1979) 95 DLR (3rd) 385.

27 [2000] 3 All ER 673.

28 (1974) 1 NZLR 180 C.A.

29 New Zealand and Australia are not true fused profession jurisdictions as their barristers and solicitors are considered discrete branches of the profession though many practise as both, and some solely as barristers; in New Zealand they are designated 'barrister sole.'

30 "What of the practitioner who practices both as a barrister and solicitor? Should a different result be arrived at in such a case? I think not. The considerations which I have mentioned seem to apply with equal force to such a practitioner. The protection, I repeat, is not conferred for the benefit of the individual, but in the interests of the administration of justice." Per Macarthur J at 186 [40-45].

viii) The Malaysian advocate now operates under the 'cab rank' rule in civil and criminal matters which did not apply at the time of *Miranda*.

Against the above, it may be contended that:

i) immunity is no longer available in civil cases and *Miranda* is a civil case;

ii) even if the question of negligence had to be decided according to the Common Law of tort / negligence and the particular acts of advocacy that had to be performed under the adversary system, the particular act of negligence in *Miranda* is not likely to enjoy any of the defences available to a case of negligence as it involved failure to observe a clear, well-known, specific and mandatory procedural requirement. (A reconsidered *Miranda* may not involve any change in the verdict, only the basis of liability);

iii) The Malaysian position on immunity has since *Miranda* been rather sweepingly expressed by Gopal Sri Ram JCA: "Our law has… always differed from English law. Advocates here have *never* (the writer's italics) enjoyed immunity from suits for negligence;"[31] and

iv) Malaysia should favour decisions from fused-profession Commonwealth countries: *Demarco* v *Engaro* (Canada) and *Lai* v *Chamberlains*[32] (New Zealand) which provide the most thorough examination on the issue to date, and which have all done away with immunity in civil cases.

v) In England, the cradle immunity has been abolished in all civil cases: *Hall v Smith*.

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31 *Lim Soh Wah & Anor v Wong Sin Chong & Anor* [2001] 2 AMR 2001 at 2004.

32 [2005] 3 NZLR 291.

c) End of Immunity in Civil Matters in England, and Canada

Even before *Hall v Simons* was decided by the House of Lords, the High Court of Ontario decided in *Demarco v Ungaro* that, "in Ontario, a lawyer is not immune from action at the suit of a client for negligence in the conduct of the client's civil case in Court."[33]

Subsequent to *Miranda, the* House of Lords did away with immunity in civil[34] and criminal matters in *Hall v Simons.*[35] The reasons given were mainly policy: rise of consumer values; anomaly of not providing a remedy for a wrong; availability of other judicial remedies against issues of re-litigation; un-sustainability of the privileged position of the legal profession compared to other professions; and that (nearly) all lawyers are now protected by (often, compulsory) professional indemnity insurance.

THE PUBLIC POLICY GROUNDS FOR IMMUNITY AND THEIR REJECTION IN CIVIL CASES

It is not proposed to completely rehash the immunity issue extensively except to the extent that the policy grounds are relevant to Malaysia. It is an important concern of this article to look at the common law in light of Malaysian conditions as expected by the proviso to s. 3 of the Civil Law Act 1956: "Provided always that the said common law, rules of equity and statutes of general application shall be applied so far only as the circumstances of the States of Malaysia and their respective inhabitants permit and subject to such qualifications as local circumstances render necessary." Indeed the House of Lords did so in *Rondel:* "I shall confine myself to conditions in England and Scotland, between which there appears to me to be no relevant difference. I do not know enough about conditions in any other country to express any opinion as to what

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33 *Demarco*, at 409.

34 The original litigation from which *Miranda* arose is civil involving dishonour of a cheque. However, it needs to be stated that the particular act of negligence was not an act or omission in the preparation for or presentation of the case but in failing to file the notice of appeal within time.

35 [2000] 2 A C 615; [2000] 3 All E R 673 (HL).

public policy may there require." (*per* Lord Reid at p 227) and was quoted by Krever J in *Demarco v Ungaro*[36] in considering *Rondel* in light of Canadian conditions. As the Canadian High Court in *Demarco* rejected the policy grounds which were said to support immunity as inapplicable to Canada it has an additional significance for us in Malaysia as it demonstrates how the proviso to s.3 of the Civil Law Act may be applied by a Malaysian court to common law decisions from England and elsewhere.

Below are the main grounds for immunity as stated in *Rondel* and in italics the grounds for their rejection as stated in *Demarco*, and the possible Malaysian position according to this writer.

i) Without immunity litigation lawyers may allow their duty to the client to override their duty to the court and conduct cases over-cautiously.

"It is impossible to expect an advocate to prune his case of irrelevancies against his client's wishes if he faces an action for negligence when he does so. Prudence will always be prompting him to ask every question and call every piece of evidence that his client wishes, in order to avoid the risk of getting involved in such an action as the present. This is a defect which the possibility of an action for negligence would greatly encourage. It is difficult and needs courage in an advocate to disregard irrelevancies which a forceful client wishes him to pursue. This question is of great importance for two reasons. First, if by good advocacy a case is cut down to its essentials, it is more manageable and more likely to be justly decided by judges or jury. Secondly, time (and consequently the cost) is greatly diminished. An un-pruned presentation of a case may actually double or treble the time which it would have taken to present had it been properly pruned of all that was irrelevant."[37]

> *"With respect to the duty of counsel to the court and the risk that in the absence of immunity, counsel will be tempted to prefer the interest of the client to the*

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36 *Demarco*, at 396.

37 *Rondel per* Lord Pearce at 273 [B-D].

> *duty to the court and will thereby prolong trials, it is my respectful view that there is no empirical evidence that the risk is so serious that an aggrieved client should be rendered remediless."*[38]

ii) An action for negligence against the barrister may be initiated to undermine the decision against the client in the original civil action.

There would effectively be a re-litigation of the original suit with the possibility of conflicting decisions on the same issue in the original suit and the negligence suit by a client who lost the original civil suit and the appeals may attempt to cast doubt on the validity of the verdict by suggesting that he lost only because of the negligence of his counsel.

> *"In the nature of things it would seem to be undesirable if, when the litigation is over and appeals have been heard there can be an inquest upon it all, or a further reopening of it at all, in the form of an action against the (barrister) alleging that it was his fault that the case had not been differently decided. The successful party in the litigation would not be involved in or be a party in the later action, yet in that action the assertion would be made that he had wrongly gained the victory. If a petitioner for divorce failed to obtain a decree and in an action against his advocate claimed that he would have succeeded but for some fault on the advocate's part, there might be inquiry as to whether the respondent to the petition might have been guilty of a matrimonial offence: the inquiry would be taking place in proceedings to which the respondent was not a party. Such procedure could not be desirable nor could it be in the public interest, bearing in mind a balance of scale."*[39]

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38 *Demarco,* at 406.

39 *Rondel* at 253 [D-G].

> *"As to… the prospect of the re-litigating an issue already tried, it is my view that the undesirability of that event does not justify the recognition of lawyers' immunity in Ontario. It is not such a contingency that does not already exist in our law and seems to be inherently involved in the concept of res judicata in the recognition that a party to an earlier action in personam, is only precluded from re-litigating the same matter against a person who was a party to an earlier action. This cannot be avoided. Better that than that the client should be without recourse."*[40]

iii) Barrister's immunity in exchange for the 'cab rank'[41] rule

Some weight was given by the House of Lords to it; liability may discourage barristers from observing the cab rank rule. However in *Hall v Smith* the House of Lords stated that the principle was an ethical one which had never played any great role in the administration of justice: "It is a valuable professional rule. But its impact on the administration of justice in England is not great."[42]

> *The judge in Demarco was skeptical about the existence of such a rule in civil matters.*[43] *In any case,*

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40 *Demarco*, at 406.

41 "There is no doubt about the position and duties of a barrister or advocate appearing in court on behalf of a client. It has long been recognized that no counsel is entitled to refuse to act in a sphere in which he practices, and on being tendered a proper fee, for any person however unpopular or even offensive he or his opinions may be, and it is essential that that duty must continue: justice cannot be done and certainly cannot be seen to be done otherwise. If counsel is bound to act for such a person, no reasonable man could think the less of any counsel because of his association with such a client, but, if counsel could pick and choose, his reputation might suffer if he chose to act for such a client, and the client might have great difficulty in obtaining proper legal assistance." Per Lawton J *Rondel* at 227[D-F].

42 At 680 [e-f].

43 *Demarco* at 407.

> *in Demaco Krever J remarked: "The special relationship of lawyer and client is not involved as it is, of course, when one is considering the law of negligence."*[44]

In Malaysia, the cab rank rule did not apply[45] at the time of *Miranda* and facilitated the analogy to the solicitor's position in litigation in England. Since 1994,[46] the rule has been applied to both civil and criminal cases. It is the writer's view that if there is to be any review of the immunity question, the cab rank rule should not weigh in favour of the advocate facing an action for negligence. It is completely irrelevant to negligence which is about competence. The matter should be dealt with, as now decided, in terms of advocacy in the context of the adversary system and the applicable public policy grounds. The cab rank rule has to be seen in terms of the right of access to civil justice which is not possible in most cases without representation. Immunity in exchange for the cab rank rule cheapens the profession.

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44 *Demarco* at 407-408.

45 Legal Profession (Practice and Etiquette) Rules 1978, Rule 2 used to provide: "No advocate and solicitor is bound to act as adviser or advocate for any person who may wish to become his client but the advocate and solicitor may accept any brief in the Courts in which he professes to practice at a proper professional fee dependent on the length and difficulty of the case: provided that special circumstances may justify his refusal, at his discretion, to accept a particular *brief*." *(sic)* (Shouldn't it be 'retainer' in the fused profession? A brief is a summary of a case prepared by a solicitor for the barrister he has retained in the case. See Osborn Concise Law Dictionary of Law 10th edn, ed Woodley, Mick, 2005, London Thompson, Sweet &Maxwell).

46 Legal Profession (Practice and Etiquette) Rules 1978; Rule 2: An advocate and solicitor shall give advice on or accept any brief in the Courts in which he professes to practice at the proper professional fee dependent on the length and difficulty of the case, but special circumstances may justify his refusal, at his discretion, to accept a particular brief. Legal Profession (Practice and Etiquette) (Amendment) Rules 1994 (PU(A) 58/94).

iv) Immunity from suits for negligence in exchange for barrister's inability to sue for recovery of fees

The concern of the House of Lords may be appropriate, even if somewhat exaggerated, as it was dealing with it in the context of a jurisdiction where this was not a cause of action, and rejecting immunity may result in another avenue for litigation and the loss of a trusting bona fide relationship where the barrister and client did not have to conduct their relationship adverting always at the back of their minds to the day when they may be on opposite sides in litigation. Since then other cases have made light of this consideration; barristers are rarely engaged by solicitors until the client had put the solicitor in funds and solicitors who did not pay barristers are referred to the Law Society.

> *"In Ontario, in which lawyers are both barristers and solicitors, (and also officers of the court*[47] *and members of the same Law Society)*[48] *and in which the lawyer conducting litigation contracts directly with the client and is entitled to sue his or her barrister for negligence (and) before Rondel v Worsley, an Ontario lawyer, in his or her role as advocate, was not immune from action at the suit of the client."*[49]

The Malaysian advocate's relationship with his client is the same as that of the Ontario barrister-solicitor. In *Miranda*, the Malaysian court seems to have given considerable weight to this point; if the advocate may sue the client, so may the client sue the advocate. Though this view confuses the relevant considerations - the advocate has to earn his living which is rule-bound to ensure honesty, and the client's allegations of negligence have to be dealt with on their own merits. Immunity in exchange for not suing for fees smacks of a certain cynicism: 'I will not sue for my fees provided you do not sue me regardless of how I do your case.'

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47 *Demarco*, at 389.

48 *Ibid.*

49 *Ibid.*

v) The difference in local conditions affecting the legal professions of England and Malaysia.

Perhaps the most significant of the reasons given by the Canadian Court are the differences between the two jurisdictions:

> *"Many of the sociological facts that are related to public policy and the public interest may be judicially noticed. The current rate of increase in the size of the profession is approximately 1,000 lawyers annually. It is widely recognized that a graduating class of that size places such an enormous strain on the resources of the profession that the articling experience of students-at-law is extremely variable. Only a small percentage of lawyers newly called to the Bar can be expected to have the advantage of working with or observing experienced and competent counsel. Yet very many of those recently qualified lawyers will be appearing in court on behalf of their clients. To deprive these clients of recourse if their cases are negligently dealt with will not, to most residents of their Province, appear to be consistent with the public interest."*[50]

[50] In the same vein, Krever J in discussing the constitution of the profession in England and how it leads to injustice where for instance a solicitor may be liable for following the advice of a barrister for which the barrister himself is not liable, quoted Chief Justice Larski delivering one of The Hamlyn Lectures titled 'The British Tradition in Canada': "The rules of conduct in England that govern the relations between barristers and solicitors have no meaning in Canada." *Demarco,* at 408. Likewise, Malaysia.

THE SAME CONSIDERATIONS APPLY IN MALAYSIA

THE DUTY OF SKILL AND CARE: CONTRACT OR TORT?

Malaysian courts,[51] following English courts,[52] have preferred a concurrent basis in contract and tort. Such an ambivalent position may be necessary in England due to the split nature of the profession there; contract for solicitors as there is a direct retainer relationship; and tort for barristers as there is no direct relationship between the lay client and the barrister.

Also, in England, in cases of negligence in a tort matter, the date of commencement of the cause of action may be extended to the date of discovery of the material facts; sec 14A, Limitation Act 1980 (UK) amended by the Latent Damage Act 1986 (UK). In the UK, the advantage of contract as the basis there is that damages under the law of contract may also include economic loss.

In Malaysia, it is suggested that the date of commencement of the cause of action in litigation negligence should be as in tort.

It would be the appropriate basis in Malaysia for litigation negligence as the advocate is not engaged to carry out a transaction where the implications of negligence are more easily determined and even negotiated. In advocacy the extent of an advocate's efforts are less easily determined at the outset of the professional relationship and are seldom negotiated if at all possible. The substantive law of the negligence is tort.

In Malaysia, the advocate is not allowed to limit the extent of his liability in the retainer; s. 117(4) Legal Profession Act 1976 states that "any provision in the agreement which states the advocate shall not be liable for negligence or, that he shall be relieved from any responsibility to which he would otherwise be subject as an advocate, shall be wholly void." It appears to be the expectation of Parliament that as the law of

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51 In *Miranda*, the court seems to have thought that the cause of action is contract; Supra n. 18; *Lim Soh Wah & Anor v Wong Sin Chong & Anor* [2001] 2 AMR 2001, at 2004.

52 *Midland bank Trust Co. Ltd v Hett, Stubbs and Kemp* [1979] Ch 384 and *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145.

tort supplies the duty of skill and care, advocates may attempt by contract to reduce or exonerate themselves from liability; hence the prohibition. (No such prohibition seems to apply in the case of non-contentious matters; s. 117(4) appears under the heading contentious business). Having two sources of law on the same question may only make for inconsistency and confusion.

CONCLUSIONS

i) In Malaysia, immunity from suits for civil litigation negligence of advocates is unlikely as nearly all Commonwealth jurisdictions have ruled against it: first Malaysia in *Miranda v Khoo Yew Boon;* Canada in *Demarco v Ungaro*; New Zealand in *Rees v Sinclair*; and England in *Hall v Simons.*

ii) In the absence of immunity in Malaysia, the legal profession should seriously consider the defences to an allegation of negligence: res judicata; issue estoppel; and abuse of process.

iii) The standard of the duty of care and skill should take into account the adversarial system as practiced in Malaysia as a true-fused profession. The courts here should take into account the greater burden borne by the advocate. There is a need to develop a new Malaysian law of civil litigation negligence applicable to advocates. There is no need to and Malaysian courts should not attempt to shoe-horn into Malaysian law of civil litigation negligence the advocacy practices of England and elsewhere in terms of what is done by solicitors and what is done by barristers in England and wherever the Bar may be split. The adversary system and the elements of advocacy should be taken in a unitary sense. Litigation negligence cases from jurisdictions where the Bar is split should be applied in Malaysia with regard to that fundamental difference, and that the fused nature of the profession requires the advocate to be both the advocate and solicitor which imposes a greater burden. Malaysian courts in applying the common law from other jurisdictions should apply the proviso to section 3 of the Civil Law Act 1956.

iv) Malaysian courts should resolve whether in the case of litigation negligence the basis of liability should be tort or contract.