

Professional Negligence in Conveyancing Practice in Malaysia

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Negligence in law can be defined as the failure to take reasonable care in order to avoid causing injury or loss to another person. Similarly, professional negligence means the lawyers are expected to conform to the standards that are termed as 'reasonable competent practitioner'. Therefore, a breach occurs if a lawyer has fallen below the standards normally adopted by lawyers¹.

The conduct and etiquette of advocates and solicitors in Malaysia pertaining to their duty towards the client are regulated by written rules which include the Legal Profession Act 1976, Legal Profession (Practice and Etiquette) Rules 1978, Solicitors' Accounts Rules 1990 and Bar Council Rulings. Failure to comply with these rules amounts to misconduct and would likely cause an advocate and solicitor to be liable for a disciplinary proceeding.² The provision in Section 117 (4) of the LPA 1976 declares that a provision in any agreement that states the advocates and solicitors shall not be liable for negligence or shall be relieved from any responsibility shall be wholly void. This clearly indicates that advocates and solicitors are not immune from being sued by the clients for misconduct or negligence committed. The Legal Profession (Practice and Etiquette) Rules 1978 enacted by the Bar Council essentially intends to uphold the integrity of legal profession by ensuring all advocates and solicitors adhere to the standard of conduct provided. These rules basically record the do's and don'ts for advocates and solicitors.

The basic idea of conveyancing is a branch of law that involves sale and purchase of properties involving the preparation of documents to convey or transmit a property that belongs to a party (owner/vendor) to another party (purchaser). Clients mainly seek professional services of solicitors to ensure the conveyance of the property is to be done in a legal manner and indisputable in future. Thus, the solicitor in charge must be competent and well versed with the applicable laws and procedures to ensure a smooth progress of the transaction from the beginning until the completion of the sale. He or she shall start with conducting proper verification exercises by doing relevant searches on the parties and property to be conveyed to certify the legal capacity of the parties, ownership and status of the land. The next step includes preparing necessary documents for execution, making applications and payment to relevant authorities if needed, until the transfer and charge are being registered in favor of the respective parties and the full receipt of balance purchase price is received by the vendor.

When a client engages the solicitor of his or her choice, he basically is placing his utmost trust in the solicitor to act for his best interest in handling the case. The solicitor therefore is bound to exert his utmost effort not to abuse the confidence reposed in him by the client.³ This establishes a solicitor and client relationship whereby the solicitor now owes the client a duty to take care of the matter entrusted upon him. Breach of the duty of care will entitle the client to bring a suit based on the negligence against his/her solicitor under both tort and contract.

The negligence in torts can be brought against his/her solicitor if the solicitor has committed an act that has caused the client to suffer financial loss and it was reasonable for the client to have relied

¹ (S.Rhoshvin)(2018) 'Here's how you can sue or make a complaint about your lawyer in Malaysia'. Retrieved from <https://asklegal.my/p/sue-complaint-lawyer-malaysia-misconduct-steal-money-lose-case>, 13.1.2020

² Section 94(3)(d) Legal Profession Act 1976

³ Rule 35 of Legal Profession (Practice and Etiquette) Rules 1978

upon his/her lawyer⁴. In *Arab Malaysian Finance Berhad v Steven Phoa Cheng Lon & Ors*⁵, there are four conditions that need to be established in order for a client to successfully bring the professional negligence suit against his or her lawyer. Firstly, the plaintiff must show that he was owed a duty by the defendant to take reasonable care. Secondly, the defendant has breached that duty. Thirdly, the breach of duty has caused the harm in question and lastly, the plaintiff has suffered damage that is not too remote. However, since this is a professional negligence, there is a test to be referred on in determining whether the lawyer has breached his or her duty. In the case of *Messrs. Yin Voon & Ooi and Wong Yin Voon v Rizal Song Bin Abdullah and Heavy Industries Valley Sdn. Bhd.*⁶, there was a claim for professional negligence against his lawyer due to failure of the lawyer in checking the status of the land. The Court had relied on *Rogers v Whitaker*⁷ Test to determine whether the lawyer had breached his duty. Under the *Rogers v Whitaker* Test, the Court would decide upon evaluating the evidence adduced where the Court has the final say.

When two or more persons enter into a contract, their main intention is to carry out the terms of the contract as promised.⁸ In conveyancing perspective, even though the solicitor himself is not a party to the sale and purchase agreement between the vendor and the purchaser, it was pre-agreed beforehand that the solicitor was appointed by his client either the vendor or purchaser as a trustee to complete the sale on behalf of him. When the solicitor accepts the offer to take up the case, it creates a contractual relationship between him and the client. Failure on the solicitor's part to complete and perfect the transfer in favor of the client will amount to breach of contract. If the client then suffers damages due to the breach by his solicitor, he is entitled to initiate a suit against the solicitor based on negligence in carrying out contractual duty. Hence, it is important for a person to take into account the privity of contract which means a person can only sue parties within the contract.

The case of *Ngeoh Soo Oh & Ors v G. Rethinasamy*⁹, is about a solicitor who failed to conduct a land search as well as failed to inform the client that the subject land was gazetted for compulsory acquisition. The court held that the solicitor was liable to compensate in tort for breach of duty of care in failing to discharge his duties. He was also liable in breaching of contractual duty as his client's solicitor.

In the case of *Mulpha Kluang Maritime Carriers Sdn Bhd v Philip Koh Tong Ngee & Ors*¹⁰, the plaintiff has succeeded in suing the defendant specifically the solicitors handling the plaintiff's sale and purchase of two lots of land. This is due to the breach of contractual duty and/or negligence towards the plaintiff because at the end of the sale, the plaintiff discovered that a portion of both of the lots purchased had been surrendered by the vendor to the state authority all the way back in 1988 and in fact, the plaintiff had ended up paying for the whole portion of the two lots while owning a lesser area than agreed. The court was satisfied that the defendant had a duty and failed to notify and advise the plaintiff on the implication of the surrendered portion of the land because if they have had firstly advised the matter to the plaintiff, the plaintiff would have a chance to decide whether to proceed with the purchase at the original price or at a reduced price after considering the surrendered portion.

⁴ (S.Rhoshvin)(2018) 'Here's how you can sue or make a complaint about your lawyer in Malaysia'. Retrieved from <https://asklegal.my/p/sue-complaint-lawyer-malaysia-misconduct-steal-money-lose-case>, 13.1.2020

⁵ [2003] 2 AMR 6

⁶ [2015] 5 CLJ 176

⁷ [1992] 175 CLR 479

⁸ Dr Syed Ahmad SA Alsagoff. (2015).Principles of the Law of Contract in Malaysia .

⁹ (1984) 1 MLJ page 126

¹⁰ [2016] 10 MLJ 517

In a nutshell, a person can sue his or her solicitor due to professional negligence and also for their breach of contractual duty. For professional negligence, besides the common requirements to be fulfilled for negligence, the Court will also need to take into account the Rogers v Whitaker test to determine whether there is a professional negligence committed by the solicitor. As for contractual breach of duty, the person must make sure that the solicitor is the party to the contract who he or she can sue.