

**THE HIGH COURT OF MALAYA AT SHAH ALAM
(CIVIL DIVISION)
IN THE STATE OF SELANGOR DARUL EHSAN
[NO. GUAMAN: BA – 22NCVC – 264 – 07/2021]**

BETWEEN

PLAINTIFF

**MEDI-CIRCLE SDN BHD
(NO. SYARIKAT: 424904-V)**

AND

DEFENDANTS

- 1. TETUAN A M ZAHARIL & CO**
- 2. AHMAD ZAHARIL MUHAIYAR**

**(DIDAKWA SEBAGAI RAKAN KONGSI TETUAN A M ZAHARIL &
CO)**

JUDGMENT

Background Facts

- [1] The present civil suit (CS) is entwined with a related CS between Medi Circle Sdn. Bhd. (MCSB), the plaintiff in the present case, sued as defendant in that suit. The related CS is herein referred to as CS 144. It arose out of a chose in action in the tort of medical negligence, where MCSB was sued by the plaintiff *Nur Zulaikha binti Dzulzaili*, via her father and litigation representative. The plaintiff was in the care and management of MCSB in their hospital at Bandar Baru Bangi. Due to inadequate medical treatment at the said hospital, the plaintiff has suffered cerebral palsy.
- [2] The related CS was tried at the Civil High Court at Kuala Lumpur.

At the conclusion of trial, the defendants including MCSB was found liable, and was ordered to pay damages. The damages awarded was a hefty sum to be borne by MCSB to the tune of RM8,189,628.67. The decision made in the related CS, was affirmed by the Court of Appeal (COA), save for the quantum of damages, which was reduced to RM7,749,267.69, together with interest and costs. Against that decision, MCSB with the intention to pursue an appeal to the Federal Court, had applied for leave to do so, but it was flatly refused. Therefore, the decision of the High Court made on liability and quantum against MCSB stays, and it binds them. They had to pay the sum of damages awarded and affirmed by the COA to the plaintiff, who is left to suffer as a result of negligence on their part against her.

Present Claim

- [3] At all material times, MCSB in the related CS was represented by their advocate and solicitor, Messrs. A M Zaharil & Co. In the current CS, MCSB has sued Ahmad Zaharil Muhaiyar (AZM) hailing from that law firm. Their chose in action is for the tort of professional negligence.
- [4] Their pleaded case against AZM, is that he and his team had conducted themselves negligently when handling and conducting the trial in CS 144.
- [5] Materially, in their statement of claim (SOC), it is pleaded that due to the unprofessional and negligent conduct of AZM, MCSB had to endure CS 144 by having to pay the hefty sum of damages, as liability was affirmed by the COA but damages to be paid was reduced.
- [6] Particulars of negligence by AZM is found in the SOC, which forms part of the Record of Appeal in this case.

Legal Representation

- [7] As the present CS, emanates from CS 144, it is premised on the contractual relationship between MCSB and the defendant AZM. It had developed when MCSB was represented by AZM in the said CS 144.
- [8] Ensuing from that relationship, AZM is said to have not performed as expected of an advocate and solicitor when handling and conducting the trial involving CS 144. However, it has to be emphasised that AZM was at all material times acting on the express instruction of MCSB when handling and conducting the case in CS 144.
- [9] In law, it means *inter alia* that AZM:
- Could only represent MCSB in CS 144 pursuant to their express instruction and advice.
 - He could not undertake to do anything else outside the scope and authority given by his client MCSB. The warrant of authority to act or the retainer given by MCSB prevails.
 - Any other step, further may be, to be taken in CS 144 has to be with the express instruction of MCSB.
 - That would include calling of material witnesses to defend the claim of medical negligence against MCSB.
 - Since MCSB was sued in its capacity as the entity in charge and management of the hospital at which the plaintiff in CS 144 was treated, they and their team of doctors who attended to the said plaintiff and treated her at all material times, are supposed to have the necessary knowledge and facts of the case pertaining the case of medical negligence in order to be supplied at all times to AZM, as their advocate and solicitor.
 - It would be for MCSB to provide all details and information on the case pertaining CS 144 and with regard to the

material witnesses to be summoned to court for the purpose of testifying for and on behalf of them at the trial in order to defend the claim brought about by the plaintiff in CS 144.

- AZM as advocate and solicitor acting for and on behalf of MCSB, steps into their shoes to offer adequate legal representation during the trial of CS 144.
- Any request for facts, details and information on the case shall come from MCSB, as they were the responsible party who had been sued as defendant in CS 144.

Findings

[10] Having meticulously considered the evidence presented by both the plaintiff and defendants, this court has arrived at the following findings, observations and determinations pertaining the plaintiff's assertion of professional negligence against the defendants:

- (i) The genesis of the relationship between the plaintiff and the defendants in CS 144 was rooted in a contractual agreement, evidenced by the role of the second defendant as the plaintiff's legal representative in that prior suit. This contractual foundation established a duty of care owed by the defendants to the plaintiff to exercise reasonable skill and diligence in providing their legal services.
- (ii) Throughout the relevant periods of CS 144, the defendants acted under the explicit directives of the plaintiff. This inference is drawn from the plaintiff's inaction in terminating the defendants' services and appointing alternative legal counsel, a prerogative they undoubtedly possessed had they been dissatisfied with the defendants' conduct. The continuation of the mandate reinforces the contractual obligation and the attendant

duty of care.

- (iii) The defendants subsequently proceeded to represent the plaintiff in CS 144, a legal action predicated on allegations of medical negligence against the plaintiff and its independent medical practitioners, purportedly resulting in cerebral palsy suffered by the plaintiff in CS 144. The plaintiff in the present proceedings now contends that the defendants' actions during this representation constituted professional negligence in tort. While the initial relationship was contractual, a breach of the duty of care arising from this contract can give rise to a concurrent liability in tort, as established in cases such as *Henderson v Merrett Syndicates Ltd* [1994] 3 AER 506.
- (iv) While the initial bond was contractual in nature, the plaintiff now frames their grievance within the realm of tortious liability, alleging that the defendants failed to exercise the requisite diligence, care, and professional acumen in their conduct of the trial before the High Court. These specific allegations are detailed within the SOC.
- (v) The tort of professional negligence arises when a professional, such as a lawyer, breaches the duty of care owed to their client, resulting in loss or damage. The standard of care expected is that of a reasonably competent practitioner in the relevant field (see by analogy the case of *Bolam v. Friern Hospital Management Committee* [1957] 1 WLR 582). Although this "*Bolam test*" has been modified, the underlying principle of a reasonable standard of care remains.
- (vi) A salient feature of this case is the substantial monetary

judgment in the form of damages that the plaintiff was ordered to pay to the plaintiff in CS 144. This liability stemmed from judicial findings of negligence, systemic and organizational deficiencies, and inadequacies in control and supervision on the part of the plaintiff. The fact that this liability was established against the plaintiff in CS 144 is a crucial element in assessing whether the defendants' conduct in representing the plaintiff fell below the acceptable standard.

- (vii) The plaintiff in the present suit posits, absent the purported negligence and want of due care on the part of the defendants, they might have achieved a successful defence against the claim lodged in CS 144. This assertion requires the plaintiff to demonstrate a causal link between the defendants' alleged negligence and the adverse outcome in the previous suit, a principle firmly rooted in the law of tort (see *Barnett v. Chelsea and Kensington Hospital Management Committee* [1968] 2 WLR 422).
- (viii) However, a pivotal and incontrovertible fact remains:
 - (a) the finding of liability against the plaintiff here in CS 144 withstood scrutiny throughout the appellate hierarchy, encompassing the Court of Appeal, and ultimately, the Federal Court.
 - (b) This affirmation of the claim at all judicial levels significantly undermines the plaintiff's current allegations against the defendants.
 - (c) The legitimacy and legal validity of the awarded damages have been definitively established by the highest judicial authorities, based on the specific

factual matrix, circumstances, adduced evidence, and pertinent legal principles of that particular case.

- (d) The appellate courts' endorsement of the trial court's findings suggests that the outcome in CS 144 was based on the merits of the case against the plaintiff in the present suit, rather than any demonstrable deficiency in the defendants' legal representation.
- (e) The reported decision by the COA between *Medi Circle Sdn Bhd .v Nur Zulaikha Zulkifli* [2022] 6 MLRA 736 demonstrates the following:
- Agreed with the finding on liability by the trial judge that the plaintiff in this present civil suit, who was the first defendant there, to have acted negligently *vis a vis* Nur Zulaikha Zulkifli.
 - Failure to evaluate and properly diagnose PW3 (the mother) who was presenting symptoms of early preterm labour.
 - Failure of an unidentified doctor to alert either of the O & G doctors that PW3 was presenting early preterm labour. He had seen PW3 on 24.2.2023 but did not see it fit to escalate the symptoms to the O & G doctors.
 - The O & G doctors were not even aware of the events that took place on 24.2.2023 as the attending doctor who ought to have recognised PW3 as exhibiting symptoms of early preterm delivery, failed to alert either of the O & G doctors, thus in the circumstance it was only the hospital which was liable for negligence.

- *Medi Circle* did not prepare complete medical records on the patient but it was decided that the failure to produce medical records or its absence had a link to the disastrous event that took place on 24.2.2024, as the fact remains there was poor treatment of PW3.
- The failure to preserve and produce the medical records had prevented the court from ascertaining the identity of the attending doctor and her qualification, training and experience.
- It was also held by the COA that the hospital managed by *Medi Circle* could not take advantage of its own failure to put forward the best evidence possible to exonerate themselves of the allegation of negligence made against them on the event which took place on 24.2.2023.
- The hospital did not produce any medical records specially to explain what took place on 24.2.2023. The trial judge made adverse findings against all the defendants in regard to the failure to produce the medical records for 24.2.2023.
- The judge made a finding that the failure to keep and produce the medical records had resulted in the poor treatment and management given, which had caused the plaintiff to suffer the birth injury.
- It was submitted for the hospital that the records for the year 2002 were kept because PW3 was an in-patient and when she was carrying the plaintiff, she was an out-patient. It was decided by the COA that this hardly qualifies an explanation by the hospital,

as after the plaintiff was born, the doctors at the hospital did discuss the plaintiff's condition with PW4, thus they would have known of PW3's condition and they ought to have preserved the medical records.

- The patient's register or any other document that could have assisted parties, was also not produced in order to identify the doctor who had attended to the plaintiff's mother on 24.2.2003 and discussed what the clinical facts on that date were.
- (ix) Any assurances provided by the defendants regarding the robustness of the plaintiff's defence in CS 144 are distinct and separate from the conclusive pronouncements rendered by the trial court and subsequently affirmed by the appellate courts.
- (x) The final judicial determinations concerning the matter of medical negligence stand independently. A solicitor's opinion *to wit* the defendants on the prospects of success does not constitute a guarantee, and the ultimate determination rests with the court.
- (xi) Based on balance of probabilities, the court finds that while the plaintiff may have harboured reservations concerning the defence strategy employed by the defendants in CS 144, they were duty-bound to communicate those reservations to the defendants timeously upon receipt of the defence.
- (xii) The plaintiff's decision to defer these complaints until the present suit, alleging professional negligence, appears to be a belated and opportunistic contention.
- (xiii) A client has a responsibility to actively engage with their

legal representatives and raise concerns promptly. Delay in doing so can be detrimental to a claim of negligence against the solicitor.

- (xiv) Similarly, it is more probable that the responsibility for securing expert testimony to bolster their defence against the medical negligence allegations in CS 144 rested squarely with the plaintiff.
- (xv) The defendants' primary function was to provide legal representation; the onus of adducing factual and expert evidence to rebut the allegations lay with the plaintiff.
- (xvi) While the second defendant, as solicitor has a duty to advise on the necessity of expert evidence, the ultimate responsibility for procuring such evidence often lies with the client, *to wit*, the plaintiff as the client must provide the necessary information and evidence to their solicitors, the defendants in this case.
- (xvii) The plaintiff's present contention in this civil suit, such as the alleged failure to adequately cross-examine the plaintiff's witnesses or to adopt the cross-examination conducted by counsel for the co-defendants (the doctors) in CS 144, ought to have been raised with the defendants during the course of trial, rather than at this belated juncture.
- (xviii) Raising the issues now, subsequent to the plaintiff's unsuccessful defence in the medical negligence claim, casts significant doubt on their genuineness and timeliness. Strategic decisions regarding cross-examination are typically within the purview of the second defendant, and hindsight bias should not be used to judge those decisions unless they were manifestly

unreasonable.

- (xix) However, in terms of the law, as elucidated by Gopal Sri Ram JCA in the case of *Tan Kah Khiam v. Liew Chin Chuan* [2007] 2 MLJ 445, pivotal in a civil case, one party's evidence is the other's as well. So, a plaintiff may rely on the defendant's evidence to prove his or her case. The converse is also true. (See also the observations of Hashim Yeop A Sani SCJ in the case of *M Mahadevan v. S Lourdenadin* [1988] 2 MLJ 371).
- (xx) To now assert that the defendants were remiss in their diligence in defending the plaintiff's position in CS 144 is unsustainable. As previously highlighted, the plaintiff possessed the unfettered right to discharge and replace the defendants had they been dissatisfied with their professional services. The fact that they indeed exercised this right at a later stage, appointing new solicitors who then proceeded to file written submissions, further underscores the plaintiff's awareness of their prerogative to change legal representation.
- (xxi) Even at that subsequent stage, should the plaintiff genuinely believed that their former solicitors, i.e. the defendants had been negligent in failing to present expert evidence or adequately cross-examine witnesses, they could have pursued with an appropriate application to either recall witnesses for further examination or call rebuttal evidence pursuant to the provisions of the Evidence Act 1950 (EA/Act 56) and the Rules of Court 2012 (ROC), seeking the discretionary intervention of the trial judge to rectify these perceived deficiencies. The failure to take such steps at the relevant time weakens the present allegations of negligence against the defendants, their former solicitors.

[11] Alleging professional negligence is considerably less arduous than substantiating such an allegation on a balance of probabilities. The standard of care expected of the respondents is that of a reasonably competent legal practitioner, operating within the exigencies and constraints inherent in courtroom advocacy. In representing their client, a lawyer must make strategic decisions and exercise their professional judgment. To now characterize these decisions as omissions and negligence, particularly in the aftermath of the plaintiff's defeat in the medical negligence suit, appears to be a retrospective and self-serving assessment, coloured by the unfavourable outcome.

[12] The court must be cautious not to assess a lawyer's conduct with the benefit of hindsight. At this juncture, it is prudent to refer to the case of *Lanphier v. Phipos* [1838] 8 C & P 475, wherein Tindal CJ said –

Every person who enters into a learned profession undertakes to bring to the exercise of it a reasonable degree of care and skill. He does not undertake, if he is an attorney, that at all events you shall gain your case, and a surgeon does not undertake that he will perform a cure, nor does he undertake to use the highest possible degree of skill. They may be persons who have higher education and greater advantages than he has but he undertakes to bring a fair, reasonable and competent degree of skill.

The duty of the defendants as professionals depends very much on what the professional is employed to do. Thus, a professional must use reasonable care and skill and not be negligent. Negligence means a failure to do some act which a reasonable man in the circumstances would not do. In the present case, the plaintiff has been unable to prove to this court on a balance of probabilities that the defendants had failed in their duty as advocates and solicitors representing them in CS 144. Glaringly, the defendants did not get the fullest cooperation from the plaintiff in terms of procurement of the material facts and evidence in order to defend their case in court.

Ultimately, it is for the plaintiff to assist the defendants to procure those pieces of material evidence in order to be proffered at the trial of CS 144. When the outcome of the case did not favour them, they cannot now point fingers at the defendants, for their own negligence in the entire case brought about by the plaintiff against them in CS144. The defendants had carried out their scope of duty to which the retainer by the plaintiff relates, by all proper means. (See the dictum of Scott LJ in the case of *Groom v. Crocker* [1938] 2 AER 394, 413). All questions of doubt were consulted with the plaintiff, as discerned from the correspondence between them and they were kept informed of the difficulties faced in the case, particularly so the non-availability of the relevant medical records as well as material expert evidence but it went to the deaf ears of the plaintiff. In sum total, the defendants had carried out their scope of duty to protect the plaintiff's interest to the best of their ability, but the trial court had decided to allow the claim for medical negligence against them premised on the abundant incidences of negligence on their part, for which the defendants as solicitors who were their legal representatives in court shall not be blamed. The rest *res ipsa loquitur*.

- [13] The plaintiff further raised an issue concerning the second defendant alleged somnolence during the medical negligence trial. The evidentiary basis for this claim rests solely on a witness's observation, "*macam tidur*" (akin to sleeping). This was directly refuted by the second defendant, who testified that he was merely closing his eyes while maintaining alertness to the proceedings. Based on the available evidence, including the CRT recording, this court finds no conclusive proof that the second defendant was in fact asleep. However, he was assisted by his associate who was also present and attending to the trial. Consequently, the allegation of negligence predicated on this ground lacks factual basis. Even if the allegation were true, the plaintiff was unable to demonstrate how this alleged conduct directly caused or contributed to the unsuccessful

outcome of CS 144.

Conclusion

[14] In sum total, the plaintiff's allegations of professional negligence against the defendants fail to satisfy the requisite legal threshold. The plaintiff has not –

- (a) successfully demonstrated a breach of the standard and duty of care owed by the defendants as their advocates and solicitors in CS 144.
- (b) has also failed to establish a direct causal link between the alleged negligence and the loss suffered, particularly given the affirmation of liability against the plaintiff by the appellate courts.
- (c) the quantum of damages awarded against the plaintiff is a direct consequence of its own negligent conduct as determined by the trial court and it was a finding that was consistently upheld throughout the entire appellate process up to the Federal Court (when leave to appeal was refused).
- (d) the respondents' legal representation cannot be held accountable for the outcome of the medical negligence claim, which was adjudicated based on its own specific merits and the evidence presented therein.

[15] In the upshot, the plaintiff's claim against the defendants is hereby dismissed with costs.

Issue on Costs

[16] The established principle governing the allocation of costs in a civil proceeding is that the unsuccessful party should bear the financial

burden incurred by the successful party. This tenet is codified in **Order 59 Rule 1 of the ROC**, which vests in the court the plenary power to determine by whom and to what extent costs are to be paid. The underlying rationale of this rule is to provide indemnification to the successful litigant for the expenses reasonably incurred in defending or prosecuting the action. The principle on costs underscores the discretionary nature of the court's power regarding costs, but this discretion is usually exercised in favour of the successful party.

[17] In the present case, the plaintiff has failed to substantiate their claim of professional negligence against the defendants. Consequently, in adherence to the aforementioned general principle, the defendants, as the successful party, are entitled to recover their costs.

[18] This court discerns no compelling reasons to deviate from this well-established rule. The plaintiff initiated this legal action alleging professional negligence, and following a comprehensive hearing of the adduced evidence and submissions advanced, this court has found the plaintiff's allegations to be without merit. Therefore, it is just and equitable for the plaintiff to bear the costs incurred by the defendants, whom had defended themselves against an unmeritorious claim. In light of the preceding findings and reasoning, it is hereby ordered that the claim by plaintiff against the defendants be dismissed with costs of RM20,000 to be paid to the defendants.

Claim dismissed with costs.

Dated: 5 AUGUST 2025

(MUNIANDY KANNYAPPAN)

Judge, High Court

Counsel:

For the plaintiff - Fozi Addhwa Mohamad Fozi & Azzan Aznan Abdul Rahim; M/s Nordin Kassim & Aziz

For the defendants - Adi Zulkarnain Zulkafli; M/s A M Zaharil & Co