the ZRp brief

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A Brief Note...

by Shahul Hameed Amirudin

The importance of Education

The third quarter of 2006 witnessed several events, the most prominent was the call from certain quarters for a review of the 1988 crisis in the judiciary, namely the removal of the former Lord President and three judges. This elicited a response from the Law Minister, Datuk Seri Mohd Nazri Aziz, that there would be no such review forthcoming. However the debate continued with a public forum entitled *The 1988 Judiciary Crisis – To Review or Not* held on 11 September 2006.

Some optimistic notes however have combed our legal landscape, namely that the Electronic Commerce Bill has been passed; the OPR remains unchanged and the Listing Requirements have been relaxed to allow foreign-owned companies to be listed.

Apart from these issues, the months of August and September took an academic slant for us at Zul Rafique & *partners*. We participated in two Career Fairs. The first, held at University of Malaya on 26 August 2006 was organised by the Kesatuan Penuntut-Penuntut UK Malaysia (KPUM). The second organised by Kemayan ATC was held on 2 September 2006. A big thank you to everyone who helped make our presence felt.

The career fairs remind me of how important education is – for it is education that moulds us, makes us and the lack of it may even break us.

On that note, let me end with a quote by James Beattie:

> *The aim of education should be rather to teach us how to think, than what to think.*

in this issue...

ZUL RAFIQUE & partners

BRIEF-FLASH...

- **AMENDMENTS TO COMMERCIAL VEHICLES LICENSING BOARD ACT 1987** The Government is reported to be in the process of making the Commercial Vehicles Licensing Board (CVLB) a statutory body. Through the proposed amendments, the CVLB will have more enforcement officers, technical staff and legal experts. The amendments are also aimed at ensuring a better transport system and traffic control, especially in major towns and cities.

- **BANK NEGARA... INTERNAL REVAMP** It was reported that Bank Negara is to undertake a holistic view of its regulatory and supervisory structures. This was announced by the Governor of Bank Negara Malaysia, Tan Sri Dr Zeti Akhtar Aziz at a dialogue session with insurers and takaful operators in Kuala Lumpur on 2 August 2006. The details of the revamp will be announced some time later this year.

- **CRIMINAL PROCEDURE CODE AND PENAL CODE AMENDED** Amendments to the Criminal Procedure Code and Penal Code have been passed and are now awaiting the Royal Assent. Some of the major amendments include those pertaining to rape and the removal of provisions relating to cautioned statements.

- **E-COMMERCE BILL PASSED** The Electronic Commerce Bill was passed in July 2006 and by virtue of such legislation, consumers are expected to obtain adequate legal protection for transactions conducted electronically.

- **ENTERTAINMENT BILL IN FINAL STAGE OF DRAFTING** An Entertainment Bill is reported to be in the final stages of drafting.

- **EMPLOYMENT ACT TO BE AMENDED** The Government has agreed to raise the ceiling wage for workers under the Employment Act 1955 from RM1,500 to RM2,000. Provisions pertaining to maternity leave may also be reviewed. The Government has expressed its intention for employers to include traveling and mileage claims in new collective agreements.

- **FIRST CIVIL ENFORCEMENT FOR SECURITIES COMMISSION** In what has been described as a milestone exercise, the Securities Commission has compensated 275 investors for losses incurred as a result of insider trading in Padiberas Nasional Bhd (Bernas) by a securities firm and an individual which occurred in 1998. By virtue of the 1998 amendments to the Securities Commission Act 1993, the Securities Commission is now empowered to institute civil actions for loss or compensation of up to three times the insiders' gain or loss avoided.

- **MEDIATION ACT?** As part of the move to speed up the backlog of cases, a committee is looking at the possibility of a Mediation Act. The committee is chaired by a Federal Court Judge and representatives from the Bar Council and the Attorney General's Chambers.

- **NEW INVESTOR RELATIONS POLICY UNVEILED** Bursa Malaysia has been reported to have unveiled its new Investor Relations (IR) policy in a move towards enhancing IR practices. The policy which outlines a framework for IR practice is posted on its website at www.bursamalaysia.com.

- **NEW CROSS-BORDER LISTING RULES** Listing Requirements were relaxed by the Securities Commission in June 2006 to allow foreign-owned companies with operations abroad to be listed on Bursa Malaysia. According to the

Securities Commission Chairman, Datuk Zarinah Anwar, such '…liberalisation would enhance the diversity of offerings and promote cross-border linkages with other markets through duals listings.'

- **OPR UNCHANGED** The Overnight Policy Rate (OPR) remains unchanged, at 3.50%. This announcement was made by Bank Negara Malaysia on 25 August 2006.

- **PARENTS TO BE HELD LIABLE** New and broader anti-social laws are being sought to hold various parties, including parents, accountable for juvenile crimes. Although it may appear to be draconian, some quarters believe that such measure may curb the problem relating to juvenile delinquency.

- **PROTECTION FOR EPF CONTRIBUTORS** It was reported that the Employees Provident Fund (EPF) has announced four steps in the protection of contributors when investing their EPF savings in trust funds.

- **REGULATED SHORT-SELLING TO BE LAUNCHED** According to reports, Bursa Malaysia Bhd will be launching regulated short-selling some time in September 2006. It was stated by the CEO of Bursa Malaysia that short-selling will be reintroduced as hedging instruments of a risk management tool.

- **TELECOMMUNICATIONS TO BE GAZETTED AS AN ESSENTIAL UTILITY?** Suggestions have been made for telecommunications to be gazetted as essential services under the Uniform Buildings By-Laws 1984. In order to categorise telecommunications as a utility, severals other laws need to be amended and they include the Housing Developers Act (Control & Licensing) 1966, Town & Country Planning Act 1976 and the Street, Drainage & Building Act 1974.

- **TRADITIONAL MEDICINE COURSES TO BE REGULATED** Traditional and Complementary Medicine courses may be recognised and regulated by the government soon. The Traditional and Complementary Medicine Control Act is expected to be tabled in Parliament next year.

- **UDA HOLDINGS TO BE PRIVATISED?** A legislation to facilitate the move proposed by Khazanah Nasional Bhd to take over UDA Holdings Bhd is reported to be in the pipeline. The move is to be made via a selective capital repayment which will be funded by Khazanah.

- **UNIFIED FILING PROCEDURE FOR PATENT APPLICATIONS** With effect from 16 August 2006, Malaysians will be able to file international patent applications through the Patent Cooperation Treaty. This would mean that instead of applying for multiple regional or national applications, under the Patent Cooperation Treaty System, the applicant needs only to file a single international patent application together with the payment of one filing fee.

FOREIGN FLASH

- **CAN YOU COPYRIGHT A SMELL?** Cosmetic giant, ***Lancome*** created legal history when the Dutch Supreme Court upheld the ruling of the Court of Appeal that allowed for smells to be copyrighted. The subject matter of the dispute was ***Lancome's Tresor*** and rival ***Kecofa's Female Treasure.*** The landmark ruling was based on physiochemical analysis where it was found that both perfumes had 24 out of 26 olfactory components.

- **CONVICTION OF SOROS UPHELD** In June 2006, the highest Court in France upheld the conviction of George Soros,

pertaining to insider trading. The case was in relation to Soros's acquisition of shares in the Societe Generale in late 1988 after being informed that it was to be taken over by a Parisian financier.

- **COURTS IN SINGAPORE UNDER SCRUTINY?** The Court of Appeal of Canada is faced with a question – whether legal decisions made in Singapore are sufficiently fair and impartial so as to meet the standards of justice in other developed countries. Whilst allegations have been made in court documents that the Singapore legal system is an 'utterly politicised component of the executive rule in which there is no guarantee of fairness even in commercial cases', the Singapore government has naturally rejected these claims.

- **FRENCH COPYRIGHT LAWS GET TOUGH** The Copyright Laws of France have become tougher after the passing of the DADVSI (***Loi Sur le Droit d'Autueur et des Droits Voisins dans la Societe de l'Information*** or Law on Author's Rights and Related Rights in the Information Society) by Parliament. Referred to by certain quarters as the 'worst copyright law in Europe', the DADVSI makes changes to the existing French copyright law to conform to the European Directive on Copyright which is commonly viewed as the European equivalent of the United States Digital Millennium Copyright Act.

- **SINGAPORE TO BOOST ISLAMIC FINANCING** According to the Managing Director of the Monetary Authority of Singapore (MAS), Heng Swee Keat, Singapore will allow banks to offer investment products via the ***Murabahah*** scheme.

BRIEF-UP...

PATENTS (AMENDMENT) ACT 2006

No
A1264

Legislation amended
Patents Act 1983

Date of coming into operation
16 August 2006

Amendments
Sections 78A, 78D, 78F, 78G, 78M, 78O and **78Q**

Introduction
Sections 35B, 78KA and **78OA**

Deletion
Sections 78H – K, 78O and **78P**

SKILLS DEVELOPMENT FUND ACT 2004

No
640

Date of coming into operation
1 June 2006

Notes
Although gazetted on 31 December 2004, the Skills Development Fund Act 2004 took effect only from 1 June 2006. Under this Act, a Skills Development Fund is established and will be administered by a Corporation. The duties of the Corporation include identifying and approving skills training programmes to trainees in approved schemes.

GUIDELINES ISSUED BY THE SECURITIES COMMISSION BETWEEN JULY AND SEPTEMBER 2006

SECURITIES COMMISSION (SC)

- *Guidance Note 13 to the SC Guidelines on Unit Trust Funds – Appointment of Delegate Not Licensed by SC* – 24 July 2006

- *Guidance Note 2 to the SC Guidelines on Real Estate Investment Trusts – Borrowing Limit and Issuance of Debenture* – 10 July 2006

- *Guidance Note 3 to the SC Guidelines on Real Estate Investment Trusts – Appointment of Delegate Not Licensed by SC* – 24 July 2006

- *Guidance Note 6E to the SC Guidelines on Issue/ Offer of Securities – In Relation to Listing Based on Market Capitalisation Test* – 22 June 2006

- *Guidance Note 7D to the SC Guidelines on Issue/ Offer of Securities – In Relation to the Listing of Foreign Corporations* – 22 June 2006

- *Guidance Note 7E to the SC Guidelines on Issue/ Offer of Securities – In Relation to the Listing of Foreign Companies with Predominantly Foreign-Based Operations* – 22 June 2006

- *Guidance Note 7F to the SC Guidelines on Issue/ Offer of Securities – In Relation to the Secondary Listing of Malaysian Public Listed Companies on Foreign Stock Exchanges* – 22 June 2006

- *New Submission Checklists for Annual/ Interim Reports (for Unit Trust Funds)*

  (i) Application to Appoint Chief Executive Officer, Director, Investment Committee Member and Panel of Adviser;

  (ii) Application to Appoint Syariah Committee Member/Syariah Adviser;

  (iii) Application for the Appointment of a Company to Act as a Trustee to a Unit Trust Fund;

  (iv) Application for an Increase in the Approved Fund Size;

  (v) Application for Establishment of a Unit Trust Fund;

  (vi) Application to Act as a Management Company of a Unit Trust Fund;

  (vii) Application for Appointment of Delegate Not Licensed by the SC;

  (viii) Application for Approval of a Foreign Market for Investment by a Unit Trust Fund;

  (ix) Application for Registration/ Renewal for Trustee to a Unit Trust Fund;

  (x) Application for an Exemption/ Variation/ Extension of Time

- *SC Guidelines on the Checklist for Compliance with Guiding Principles for Outsourcing of Back Office Functions for Capital Market Intermediaries*

- *SC Guidelines on the Checklist for Compliance with Guidelines on Performance of Supervisory Functions at Group Level for Capital Market Intermediaries*

BRIEF-CASE...

BANKING – Banking business and recovery of loan – Whether notice of demand was served on the borrower

ALLIED BANK (MALAYSIA) SDN BHD V YAU JIOK HUA 2006, Court of Appeal

FACTS The appellant bank sued the respondent for the recovery of a loan. The respondent denied having received any notice of demand from the appellant. At the High Court, the appellant attempted to introduce as evidence the AR cards and four notices of demand which were sent to the respondent by registered post. The notices of demand were issued by a solicitor who had since migrated to Australia. The Judicial Commissioner of the High Court dismissed the appellant's claim on the basis that it had failed to prove that the notice of demand was served on the respondent.

ISSUE Whether the Judicial Commissioner was correct in law in dismissing the appellant's claim.

HELD In allowing the appeal, it was held that section 73A of the Evidence Act 1950 should have been considered when determining the issue of admissibility of the notices of demand and the AR cards. The proviso to section 73A(1) provides that the condition that the maker of the statement shall be called as a witness need not be satisfied if he is beyond the seas and that it is not reasonably practicable to secure his attendance. The conditions laid down in section 73A of the Evidence Act 1950 was satisfied under the circumstances of this appeal and hence the notices of demand were admissible.

BANKING LAW – Relationship between banker and customer – Whether banker had duty to inform customer of variation of clause in facility agreement

ABDUL RAHMAN ABDUL HAMID & ORS V PERDANA MERCHANT BANKERS BHD 2006, Federal Court

FACTS A loan facility of RM20 million had been granted by the respondents to the appellants. After a series of negotiations, the parties had agreed on a working draft dated 1 June 1992. The facility agreement was subsequently entered into on 30 June 1992. Although it was agreed that all the clauses in the working draft would be incorporated into the facility agreement, there was a substantial variation of a clause in the facility agreement.

ISSUE The issue that arose was at what point in time was there a banker/customer relationship and whether the banker had the duty to inform the customer of the variation of the clause in the facility agreement.

HELD The relationship began before the execution of the facility agreement, that is, with the commencement of the negotiations which were considered part of the contract. Failure of the respondents to inform the appellants of the variation of the clause amounted to a fundamental breach of duty of care.

Knowledge and understanding are life's faithful companions who will never be untrue to you. For knowledge is your crown, and understanding your staff; and when they are with you, you can possess no greater treasures – Kahlil Gibran (1883 – 1931)

PROCEDURE – Whether Danaharta is a 'public authority' as expressed in the Rules of the High Court 1980, thus amenable to judicial review

TANG KWOR HAM & ORS v PENGURUSAN DANAHARTA NASIONAL BHD & ORS 2006, Court of Appeal

FACTS The appellants were directors of a company which was also the sixth respondent. The company had a non-performing loan which was acquired by the respondent (Danaharta). A proposal was prepared and submitted, recommending the sale of a piece of land with the property thereon belonging to the sixth respondent. The proposal was approved by the majority of the creditors of the company. The appellants, on behalf of themselves and also by way of representative and derivative action on behalf of the company, applied to the High Court for judicial review of the said proposal claiming that it was infused by public elements and that they had not been given the opportunity to air their grouses at the secured creditors meeting at which the proposal was approved.

ISSUE Whether Danaharta was a public authority within the scope of Order 53 r 2(4) of the Rules of the High Court 1980 to be amenable to judicial review and whether the appellants were correct in framing their application in a representative and derivative capacity for the benefit of the company.

HELD It was held that an application for judicial review may be made by the applicant acting in a representative capacity. It was also held that although the phrase 'public authority' is used in the Rules of the High Court 1980, the term 'person in authority' is employed in the Courts of Judicature Act 1964. By virtue of the parent Act therefore, Danaharta is a person in authority.

COMPANY LAW – Whether there was a breach of sections 132(1) and 132C of the Companies Act 1965

HENRICK INTERNATIONAL HOTEL & RESORTS PTE LTD v YTL HOTELS & PROPERTIES SDN BHD 2006, High Court

FACTS The plaintiff, Henrick International (HI), a company providing hotel management services entered into a joint venture agreement with YTL to develop and manage hotels in Malaysia. A joint venture company, Trans Pacific was formed with HI and YTL as the only shareholders in equal proportions.

As a result of several resignations of key employees of HI (including the President and CEO who had left the employment of HI to join YTL), YTL became increasingly dissatisfied with the services of HI. Both parties subsequently agreed to terminate the agreement between themselves with a further agreement for YTL to purchase the shares of HI in Trans Pacific.

ISSUE Whether YTL had violated sections 132(1) and 132C of the Companies Act 1965 by having the agreement terminated.

HELD The shareholders of Trans Pacific decided to take a particular course of action and it could not therefore be said that the directors of Trans Pacific had acted dishonestly or without reasonable diligence. Furthermore, to allow HI to rely on section 132C of the Companies Act would in effect be allowing it to reprobate on its expressed representation whereby it agreed to the termination of the hotel management contracts. By its conduct and expressed representation, HI was estopped from relying on section 132C of the Companies Act 1965.

CONTRACT LAW – Whether a money lending transaction was disguised as a factoring facility

LAYANGAN BINA SDN BHD v MP FACTORS SDN BHD 2006, High Court

FACTS The plaintiff who had been awarded a contract by a developer (the customer) to develop a housing project entered into a factoring agreement with the defendant where the debts in question were the architect certificated progress claims that the plaintiff had and would have in the future as a financial claim against the customer for works done.

ISSUE Whether the factoring agreement was in fact a money lending transaction.

HELD A factoring agreement involves the assignment of book debts. Such an assignment is not a money lending transaction. On the facts, the transaction between the parties clearly involved the purchase of debts under the agreement. The fact that securities were required and were given by the plaintiff does not change the character of the transaction. The fact that the defendant had deferred recourse against the customer does not convert the transaction to one of money lending.

I expect to pass through this life but once. If, therefore there can be any kindness I can show, or any good thing I can do to any fellow being, let me do it now, for I shall not return this way again. – William Penn (1644 – 1718)

COMPANY LAW – Whether the defendant had a lien over shares owned by the plaintiff

MING HOLDINGS (M) SDN BHD v YUSOF LATIF HOLDINGS (M) SDN BHD 2006, Court of Appeal

FACTS The subject matter of the dispute was two share certificates in a company known as Global Harvest Sdn Bhd. The plaintiff claimed to be the owner of the share certificates whilst the defendant claimed that it was entitled to a lien over the certificates on the basis of a prior transaction between the defendant and the director of the plaintiff, one Dato Yusof Latiff.

ISSUE The issue for consideration was whether the defendant was in fact entitled to the lien over the shares.

HELD In dismissing the appeal it was held that there was no evidence to establish the defendant's assertion that there was an agreement between the defendant and the director of the plaintiff. Furthermore based on the celebrated case of ***Salomon v Salomon*** it is trite law that a company is a separate individual from the shareholders and directors. The property of the company belongs to the company and not the shareholders or directors.

My mother drew a distinction between achievement and success. She said that achievement is the knowledge that you have studied and worked hard and done the best that is in you. Success is being praised by others. That is nice but not as important or satisfying. Always aim for achievement and forget about success – Helen Hayes (1900 – 1993)

ISLAMIC LAW/ INHERITANCE LAW – Whether the moneys in a joint account belonged to the appellant or did it vest in the estate of the deceased

LATIFAH MAT ZIN v ROSMAWATI SHARIBUN 2006, Court of Appeal

FACTS The deceased had maintained several accounts jointly with the appellant (the surviving spouse of the deceased). The deceased and the appellant had agreed between themselves and the bank that in the event of the death of either, any balance remaining in the credit of the joint account may be paid to the survivor. After the death of the deceased, the appellant made several withdrawals from the joint accounts. The petitioner (the daughter of the deceased from a previous marriage) filed for letters of administration.

ISSUE Whether the moneys in the joint accounts belonged to the appellant or did it vest in the estate of the deceased.

HELD The subject-matter of the dispute was that of gifts inter-vivos or ***Hibah*** between Muslims and was within the jurisdiction of the Syariah Courts. In the event that the court was wrong in holding that the High Court had no jurisdiction, the law applicable to gifts inter-vivos is the Islamic Law of ***Hibah***. Conditions for the validity of a ***Hibah*** are (a) a manifestation of the wish of the donor; (b) the acceptance of the donee; and (c) the taking possession of the subject-matter of the gift by the donee, either actually or constructively.

In this case, the appellant had discharged her burden of proving the ***Hibah***.

ISLAMIC LAW – Whether conditions and prerequisites for a gift were satisfied – Whether the transfer of the land (gift) was registered

TM FEROZE KHAN & ORS v MEERA HUSSAIN TM MOHAMED MYDIN 2006, Court of Appeal

FACTS In 1968, the deceased had transferred a piece of land to himself as trustee for the benefit of his 8 year old son, the respondent. The deceased had also executed a trust deed declaring himself as holding the property in trust for the respondent. During his lifetime, the deceased had not made any attempt to revoke the memorandum of transfer or trust deed in question. In 1992, the defendant had obtained from the High Court, an ex parte order vesting the property in his name. The appellants (the children of the deceased from his other marriage) argued that the purported gift of property was void under Islamic law and thus ought to belong to the estate of the deceased.

ISSUE Whether there was a valid transfer of the gift of property to the respondent under Islamic law.

HELD The conditions for a lawful gift under Islamic law are as follows: (a) a manifestation of the wish of the donor to give; (b) the taking of possession of the subject matter of the gift by the donee, either actually or constructively. However, in respect of the condition that the donee has to take possession of the gift, the exception is where the gift is from the father to his minor son. On the facts of the case, these conditions had been fulfilled.

CONTRACT/ COMPANY LAW – Whether a transaction entered between the appellant and respondent was illegal and thus a violation of section 32 of the Securities Commission Act 1993

HASMAH BINTI ABDUL RAHMAN V KENNY CHUA KIEN LAM 2006, Court of Appeal

FACTS The respondent who was the managing director of a company involved in the logging business, sought the assistance of the appellant to float the company's shares on the Second Board of the then KLSE. The respondent executed the relevant statutory declaration stating, among other things, that he was fully aware of the provisions of section 32B and 32(6) of the Securities Commission Act 1993.

The respondent's claim against the appellant was for the return of 170,000 shares in the company which he claimed the appellant had purchased from him and registered in her name but that the purchase price for which was never paid. The appellant argued that the respondent was not allowed to claim against her as the transaction between her and the respondent was illegal.

ISSUE Whether the transaction between the appellant and respondent was tainted with illegality.

HELD The purported sale of the company's shares by the respondent to the appellant amounted to nothing more than a transaction which on the face of it was lawful but was entered into for an unlawful purpose or to achieve an unlawful end. There was deception practised on the relevant regulatory authorities which formed part of the public administration in this country. The transaction was therefore tainted with illegality right from the start and was thus unenforceable.

LOCAL GOVERNMENT – Whether an amendment to the valuation list issued pursuant to section 144 of the Local Government Act 1976 was valid

MAJLIS DAERAH DUNGUN V TENAGA NASIONAL BERHAD 2006, Court of Appeal

FACTS The appellant's claim was for the recovery of arrears of rates imposed on a particular holding (a power station comprising 13 buildings including a power generating plant) owned and operated by the respondent. The respondent sought a declaration that the notice of amendment to the valuation list issued by the appellant pursuant to section 144 of the Local Government Act 1976 was ultra vires and null and void.

The respondent questioned the legality of the notice of valuation on the basis that the matter was under negotiation for settlement.

HELD Pursuant to section 144 of the Local Government Act 1976, the local authority has a discretion to amend the valuation list and the rates shall be payable in respect of the holding in question in accordance with the amended valuation list.

The respondent is prohibited by the doctrine of ultra vires from entering into negotiations with the appellant to reduce the rate imposed by the latter since there is no provision in the Local Government Act 1976 which allows an owner of a holding to negotiate with a local authority with a view to reduce the rate assessed thereon.

Instead of acting on its own accord, the respondent should have availed itself of the statutory provisions in the Local Government Act 1976, in particular sections 142 and 143 where the opportunity to be heard is allowed and if the respondent was still dissatisfied, it could have appealed to the High Court.

BRIEFING...

MEDICAL LAW

THE PRIVATE HEALTHCARE FACILITIES AND SERVICES REGULATIONS 2006... BANE OR BOON? The Private Healthcare Facilities & Services Regulations 2006 took effect from 1 May 2006. This law empowers any patient dissatisfied with a private medical practitioner to lodge a complaint and to be able to expect a response within 14 days, failing which, the Director-General of Health would step in to investigate, leading to official findings which need to be complied with. Otherwise, legal action would be instituted against these errant doctors.

In this article, we examine the implications of these Regulations.

WHY THE NEED? The issue that arose was whether there was in fact a need for the Private Healthcare Facilities & Services Regulations 2006 ('the Regulations'), in light of the existence of other statutes such as the Private Hospitals Act 1971, Medical Act 1971 and Dental Act 1971.

The contention of the Ministry was that those Acts were focused on regulating the professional practices and not healthcare facilities and services. Moreover, the Malaysian Medical Council is not empowered to enforce these laws. It is obvious that as society progresses the present Acts appear insufficient to cope with current developments. What appears to be lacking is a proper channel for the protection of patients from the current era of commercially-driven private healthcare.

The reactions to the enforcement of these Regulations are varied - from the roar of approval from the public to the howls of protest from certain quarters within the medical fraternity. The main criticism is centered on the unfair and degrading image of the medical fraternity that has been portrayed by the Regulations.

AIM OF THE LAW The Ministry has insisted that the rationale for the regulations is to have a better scope of control over the coverage of facilities in the private medical field. The effect is to prevent certain quarters from resting on their laurels and in fact to prepare them for a change. The intention of the legislation therefore is not to degrade, but to upgrade, maintain and enhance the integrity of the medical profession.

SCOPE OF THE REGULATIONS The law covers the qualifications of personnel, procedures and standards to be adhered to such as approval and licensing, and other details, namely the renovation of premises, in particular those pertaining to haemodialysis, daycare centres and operation theatres. This is aimed towards infection control and clinical barriers to communicable diseases and comfort of patients.

Precise requirements for the size, doors, ceiling heights and design of clinics have given rise to protests as it could result in doctors having to renovate or worse still, relocate - despite the fact that their present clinics are sufficiently designed to meet daily needs.

Apart from the issue of costs, the hardship in having to deal with the landlord and local authorities for renovation or relocation purposes may be a prohibitive factor.

It would appear therefore that good clinical practice alone may not be sufficient. Since it is now micromanaged by specific regulations, every single infringement, however trivial, is theoretically punishable.

BANE OR BOON? Doctors have until 30 November 2006 to register their clinics, or face a fine of up to RM300,000. Such fines are claimed to have the effect of treating doctors not only as an unethical, greedy and immature lot but also as common criminals.

The Ministry responded that the force of law is needed to put the legislation into effect. Moreover, those who practise according to the code of professional conduct need not have any fear.

As simple as the theory might sound, one cannot help but realise that even with a good quality practice, things can go wrong. Stories have revealed that although sound medicine is practised in the private fraternity, other provisions of law are still invoked against them although the same trivial matters are breached by their counterparts in the public medical fraternity.

The subtle risk of the increase in defensive medicine as seen in the United States and Europe that would affect the patients is cushioned by the existence of Professional Fee Schedule to control the costs.

On the requirement for every doctor to have basic emergency services, the argument by the private medical fraternity is that there are those who have not practised it for years, especially the dermatologists, psychiatrists or other specialists who may not be reasonably competent to carry out such procedures. However, the Ministry has made it clear that this is targeted towards primary cares that have been accredited by the Ministry.

CONCLUSION Although the step taken by the Ministry is laudable as it ensures protection of the patients' rights, one wonders whether the stringent requirements are the result of a few rotten apples of the medical profession in comparison to the majority who have been practising sound medicine.

TORT LAW

ECONOMIC LOSS V PURE ECONOMIC LOSS The debate on whether damages arising from economic loss as well as pure economic loss may be claimed has been on-going since the celebrated case of ***Donoghue v Stevenson*** (1932). Lord Atkin in that case expounded the principle that reasonable care must be taken to avoid acts or omissions which may reasonably be foreseen to cause physical injury to a person or damage to property other than the damaged property itself.

In this article, we examine the distinction between economic loss and pure economic loss and whether damages arising from such losses may be claimed in Malaysia.

DEFINITIONS It would be apt to first distinguish 'economic loss' from 'pure economic loss'. According to ***Black's Law Dictionary,*** economic loss is defined as 'financial or monetary loss that is a consequence of personal injury or damage to property.' Examples of such losses are financial loss due to personal injury in the form of medical bills, loss of earnings and vehicle repair bills. Economic losses are usually recoverable. It may also be claimed as commercial loss for the property's inadequate value and consequential loss of profits of use as a result from property damage arising from negligence.

Pure economic loss on the other hand, is not consequential upon death, personal injury or damage to property. It may have a 'probable' and 'uncertain' value to it, for example, loss of probable income, loss of turnover suffered by the employer or loss of future profits, and would also encompass claims on the defective product itself. The success of these arguments is dependent on the reasonable foreseeability test.

ENGLISH POSITION A case that illustrates the difference between economic loss and pure economic loss is the English case of ***Spartan Steel & Alloys Ltd v Martin & Co (Contractors) Ltd*** (1973). In that case the defendant negligently cut off an electric cable which resulted in a power failure at the plaintiff's factory. Steel alloys were manufactured in that factory. In order to prevent damage to their furnace, the plaintiff had the melt removed and this reduced the value of such melt. The plaintiff claimed for loss of profits they would have made on the melts they could have processed. The Court of Appeal held the defendant liable for the reduction in value to the first melt as well as the loss of profit from it, but the defendant was not liable for the loss of expected profits as that was pure economic loss.

The English position may be traced all the way back to the 1978 case of ***Anns v Merton London Borough Council*** where it was held that the local council was liable on the ground that it owed a duty to the plaintiff to exercise reasonable care and skill in carrying out examination or inspection, and that the inspector had failed to use such care and skill. This liability is extended to the recovery of those damages 'which foreseeably arise from the breach of duty of care, which may include damages for personal injury and damage to the property…they may also include damage to the dwelling house itself'.

The position today is reflected in the case of ***Murphy v Brentwood District Council*** where the House of Lords rejected the view that economic loss is recoverable vis-a-vis the tort of negligence. It was in fact held that the council owed no duty of care to the plaintiff in respect of damages suffered, and that pure economic loss was only recoverable in contract. The main reason for this decision is to curb the opening of floodgates of pure economic losses claims against the local councils.

MALAYSIAN POSITION In Malaysia, ***Murphy*** was followed in ***Kerajaan Malaysia v Cheah Foong Chiew*** where it was held that pure economic loss is irrecoverable in tort, and that tort decisions in England are undeniably accepted and applicable here. The principle that pure economic loss is irrecoverable has also been so held in the subsequent case of ***Teh Khem On & Anor v Yeoh & Wu Development Sdn Bhd & Ors.***

Following that, the recent Court of Appeal case of ***Lim Teck Kong v Dr Abdul Hamid Abdul Rashid*** decided that '…a claim for pure economic loss can be entertained in a claim for negligence.' It was said that the legal principle for accepting a claim for economic loss should not be confined to defective buildings and structures, because to comply strictly with the limitation as set in ***Murphy*** would be 'grossly inequitable with justice not being served'. It was also stated that the fundamental rationale against allowing pure economic loss is still to prevent the creation or extension of liability to 'an indeterminate amount for an indeterminate time to an indeterminate class'.

Although English tort cases and principles have been applied here, it was suggested by Mokhtar Sidin JCA in ***Lim Teck Kong*** that 'we have been too long in the shadow of the House of Lords' decision of ***Murphy'*** and that 'it is time for us to move out of that shadow and move along with other Commonwealth countries where damages could be awarded on pure economic loss'. One of the pressing concerns that influenced His Lordship's decision is 'how consumers suffer due to the shoddy and haphazard manner of the developers and contractors in putting up buildings with so many defects and in most cases, delay'. Since a special tribunal has been set up to cater for such complaints, 'the courts should also play their part in this'.

Leaders understand the power of choice - Anonymous

LEGAL PROFESSION – Jury trials

TWELVE (OR SEVEN?) ANGRY MEN

Twelve Angry Men, a movie by Sidney Lumet, screened in 1957, was described as 'gripping, penetrating and engrossing'. It was about a group of 12 jurors brought together to deliberate in a murder trial of an uneducated, teenaged boy for the alleged murder of his father. An expose of the jury trial, revered as infallible, unbiased and idealistic, the focus of the movie was on Juror No 8 who persistently and persuasively forces the eleven other judgmental men to reconsider and review the case.

In Malaysia there have been calls to revive jury trials, on the basis that it would be a check and balance on possible corrupt judges. We examine the pros and cons of jury trials and whether findings by jurors are really made without fear or favour.

HISTORY Although jury trials were in existence as early as the Dark Ages in England, they became more popular due to the efforts of King Henry II. A jury panel comprising twelve free and unbiased men was assigned to adjudicate disputes. In 1215, trials by jury became an implied right which was documented in Article 39 of the Magna Carta:

> No free man shall be arrested, or imprisoned, or deprived of his property, or outlawed, or exiled, or in any way destroyed, nor shall we go against him or send against him, unless by legal judgment of his peers, or by the law of the land.

In Malaysia, jury trials consisting of a seven-member panel were introduced subsequent to independence and have only been an option for capital cases. It was abolished in February 1995, the then Law Minister justifying the move on the basis that they were impeding the quick disposal of cases. Furthermore, the authorities have always lamented that it was difficult to find qualified jurors.

TO REVIVE OR NOT TO REVIVE Jurors as 'peers of the accused' are responsible for listening to a dispute, evaluating the evidence presented, deciding on the facts, and making a decision in accordance with the rules of law and their jury instructions. A jury trial has always been viewed as a symbol of individual liberty – one is judged by one's peers and not by judges.

On 2 July 2006, it was reported that the Attorney General called for the return of jury trials on the basis that Malaysians are very well-read, more well-informed and competent and that they are more aware of the law and their legal rights.

However, many quarters, including the Government, have been skeptical of such revival. According to a Constitutional Law expert, '…levels of literacy have improved but this issue is not only of knowledge but of wisdom. Facts do not contribute to wisdom, the ability to be impartial, fair and just, to ignore stereotypes.' It has also been said that with the revival of jury trials, tactical lawyers who are able to capitalise on the emotions of the jurors to arouse sympathy, distrust or hatred will in most cases be able to secure an acquittal.

Although it has been said that jurors, being ordinary people are prone to passions, pride and prejudices, one cannot say with full confidence that a judge may not be influenced by similar considerations.

In fact, defence lawyers have provided counter arguments to the case against jury trials, stating that jurors have an unadulterated view of the facts presented before them.

CONCLUSION The Government may have shot down calls to allow trials by jury, but the jury is still out on whether the jury should be in.

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ZRp IN-BRIEF...

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would like to take this opportunity to wish everyone

I believe in the sun even though it is slow in rising.
I believe in you without realising.
I believe in rain though there are no clouds in the sky.
I believe in truth even though people lie.
I believe in peace though sometimes I am violent.
I believe in God even though he is silent.
- Unknown