

**THE IMPOSITION OF DUTIES OF CARE BY THIRD PARTIES IN
TORT**

MAZURA BT MAHDZIR

UNIVERSITI TEKNOLOGI MALAYSIA

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TORT**

MAZURA BT MAHDZIR

**A project report submitted in partial fulfillment of the
requirements for the award of the degree of
Master of Science (Construction Contract Management)**

Faculty of Built Environment

Universiti Teknologi Malaysia

APRIL 2010

To my beloved Mother and Father.

Sister and Brothers

Thank you for your support, guidance, and everything.

ACKNOWLEDGEMENTS

This master project was successfully completed with contribution from many people to whom I would like to convey my appreciation and indebtedness. First and foremost, I would like to express my appreciation to my supervisor, Assoc. Prof. Dr. Maizon Hashim, for her valuable guidance, ideas, time and patient throughout the entire journey of this research. In fact, I'm so grateful that finally I managed to complete it on time due to her encouragement and effective supervision.

A special gratitude must also go to all lecturers under the program of Master of Science (Construction Contract Management), for sincerely providing me with valuable knowledge during the process of learning. Besides that, I'm deeply indebted to my dearest parents, Mahadzir and Maznah, as well as my sister and brothers for their boundless understanding, cooperation and moral support.

Unforgettable, I would like to extend my indebtedness to all my classmates, friends or other individual members, who have lent me a hand and contributed in some way during the accomplishment of this research study.

ABSTRACT

The privity rule has give rise to many criticisms due to its injustice and inconvenience. In realizing this situation, various means or mechanisms were available to circumvent the privity rule including tort of negligence. Nevertheless, it may have its own weakness that is; it is difficult to establish a duty of care owed by promisor in recovering of pure economic loss claim. Hence, this dissertation intends to examine the claims by third parties in tort and look into their problems in imposing a duty of care owed by the promisors. By adopting the judicial decision from various cases, the scope of this research is confined with the third parties claim namely contractors or builders, owners or subsequent owners and purchasers or subsequent purchasers. The findings revealed that of 21 cases, only five managed to prove a duty of care owed by professional man, whereas the rest proved otherwise. To recap, the recovery of claims by third parties remains difficult and we might concluded that tort of negligence provides uncertainties in protecting their rights. Indirectly, it was not an effective mechanism to circumvent the privity rule's problems as yet it was inadequately protecting third-party's rights in certain situations. Therefore, they may utilize this research as guidance so that, they have a better understanding in relation to its operation.

ABSTRAK

'Privity rule' telah menimbulkan banyak kritikan disebabkan ketidakselesaian and ketidakadilan. Menyedari situasi ini, pelbagai mekanisme telah disediakan untuk menghindari 'privity rule' termasuklah kecuaiian di dalam undang-undang tort. Tetapi, ia juga mengandungi kelemahannya sendiri iaitu, kesusahan untuk mencari kewajipan berjaga-jaga yang diperuntukan terhadap pihak yang membuat janji dalam menuntut kerugian ekonomi tulen. Jadi, kajian ini berhasrat untuk mengenal pasti tuntutan mereka dan mengkaji masalahnya dalam meletakkan kewajipan berjaga-jaga yang diperuntukan terhadap pihak yang membuat janji. Berpandukan keputusan mahkamah daripada pelbagai kes, skop kajian ini terbatas kepada tuntutan pihak ketiga yang dinamakan sebagai kontraktor atau pembina, pemilik atau kumpulan pemilik yang berikutnya dan pembeli atau kumpulan pembeli yang berikutnya. Penemuan mendedahkan bahawa, daripada 21 kes, hanya 5 berjaya membuktikan adanya kewajipan berjaga-jaga yang diperuntukan terhadap pihak yang membuat janji, manakala selebihnya membuktikan sebaliknya. Kesimpulannya, pihak ketiga menghadapi kesulitan untuk memperoleh tuntutan dan jadi, kecuaiian dalam undang-undang tort menyediakan ketidaktentuan dalam melindungi hak mereka. Secara tidak langsung, ia bukanlah kaedah yang baik untuk menghindari masalah 'privity rule' kerana ia masih tidak mencukupi dalam melindungi hak pihak ketiga dalam keadaan tertentu. Dengan itu, pihak ketiga boleh menggunakan kajian ini sebagai panduan, supaya mereka dapat lebih memahami operasi di dalam undang-undang tort.

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CHAPTER ONE

INTRODUCTION

1.1 Background of study

The doctrine of privity of contract or so called the privity rule, fundamentally concerned with the law of contract that only those who are parties to the contract can sue or be sued on it. Therefore, a person who is not the party to a contract, which refers to third party, could not rely of this rule. Similarly, the parties to a contract cannot impose liabilities upon them who are normally considered as a stranger to the original contract.

In other words, the general principal of this rule contains that only the parties to the contract are bound by or entitled to a remedy for enforcement of the obligations under the contract. Thus, if he is not the party to the contract,

the person may not enforce a contractual promise and obtain remedies for its breach, even when the promise was expressly made for that person's benefit¹.

It should be noted that, traditionally, the utilization of this rule has long been accepted and established in English private law, as illustrated in the classic case of *Tweddle v Atkinson*². This case lies on the principle that consideration must move from the promisee, thus, again the action of the plaintiff failed due to the reason that no stranger to the consideration can take advantage of the contract although made for his benefit³. It has further been applied as in the case of *Dunlop Pneumatic Tyre Co Ltd vs Selfridge & Co Ltd*⁴.

This rule is also applicable in Malaysian even though the Contracts Act 1950 (Act 136) has no express provision pertaining to the doctrine of privity of contract⁵. In *Kepong Prospecting Ltd & Ors v A.E Schmidt & Marjorie Schmidt*⁶ therefore, it gives the gloom picture that the doctrine still applies in Malaysia, as it only recognized the person who is the party to a

¹ Poole, J (2006). *Textbook on Contract Law* (8thEd). Oxford University Press: New York

² [1861] ER 369

³ Alsagoff, S.A.S.A (1996). *Principles of the Law of the Contract in Malaysia*. Malayan Law Journal Sdn Bhd : Kuala Lumpur

⁴ [1915] AC 847

⁵ Meng, T.P (2009). Circumventing the Privity Rule in Malaysia. *Journal of International Commercial Law and Technology*, Vol. 4 (No.4), pp. 262-273. Retrieved October 27, 2009, from [http:// www.jiclt.com](http://www.jiclt.com)

⁶ [1968] MLJ 170

contract to take the advantage. It has been further applied by the Supreme Court in *Emar Sdn Bhd v Aidigi Sdn Bhd*⁷.

Undoubtedly, this principle, which has been a keystone of English contract law for the past 139 years⁸, might give enormous benefits to the parties of contract to limit their exposure to contractual liability to one party. Putting it another way, the privity rule might give freedom for contracting parties to confine their rights by varying the contract in certain situations. For instance, the existence of the contract between the employer and the contract administrator would be an advantage for the contract administrator to avoid any claim raised by the contractor. The reply would be that the contractor was not a party to the contract and so no action for breach could be brought by them.

Despite of the advantages that it has, the privity rule also has come under heavy criticism due to its rigidity application often causes inconvenience in practice⁹. Besides that, it often results in injustice¹⁰. Lord Diplock further pointed out that it was 'an anachronistic shortcoming that has

⁷[1992] 2 MLJ 734

⁸Edwin, C (2000). Contracts for the benefit of third parties. Will our common law see the demise of privity of contract. *Malayan Law Journal*, Vol. 4 (No.1), pp. 262-273. Retrieved November 27, 2009, from [http:// www.lexisnexis.com](http://www.lexisnexis.com)

⁹Upex, R (1999). *Davies on contract*. (8thEd). Sweet & Maxwell: London

¹⁰Edwin, C (2000). Contracts for the benefit of third parties. Will our common law see the demise of privity of contract. *Malayan Law Journal*, Vol. 4 (No.1), pp. 262-273. Retrieved November 27, 2009, from [http:// www.lexisnexis.com](http://www.lexisnexis.com)

for many years been regarded as a reproach to English private law'¹¹. In fact, these arguments arose due to frustration in relation to its failure to protect the third party contractual benefits, which provide them with unfair solution.

Other, it was inadequately protecting not only the promisee's expectation interest but also third-party's expectation interest. Thus, the third party, though a stranger to the contract between the promisor and promisee, is party to an identical, or identical in part, ('collateral') contract with the promisor¹².

1.2 Statement of issue

In considering the weaknesses incorporated within the privity rule, there are various mechanisms have been available to circumvent that rule instead. Of the prominent mechanisms is the tort of negligence, where the third party brings their claim against the parties to a contract. In fact, the utilization of this mechanism remains significant due to some advantages.

¹¹*Swain v Law Society* [1983] 1 AC 598 at p 611.

¹²Smith, S.A (1997). Contract for the Benefit of Third Parties: In Defence of Third-Party Rule. *Oxford Journal Legal Studies*, Vol 17, pp.643 - 663. Retrieved January 14, 2010, from [http:// www. ojls.oxfordjournals.org](http://www.ojls.oxfordjournals.org)

Amongst others are, it gives flexibility in terms of its the conceptual framework as its scope falls to be determined by the control device of the duty of care such as the 'neighbour principle', the *Anns* principle or 'justice and reasonableness', or whether they are taken on a casuistic or incremental basis. Other, it avoids any need to find consideration for the undertaking whose breach it is claimed should give rise to liability and it may therefore sanction breach of gratuitous undertakings (as defined by the rules of consideration)¹³.

Besides of its advantages, this mechanism also contains its own weakness, that is, in bringing an action in tort, a third party may only be permitted to enforce the terms of a contract where it can be shown that the promisor owed a duty of care to the third party claimant¹⁴.

Nevertheless, it will not always be easy to establish a duty of care and show that the promisor was negligent¹⁵. In fact, the major difficulty faced by a third party is to impose a duty of care owed by the promisor as which has been breached, particularly in recovering the claim for pure economic loss¹⁶. In other words, the issue normally relates with its problems to protect the third party rights in tort.

¹³Whittaker, S (1996). Privity of Contract and The Tort of Negligence: Future Directions. *Oxford Journal of Legal Studies*, Vol 16 (No.2), pp191-230. Retrieved January 14, 2010, from [http:// www. ojls.oxfordjournals](http://www.ojls.oxfordjournals)

¹⁴Poole, J (2006). *Textbook on Contract Law* (8thEd). Oxford University Press: New York

¹⁵Hilliard, J and O'Sullivan, J (2004). *The law of contract* (1st Ed). Oxford University Press : USA

¹⁶Meng, T.P (2009). Circumventing the Privity Rule in Malaysia. *Journal of International Commercial Law and Technology*, Vol. 4 (No.4), pp. 262-273. Retrieved October 27, 2009, from [http:// www.jiclt.com](http://www.jiclt.com)

In the light of this weakness, it gives rise to uncertainties with positions of third party's rights to claim notably with judgment obtained from Commonwealth countries. As a consequence, it requires us to examine the following objective.

1.3 Objective of study

The objective of this research is:

- i. To examine the recovery of claims by third parties in tort
- ii. To identify their problems in imposing a duty of care owed by the promisors.

1.4 Scope and limitation of study

This research is confined with the problems faced by third parties in recovering the pure economic loss claim. Thus, it involved three types of third parties claim namely contractors or builders claim against contract administrator, the owners or subsequent owners claim against designer or

constructor and the subsequent purchasers or purchasers claim against designer or constructor.

The case analysed, included one (1) from Hong Kong, two (2) from Malaysia, six (6) from Canada, four (4) from Australia, six (6) from UK, one (1) from Singapore and one (1) from New Zealand. On the other hand, there is no limitation for court cases referred unless it was reported in Lexis Nexis.

1.5 Significance of study

This research is primarily intended to be a reference not only for parties within the construction but also the outsiders, who were really interested with contract particularly. It provides information for them in relation to the mechanisms available under the tort of negligence, which is designed to avoid the unfairness of the doctrine of privity of contract.

Aims to enhance their knowledge with regard to this mechanism, it also valuable for a person who has suffered losses or known to be a third party, to realize the effect of the mechanism with their rights completely. Is it they have been protected under the law of tort? Hence, various circumstances will be studied by looking into the several cases, which demonstrated the problems faced by third parties in imposing a duty of care owed by promisor.

Thus, they managed to identify the problems which normally arise in that mechanism through the comprehensive study regarding the cases found out in construction. From this study, they would then have a better understanding pertaining with their rights to claim, whether it can be recovered or not.

In doing so, they will be more appreciate with the various reasons behind each cases and take a safety measure if they have intended to enter into future contracts. At last, the problems arisen in the numerous cases pertaining to those mechanisms in protecting the third party rights could be minimized if the parties really comprehend the operation under the tort of negligence.

1.6 Research Methodology

This research consists of systematic approach in order to achieve the objective of study. Generally, it consists of five stages namely identifying the research issue, literature review, data collection, data analysis, conclusion and recommendations.

1.6.1 First Stage: Identifying the Research Issue

Initially, the primary step in doing this research is by identifying the research issue. The formulation of the issue normally is motivated from various materials like articles, journals, newspaper and books. Once the idea is identified, the objective then would be developed, which focus on examining the problems faced by third parties in tort of negligence and the recovery of the claims.

1.6.2 Second Stage: Literature Review

The literature review stage normally will give the overview concept of this research briefly. In order to give an overall understanding, this study can be divided into three chapters, which are the tort of negligence, the duties of care to third parties and the recovery of claims by third parties. Thus, the information would rely heavily from various sources of materials like books in the fields of construction contract, journals, newspaper, articles, lecturer notes and magazines.

1.6.3 Third Stage: Data Collection

This stage concerned with collecting all the relevant data from numerous cases obtained from Malayan Law Journal, Building Law Report and other journals from various countries.

1.6.4 Fourth Stage: Data Analysis

Once the data collection is made, the analysis stage would be carried out to evaluate, interpret and arrange the information prudently. The initial process started with reviewing the tort of negligence provided to mitigate the rigidity of the privity rule. The focus of the study would eventually focused on examining judicial decisions and facts of the case from various countries in order to understand the problems incorporated within the mechanism, that is to impose a duty of care. Thus, a conclusion whether the claims are recoverable or not is determined. Consequently, it is studied and developed, so that broad comparison could be done critically.

1.6.5 Fifth Stage: Conclusion and Recommendations

It is the stage to review the data and information founded from 21 of cases, to ensure the listed objective is achieved. The findings therefore, are obtained based on the data collection and analysis before the conclusion is made. Besides that, the recommendation for further research would be encouraged.

1.7 Organisation of report

Chapter 1 consists of the background of study for the research, the objective of study, scope and limitation of study, research methodology and the organisation of chapter.

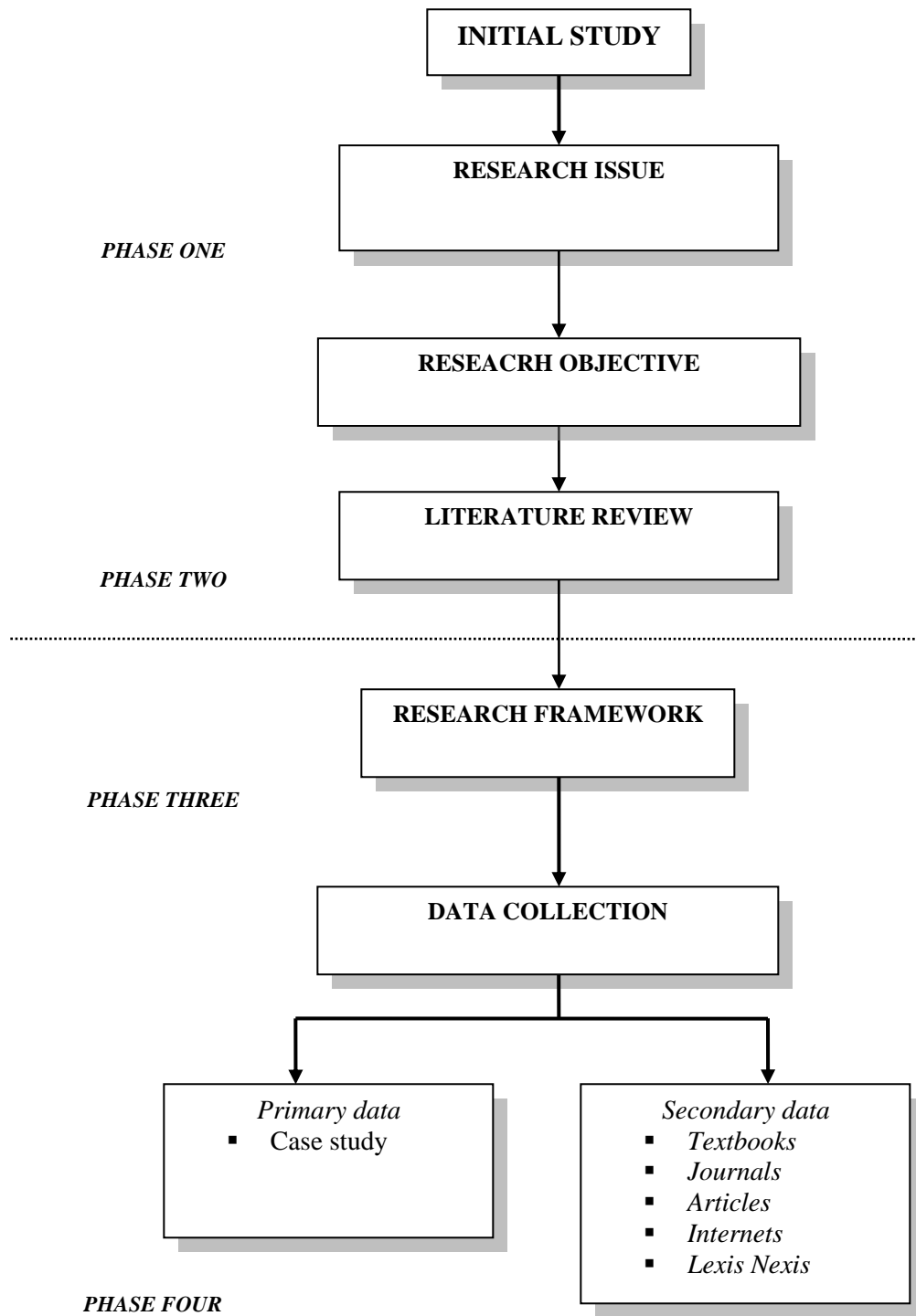
Chapter 2 studied the basic concept of tort of negligence including the nature of the law of tort and definition of negligence. The elements of negligence and its relation with professional man and third parties then are identified. Once established, the duty of care and its development is carried out to recognize several devices used as a basis to claim on various types of loss.

Chapter 3 is focused on studying the duties of care owed by professional man against third parties at common law. In this regard, the study will extend to identify the professional duties towards three types of third parties namely, contractors or builders, purchasers or subsequent purchasers and owners or subsequent owners. The scope of duties imposed by statutes also needs to be adhered apart from knowing the standard of care and skills that is required to be applied.

Chapter 4 studied the recovery of claims by third parties. To understand deeply, the definition of pure economic loss will be discussed. This research also concerned to identify the other criteria to claim which are the causation and foreseeability concept. The scope of successful claims also is covered, which requires us to know the limitation period of actionable action by third parties as well as exclusion or restriction of liability involved to limit the professional duties.

Chapter 5 analysed the cases obtained from the various commonwealth jurisdictions in order to get the results, which concerned about the problems faced by the third parties in imposing a duty of care against professional man. So as with the recoverability of pure economic loss will be determined.

Chapter 6 set out the conclusion and recommendations for further research once the findings is analysed and compiled.



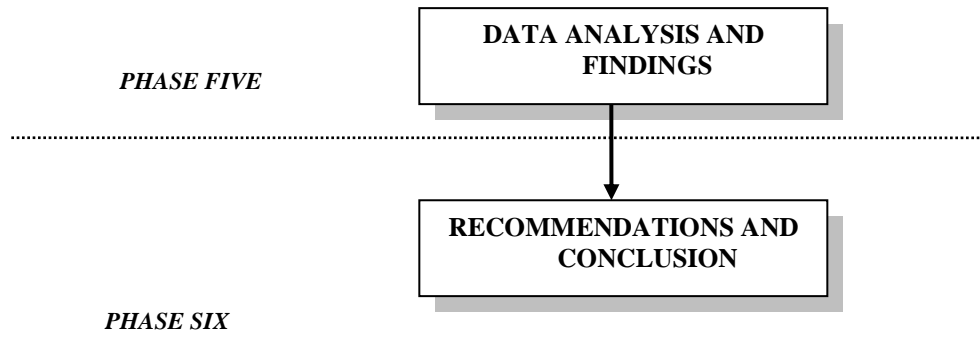


Figure 1-1: Flow Chart of the Research Methodology.

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