

THE EXPERT WITNESS IMMUNITY IN NEGLIGENCE

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DEDICATION

“For my mighty God ”

Thanks for the strength and wisdom.

“To beloved my parents and family”

Thanks for giving me such support.

“To my lovely dear”

For the support and adviser.

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This master project can be completed successfully due to the contribution of many people. First of all, I would like to express my highest gratitude to my supervisor, Assoc. Prof. Dr. Rosli Bin Abdul Rashid for her patience, guidance, advice and support in order to complete this master project.

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Thank you.

ABSTRACT

Experts play a fundamental role in litigation, particularly in the court that related to technology and construction field which almost always require technical expertise. Experts often become part of the litigation team from an early stage and their professional opinion can be a deciding factor in determining whether to pursue a claim. Expert witness currently benefit from blanket immunity from civil liability in relation to evidence provided in civil proceedings. The rationale for the immunity from civil suit was found in various law cases. In recent years, there have been calls for this whole question of immunity to be reviewed and in some cases where experts have failed in their duty to the Court their immunity should be removed. Law of Evidence in Malaysia 1950, Section 45 defined an expert as a person who own special skills on those points which he is asked to give expert evidence. However, there are no any statutes stated that expert is immune from the legal proceeding in Malaysia content. In England, the main problem is the conflict between the expert immunity doctrines and the Civil Procedure Rules (CPR), Part 35 where an expert witness owes a duty of care to the court and to those who appointed him. There are too many different views and decisions ruled by the court. It is hard to understand the ground or the principles of expert immunity. Therefore, the aim of this study is to determine the legal reasons for the granting or removing the expert witness immunity in negligence action. It also examines the limitations of expert witness immunity. The study reviewed that the expert witness immunity was removed in England in the case of *Jones v Kaney*. There are a total number of eight England court cases have been analyzed thoroughly in this study. As the findings of the result, the legal reasons for granting the expert witness immunity are the necessity to secure that witness will speak freely and fearlessly, to avoid multiplicity of actions in which the value or truth of their evidence would be tried over again when their giving evidence in the court, to protect public interest, treats the immunity of expert witness and ordinary witness are the same and expert witness was owed no duty of care to the court. Interestingly, from the study, the legal reasons for removing immunity of expert witness are the breach of duty of expert witness when comply his duty to the court, difference between expert witnesses and lay witnesses; and the remedy of expert witness immunity. The immunity of expert witness are limited when he gives wrongly advises to his client, serious failure to comply duties to the court and proofing that expert witness was serious act incorrectly reported or interpreted the results of the test. The findings of the study showed that the client now can sue their experts for negligence and breach of contract in the performance of their duties in preparing for and giving evidence in court proceedings.

ABSTRAK

Saksi pakar memainkan peranan penting dalam litigasi, terutamanya dalam kes-kes yang berkaitan dengan bidang teknologi dan pembinaan kerana ia selalu memerlukan teknikal and pengalaman yang khusus. Saksi pakar pada masa ini mendapat manfaat daripada perlindungan khas daripada tindakan mahkamah dalam pelbagai kes undang-undang. Dalam tahun-tahun kebelakangan ini, terdapat banyak isu yang bangkit untuk menyoal semula perlindungan saksi terutamanya apabila mereka gagal melaksanakan tugas mereka kepada mahkamah dan juga orang yang mengupah mereka. Akta Keterangan Malaysia 1950, seksyen 45 menyatakan bahawa saksi pakar adalah orang yang mempunyai kemahiran khas dan diupah untuk memberi keterangan pakar kepada mahkamah. Akan tetapi, tiada undang-undang khas yang menyatakan bahawa saksi pakar adalah terlindung daripada tindakan lanjut mahkamah. Di England, Civil Procedure Rules (CPR), Bahagian 35 telah menyatakan bahawa seorang saksi pakar perlu melaksanakan kewajipan dan berwaras-pada kepada mahkamah yang melantik mereka. Tetapi, terdapat banyak pandangan dan keputusan yang berbeza yang diperintah oleh mahkamah. Ini adalah sangat sukar untuk memahami alasan atau prinsip-prinsip perlindungan saksi pakar. Oleh itu, tujuan kajian ini adalah mengkaji sebab memberi perlindungan kepada saksi pakar dan sebab membuang perlindungan saksi pakar sekiranya mereka bertindak secara kecuai. Ia juga membincangkan tentang had perlindungan saksi pakar dalam kedudukan semasa. Kajian ini akan merujuk kepada kes *Jones v Kaney* yang menjadi kes pertama dalam negara English menghapuskan perlindungan saksi pakar apabila mereka bertindak secara kecuai. Terdapat lapan kes mahkamah England yang telah dianalisis dengan teliti dalam kajian ini. Sebagai penemuan hasilnya, sebab-sebab untuk memberikan perlindungan saksi pakar adalah terdapat keperluan bagi saksi untuk bercakap dengan bebas dan tanpa takut, untuk mengelakkan berbagai tindakan di mana kebenaran keterangan mereka akan dibicarakan semula apabila mereka memberi keterangan di mahkamah, untuk melindungi kepentingan awam, menganggap perlindungan saksi pakar dan saksi biasa adalah sama dan saksi pakar tidak mempunyai kewajipan kepada mahkamah. Kajian ini juga menemu sebab-sebab menghapuskan perlindungan saksi pakar, antara sebabnya ialah terdapat pelanggaran kewajipan saksi pakar apabila mereka melaksanakan kewajibannya kepada mahkamah, perbezaan antara saksi pakar dan saksi biasa, dan remedi perlindungan bagi seorang saksi pakar. Perlindungan saksi pakar adalah terhad apabila dia memberikan nasihat yang salah kepada pelanggannya, gagal untuk mematuhi kewajipan kepada mahkamah dan perbuatan yang serius yang dilaporkan dalam mentafsirkan keputusan ujian. Hasil kajian menunjukkan bahawa seorang saksi pakar adalah bertanggungjawab dalam tindakan kecuaiannya dan mereka perlu berhati-hati apabila bertindak sebagai saksi pakar bagi pelanggan mereka.

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LIST OF ABBREVIATIONS

AC	- Appeal Cases
ALL ER	- All England Law Report Reprint
BLR	- Building Law Reports
CPR	- Civil Procedure Rules of England, 1998
ER	- English Report
EWCA	- England and Wales Court of Appeal
EWHC	- England and Wales High Court
FPP	- Fitness to Practice Panel
GMC	- General Medical Council
HL	- House of Lords
KB	- King's Bench
Lloyd's Rep	- Lloyd's List Reports
NSWLR	- New South Wales Law Reports
QB	- Queen Bench
SJE	- Single Joint Expert
UKHL	- United Kingdom House of Lords
WLR	- Weekly Law Reports

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CHAPTER 1

INTRODUCTION

1.1 Introduction

An expert can be anyone with knowledge or experience of a particular field or expected of a layman. An expert witness is an expert who makes this knowledge and experience available to court to help it understand the issues of a case and thereby reach a sound and just decision.¹ The primary duty of an expert witness is to the court – to be truthful as to fact, thorough in technical reasoning, honest as to opinion and complete in coverage of relevant matters.² His evidence as an expert would be his opinion based on the known facts and knowledge and experience not to act as an advocate for the party calling him. However, he is not permitted to give his interpretation of the law that is a matter for the tribunal.

Experts play a fundamental role in litigation, particularly in cases related to the technology and construction which almost always require technical expertise.³ Experts often become part of the litigation team from an early stage and their

¹ Mildred, R.H., (1982). *The Expert Witness*. London: George Godwin, p.4.

² *Expert Support Service from the UK Register of Expert Witness, Factsheet 2: Expert Evidence*, (May 2008). UK: J S Publications, p.2. Available at <http://www.jspubs.com/experts/fs/02.pdf>.

³ Tagg, G., *Expert Immunity Under Threat*, (April 2010). Integrity Insurance Solutions Limited. Available at <http://www.integrity.co.uk/expert-immunity-under-threat.html>.

professional opinion can be a deciding factor in determining whether to pursue a claim. Experts are involved not only in informing their instructing client on the merits of a claim, but also in educating judges on technical areas outside of their knowledge and experience. In complex cases, this can form a large part of a dispute. In performing their role, an expert owes two duties: a contractual duty to his instructing client and, in the event of any conflict, an overriding duty to the Court.

Generally, there are two aspects of professional liability of concern to expert:⁴

- 1) The extent to which expert may advise on the breach or breaches of the appropriate professional standard of care in contract and tort;
- 2) The degree and standard of care that the expert himself must observe in carrying out his duties in contract and in tort.

An expert is immune from subsequent proceedings arising out of his opinions expressed in evidence as to the matters in issue, whether or not those opinions take the form of criticism of other parties involved in the proceedings, and provided always that it cannot be shown that he has perjured himself or has been a party to our attempted fraud arising out of proceedings.⁵ The principle was confirmed in the case of *Sutcliffe v. Thackrah and Others*⁶ by Lord Salmon:

“It is well settled that judges, barristers, solicitors, jurors and witness enjoy an absolute immunity from any form of civil action being brought against them in respect of anything they say or do in Court during the course of a trial.”

In the case of *Mitcell v. Forsyth*⁷, the Court has recognized two types of immunity of expert witness – limited and absolute. Under the limited immunity, the participant who acts in bad faith can be prosecuted but no liability attaches to mere negligence. Absolute immunity as enjoyed by the police officer protects even against “bad faith”.

4 Reynolds, M.P., (2002). *The Expert Witness in Construction Dispute*. London: Blackwell Science Ltd., p.41.

5 Mildred, R.H., (1982). *The Expert Witness*. London: George Godwin, p.8.

6 [1974] 1 AC 615

7 [1985] EWCA CIV 1176

In recent years, there have been calls for this whole question of immunity to be reviewed. Of particular concern to experts will be the argument that an expert's immunity from suit should be removed in some cases where experts have failed in their duty to the Court. An expert's duty of care to their instructing client should be ongoing during civil proceedings and not confined to advice provided technically outside of those proceeding.⁸

Construction project also involved experts from a range of professions such as architects, quantity surveyors, engineers, building surveyors and project managers. Whether in litigation, arbitration, adjudication or alternative dispute resolution, the input of an expert can be just a crucial to the outcome of dispute as may be the input from the parties' legal advisers.⁹

1.2 Problem Statements

The immunity from suit has a long history. It has been said that the reason for the rule is to protect a witness who has given evidence in good faith in court from being harassed and vexed by an action for defamation brought against him in respect of the words which he has spoken in the witness box.¹⁰ However, consideration of the impact of the immunity on evidence given by experts is a relatively recent development. Such witnesses are most unlikely to find themselves subject to an action in defamation – the more probable concern being a claim in professional negligence brought by the party that retained them.¹¹

Expert witnesses currently benefit from blanket immunity from civil liability in relation to evidence provided in civil proceedings. The rationale for this immunity

8 Mildred, R.H., (1982). *The Expert Witness*. London: George Godwin, p.12.

9 R v Skinner [1763] Lofft 54, [1558-1774] All ER Rep 321.

10 Darker (as personal representative of Docker, deceased) v Chief Constable of the West Midlands [2001] 1 AC 435, [2000] 4 All ER 193.

11 Lazarus, R., Limited Immunity. 39 Essex Street, Available at <http://netk.net.au/USA/ImmunityLazarus.asp>.

from civil suit is found in various law cases. In recent years, there are many calls for argument on this immunity to be reviewed. The argument started by Jonathan Selby (Society of Construction Law, April 2003), that an expert's immunity from suit should be removed in some cases where experts have failed in their duty to the Court.

He points to the case of *Arthur J.S Hall and Co. v Simons*¹² which led to the removal of immunity for barristers, and suggests that, in the wake of the very public and high profile case of *R v Sally Clark*,¹³ the time has come for experts to be held accountable for their negligent acts. In cases where experts are thought to have breached the protocols, there have already been instances where the trial judge has been instrumental in placing a report before the expert's professional body. There have been hints from the judiciary, too, that consideration should be given to applying costs sanctions to experts who are negligent or have signally failed in their duty to the court. The question on why the barrister's immunity can be removed but expert witness immunity still continue in the court even both of them have same position in the court.

The argument also arose on the ground of professional liability in negligence. An expert witness, as skillful man who acts with his opinion based on the known facts and knowledge and experience is a professional. They are the only professional participants in the court process who enjoy immunity from suit from actions in negligence other than judge, arbitrator or adjudicator.¹⁴ So, what going on when an expert witness negligently present his duty to the court?

The Civil Procedure Rules 2010 of England (CPR), Part 35.2 defines an expert witness as "an expert who has been instructed to give or prepare expert evidence for the purpose of court proceeding". As a professional, expert witness has accepted a higher duty and what they have in common is the recognition that a professional holds himself out as being an expert by training and experience and the requirement is that he is bound to be as skilful and careful as an average member of

¹² [2000] 3 AER 673

¹³ [1763] Lofft 54, [1558-1774] All ER Rep 321.

¹⁴ Selby, J., (April, 2003). *The Expert Witness' Liability in Negligence*, Society of Construction Law.

that profession.¹⁵ In usual circumstance, a professional who negligently perform his duty will be sued under contract or law or tort. But, why an expert witness who also is a professional does not owe a duty of care to anyone in respect of negligently in given evidence to the court?

Under the common law, the expert witness could not be sued even they are negligent or have signally failed duty to the court. Even though, the CPR stated that an expert witness is owe a duty of care to the court and to who appointed him but when they are breach duty of care, they still enjoy the immunity from the court. It is seem some confusion on the professionalism of an expert witness. However, this research would not consider in this problem due the time constraint.

On the another hand, recent court decisions in case law seem to indicate that there are some limitations of expert witness immunity. In the case of *Meadow v General Medical Council*¹⁶ where the court of appeal refused to extend the expert witness immunity to the Fitness to Practice process and also in the case of *Gareth Pearce v Ove Arup Partnership Ltd & Others*,¹⁷ the judge refused to grant immunity to an expert witness who serious misconduct in his duty. The expert witness start realizes that they are no longer immune from the suit action in negligence and this problem still does not have any solution.

Therefore, this study will proceed to understand the limitations of expert witness immunity that has been practice in the common law countries and what are the legal reasons that immunity will be grant or remove for an expert witness. This study also will find out the circumstances that expert witness will be immune from the legal proceeding in their negligence action.

¹⁵ Lazarus, R., *Limited Immunity*. 39 Essex Street, Available at <http://netk.net.au/USA/ImmunityLazarus>.

¹⁶ [2007] 1 FLR 1398

¹⁷ [2002] ECDR CN 2 (Ch) [33]

Besides that, there is another problem that arose in the recent case of *Paul Wynne Jones v Sue Kaney*¹⁸ where the court of appeal abolished the expert witness immunity. This case was highlighted the reason of removing the expert witness immunity and come out with the new principles. So, what are the reasons to remove expert witness immunity? And what are the effects by the decision from this case?

1.3 Objective of Research

From the problem statement, the following is the objective of the study:

- i. To determine the legal reasons for granting or removing the expert witness immunity in common law jurisdictions.
- ii. To examine the limitations of expert witness immunity.

1.4 Scope of Research

The following are the scopes for this study:

- i. Only the recent common law cases from 2000-2011 subjected to expert witness immunity in negligence will be discussed in the study.
- ii. The approach adopted in this research is law case methodology assessed form Lexis Nexis.
- iii. Due there are no related law cases in Malaysia, this study will only review on the law cases from England and Wales court cases.

¹⁸ [2011] UKSC 13.

1.5 Importance of Research

The importance of this research is to determine the legal reasons for granting and removing the use of expert witness immunity. After this study, the parties will know the extensions and limitations of expert witness immunity when they seek for remedies in commonwealth nations. Besides, this allows the application of expert witness immunity that has been adopted in the recent case in *Paul Wynne Jones v Sue Kaney*¹⁹ which the court abolished it. These principles will be useful in construction industry due the alternative dispute methods such as arbitration litigation, and adjudication wide implemented in Malaysia. Besides, this allows the Malaysian Courts to rethink the principles expert witness immunity adopt the recognized legal reasons if they are reasonable and applicable to the Malaysia position.

1.6 Research Methodology

A systematic process of conducting this research had been organized in order to achieve the objective of the study. There are a few stages in completing the research that will be followed, which involve identifying the issue, literature review, data collection, data analysis, conclusion and suggestion.

19 [2011] UKSC 13.

1.6.1 Stage 1- Identifying the issue

The issue of the study arises from the intensive reading of articles, journals and newspaper cutting from the UTM library. Discussion with lecturers and friends also had been done to get an idea of the research topic. From the issue, the objectives of the study have been identified. This study is carried out to determine whether the expert witness granting or not granting which are referred to the court cases.

1.6.2 Stage 2- Literature review

After the issue and objectives of the study have been identified, literature review regarding to the study field will be collected to give more understanding about the topic in order to achieve the objectives of the study. Information and data is collected from the books, journals, research papers, reports, newspaper and internet. It is important to know the background of the study of expert witness and its immunity in negligence actions.

1.6.3 Stage 3- Data collection

After identifying all the background of study and relevant issues through literature review, legal cases based on previous court cases which are related to the expert witness immunity in negligence will be collected from Lexis-Nexis Legal Database via UTM library electronic database. There are 8 previous court cases are selected in this study. The cases then will be analyzed in order to achieve the objective of the study.

1.6.4 Stage 4- Data analysis

After the related court cases have been collected, the author will conduct case study on those legal cases. The case study is started by carefully reviewing all the facts of the cases. Then, the author will find out whether the case is considered as granting or not granting the expert witness immunity by the judge. After that, the author will look for the reasons for each case which were held by court.

1.6.5 Stage 5- Conclusion and recommendations

After the discussions have been made from previous stage, the author will then make a conclusion from the analysis. After presenting the research findings, further study will be suggested. The author will also review the whole process of the study to identify whether the objective of the study have been achieved.

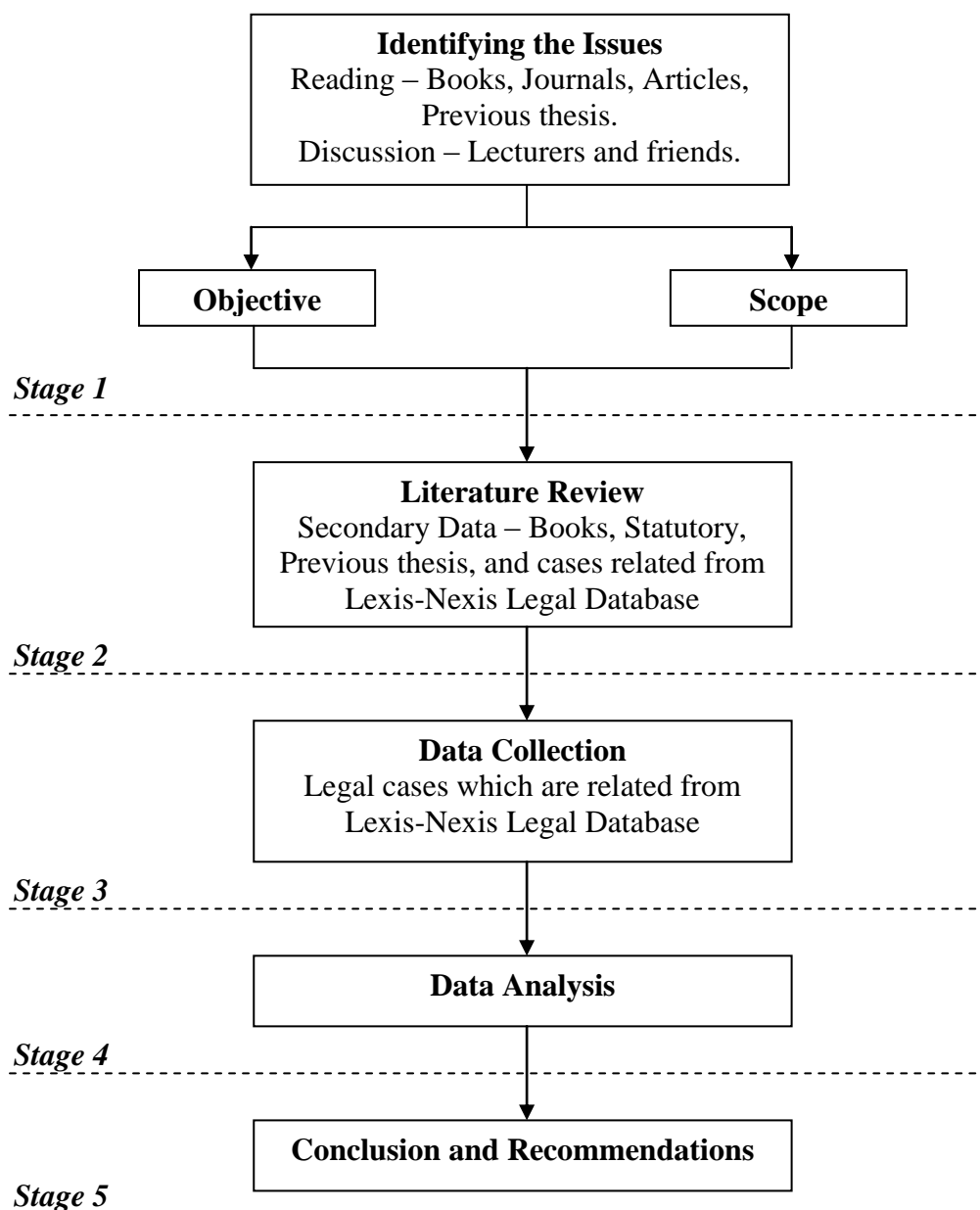


Figure 1.1: Stages of Research Methodology

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