

PRINCIPLES OF ASSIGNMENT ON ACCRUED CAUSES OF ACTION

CHING CHEN LENG

UNIVERSITI TEKNOLOGI MALAYSIA

PRINCIPLES OF ASSIGNMENT ON ACCRUED CAUSES OF ACTION

CHING CHEN LENG

A report submitted partial fulfillment of the
requirements for the award of the master degree of Construction Contract
Management

Fakulti Alam Bina
Universiti Teknologi Malaysia

SEPTEMBER 2016

DEDICATION

**To my beloved
papa & mummy,**

Mr. Ching Hui Ing & Mrs Yap Kim Choo

Thank you for supported me all the way since beginning of my studies.

I love you all....

To my respected supervisor...

En Jamaludin,

Thank you for your guidance and knowledge given during the research.

Your kindness much appreciated.....

Thanks for Everything

ACKNOWLEDGEMENTS

First, I would like to thank my supervisor En Jamaludin Yaakob for patiently guiding through the whole research, his willing supports and contributes in preparing this research report. I also appreciate the motivation he gave throughout the whole research.

Next, I would like to express my thanksgiving heart for those who gave advice and helping hand during the research process to obtain the sources for this research. I also appreciate those who had involved in this research and gave me some knowledge and experience. Not to forget the friends who gave their moral support and encourage me during the research.

Last, I would like to express my feeling to my beloved families who gave support me with their encouragement that enable me to finish this research.

ABSTRACT

It is submitted that it is a common practice in the construction industry for contractors to give guarantee to employers for rectification of defects by way of collateral warranties. It is also normal for employers to assign these warranties to subsequent purchasers or lessees to enable them to directly sue the contractors when defects occur. This mechanism is effective if the defects occur subsequent to the assignment. The general principle is that the assignment may not be effective if the defects or the cause of actions are already in existence at the time when the assignment is made. However, this may not always necessarily be the case. A brief examination of the case law on this issue shows that there are certain situations, by applying certain principles, considering the wordings of the assignments and the facts of the case, courts have allowed claims for accrued cause of actions under collateral warranties. The objective of this research is to identify the principles that the judges used when dealing with the assignments that involved accrued cause of action. The methodology used in this research is by way of quantity analysis of the relevant case law. The scope of this research includes Malaysian and English cases on assignment of collateral warranty and accrued cause of action. In particular, the assignment required from the building contractor to the subsequent building owner. From the analysis, it was found that the assignment only covers the damages caused before the assignment is made and not the right to sue against the loss caused after the assignment. Further, if there is a prohibition that prevents the transfer of contract, it includes the prohibition of assignment as well; and if the assignment requires prior consent of the parties, the assignment without consent would be invalid.

ABSTRAK

Ia adalah satu amalan yang biasa dalam industri pembinaan bahawa kontraktor memberikan jaminan kepada majikan bagi menjaminan pembetulan kecacatan dalam bangunan melalui cagaran. Ia juga adalah perkara yang biasa bagi majikan untuk memberikan jaminan ini kepada pembeli yang berikutnya atau penerima pajak yang seterusnya untuk membolehkan mereka terus menyaman kontraktor jikalau kecacatan dalam bangunan berlaku selepas pembinaan siap. Prinsip umumnya adalah bahawa penyerahhakan ini mungkin tidak berkesan jika kecacatan atau punca tindakan tersebut telah wujud pada masa penyerahhakan itu buat. Walau bagaimanapun, ini tidak semestinya terjadi dalam semua kes. Satu pemeriksaan ringkas mengenai kes undang-undang mengenai isu tersebut telah menunjukkan bahawa terdapat keadaan tertentu, dengan menggunakan prinsip-prinsip tertentu, penggunaan perkataan-perkataan tertentu dan fakta-fakta daripada kes, mahkamah telah membenarkan tuntutan untuk 'accrued causes of action' dengan penggunaan 'collateral warranty'. Objektif kajian ini adalah untuk mengenal pasti prinsip yang hakim-hakim menggunakan ketika berhadapan dengan tugas yang melibatkan 'accrued cause of action'. Kaedah yang digunakan dalam kajian ini adalah melalui analisis kuantiti kes undang-undang yang berkaitan. Skop kajian ini termasuklah kes-kes Malaysia dan kes-kes Inggeris yang berkaitan dengan 'accrued cause of action' dan 'collateral warranty'. Khususnya, 'assignment' yang didapatkan daripada kontraktor kepada pemilik bangunan yang berikutnya. Daripada analisis, didapati bahawa 'assignment' hanya meliputi kerosakan yang dilakukan sebelum 'assignment' itu dibuat dan tidak ada hak untuk menyaman terhadap kerugian yang disebabkan selepas 'assignment'. Di samping itu, jika ada larangan yang menghalang pemindahan kontrak dalam kontrak, ia termasuklah larangan 'assignment' dan jika 'assignment' tersebut memerlukan persetujuan pihak-pihak berkontrak, 'assignment' yang tidak ada kebenaran akan menjadi tidak sah.

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- Dawson v Great Northern*(1904) 1 K.B. 277
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LIST OF ABBREVIATIONS

AC	Law Reports: Appeal Cases
All ER	All England Law Reports
AMR	All Malaysia Reports
AC	Appeal Cases
Build LR	Building Law Reports
CLJ	Current Law Journal (Malaysia)
EWCA Civ	Court of Appeal, Civil Division (England & Wales)
HL	House of Lords
Lloyd's Rep	Lloyd's List Reports
LR	Law Reports
MLJ	Malayan Law Journal
PC	Privy Council
QB	Queen Bench
SCR	Session Cases Report
SLR	Singapore Law Report
WLR	Weekly Law Report

CHAPTER 1

INTRODUCTION

1.1 Background of Studies

Referring to common law, the common law rule on privity of contract where the contracting parties are the parties who can sue or be sued upon it, example a contract cannot be enforced by or against a party who is not a party to that contract. The leading case of this doctrine was the case of *Tweddle v Atkinson*¹, the fact is that when a couple decided to get married. Family from the bride had make an agreement with the family of the groom that both of the family have to pay some money to the couple. However, the bride's father passed away before paying to the couple. After the death, the groom brought an action against the lawyer who handles the will. In the court, the judge held that the claimant was not a party to the contract and the consideration of the contract did not assigned to him by his father. Therefore, the groom cannot enforce the contract.

Further, in the case of *D&F Estates v Church*², the defendant was the owner for the flats built by a contractors company who later sub-contracted the plastering work.

¹ (1861) EWHC QB J57

² (1989) AC 177

However, the sub-contractors carried out the works without reading the instructions attached on the materials. After several years, the plaintiff found that the plaster was defective and start to fall off from the walls. The court held that the damages were irrecoverable in tort because it is a pure economic loss and such a claim could arise only in contract but the plaintiff had no any contract with the contractor. In tort, the damages only recoverable where the defective materials or workmanships had caused damage or injury to the other properties or persons than the defective product itself.

However, the decision has been overruled in the case of *Murphy v Brentwood District Council*.³ Lord Keith said that the case of Anns' decision is said to be unsatisfactory. The scope of duty owned by the local authority must regarded as a superficial examination of principle and it is extreme difficulty. It was supported in the case of *D&F Estates*. It is said that the Anns' decision did not ruled in any basis or principle at all. Therefore, the House of Lords overruled Anns and held that the council was not liable in the absence of physical injury.

Michael P. and Simmons S mentioned in their paper that it is difficult to make a contractual claim in tort. Tort is based on the notion that in the non-contractual circumstances, people have a duty towards each other. If the said duty is breached, the injured party may be liable to sue for it, however, it is only subject to loss or injury to a person. In construction industry, unfortunately of the loss suffered is 'pure economic loss' which would not be able to sue under the law of tort.⁴ The mentioned cases had brought further development to the application of assignment in the legal field. Assignment of rights was determine by Arthur, he stated that assignment is an expression of intention by the assignor that his right shall pass to the assignee and that an assignment of an existing right is an act of the possessor of that right which operates to extinguish the right of the assignor and to create an exactly similar right in the assignee.⁵ As mentioned by Out-Law.com, without restrictions, the benefit of a

³ (1991) 1 AC 398

⁴ Michael P and Simmons S (2004) Third party rights may be extended, Reed Elsevier (UK) Ltd 2004

⁵ Arthur L. Corbin (1926) Assignment of Contract Rights, Vol. 74, pp 207-234, University of Pennsylvania Law Review and American Law Register

warranty can be assigned in the same way as any contractual benefit.⁶ It further explained that other common qualifications on the right to assign include only certain rights may be assigned for example, warranties and indemnities may be excluded.⁷

What is collateral warranty? Collateral warranty is said a substitution or alternate resolution to the contract when dealing with the third party rights. In a construction process, a collateral warranty is given as a contract or warranty where the professional parties, contractors or subcontractor give a guarantee to the third party for example the purchaser or tenants that they had satisfied with their professional appointment agreement, building contract or the subcontract.⁸

Harbans quoted the judgment in *Heilbut Sumons & Co v Buckleton*⁹ explain collateral warranty as followed 'by principle and authority, it is clearly shown that a contract could be arose from the consideration which was arose from other contract. "If you will make such and such a contract I will give you one hundred pounds," was said to be a complete contract or agreement which was shown in every single word. Such agreement was said to be parallel to the original contract, however both the original contract and collateral contract have their own existence, and both have no different in respect of their situation as a full contract. A collateral agreement where amended the consideration of the main contract or it would modified the original contract when carrying it out would not be considered as collateral agreement. It is said to be suspicious to the law.

The local court hence reformulated collateral warranty as: (1) that there must be a representation which was wanted by the defendants to be relied upon, (2) the

⁶ Out-Law.com (2012) Collateral Warranties, <http://www.out-law.com/topics/projects--construction/construction-contracts/why-are-collateral-warranties-necessary/> (Accessed on April 2016)

⁷ Out-Law.com (2011) Assignment and novation, <http://www.out-law.com/en/topics/projects--construction/construction-contracts/assignment-and-novation/> (Accessed on April 2016)

⁸ Practical Law: A Thomson Reuters Legal Solution (2016) <http://uk.practicallaw.com/4-502-4310?q=&qp=&qo=&qe=> (Accessed on April 2016)

⁹ (1913) AC 30

representation induced the signing of contract and (3) the representation itself must amount to a warranty which collateral to the main contract and existing side by side with it.¹⁰

1.2 Problem Statement

Even though there were protections available against the latent defect in Malaysia, however, when the cause of action was accrued before the assignment? There is the recent newsletter head of the Australian Construction Dispute Resolution Newsletter by Herbert Smith Freehills on April 2016 which stated ‘whether the assignment of collateral warranty can be extended to accrued cause of action?’ The decision had brought further development to the application of assignment.

The issue was raised in the case of *Tzaneros Investments Pty Ltd v Walker Group Constructions Pty Ltd*,¹¹ this is the case where the party who had been assigned the benefit of contractual warranties provided by the contractor, sued the contractor for breach of those warranties as a result of defects. In this case, the contractor did not deny that the works were defective but the contractor argued that they fell outside the scope of the assignment and therefore that it had no liability to assignee.¹²

The fact of the case in *Tzaneros v Walker* is that the plaintiff was the assignee of warranties given by the defendant (WGC) to the principal under a contract to construct a container terminal at Molineux Point. Thereafter, defects in the paving were discovered and the plaintiff claimed the cost of replacing the pavement in the

¹⁰ Ir Harbans Singh KS (2011) Harbans’ Engineering and Construction Contracts Management: Law and Principles, 2nd editions, LexisNexis

¹¹ (2016) NSWSC 50

¹² Herbert Smith Freehills (2016) Australian Construction Dispute Resolution Newsletter

sum of 14.8m dollar. WGC defended the claim on the grounds that the assignment of warranty was not effective to assign any cause of action that had already accrued at the time of the assignment. The judge found in favour of the plaintiff stated that the language of the assignment ‘all the benefit of the building warranties’, included the right to sue in respect of the breached that had already occurred.¹³ Before this court, there are many relevant cases which discussed particularly on the application of assignment on accrued cause of action. The cases shown different decision made by the court, there were different principles used in making the decision by the court, therefore, this will be the foundation that lead this research.

1.3 Research Objective

From the problem statement, the objective of this research would be as followed:

1. To identify the principles used by judges when dealing with assignments that involved accrued cause of action

1.4 Scope of Research

In this research, since the application of assignment is not common in Malaysia, therefore, there will be no any limitation assigned when searching the law cases. Hence, the leading English cases were the bases for this research and the cases referred are related to the assignment of accrued cause of action where the assignment was given from the contractor to the purchaser through the assignor. The following are the cases

¹³ Lexology (2016) Assignment of warranties under construction contract-did it apply to accrued causes of action? <http://www.lexology.com/library/detail.aspx?g=d1247d75-4af6-417f-b9ad-c7ba6e50350e> (Accessed on April 2016)

searching process carried out throughout the research by using the LexisNexis Academic searching engine.

Table 1: Searching Hits for Cases in LexisNexis Academic

Commonwealth case		Commonwealth case	
Collateral warranty	1729	Collateral warranty	1729
+ Building contract	233	+ Patent defect	34
+ Subsequent purchaser	12	+ Vendor	25
		+ Developer	3
Commonwealth case		Commonwealth case	
Construction contract + collateral warranty	113	Building warranty	43
+ Assignment	28	+ Defect	29
+ Defect	20	+ Assignment	9
+ Contractor	18		
MLJ/ MLJU case		MLJ /MLJU case	
Assignment + warranty	107	Assignment	2089
+ Defect	24	+ Building contract	88
		+ Warranty	5
Commonwealth case		MLJ /MLJU	
Accrued cause of action	469	Accrued cause of action	4
+ Building contract	31	+ Building contract	0
+ Defect	15		
+ Assignment	8		
MLJ /MLJU		Commonwealth case	
Accrued cause of action	4	Assignment of warranty	21
+ Construction	0	+ Building contract	2

Table 1 shows the searching hits and the keywords used for searching cases in LexisNexis Academic. The search results formed the scope of this research. First, the scope has been limited to only MLJ or MLJU cases. For the first search, by using ‘assignment and warranty’ as the keywords, it gave 107 hits and by adding the word ‘defect’, the result reduced to 24 hits. However, there were no relevant cases could be identified. Next, by using the term ‘assignment’, it gave 2089 hits and after adding the

word 'building contract', it was reduced to 88 hits and by adding the term 'warranty', it was reduced to only 5 hits. However, there was no relevant cases found.

Next, by selecting the MLJ/MLJU case, by using the term 'accrued cause of action', there were only 4 hits and by adding the terms 'building contract', the result turned to zero. By searching using the terms 'accrued cause of action' but the result also turned to zero after search within the result using the word 'construction'. Since there was no relevant Malaysian case that could be found. The scope extended to all commonwealth cases. The following searches were conducted by selecting 'all commonwealth case'.

For the fifth search, by selecting the commonwealth case, the first keyword 'collateral warranty' resulted in 1729 hits and search within the result using the terms 'building contract', the hits was reduced to 233 and by adding the terms 'subsequent purchaser', the hits was reduced to only 12. From the 12 hits, there were 6 cases identified. Nonetheless, there was no relevant case could be used for this study from this search.

For the sixth search, by selecting all commonwealth case, the first keyword 'construction contract and collateral warranty' gave 113 hits and thorough search within the result using the word 'assignment', the hits was reduced to 28 and by adding word 'defect', the hits again was reduced to 20 and the search was followed by adding the word 'contractor', the hits was reduced to 18 only. Among the 18 hits, there were 9 cases identified. However, there was no relevant case that could be used for this study.

For the seventh search, by selecting Commonwealth case, the first keyword 'building warranty' gave 43 hits and another search conducted within result using the word 'defect', resulting in the hits reduced to 29 hits and by adding the word 'assignment', the hits was reduced to 9 hits only. Among the result, there were 6 cases

identified and only one case was applicable for this research, that is *Tzaneros v Walker Group*.¹⁴

For the next search, by selecting Commonwealth case again, the first keyword ‘assignment of warranty’ gave 21 hits and the following search using the terms ‘building contract’, the hits were only 2 hits and there was only one case which was same case within the seventh search.

Next, for commonwealth case, the first keyword entered was ‘assignation and measure of damage’ which gave the result of 48 hits and further adding the word ‘interest’ gave a result of 40 hits and a search within the result with the term ‘right of action’ which resulted in 16 hits. However, there was only one case that can be used in this research, that is *GUS Management v Littlewoods*.¹⁵

After that, another search using the term ‘assignment and prohibition and written consent’ result in 1225 hits and followed by adding ‘contractual prohibition’ which gave the result of 94 hits. Next, a search within the result with the term ‘third parties’ and ‘cause of action’ which gave 50 hits, there were 32 cases within the 50 hits but only one case can be used in this research, namely *Linden Gardens v Lenesta*.¹⁶

Again, search the cases using the terms ‘assignment and prohibition and written consent’ then added ‘assignment of causes of action’ which gave 16 hits. The *Linden* case was the only case which was found applicable in this research.

Next, by using the terms ‘assignment of right and compensation’ which gave the result of 481 hits and added ‘assignee entitled’ which reduced to only 3 hits but there

¹⁴ supra

¹⁵ supra

¹⁶ supra

were only 2 cases identified. However, there was only one case which can be used in this research, particularly *Dawson v Great Northern*.¹⁷

Last, search again using the terms 'assignment of right and compensation' which gave the result of 481 hits and added the term 'structural damage' which reduced the result to only 6 hits. There were 3 cases identified within the 6 hits but the Dawson case was the only case which found in both search results.

From the searching process, there were 4 cases identified and used in the analysis process for this research. The cases were *Tzaneros v Walker Group*, *GUS Management v Littlewoods*, *Linden v Lenesta* and *Dawson v Great Northern*.

1.5 Importance of Research

In common law of privity of contract, the third party cannot sue or claim due to no relationship with the main contract party. Therefore, the assignment and collateral contract or collateral warranty served to provide a contractual bridge that allowing the third party to act as a party to the contract and impose the obligations.

Before the case of *Dawson v Great Northern*,¹⁸ the issue regarding the assignment of accrued cause of action had never been raised, however, the development in law took place in the case that allowed the assignment of accrued cause of action, however, there were still many cases that did not allow the assignment of accrued cause of action. Therefore, this research objective is to identify the principles applied in the cases to rule on the application of assignment. This would help to give

¹⁷ *supra*

¹⁸ (1904) 1 K.B. 277

a clearer vision on the principles used by the court to interpret the assignment to make their decisions.

1.6 Research Process and Methods of Approach

In this research, the research process is started by identify the research issue, carrying out the literature review and followed by data collection, data analysis and last, making conclusion and suggestions to this research.

Stage 1: Identify Legal Issue

In order to identify the research topic, it is necessary to conduct the reading on various sources of published materials for example journals, articles, previous research papers, law cases as well through the internet and online databases (LexisNexis through Malaysian Law Journal) from UTM's library website.

Stage 2: Literature Review

Stage 2 involves the reviewing of documents which are collected from secondary data for the research during the first stage, for example, books, articles etc. however, published resources such as books, the journal in the LexisNexis are the most helpful resources in develop the literature.

Stage 3: Data Collection

This is the stage where after the better understanding on the theoretical of the topic, the law cases analysis was carried out in order to achieve the research objectives. In this research, the approach used to collect the data is only through the law cases analysis

Stage 4: Data Analysis

Once the necessary information such as the journals and law cases are all prepared, a documentary analysis will be carried in order to identify whether the objective of this research paper will be achieved or not.

Stage 5: Conclusion and Suggestions

This stage indicated the result of this research and conclusion that has been made upon the analysis carried out in previous stages. Some recommendations will be listed down for future research and the problems or limitations in this research will also be stated down.

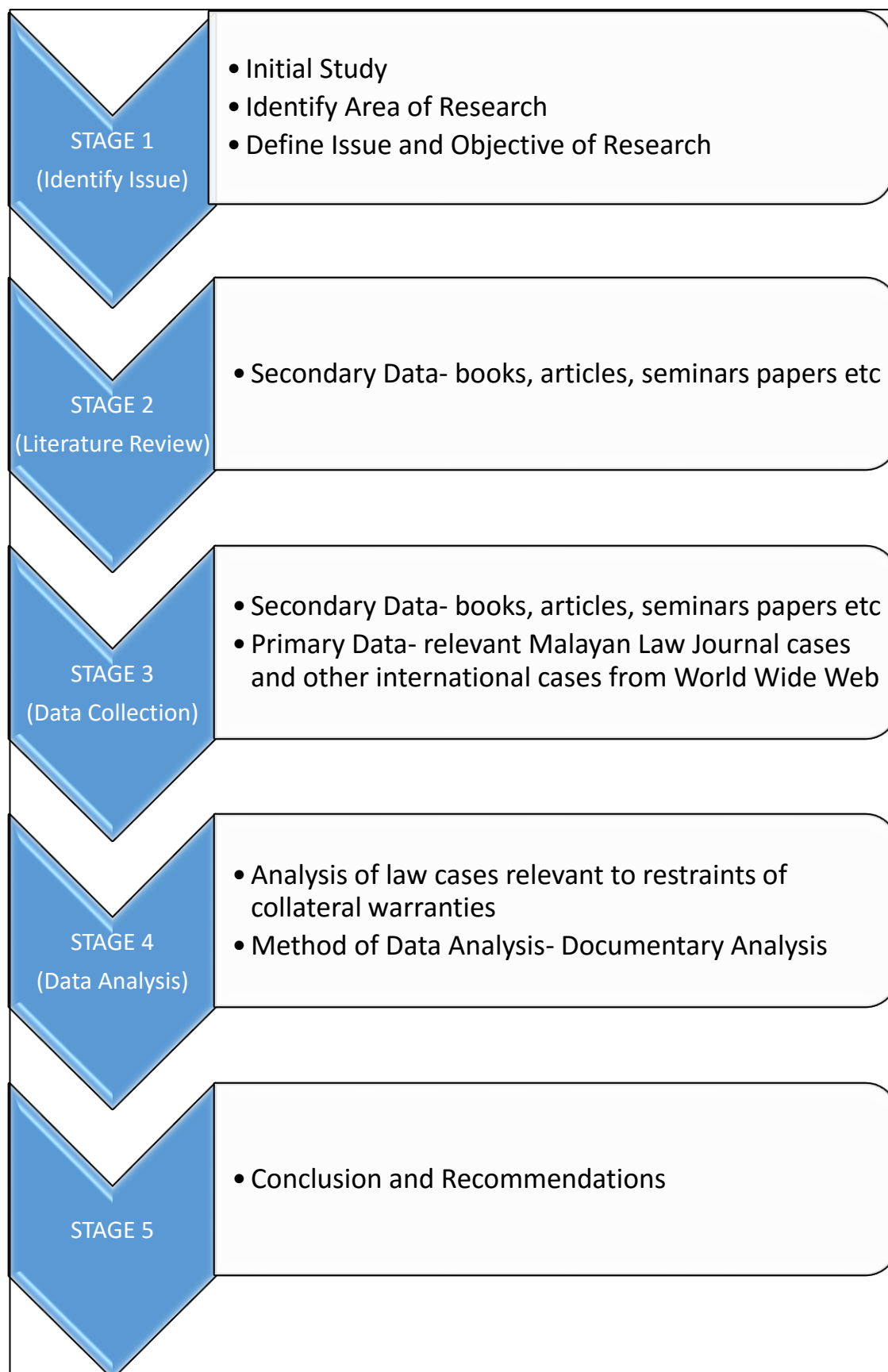


Figure 1.1: Research Methodology

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