

THE EXPERT WITNESS IMMUNITY IN NEGLIGENCE

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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 kecuaiian. 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 kecuaiian. 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.

