

CRITERIA IN ASCERTAINING PROFESSIONAL NEGLIGENCE

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.....To my beloved family and friends.....

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Abstract

Professional negligence can be defined as malpractice by a professional that not according to reasonable skill and care. Negligence among construction professional may result in damage to property and person or loss of life. It is therefore important for the construction professional to exercise reasonable skill and care when carrying their work in order to minimize the possibility of being charged with negligence. How does the judge determine whether a professional man has exercise the necessary skill in carrying out their work? What are the criteria or the general outline for negligence to be established? The objective of this research is to identify criteria that judges determine whether a professional man is negligent or not when discharging their duty. For the purpose of this study ten case law of negligence from United Kingdom, Malaysia and Singapore has been carefully chosen for the analysis. Case law between 1980 to date was chosen to make sure that the principle of negligence use is up to date. The study suggested that the first method for the judge is to determine the relationship between the plaintiff and defendant and whether they owed a duty of care to the plaintiff. Several criteria on proving duty of care like relationship in tort and contract, proximity, foreseen ability, causation and the qualification of the professional. Then the judge will see whether defendant has breach that duty. The first criteria are the court will check whether the professional has exercise reasonable skill and care, requirement and regulation, assists with expert evidence and regulatory bodies of the relevant profession. The last one is whether the damage must be actual and resulted from the defendant breach. The important from this element is if one of the element is failed to be proved by plaintiff, the negligence cannot be establishes.

Abstrak

Kecuaian professional boleh didefinisikan sebagai kesalahan praktik oleh professional yang tidak mengikuti piawaian dan tanggung jawab yang berpatutan. Kecuaian oleh profesional dalam industry binaan akan menyebabkan kerosakan kepada harta benda dan kecederaan malah kehilangan nyawa. Oleh itu adalah penting bagi professional pembinaan untuk melakukan kerja mengikut tahap piawaian dan tanggung jawab yang berpatutan untuk meminimumkan kebarangkalian untuk dikenakan tuduhan melakukan kecuai. Bagaimanakah hakim menentukan sama ada seorang professional telah melakukan kerja dengan mengikut tahap piawaian dan tanggung jawab? Apakah kriteria atau panduan umum bagi menentukan kecuai? Objektif kajian ini adalah untuk menentukan kriteria yang digunakan oleh hakim untuk menentukan sama ada seorang profesional cuai dalam melakukan tugasnya. Untuk tujuan kajian ini 10 kes undang-undang dari United Kingdom, Malaysia dan Singapura telah dipilih untuk analisis. Kes undang-undang dalam lingkungan tahun 1980 hingga kini dipilih agar prinsip dan teori bagi kecuai adalah yang terkini. Kajian menunjukkan bahawa langkah pertama hakim adalah dengan menentukan hubungan antara plaintif dan defendan dan sama ada dia mempunyai tanggung jawab kepada plaintif. Beberapa kriteria dalam membuktikan kecuai adalah tanggung jawab dalam tort dan kontrak, proximity, foreseeability, causation dan kelayakan profesional tersebut. Seterusnya hakim akan menilai sama ada defendan telah memecahkan tanggung jawab mereka. Kriteria pertama yang akan dikenalpasti oleh mahkamah dalam menilai sama ada seorang profesional telah melaksanakan kerjanya dengan tahap piawaian dan tanggung jawab yang berpatutan, peraturan dan keperluan, bantuan dari bukti pakar atau badan-badan profesion yang berkaitan. Yang terakhir adalah kerosakan yang berlaku mestilah kerosakan yang sebenar dan berpunca dari defendan memecahkan tanggung jawabnya. Kriteria ini sangat penting kerana jika salah satu darinya tidak dapat dibuktikan oleh plaintif, kecuai tidak dapat dibuktikan.