

Vicarious liability steelyard of rights law employment essay

Law



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By, Lim Kuan, Chua Chia Ying, Eleanor, Sia Yi Ting, Joycelyn Koh

Introduction

Vicarious Liability is a strict liability imposed on the employer on any damage caused by his employee to another party in his course of employment. Unlike other law of torts, vicarious liability has developed from "social convenience" and "rough justice" as in *Imperial Chemical Industries Ltd v Shatwell*[1], Lord Pearce stated that: "The doctrine of vicariously liability has not grown from any very clear, logical or legal principles but from social convenience and rough justice." The concept of vicarious liability had created a legal chaos in law of torts. In an area of law dominated by fault-based liability, it is simply absurd or ridiculous to find an innocent party i. e. the employer to be held liable for the faults of another i. e. the employee. Judges had been struggling years to draw a clear, logical and legal rationale to justify the concept of vicarious liability but perhaps this concept is grown itself from social convenience and rough justice. Glanville Williams even cynically remarked that 'vicarious liability is the creation of many judges who have had different ideas of its justification or social policy or no idea at all'. Facing such uncertainty in this field of law, modern-day courts have adopted a pragmatic approach, which appears to rely alternatively on precedent and social justice. At times, the courts will merely find a precedent and follow it without consideration of the wider implications of the decision. The courts have preferred to ensure that the victim is compensated and to utilise vicarious liability as a means to connect the claimant with a defendant of means.[2]Atiyah in his leading text on vicarious liability outlines the different theories adopted by the courts and academics, which range from

blaming an employer for his or her poor choice of employee to the more modern concept of loss distribution.[3]It might sound absurd or even ridiculous to have a presumably innocent master to be held liable for the damage caused by negligent employees, however the main reasons put forward in justification for the doctrine of vicarious liability is " social convenience" and " rough justice". The term " social convenience" where Lord Pearce speaks of derives from a simple principle. The principle behind the concept of " social convenience" is that an employer is clearly in a better position to insure and protect against claims. Moreover, individual employee defendant is very often a " man of straw" and, although he is also liable jointly, he is most probably not worth suing. By making the employer, who is likely to be in a stronger financial position be liable for the employee's actions, the doctrine of vicarious liability ensures that a claimant will adequately compensated for any loss he encounters. Besides that, the fact that an employer profits from his business shall be taken into consideration and therefore the employer ought to bear any loss resulting from his business activities. As for the term " rough justice", Lord Pearce says " the master has an important duty of care for his servant. The master having (presumably for his own benefit) employed the servant, and being (presumably) better able to make good any damage which may occasionally result from the arrangement, is answerable to the world at large for all the torts committed by his servant within the scope of it." It follows that an employer is in a strong position to supervise and train (and dismiss where necessary) his staff accordingly and to take responsibility when his staff cause damage in the course of furthering his business. Hence, taking into

consideration that the master is empowered with such strong position over his employee and at the same time he employs for his own benefit, the onus of responsibility imposed on him may prima facie look absurd, but it is for the sake of "rough justice". There are 3 elements to be discussed in establishing vicarious liability in a course of action. The elements are Wrongful or tortious act, Special relationship, and Course of employment. In establishing this liability, all the elements have to be proved and the second element, special relationship is often a material issue to be raised. In order to prove the special relationship of employer-employee, there are 3 tests that are developed throughout the years to determine the employer-employee relationship. They are the Control Test, Multiple Test and Organization Test.

Control Test

It is crucial to distinguish the existence of a contract of service in order to make the employer vicariously liable. Control test being one of the earliest basic tests in vogue in 19th century is used to identify the special relationship between the employer and employee. It is very easy and simple to identify the relationship of master and servant or apprentice initially with the use of control test. However, this test is not sufficient to include other complex relationships of workers and employer such as drivers and plumbers on the issue of whether they are employee or independent contractor. Initially, in Reg. v. Negus,^[4] Blackburn had laid down the traditional "control" test which was further quoted in Hill v. Beckett^[5] by Avory J on the question of whether the alleged servant was bound to obey the orders of the alleged master and was controlled by him; if he was, there is existence of the

master and servant relationship. Subsequently, the control test can be found in *Short v. J & W Henderson Ltd*[6] where the appellant, a dock labourer was accidentally injured in the discharge of cement bags from the motor vessel, and has claim for compensation under the Workmen's Compensation Acts from the respondent. There are four indicia being set out by Lord Justice-Clerk was cited and approved by Lord Thankerton in identifying contract of service. Firstly, the master must have the power in selecting his servant. He also had the power in determining the wages or other remuneration of his servant. Thirdly, he has the right to control the method on how the work is done. Lastly, the master has the right to suspend or dismiss the services provided by his worker. As long as the contract of service's principle requirement exists whereby the master is able control the method of work done reasonably, it does not matter if some elements does not exist. This factor of control and superintendence has often been considered as vital on the legal quality of the relationship. Upon applying the principle above, the appellant is an employee of the company as the respondent had retained the right of supervision and control. Therefore, the respondent is liable to pay all the costs and expenses incurred to the appellant. Comments: From this case, with the application of control test, it has provided justice to the worker, whereby the employer is responsible for the worker's injuries. It will be unfair if the worker who had been working so hard to incur the cost of medical injuries despite suffering pain. In 1953, Lord Birkett L. J in *Pauley v Kenaldo Ltd*[7] had approved and quoted the judgement of Ormerod J. in *Gould v Minister of National Insurance*[8] with reference of previous case. The defendants had selected the plaintiff as a cloak-room attendant in a

restaurant. They gave remuneration by tips only. They could also dismiss or suspend the plaintiff, but the manner of work should be done was not controlled by them as the plaintiff was not compelled to 'clock' in as the other workers. She could even stay away whenever she like and pay for an assistant. Therefore, between the plaintiff and the defendant, there was no contract of service as the defendants do not control the manner how the work is to be done. Comments: The reasoning of this judge is based on the working manner of plaintiff and had held the plaintiff does not succeed to prove the existence of contract of service. This case truly shows that the manner of control is essential to be known in order to prove whether the defendant is the employer of the plaintiff. Further, Hillbery J in *Collins v. Hertfordshire County Council & Anor*[9] had distinct contract of service and contract for services by having one case where the master can require and order how is to be done despite of what is to be done, while the other case, he can only acquire what is to be done. MacKenna J values that as long as the employee expressly or impliedly agreed that in his service performance he shall be subjected to the other's control within a sufficient degree in a contract of service. The control has not only include the way of the thing to be done, and the means to be employed in doing it, but also includes the decision power on the thing to be done and the time and place where it shall be done.[10] Comments: The distinction of contract of service and contract for services is vital to held whether the employer is vicariously liable or not on the employee behalf. It will be unfair to charge the employee to be liable for the claim as the employee usually just followed what the employer said. The applying of control test rigidly is undesirable in *Hillyer v Governors of St*

Bartholomew's Hospital,[11]where the nurses who works in the operation theatre were held as not the employees of the hospital even though they were employees of the hospital for general purposes as they had not taken their orders from the hospital authorities, but the operating surgeon.

Comments: However, nowadays, the control element is no longer an accurate test to determine the relation of the employer-employee. The employer has no longer control the method of job to be done in many modern jobs for example, doctor or ship captain. Moreover, employer is known as a corporate entity instead of natural person in modern business. It is not practical to use control test to determine whether hospital is the employer of the doctor, as the hospital does not determine the way how the operation is to be done. It depends on the doctor's expertise. In Malaysia, courts would prefer the control test in determining the special relationship, as can be seen in the Bata Shoe Company (Malaysia) Ltd v. Employees Provident Fund Bhd[12]whereby for the purposes of the Employees Provident Fund Ordinance, plaintiff company had sought a declaration on the fact that the salesmen were not their employees as they are employed by their shop managers. Gill J had held that the salesmen in the retail shop are not employees of Bata as Bata does not select and appoint them. Their wages are paid by the manager instead of the company. Even if Bata has only indirect control on dismissal or suspension under the agreement where manager is required to dismiss any salesmen under him; and has no direct control on the manner how the work of sales performed by the salesmen, Bata has never required the manager to dismiss them. It is ultimately the shop manager to exercise those rights. The company only has the power to

transfer a shop manager, but has no powers on the salesmen. Therefore, the plaintiff is entitled for the declaration and the defendant is required to pay the cost of actions. Comments: The use of control test has not only given justice to the employee but also to company whereby the EPF Board would not impose too much burden on the company. This test may be relevant at the beginning of industrialization. However, seeing that there is a vastly different socio-economic milieu in the present time, it appears to be unrealistic. It must be modified in order to be valid as stated by Wan Suleiman FJ.[13] In *Hoh Kiang Ngan v Mahkamah Perusahaan Malaysia & Anor*[14] had raise the issue whether a director of a company can be a workmen where the court held that the respondent is a workman by affirming the industrial Court decision with the reference of he was engaged under a contract of service. This decision derived the principles from the *Inchcape* case which requires the employer to have the brain or controlling mind in a company, whereby the reasoning by Seah SCJ was erred on the ground that a company director can never be a workman. Comments: The reason the statement Seah SCJ was erred is possibly because of as long as a director has the controlling mind in a company, he could be an employer. Apart from that the appellant is a workmen seeing that he does not has the controlling mind in a company. Therefore, this case has uses the control test indirectly which is vital to help the appellant out from distress. In a very recent case, *Wu Siew Yong v Pulau Pinang Clinic Sdn Bhd & Anor*,[15] Chew Soo Ho JC had dismiss the case and held that the 1st defendant, Gleneagles Medical Centre ('the hospital') is not vicariously liable to the 2nd defendant the Obstetrician and Gynaecologist practising at that hospital. The plaintiff

failed to claim damages from the hospital on the ground that the negligent act and wrongful act are related to 2nd defendant's personal act due to the fact that 2nd defendant had full control over the management, treatment and care of the plaintiff. Comment: Control test is useful here as it is referred here in determining whether the hospital would be liable on behalf of that doctor. However, the decision varies from one another. As a conclusion, control test is still useful in certain ways, but still limited in some other matters, such as determining whether a football player is an employee or not.

Organization Test

A second test was developed in order to consider the broad range of potential employer-employee relationships is the organization test. The test was introduced to redress the inconclusiveness of the traditional control test in the case of *Stevenson, Jordan and Harrison Ltd v Macdonald and Evans*[16], a copyright dispute between two publishing houses, the outcome which depended upon the status of an author who had submitted a series of lectures to the defendants for publication. The author was employed by the plaintiffs to write educational texts, but the printed material was at the centre of the dispute was the result of a series of lectures that he had given at an evening institute in his spare time. He transferred his copyright in this material to his publisher, MacDonald & Evans. His employer sued for the copyright, claiming that the material has been produced by their employee in the course of his employment. The Court of Appeal ruled that the material based on his lectures was not produced as an integral part of his employment and therefore did not belong to the employer. Denning LJ

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observed that:" one features which seems to run through the instances is that, under a contract of service, a man is employed as part of the business, and his work is done as an integral part of the business; whereas under a contract of service his work, although done for the business is not integrated into it but is only accessory to it." Comment: If a man is an integral part of an organization, he is an employee; if he performs work for the organization but remains outside it, he is an independent contractor. Therefore, in our opinion this test is particular helpful in determining the position of the professional people where there is obviously no right of control over the method of performance. In present day circumstances, this is much more realistic than the old control test. However, one cannot automatically assume that a worker who is part time, or works from home, or who also works for another employer during the week is for these reasons only not integrated into business. In *Mat Jusoh bin Daud v Syarikat Jaya Seberang Takir Sdn Bhd*[17], the plaintiff was employed as a sawyer in the plaintiff's sawmills. He was injured in the course of his employment and as a result lost three fingers of his right hand. Because of the injuries, he was refused further employment at the defendant's sawmill. He sued the defendants and claimed for damages. The defendant denied liability contending that the plaintiff was not their employee but the employee of the defendant's contractor Lim. The court held that Lim could not be held to be a contractor as he was not undertaking to execute any part of the defendant's sawmills business. He was merely a middle man to procure workmen for the defendants to be employed at the defendant's sawmill. Since wages and the number of logs to be sawn were determinable by the defendants, the plaintiff's work was an

integral part of the defendants' business and therefore an employee of the defendant. Besides, the court found that the defendants negligent for not providing a sufficient number of workmen to do job the plaintiff was doing and not providing a proper and effective system of work. Salleh Abas FJ therefore held that the defendants are wholly responsible for the injuries suffered by the plaintiff. Comment: In our opinion, the court allowed the claim of plaintiff which he suffered injury when working at the employer place. The reason being is that such injuries caused the employee suffered loss of earning capacity which he does not have a very good and stable financial position. Besides, the plaintiff loss of three fingers which definitely makes it very difficult for him to carry heavy objects, as a result he was refused employment by the defendants. As we know that, the plaintiff is a labourer and the use of the right hand must be of very great importance to him. As a result, it is unlikely that the victim is able to engage in the similar field. Therefore, Salleh Abas FJ was correct in holding that defendants are wholly responsible for the injuries suffered by the plaintiff. Besides, in the case of *Whittaker v Minister of Pensions and National Insurance*[18], the claimant worked in a circus as trapeze artiste but was also required to spend time as an usherette. She claimed industrial injury benefit as a result of an accident sustained at work where she fell and broke her wrist. Initially, this was refused on the basis that she was not an employee of the circus. It was held that the plaintiff's contract with the circus was to carry out her duties under it as an integral part of the business of the circus, and not as accessory to it. Besides, at the time of the accident she employed under a contract of service by the company. In addition to her trapeze act, she had to

work as an usherette before and during part of each show and assist at all moves of the circus as requested by the management. In our opinion, this case shows that where a social security benefit claims for a broken wrist depended on the existence of a contract of employment. However, the reason for the court to allow her claim of industrial injury benefit as a result of an accident sustained at work where she fell and broke her wrist is that at the time of her accident she was employed under a contract of service and consequently employed in insurable employment. The judge was correct in holding that the plaintiff's contract with the circus was to carry out her duties under it as an integral part of the business of the circus, and not as accessory to it. Furthermore, in *Lian Ann Lorry Transport and Forwarding Sdn Bhd v Govindasamy*,^[19] the respondent, a lorry driver was employed by the appellant at a daily wage of \$15. 00 per day. Three days later, whilst he and his lorry attendant were unloading bundles of carpets from the appellants' lorry, the bundles sprang and rolled down and fell on the respondent knocking him down. As a result, the respondent suffered serious injuries which rendered him paralysed from the waist downwards and sued the appellants for damages on account of negligence. It was held that the appellants were negligent in failing to provide a safe system of work in unloading the goods from their lorry. The federal court in finding that a daily rated lorry driver was an employee stated as follows:" the law will imply the existence of such relationship where a person is hired by another as an integral part of the latter's business. The circumstances of this case clearly show that there was a contract of service between the appellants and the respondent because the respondent was employed as part of the appellants'

transport business. Besides, the term of the employment being that the respondent was placed on a temporary basis at a daily wage of \$15. 00 per day until he would eventually be absorbed into permanent service or otherwise have his employment terminated. Thus, it is clearly the respondent was an employee." Comment: In our opinion, the reason being that the court allowed the claim of the respondent as a result he suffered serious injuries which rendered him paralysed from the waist downwards as there is a possibility that the victim is unable to engage in any activity in the future. Accordingly, the court awarded damages for the loss of future earnings and future nursing care. So, the judge was correct in holding that the appellants were negligent in failing to provide a safe system of work in unloading the goods from their lorry. The test was applied in the case of *Albrighton v Royal Prince Alfred Hospital*[20], a girl was operated on for corrective surgery to her back. She suffered damage and sued the two doctors and the hospital as being vicariously liable for the doctor's negligence. The hospital attempted to escape liability by claiming that the consultant neurosurgeon was not an employee but rather an independent contractor, a private practitioner beyond its control. On appeal, the Supreme Court held the hospital was vicariously liable for the doctor stating as follow:" The uncontrollability of a person performing part of an organization as to the manner in which he performs his task does not precluded recovery the finding of a relationship of master and servant, such as to make the former vicariously liable for the negligence of the latter. In order to determine the relationship between the hospital and the medical practitioners, it was necessary to look at the evidence in order to determine whether the hospital

was vicariously liable for any negligence proved against the medical practitioners concerned." Comment: In our opinion, when a patient is a private patient and the doctor is employed directly by the patient, the hospital may not be liable for the particular action of the doctor. It would depend very much on the facts and circumstances of each case. However, if the damages caused to the patient came about as the result of the faulty hospital equipment being used by the doctor, then the hospital would definitely be held liable. Therefore, the judge was correct in holding that the hospital was vicariously liable for the doctor. Moreover, in 671122 Ontario Ltd. v. Sagaz Industries Canada Inc[21], Design Dynamics Limited lost a contract to supply Canadian Tire Corporation with synthetic seat covers. Later, Canadian Tire gave this business to Sagaz Industries which it had been influenced by the owner of American Independent Marketing Inc. (AIM), a consulting firm engaged by Sagaz. Later, Design Dynamics Limited commenced an action for damages for the loss of business against Canadian Tire. In appeal, it showed that AIM was an independent contractor and there was an agreement designating AIM as an entity distinct from Sagaz. The Court held that AIM was a separate legal entity and it worked under the direct supervision and direction of Sagaz. Also, AIM was squarely within the organization test for vicarious liability and that Sagaz was therefore liable for the wrongful acts of AIM and its staff. This approach requires that the facts of each case be scrutinized to determine the extent to which the contractor is integrated into the employer's business which the organization test, described by the Court as follows:" The organization test inquires into whether the agent or servant functions as part of the principal's organization

and whether an agent's work is done as an integral part of the principal's business. If the answer to these questions is yes, the principal is liable for the tortious acts of the agent even though, as between themselves, the principal and the agent have chosen to designate the relationship as that of independent contractor. Comment: In our opinion, it was revealed that engaging the services of external consultants does not ensure that employers will be shielded from liability for wrongful acts committed by these individuals. On the other hand, even if the employer does not know of or participate in the misconduct, it will still have to demonstrate that the consultant was not integrated into its organization in a manner that will attract vicarious liability. The judge was correct in holding that Sagaz was therefore liable for the wrongful acts of AIM and its staff. As a conclusion, the basis for the organization test is that a person who is employed under a contract of service is employed as part of the business and his work is done as an integral part of the business; whereas under a contract for services his work, although done for the business is not integrated into it but only accessory to it. However, this test has its limitations as it may be useful for explaining the employee status of managerial and professional workers, but it is less effective in explaining the position of out-workers or workers employed by a sub-contractor of the ultimate user of labour. Therefore, integration was a very abstract concept and it was often unrealistic to apply any one test to the complex situation represented by most employment relationships.

Multiple Test

In modern times, employers 'lack control' over the method in which the work is to be done and this no doubt had caused the control test which was established in *Short v J & W Henderson Ltd*[22] increasingly difficult to apply. Apart from this, the organisation test throughout the years had also received criticism as it was unable to reach a clear and candid answer. Soon enough, it was realised that no one factor could be isolated in determining such a relationship and this dissatisfaction had led to the development of the mixed or multiple test. This test is likely to be in favoured by the courts as the approach is based on common sense. It was first propounded by Mac Kenna J in *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance*[23]. The courts had adopted this in examining the terms of the contract to see if it falls under contract of service or a contract for services. In this case, a contract was entered between the appellant's company and L for the purpose of L agreeing to carry the concrete for the former under a scheme of delivery by owner-drivers. MacKenna J, after taking into account the multitude factors, such that L was to be paid for his services based on mileage at an agreed rate, being obliged to wear the appellant's uniform and comply with the rules and regulations, have held that L was an independent contractor, as the lorry had to be maintained by him at his own expense, pay all the running cost and employ a driver at his own account if he is unable to drive. In this case, the courts have held that before a contract of service can be established, there were three factors to be fulfilled. First, the servant or the employee must agree that his own expertise will be used and the employer pays him. Second, it is reflective on employer-employees

relationship, that the employee will expressly or impliedly be bound by the employer's instruction. Thirdly, the conditions of the agreement are the same of that of a contract of service. Comment: Although it was decided by the Minister that L was employed under a contract of service, but the judge in this case held that L was running the business on his own. From the case, it can be said that L has enough freedom in his obligations to qualify him as an independent contractor as he must make the vehicle available, maintain it and hire a competent driver at his own expense throughout the contract period regardless if he is being paid at rate per mile. Therefore, the judge is correct into holding that such obligations are more consistent with that of a contact of carriage than that of service. The third condition set out in this case has caused difficulty in subsequent cases. However the multiple test was developed further in *Market Investigations v Minister for Social Security*[24] where the fundamental test was paraphrased by Cooke J on whether the party who performs the services was 'in the business for themselves'. This case concerned a market researcher, who was engaged on a fixed remuneration for research on marketing questionnaires from time to time for Market Investigations. A dispute arose on whether National Insurance contributions should have been made on her behalf regarding to the surveys she did and this depended if she was an employee. The court held that she was an employee as she could control some of the work she carried out but not entirely. Comment: The judge was correct in holding that there was no sign of the market researcher being in the business on her own account because it was clearly shown that she did not have sufficient control in the matter; seeing that the questions to be asked and the persons to

approached was specified by the company. From this case, it can be summarised by Cooke J that a whole variety of factors must be looked into the courts, such as investment, who bears the risk of loss, the ownership of tools and who stands to make such profits. Home workers were classified as employees in cases such as *Airfix Footwear Ltd v Cope*[25] and *Nethermere (St Neots) Ltd v Gardiner and Another*[26]. In the former, there existed a strong element of control because the work had been provided on a regular basis and in the latter, due to the length of the relationship, there exists a mutuality of obligations. However, cases concerning casual workers, such as in the case of *O'Kelly v Trusthouse Forte plc*[27], the lack of mutuality whereby it was not an obligation for the employer to provide work and for the casuals to offer such services, had led the courts into holding that casual workers are self-employed even if they worked for one employer. This concept of the lack of mutuality of obligations have also led the case of *Wickens v Champion Employment*[28] to hold that agency workers are also self-employed due to the lack of obligation to provide work or services. In *Lee Ting Sang v Chong Chi-Keung & Anor*[29], a subcontract on behalf of main contractors upon a building site, who were the second respondents in this case, was executed by the first respondent, a building subcontractor. The applicant in this case was a mason who worked for the first respondent and during the course of his work, suffered back injury after falling from a high stool. The respondents in this case had argued that the mason was not an employee when he worked under the first respondent but was an independent contractor and could not claim under the Employees Compensation Ordinance. On the issue of determining the employment

status of the mason, the Privy Council stated that there was no single test and the standard to be applied was the one stated by Cooke J in *Market Investigations* case. The Privy Council then allowed the appeal. Comment: The applicant had claimed that he was working as an employee at the material time within the meaning of the Ordinance. In the Privy Council, a purposive construction of the Ordinance that was adopted by Their Lordships and it was correct in holding that the Ordinance was intended to give a wide measure of protection to workers in the construction and the building industry. In the case of *Hall (Inspector of Taxes) v Lorimer*[30], Mr Lorimer became a freelance vision mixer after leaving his full-time employment and had built up a list of 22 companies in the first 14 months. All work done by him was carried out at studios either owned or rented by the production company and equipments were also supplied by the company. It was held by the court that Mr Lorimer was self employed. Comment: It can be seen that Mr Lorimer was engaged under a contract for his services as the bookings were mostly made during phone calls to his home, where he had an office. From this case, in order to determine the employment status of a person, it was necessary to consider the overall view and the different aspects of a person's work activity on whether he does the business on his own account. Apart from factors such as mutuality of obligations, control and who bears such risk, it has been stressed in this case that such factors shouldn't be looked by the courts in mechanical order but by the overall picture. In the case of *Mary Colette John v South East Asia Insurance Bhd*[31], the plaintiff, a beautician who had been engaged by Angel Helen Puspam Pereira ('Angel') to make-up a bride, suffered injuries when the car she was in overturned. In

an action filed by the plaintiff to the defendant insurer, the latter had argued that the plaintiff was not being carried in Angel's car by 'reason of or in pursuance of a contract of employment' under s 75 of the Road Traffic Ordinance 1958 ('the Ordinance'). It was agreed by the trial judge that there was no employer-employee relationship between the parties. The plaintiff then appealed on this decision and submitted that the word 'employment' in s 75(1)(b)(ii) of the Ordinance must be given its ordinary English meaning and that the trial judge in finding that there was no such relationship had erred in law as that section did not require such a strict interpretation. The main issue concerning this appeal was whether the plaintiff was being carried in the car by reason of or in pursuance of a contract of employment with the insured, Angel or as a mere passenger in Angel's car. The appeal was dismissed with cost. Comment: In this case, Abu Samah JCA was correct in holding that the plaintiff was an independent contractor as she will be using her own skill and judgment, her own equipment and Angel had no control over the work even if she was paying the plaintiff. It had also been admitted by the plaintiff that Angel was not her employer and therefore, there was no contract of employment between the parties. Thus from all of these cases, one of the main reasons for the multiple test is the importance for both parties to know what the legal relationship is and where in law they stand. The employer in any case will know how far he will be held liable, whereas on part of the worker, he will be aware of the rights available to him, in regards to his employer and welfare and employment protection rights.

Grey Area

There are two areas, which are hospital staffs and lending a worker are fall under grey areas due to uncertainty to distinguish the status of worker. For hospital staffs, the case of *Cassidy v Ministry of Health*[32] has to be discussed. In this case, the claimant's condition became worse due to incompetency performance of the operation when he underwent an operation in his hand as what he had routinely did. As a consequence, the health authority was sued by the claimant. Principle of vicarious liability was applied. The issue arose was whether the health authority and the surgeon were fall under "master-servant" relationship. By applying the case of *Collins v Hertfordshire*[33], it has been concluded that the relationship between surgeon and his employer was fall under contract for service instead of contract of service. It can be suggested that a surgeon was not fall under the category of the servant of his employer. However, it was vaguely condemned by Court of Appeal rather than technical dissimilarities. In this case, it was determined that minister of health was the master of employee because it was based on routine basis even though their duties was professional nature. The judge, Somerwell L. J. in the case of *Cassidy* held that "although the master of a ship may be employed by the owners, they had no power to tell him how to navigate his ship. So the absence of control in the case of an expert was not a barrier to the existence of a contract of service." In 1965, the principle held by Somerwell L. J. was reemphasized in the case of *Morren v Swinton and Pendlebury Borough Council*[34]. Denning LJ commented that: "whenever they accept a patient for treatment, they must use reasonable care and skill to cure him of his ailment. The hospital

authorities cannot, of course, do it by themselves: they have no ears to listen through the stethoscope, and no hands to hold the surgeon's knife. They must do it by the staff which they employ; and if their staff are negligent in giving the treatment, they are just as liable for that negligence as is anyone else who employs others to do his duties for him.' and ' where a person is himself under a duty to use care, he cannot get rid of his responsibility by delegating the performance of it to someone else, no matter whether the delegation be to a servant under a contract of service or to an independent contractor under a contract for service." Consequently, it was held that the hospital was liable for the negligence of a resident surgeon because he was deemed as an employee of that hospital. Comment: The decision in the Cassidy case was decided based on the justice and welfare of the victim because it cannot be said that due to the tortfeasor cannot be identified in the case of negligence was occurred in hospital, then the hospital can be free from the liability. As similar to the Cassidy's case, the hospital cannot escape the liability under vicarious liability for the tort of negligence. It is unfair when the liability is not imposed on the hospital since these professionals were the employee of hospital that working and serving for hospital. So the hospital is vicariously liable in Cassidy's case for the negligence of professionals such as doctors who employed under the contract of service. In *Roe v Minister of Health*[35], Roe had to go through a surgery under supervision of Minister of Health. The staff was unidentified to the condition of the invisible micro-crack in the syringe of the phenol. When phenol contaminated with an aesthetic, it had caused permanent injury which was paraplegia to Roe. It was decided by Lord Denning that the doctor

was not negligent for the ignorance of undetectable cracks at that time. However, a part-time employee is considered as a part of the organization of the hospital so hospital was still vicariously liable for the negligence committed by a part-time employee. Comment: The judgment was held based on justice and fairness. Since a part-time employee is employed by hospital as a part-time worker instead of full-time worker, the hospital still can be vicariously liable to the negligence conducted by part-time employee since he or she is part of the hospital organization. Although it may be difficult to analyze the relationship between a part-time employee and hospital, hospital still can be liable when part-time employee is not engaged in his own business. It will be unfair to decide that the hospital can escape from liability when the part-time employee is part of the organization and engaged the business for hospital but not for him. As a consequence, the case of Cassidy and Roe had shown the difficulty in merely using control test to ascertain the relationship between an employee and employer. Thus, the control test is insufficient to apply in modern society. In the case of Gold v Essex County Council^[36], the fact was the hospital was held vicariously liable for the negligence of an employee radiographer who caused injury. Lord Greene MR pointed out his view that "the liability of a hospital arises out of an obligation to use reasonable care in treatment, the performance of which cannot be delegated to someone else, not even to a doctor or surgeon under contract for service." In addition, Goddard LJ said that "the liability for doctors on the permanent staff depends, on 'whether there is a contract of service and that must depend on the facts of any particular case'. He said: 'Apart from any express term governing the relationship of the parties, the

extent of the obligation which one person assumes towards another is to be inferred from the circumstances of the case". This is right whether the relationship be contractual (as in the case of a nursing home conducted for profit) or non-contractual (as in the case of a hospital which gives free treatment). In the former case there is, of course, a remedy in contract, while in the latter the only remedy is in tort, but in each case the first task is to discover the extent of the obligation assumed by the person whom it is sought to make liable. Once this is discovered, it follows of necessity that the person accused of a breach of the obligation cannot escape liability because he has employed another person, whether a servant or agent, to discharge it on his behalf, and this is equally true whether or not the obligation involves the use of skill.'He distinguished between nurses, for whose negligence the hospital would be liable, and consulting physicians and surgeons where: 'clearly the nature of their work and the relationship in which they stand to the defendants precludes the drawing of an inference that the defendants undertake responsibility for their negligent acts.'The hospital provided treatment by radiography, and it owed a duty to provide such treatment with care and was liable for the negligence of the 'whole-time employee engaged to give the treatment': 'It is clear, therefore, that the powers of the defendants include the power of treating patients, and that they are entitled, and, indeed, bound in a proper case, to recover the just expense of doing so. If they exercise that power, the obligation which they undertake is an obligation to treat, and they are liable if the persons employed by them to perform the obligation on their behalf act without due care. I am unable to see how a body invested with such a power and to all appearance exercising

it, can be said to be assuming no greater obligation than to provide a skilled person and proper alliances. MacKinnon described a general rule that: ' One who employs a servant is liable to another person if the servant does an act within the scope of his employment so negligently as to injure that other.'[37]Comment: It is very difficult to ascertain the relationship between the professional as can be seen in this case radiographer. As a result, grey areas will emerged if the Court decide the judgment by applying the control test and it is unfair and not suitable to use control test due to technical problem and changes in the social society. As for lending of workers, in the case of Mersey Docks and Harbour Board v Coggins and Griffiths (Liverpool) Ltd[38], the facts in this case were a crane and driver from plaintiff was hired by the defendant. The crane was negligently driven by Mr Newall. The issue was whether the Board was vicarious liable to Mr Mcfarlane as Mr Newalls was principal employers. Another issue was whether the hirers bare the responsibility to Mr Mcfarlane. It was held that the hirers lifted it when he has power to control over Mr Newall's work. On the other hand, the decision was the Mr Newall's work control had not readily pass to the hirers. Lord Macmillan provided that: " That the crane driver was in general the servant of the appellant board is indisputable. The appellant board engaged him, paid him, prescribed the jobs he should undertake and alone could dismiss him." It will only be held that control will be passed when there is a control on what and how the work was done. Thus damages were awarded to the plaintiffs. This decision had been appealed but the appealed was dismissed. Comment: Mersey Docks has the real control instead of the person who hiring the crane. A servant that employed by employer is subject to the

control of the employer so employer will liable for those who running their own business and this principle is decide based on justice because it is unfair to charge a temporary worker who running the business for the benefit of employer instead of charging permanent employer.

Conclusion

As a conclusion, the law of vicarious liability had grown from a seed of law based on social convenience and rough justice to a branch of law that is well established and gains its recognition worldwide. The tests to determine the special relationship had also developed from the basic control test, to the organization test and later on the mixed or multiple tests. In general, the employers or masters are people of higher class in the society. They are presumably in a stronger financial position and possess higher knowledge and power over their employee. The establishment of law of vicarious liability had definitely leaves employer in great fear of increased liability and henceforth secure the rights of employee.