

Analysis of the Tests Developed by the Courts in Determining the Existence of an Employee or an Independent Contractor Relationship in the Imposition of Vicarious Liability in Malaysia

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ABSTRACT

Employers are said to be vicariously liable for the torts of their employees which are committed during the course of employment. It is critical that business owners correctly determine whether the individuals providing services are employees or independent contractors. Employers or 'masters' will only be liable for the torts of their employees or 'servants' as they are called in law. They will not usually be liable for the torts of their independent contractors (subject to some exceptions). It is, therefore, necessary to establish the status of the person who committed the wrongful act. The task of the court is to interpret the contract of employment. In order to make such a distinction, the courts have adopted certain tests. However, the courts have been unable to formulate a concise definition of the terms 'employee' and 'independent contractor' that will furnish an accurate test to be applied in determining whether one is acting for another as servant or as an independent contractor. In Malaysia, the courts generally favour the control test. While the control test may have been persuasive in the past, in modern industrial society, with its increasingly sophisticated division of labour, the test is not always effective. In many cases employees may have technical skills and knowledge not shared by their employers. The purpose of this article is to examine these tests and the problems posed by the tests used by the Malaysian courts in an attempt to draw a distinction between an employee and an independent contractor in the context of vicarious liability.

Keywords: Contract of employment, course of employment, employers, employees, independent contractors, servants, torts, vicarious liability

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INTRODUCTION

Vicarious liability is where one person is made liable for the tort of another person

(Cooke, 2009). The commonest example of vicarious liability in tort is that of an employer for the torts of their employee. Two things are necessary for such liability to arise. There must be a particular relationship between the employer and the employee. A distinction is drawn between employees and independent contractors. The employer is liable for the torts of the former but not those of the latter (subject to some exceptions) (Cooke, 2009). Second, the tort committed must be referable to the employment relationship (Cooke, 2009). This is expressed by saying that the tort must be committed in the course of employment. The principle that an employer is vicariously liable for the torts of an employee committed in the course of their employment, but not for those of an independent contractor has caused severe difficulties for the courts and continues to do so.

A number of tests have been used as an attempt to draw a distinction. Traditionally, a distinction was made between a contract of service (employee) and a contract for services (independent contractor) (Cooke, 2009). A contract may specify that the person doing the work is an independent contractor, or that the contract is a contract for services, but this is not conclusive and it is open to the court to consider, as a matter of fact, the precise nature of the employment (Harpwood, 2009). The courts have now abandoned the search for any single factor to act as a test and will now look at all the circumstances of each particular case (*Hall (HM Inspector of Taxes) v Lorimer* (1994) IRLR) 171).

In Malaysia, despite the availability of all these tests the courts generally favour the control test (Norchaya Talib, 2010). Workers have been held to be non-employees on the basis that the defendant was not responsible for payment of wages and did not have control over the manner in which the work was to be performed (Norchaya Talib, 2010). In the majority of cases there is no difficulty in determining whether a worker is an employee i.e. office clerical staff, live-in domestic held etc. However, it should be admitted wholeheartedly that sometimes it may be difficult to ascertain whether a worker is deemed to be an employee or otherwise.

This article examines the tests formulated by the courts in determining the existence of a contract of service as opposed to a contract for services and the problems posed by these tests. The next section shall focus on the justification for vicarious liability bearing in mind that holding a person liable for the wrongful acts of others demands justification. The third section shall focus on employee versus independent contractor, with particular emphasis on how this could affect the discussion on vicarious liability. The fourth section turns the attention to the tests that have been formulated in an attempt to draw a distinction between an employee and an independent contractor in the context of vicarious liability.

Throughout the article the author shall use the terms 'employee' or 'servant' and 'independent contractor' or 'self-employed' in the context of vicarious liability, and

avoid the use of the term 'primary liability'. It is important to draw a distinction between primary liability and vicarious liability. This can be illustrated by medical negligence cases. For example, a health authority may be vicariously liable for the torts of its employee and it may also be primarily liable where it fails to provide adequate levels of staffing in one of its hospitals and an accident results.

JUSTIFICATION FOR VICARIOUS LIABILITY

Vicarious liability obviously conflicts with a basic principle of tort, that wrongdoers should be liable for their own actions. Why then do we have it? Various explanations have been put forward. However, it is not easy to find a real justification for a master's liability for the unauthorised wrongs of his servant. The justifications that have been put forth in this regard are generally not convincing. Broadly, these justifications stand on the 'benefit and burden principle' and are supported on the basis of an economic analysis of the situation (Ali Mohammad Matta, 2004). Some of these justifications are: employers have the necessary control; employers benefit from the work of their employees; an employer being negligent in selecting an employee; etc (Elliott & Quinn, 2007).

Regardless of the justifications stated above, any certainty in the justification for the theory is doubtful as held in *Imperial Chemical Industries Ltd v Shatwell* ((1965) AC 655 at p.685) where Lord Pearce said:

"The doctrine of vicarious liability has not grown from any very clear, logical or legal principle but from social convenience and rough justice. 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..."

From the above statement, it would suffice to note that the modern approach is entirely pragmatic and is based on social convenience and rough justice. It would appear that certainly where the employer's business is in the form of public service, such as operating a public bus service, policy dictates that the employer should be liable even for unauthorised acts of his employee.

EMPLOYEE VERSUS INDEPENDENT CONTRACTOR

One of the features of employment law in Malaysia is the distinction between employees and independent contractors. An employee is a servant. Where the status of an employee is established, the individual will be entitled to a considerable level of statutory and common law protection. In Malaysia there are several legislations governing the relationship between an employer and an employee. We have the

Employment Act 1955, Industrial Relations Act 1967, Occupational Safety and Health Act 1994 and many more. An employee is said to be under a 'contract of service' or a 'contract of employment' (Sec 2 of the Employment Act 1955, Sec 3 of the Occupational Safety and Health Act 1994 and Sec 2 of the Industrial Relations Act 1967). This is a very different concept for an independent contractor in a 'contract for services'.

There are a number of reasons why it is important to establish whether an individual is an employee or independent contractor. For example, not all individuals working within a business are employees in the eyes of the law. Where they do not have employee status they will often be treated as self-employed and will not receive the benefits of employment protection measures applicable to employees. In the context of this study, it is important to point out that an employer is vicariously liable for the torts of an employee committed in the course of their employment, but not for those of an independent contractor (subject to some exceptions such as: the employer authorising the commission of a tort; torts which do not require intentional or negligent conduct; negligence of the employer; and non-delegable duties) (Harpwood, 2009).

TESTS DEVELOPED BY THE COURTS IN DETERMINING WHO IS AN EMPLOYEE AS OPPOSED TO AN INDEPENDENT CONTRACTOR

The common law has developed a number of tests for distinguishing those who have a contract of employment from those who are

self-employed (Sargeant & Lewis, 2010). It is important not to see these tests as mutually exclusive, but rather developments in the law as a result of the courts being faced with an increasingly complex workplace and a greater variety of work situations. What we have today in form of the formal tests that have been developed remain useful indicators regardless of some shortcomings.

The 'Control Test'

An early test developed by the courts was the control test (*Yewens v Noakes* (1880) 6 QB 530 & *Walker v The Crystal Palace Football Club Ltd* (1910) 1 KB 87). It was developed on the premise that a servant is one who serves. Service implies: submission to another; acceptance of an inferior status; a master is entitled to give the servant orders; a servant must carry out such orders; and a master can tell the servant what to do, how to do it and when to do it (Fairclough, 2004). This test was laid down in the case of *Short v J & W Henderson Ltd* ((1946) 62 TLR 427 at p.429) where Lord Thankerton said that there were four factors to be considered in determining the existence of contract of service. First, the power of selection by the employer; secondly, the power in determining salary or other remuneration; thirdly, the power to or right of the employer to control the method in which the work was done; and fourthly, the power and right of the employer to terminate the employee's services.

In Malaysia, the courts generally favour the control test (Norchaya Talib, 2010). For example, workers have been held to be non-

employees on the basis that the defendant was not responsible for payment of wages and did not have control over the manner in which the work was to be performed. In *Zedtee Sdn Bhd v Maduraya Sdn Bhd* ((2004) 7 MLJ 461) by applying this test the court held that Bawan was an independent contractor and so the defendant was not liable for his acts of trespass and conversion. The importance of the 'control test' can be seen from the recent decision of the court in the case of *Wu Siew Yong v Pulau Pinang Clinic Sdn Bhd & Anor* ((2011) 3 MLJ 506) where the court held that there was no employer-employee relationship between the first and second defendants. The negligent and wrongful act complained of by the plaintiff was in relation to the personal acts of the second defendant in the treatment, management and care of the plaintiff in which the second defendant retained full control. Therefore, the first defendant could not be said to be vicariously liable.

Apart from the two cases cited above, reference can also be made to the recent decision of the Court of Appeal in the case of *Maslinda bt Ishak v Mohd Tahir bin Osman & Ors* ((2009) 6 MLJ 826). The issue in this case was whether the first respondent (a member of RELA (Angkatan Relawan Rakyat Malaysia) who snapped the photographs of the appellant while urinating was done 'in course of duty' and thus the second (the Director General of RELA), third (Director of the Jabatan Islam Wilayah Persekutuan Kuala Lumpur ('JAWI')) and fourth (the Government of Malaysia) respondents were vicariously

liable. The Court of Appeal held that the first respondent was not there on his own volition but on instruction. He not only was under the direct supervision of RELA, but on that particular night the first respondent was also subject to the direction of JAWI, with his duties shuttling from ensuring the security of those who participated in the exercise and to keeping an eye on those arrested. As the first respondent took the unauthorised photographs, whilst in the course of the work or employment for which he was instructed to carry out, at a time when the operation was in progress, the second, third and fourth respondents must be held vicariously liable.

Based on the cases cited above, it is clear that the courts in Malaysia have taken note of the importance of the 'control test' in determining the existence of employer-employee relationship. However, the author is of the opinion that there is a need not only to pay attention to the 'control test' as a determining factor. At the end of the day, each case should be decided on its own peculiar facts especially in the interest of justice and fairness. In other words, the facts presented in each case must be viewed and any tests applied should correspond to the modern working practices.

Perhaps the 'control test' was appropriate in the time of unskilled workers and rigid social classifications (Fairclough, 2004). However, the control test began to fail as a single conclusive test with the development of skilled workers. Such work does not require the master or employer to tell the employees how to do his or her work. In

addition, with the advent of independent contractors the control test is blurred when such a contractor consents to a degree of control but does not consent to actually becoming an employee. Working practices have changed over the years, and as industry has become more technical and required more expertise, it has become obvious that the control test alone will not suffice. As Cooke J. stated in the case of *Market Investigations v Minister of Social Security* ((1969) 2 QB 173) "... control will no doubt always have to be considered, although it can no longer be regarded as the sole determining factor".

Furthermore, in modern conditions the notion that an employer has the right to control the manner of work of all his servants, save perhaps in the most attenuated form, contains more of fiction than of fact (Rogers, 2006). It is clearly the law that such professionally trained persons as the master of a ship, the captain of an aircraft and the house surgeon at a hospital are all servants for whose torts their employers are responsible, and it is unrealistic to suppose that a theoretical right in an employer, who is likely as not to be a corporate and not a natural person, to control how any skilled worker does his job, can have much substance (Rogers, 2006). It has now been recognised that the absence of such control is not conclusive against the existence of a contract of service and various attempts to find a more suitable test have been made.

The 'Organisational Test'

This test, sometimes called the 'integration test', was designed to get around some of the problems experienced with the control test. The basis of the 'organisational test' is its assumption that under a contract of service a person is employed as an integral part of the business. On the other hand, under a contract for services, an individual's work is done for the business but is not integrated into it. It is only an accessory to it. In *Stevenson, Jordan and Harrison Ltd v MacDonald and Evans* ((1952) 1 TLR 101 at p.111), Lord Denning said:

"One feature that 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 for services, his work, although done for the business, is not integrated into it but is only accessory to it."

From the above statement, it is not entirely clear when a person is integrated into an organisation and when they are not. It is difficult to anticipate where the dividing line may be drawn: for example, what of the dependent contractor? If a person is self-employed, but works continuously for one organisation, is he to be treated as integrated into the organisation or not? To what extent, for example, is the catering assistant who works for an outsourced company be treated as an integrated part of the organisation in

which he is located? (Sargeant & Lewis, 2010).

Looking at the position in Malaysia, although the courts generally favour the control test as mentioned earlier, there have been instances where the courts have also acknowledged the existence of the 'organisational test'. In *Mat Jusoh bin Daud v Syarikat Jaya Seberang Takir Sdn Bhd* ((1982) 2 MLJ 71 & *Lian Ann Lorry Transport & Forwarding Sdn Bhd v Govindasamy* (1982) 2 MLJ 31) applying the organisational test laid down by Lord Denning in *Stevenson, Jordan and Harrison Ltd v MacDonald and Evans* ((1952) 1 TLR 101), Salleh Abas FJ held that it is clear that what was done by Lim and the workmen procured by him was done as an integral part of the defendant's business and he therefore had no hesitation to hold that the plaintiff was an employee of the defendants.

Based on the discussion and cases cited above, one could argue that the 'organisational test' seemed to be an attempt to cope with the difficulties posed by the growth of technical and skilled work which may not be the subject of close control by an employer. Although it may be used as an indicator of a person under a contract for service, it cannot be conclusive. Indeed the problem with this test and the control test is that they do not sufficiently distinguish between the employed and the self-employed (Sargeant & Lewis, 2010). It is arguable that it is possible for workers without a contract of employment to be closely integrated into an organisation and closely controlled by that organisation. To

some extent this has been recognised by the Court of Appeal in *Franks v Reuters Ltd* ((2003) IRLR 423).

The 'Multiple Test'

This test is a further recognition that there is no one factor that can establish whether a contract of service exists. In different situations, the various factors can assume greater or lesser importance. This test concludes that no single test can, in itself, determine employment status. It accepts that all tests have value and merit and are useful as general guidance. It is based on the principle that in each and every case it is necessary to weigh all the factors and ask whether it is appropriate to call the worker an employee. According to McKenna J. in *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* ((1968) 2 QB 497), the test asks for three questions: (a) Did the servant agree to provide his work in consideration of a wage or other remuneration? (b) Did he agree, either expressly or impliedly, to be subject to the other's control to a sufficient degree to make the other master? (c) Are the other provisions of the contract consistent with it being a contract of service? McKenna J. also pointed that "a man does not cease to run a business on his own account because he agrees to run it efficiently or to accept another's superintendence" (Bell, 2003).

In addition, more recently, the important factors appear to be that of personal performance and mutuality of obligation (Sargeant & Lewis, 2010). McKenna J. (*Ready Mixed Concrete (South East) Ltd v*

Minister of Pensions & National Insurance (1967) 2 QB 497 at p. 517) illustrated the complexity of the decision:

“An obligation to do work subject to the other party’s control is a necessary, though not always a sufficient, condition of a contract of service. If the provisions of the contract as a whole are inconsistent with it being a contract of service, it will be some other kind of contract, and the person doing the work will not be a servant. The judge’s task is to classify the contract... he may, in performing it take into account other matters than control.”

Based on the illustration above, the problem with this approach, which may be insoluble without a more precise statutory definition, is that it can lead to inconsistencies of approach. For example, which factors should be taken into consideration by the courts? Should we basically view the list as not being exhaustive and thus no single factor determines the distinction between employed and non-employed status? Are all the factors above given equal scrutiny? With all these questions in mind, the test has been viewed as having its own shortcomings.

In the context of this study, it is important to note that the courts in Malaysia have taken note of the existence of the ‘multiple test’. In *Tan Eng Siew & Anor v Dr Jagjit Singh Sidhu & Anor* ((2006) 1 MLJ 57), James Foong J. acknowledged in his judgment the existence of all the

three tests and went further by stating that having examined the evidence and applying all the tests as elaborated, he found that no such special relationship existed to attribute vicarious liability on the second defendant. In analysing the decision of the court, it would suffice to note that what is somewhat confusing is the court stating that in any event the post-surgery care given to the plaintiff was on the instructions of the consultant. This suggests that if they had been negligent, liability could still be excluded by the hospital, which would be inconsistent with the basic principle of an employer being vicariously liable for his employee’s torts. We must remember that the ward nurses, medical attendants and physiotherapist were employees of the hospital. However, according to the decision of the court, these personnel did not commit any tort on the plaintiff.

The ‘Economic Reality Test’

In many ways, this test is an extension of the ‘multiple test’. It was formulated in the case of *Market Investigations v Minister of Social Security* ((1969) 2 QB 173) by Cook J. and asks the fundamental question whether the worker is in business on their own account? It then considers such factors as control, whether the worker provides his own equipment, whether he hires his own helpers, what degree of financial risk he runs, whether the worker has responsibility for investment and management of the work and what, if any, opportunity the worker has to profit from the sound management of the task (Bell, 2003). In the later case of *Lee*

Ting Sang v Chung Chi-Keung ((1990) IRLR 236) the Privy Council stated that whilst there was no single test for determining employment status, the standard to be applied was best stated by the test from *Market Investigations*.

This test of economic reality, i.e. looking at the contract as a whole to decide whether the individual was in business on his own account, was an important development in distinguishing between those under a contract of service and others. The element of control is still important, but there is a need to take into account the other factors that make up the contract of employment. For example, where there is ambiguity it is relevant to know whether the parties to the contract have labelled it a contract for services or a contract of service. This test enables the courts to see through labels. This is what the parties to the contract call themselves. However, we have to bear in mind that labels can be deceptive. The fact still remains that such labels will not prevent a court from looking behind them to ascertain their true status (*Davies v New England College of Arundel* (1977) ICR 6).

The Mutuality of Obligation Test

This test has been used on a number of occasions, particularly to try to determine the status of part-time, casual or “agency” workers. For example, it was used in the case of *O’Kelly v Trusthouse Forte plc* ((1983) 3 All ER 456) to prove that part-time casual catering workers were not employees, since the court found that the company were under no obligation to provide work, and the

workers were under no obligation to accept work if it were offered. The importance of this factor was confirmed by the House of Lords in the case of *Carmichael v National Power Plc* ((1999) ICR 1226) which made it clear that both control and mutuality of obligation are essential features of a contract of employment. Moreover, the test for mutuality of obligation must be applied in a contractual manner; in other words, the worker must be under a contractual obligation to accept work and the company under a contractual obligation to offer it. An attempt by the Court of Appeal in *Carmichael* ((1998) IRLR 30) to mollify the test by introducing the element of reasonableness was firmly rejected by the House of Lords.

In Malaysia, the application of the mutuality of obligation test perhaps could be seen in the case of *Employees Provident Fund Board v Bata Shoe Company (Malaya) Ltd* ((1968) 1 MLJ 236) where the Court of Appeal specially mentioned that the five tests are simply there to help the court to determine the answer to the ‘fundamental test’. As such the application is really a matter of common sense and whether or not there was a contractual service and between who was a pure question of fact. Based on the decision of the Court of Appeal above, the author would like to reiterate that one could rule out the possibility that a sham may be found where the parties to a contract have a common intention that the document or one of its provisions is not intended to create the legal rights which they set out whether or not there is a joint intention to

deceive third parties or the court. Perhaps what is needed here is to consider whether the words of a written contract represent the true intentions or expectations of the parties not only at the inception of the contract but, if appropriate, as time passes.

The mutuality of obligation test is the most problematic of all the tests and its widespread use has led to situation where the distinctions between temporary, casual and fixed-terms workers are often confused with self-employed. For example, problems can arise with individuals who enter into occasional short-term engagements where there is no obligation to provide, and perform, work, or who work regularly for someone whilst maintaining there is no continuing obligation to provide or accept work.

CONCLUSION

Although the courts have wrestled with formal tests in an attempt to define the existence of a contract of service especially in the context of distinguishing between an employee and an independent contractor, the facts still remains that no single conclusive test has been found. All the tests discussed throughout this study are with some shortcomings. However, regardless of these shortcomings, the formal tests that have been developed remain useful indicators in helping the courts to hold employers vicariously liable for the wrongful act of their employees. For instance, the control test is still applicable. It is not the single determinate factor in a contract of service, but recent cases have

returned to it for guidance (*Montgomery v Johnson Underwood Ltd* (2001) IRLR 269 & *Motorola Ltd v Davidson* (2001) IRLR 4). The control test lives on and remains good law, albeit no longer the single determinant of employment status. Also, the organisational test still remains a useful test particularly where the employee is a professional or skilled employee (*Cassidy v Ministry of Health* (1951) KB 343). As for the mixed test, perhaps it could be argued that in a practical sense this test still remains relevant because it represents the court's desire to expand the scope of contract of service beyond the old idea of control (*Hull (HM Inspector of Taxes) v Lorimer* (1994) IRLR 171). The economic reality test is also still considered relevant in that it enables the court to distinguish between those under a contract of service and others. This could be done through labels i.e. what the parties to the contract call themselves. But again, such labels will not prevent a court from looking behind them to ascertain their true status.

Furthermore, it could be said that of all these tests; in Malaysia, the courts generally favour the control test (*Employees Provident Fund Board v Bata Shoe Company (Malaya) Ltd* (1968) 1 MLJ 236 & *Employees Provident Fund Board v MS Ally & Co Ltd* (1975) 2 MLJ 89). However, in recent years the courts have appeared to adopt a somewhat different approach. Rather than applying formalistic tests, there are several instances of the courts taking a more holistic approach. The application of this holistic approach can be seen in the case of *AXA Affin Assurance Bhd v Natural Avenue*

SdnBhd ((2009) 8 MLJ 517) where one of the issues in this case was whether the learned arbitrator committed an error of law in holding that the driver of the insured vehicle one Abdul Aziz was an employee and not an agent of the respondent. In response to this issue, Wan Afrah J. held that to his mind there was an error on the face of the law to hold that Abdul Aziz (the driver) did not act as an agent for the respondent and that the respondent was not vicariously responsible for his negligence and at the same time the learned arbitrator held as a finding of fact that Abdul Aziz was negligent. From this decision, it could be argued that the court took the view that each case should be decided on its own facts rather than following the “mechanical tests”.

Based on the overall discussion of the local cases, the author would like to submit that we ought to be very careful of the application of the “mechanical tests” in determining whether a person is an employee or an independent contractor for the purpose of the imposition of vicarious liability. Perhaps the approach that the courts should adopt in dealing with this pertinent issue is to take the view that each case should be decided on its own facts. Apart from that, there could also be other policy considerations which could act either as a “counterweight” as a reason or additional reason to impose liability. Of course the author is fully aware of the discomfort some judges have with making decisions based on policy considerations of what is fair and just. However, we ought to remember that we have inherited these “tests” on the basis

of common law approach, thus it would not be wrong to give emphasis to policy considerations rather than resorting to the “mechanical tests”. It is important to note that English Courts had thus been unable to forge a legal rule without reference to policy considerations.

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