

ANALYSING THE CONDITIONS FOR ESTABLISHING VICARIOUS LIABILITY IN MALAYSIA

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ABSTRACT

Amidst the realm of employment scenarios, there are cases where an employee's actions caused injury to their victims. Generally, an employer may be held vicariously liable for its employee's actions, subject to several conditions. The research found that while the concept of vicarious liability has been long recognised in Malaysia, there is still a question over the test used by the court in determining "the course of employment." The test to determine "the course of employment" has evolved over time, transitioning from "frolic of his own" to a "close connection test," as affirmed in *GMP Kaisar Security (M) Sdn Bhd v Mohamad Amirul Amin Bin Mohamed Amir* [2022] 6 MLJ 369. In this case, the Federal Court held that the employee's shooting was closely connected to his employment, and that it would be fair and just to hold the employer vicariously liable, despite the fact that his actions may have been unauthorised by the employer. However, this flexible approach may offer limited protection to the latter. This research therefore aims to analyse the conditions for establishing vicarious liability in Malaysia, particularly the test employed by the court, to determine whether the defendant's actions fall within the course of employment. This research adopts a doctrinal approach involving a detailed analysis of the relevant case law and scholarly writing related to this area.

Keywords: employment; vicarious liability; close connection test; liable; protection

Introduction

Vicarious liability is a concept inherent in the common law of tort (Tan, 2015). The term "vicarious" originates from the Latin word "vicārius" meaning substitute or experienced through the actions of others, while "liability" refers to being accountable for something. When these two words are combined, they imply that a person can be held liable for the actions of another party. It is worth noting that vicarious liability is not a tort, but a rule of responsibility which renders the defendant liable for the torts committed by another tortfeasor (Giliker, 2010). That said, to impute tortfeasor's liability to another person, there must be some special relationship to justify such imposition of liability. Historically, vicarious liability has been linked to the master-servant relationship. This can be traced back to Roman law where a master was held liable for a slave's conduct (Beuermann, 2022). Since then, the use of vicarious liability has

broadened as a result of expansion in commerce and industry and the inclusion of the relationship between employer and employee and principal and agent (Morgan, 2012; *Arshad Zainal Abidin v Shell Malaysia Trading Sdn Bhd & ors* [2023] 1 LNS 685).

The doctrine of vicarious responsibility keeps adapting to ever-changing conditions in society (Glavaničová, & Pascucci, 2022). It acknowledges that an employer that benefits from the activities of its employee should bear the risks associated with those activities and be held accountable for any harm caused as affirmed in *Armes v Nottinghamshire County Council* [2017] UKSC 60. In this case, the court emphasised that “... an enterprise which takes the benefit of activities carried on by a person integrated into its organisation should also bear the cost of harm wrongfully caused by that person in the course of those activities.” Ahnad (2021) argued that the employer would be in a better financial position to compensate the injured third party. However, an employer is not liable for all the torts committed by its employees; rather, the employer is only liable for an employee’s torts which are committed within the course of the employee’s employment. In general, proving vicarious liability requires some relationship between the person alleged to be vicariously liable and the tortfeasor, such as between employer and employee and the tort committed by the employee in the course of his employment (Shao, 2019; Hewson, 2022). This can be seen in *Lee Woon Jeng v Excel Champ Automobile Sdn Bhd* [2015] MLJU 2380, where the Court of Appeal affirmed the findings of the High Court, stating that “An employer is vicariously liable for a tort committed by an employee in the course of his or her employment.” However, the question that often arises is, what constitutes “in the course of employment”? Since our courts frequently rely on English case law about vicarious liability, this research also refers to such case law when discussing its conditions. This research therefore aims to analyse the conditions for establishing vicarious liability in Malaysia, particularly the test employed by the court to determine whether the defendant’s actions fall within the course of employment.

Research Methodology

This research adopts the doctrinal research approach since the research involved a detailed analysis of legal relevant case law, journal articles, and scholarly writings related to this area. The data collected were examined analytically and critically to examine the conditions for establishing vicarious liability in Malaysia.

Findings and Discussion of the Research

Vicarious liability is a topic that is often discussed to determine liability arising from tort (Huberman, 2021). In *Tan Eng Siew & Anor v Dr. Jagjit Singh Sidhu & Anor* [2006] 5 CLJ 175, the High Court set out three conditions that must be satisfied to establish vicarious liability. Firstly, there must be a wrongful or tortious action. Secondly, a legally recognised special relationship must exist between the individual alleged to be vicariously liable and the tortfeasor. Lastly, the tort must occur within the scope of employment. Proof of this condition frequently serves as the main issue in determining vicarious liability (Teoh & Ahmad Muzhaffar, 2023; Glofcheski, 2004). Initially, the court would employ the test of whether the employee had acted in a “frolic of his own”. This implies that if an employee does something unrelated to his job duties, the employee will be deemed to have stepped out of the course of employment, resulting in no vicarious liability. The test was applied in the Federal Court case of *Samin bin Hassan v Government of Malaysia* [1976] 2 MLJ 211, where the defendant was held not liable as the coachman was not acting within the course of his employment but was indeed acting on a frolic of his own. However, this test has been subject to much criticism. Among them are that the test “frolic of his own” is vague and does not provide a sufficient basis for determining the existence or limits of vicarious liability (*Lee Woon Jeng v Excel Champ Automobile Sdn Bhd* [2015] MLJU 2380). The concept of a frolic may encourage employers to avoid liability for their employees’ conduct, even when the acts are foreseeable or related to their job tasks (Millard & Bascerano, 2016). Furthermore, the test is inadequate

for addressing cases of intentional wrongdoing (Amy & Alina, 2020). The test later evolved into the “close connection” test. The test was affirmed by the Federal Court in *GMP Kaisar Security (M) Sdn Bhd v Mohamad Amirul Amin bin Mohamed Amir* [2022] 6 MLJ 369. In this case, the Federal Court held that although Jaafar’s actions may have been unauthorised by his employer, Jaafar’s actions in unlawfully discharging his firearm and causing injury to Mohamad Amirul (respondent) was so closely connected with his employment that it would be fair and just to hold the employer vicariously liable. It signified that there was a connection between the employee’s unauthorised tortious act and his employment that was sufficient to render his employer (appellant) vicariously liable. So far, only a few studies have specifically focused on the test used by the court in determining the course of employment in the context of vicarious liability in Malaysia. Previous research has discussed how an employer can be held vicariously liable for the negligence of its employee in the course of their employment, with focus on the test used by the courts to draw a distinction between an employee and an independent contractor (Masum, 2014). Other researchers discuss vicarious liability with reference to specific types of negligence such as medical negligence, sports activities and public services (Kaur et al., 2022; Syed Muhamad Ubaidillah, 2019; Wan Murshida & Mazlena 2021) without delving into the details of the test used by the court in determining whether the defendant’s actions fall within the course of employment. There is research in Malaysia that critically examined the close connection test adopted by *GMP Kaisar Security (M) Sdn Bhd v Mohamad Amirul Amin Bin Mohamed Amir* [2022] 6 MLJ 369 (Teoh & Ahmad Muzhaffar, 2023). In realising the fact that the test to determine this condition has evolved and changed in recent years, particularly with the recent Federal Court case of *GMP Kaisar Security (M) Sdn Bhd*, it highlights the need for further research on this topic.

Legal position of vicarious liability in Malaysia

Vicarious liability has long existed and been the subject of heated debate in the Malaysian courts. Among the early cases that discussed this issue is the case of *Noor Mohamed v Palanivelu & Anor* [1955] 1 LNS 78. In this case, the Court held that the second defendant was vicariously liable for the negligence of the first defendant. Since then, many subsequent cases discussed this topic in determining the conditions that must be proven in establishing vicarious liability. The conditions to establish vicarious liability were succinctly discussed in *Tan Eng Siew & Anor v Dr Jagjit Singh Sidhu & Anor* [2006] 5 CLJ 175, where the High Court with reference to the book entitled *Law of Torts in Malaysia* (2nd edn) by Norchaya, set out three (3) conditions to establish vicarious liability. Firstly, there must be a wrongful or tortious action. Secondly, there must exist a special relationship that is recognised by law between the person alleged to be vicariously liable and the tortfeasor. Thirdly, the tort has to have been committed within the course of employment.

The following section will examine the three (3) conditions one by one, with a particular emphasis on the third condition as it is the focus of this research.

There must be a wrongful or tortious action

Before discussing vicarious liability, it is necessary to first discuss the circumstances under which an employee can be held liable. This discussion is important because the employer can only be vicariously liable if the employee has committed a tortious act. There are two types of torts: intentional and unintentional torts. Examples of the former are assault, battery, and false imprisonment, whereas an example of the latter is negligence. Understanding this is important as the need for victim protection has grown and liability has been expanded to include not only negligent employee actions, but also intentional conduct (Glavaničová & Pascucci, 2022). Based on case law, an employer can be held vicariously liable if an employee has committed a wrongful act. This principle was discussed in *Bohjaraj a/l Kasinathan v Nagarajan a/l Verappan* [2001] 6 MLJ 497. In this case, the first defendant, who was a bus conductor employed by the second defendant, assaulted the plaintiff by punching him, resulting in injuries and loss of income. In allowing the appeal by the plaintiff, the court held that the first defendant

had exceeded his authority to maintain order in the bus by using abusive and vulgar words and force. His conduct in assaulting the plaintiff was closely connected with the acts which he was authorised to carry out, albeit using improper modes. Therefore, the second defendant was vicariously liable for the act of the first defendant. The act of assaulting the plaintiff was seen as a wrongful act committed beyond the scope of his authority, but still while carrying out his employment.

Another situation in which the employer can be vicariously liable is if the employee commits negligence. One case in point is *Lim Ah Toh v Ang Yau Chee & Anor* [1969] 2 MLJ 194. In this case, the plaintiff claimed damages for the death of her son, who was killed in an accident allegedly caused by the negligence of the driver of a motor-van (first defendant), in which the deceased was a passenger. Based on the evidence presented, the Court found that the first defendant was liable for negligence. Since the first defendant was found liable, the Court had to decide whether the employer (second defendant) was vicariously liable. Raja Azlan Shah J observed that for the second defendant to be held vicariously liable, the first defendant's journey must be undertaken for the purposes of the second defendant, which was proven in this case. Thus, the Court held that the second defendant was vicariously liable for the negligence of the first defendant who was authorised to drive the van in the interest of the former.

In short, an employer can be held vicariously liable for an employee's wrongful behaviour and negligence as described above. Once the first condition is proved, the second and third conditions will be of relevance to be examined.

Special relationship that is recognised by law between the person alleged to be vicariously liable and the tortfeasor

The next condition that needs to be proved is that there must be some special relationship between the person alleged to be vicariously liable and the tortfeasor. The question may arise: what kinds of relationships give rise to vicarious liability? Examples of relationships include those between an employer and an employee, a master and a servant, or a principal and an agent (Syed Ahmad, 2018). Steele (2017) argued that vicarious liability operates most often in the employment setting. In the employment context, this principle can be seen in *Lee Woon Jeng v Excel Champ Automobile Sdn Bhd* [2015] MLJU 2380, where the High Court affirmed that "An employer is vicariously liable for a tort committed by an employee in the course of his or her employment." Giliker (2018) further elaborated that vicarious liability is not just limited to a strict employer-employee relationship but also includes a relationship akin to employment. This can be seen in *Dr Kok Choong Seng & Anor v Soo Cheng Lin & Another Appeal* [2017] 10 CLJ 529, where the Federal Court asserted that relationships akin to employment are now included in the scope of vicarious liability in addition to employer-employee relationships. With this more flexible approach, the factors determining the employer-employee relationship is not solely based on the control test and may include other factors as well (Wan Azlan & Mohsin, 2019). The Federal Court in the subsequent case of *Dr Hari Krishnankin v Megat Noor Ishak Megat Ibrahim & Anor and Another Appeal* [2018] 3 CLJ 42 explained other factors that may be considered in determining the employment or akin to employment relationship, including whether the tortfeasor's (first defendant) activity was part of the person alleged to be vicariously liable (second defendant) business activity, and whether the tort was committed as a result of first defendant's activity done on behalf of the second defendant. If the relationship in question does not fall within the ambit of employer and employee relationship or akin to employment relationship, but is considered an independent contractor, then vicarious liability does not apply. This was decided in *Dr Kok Choong Seng & Anor* where the appellant was considered by the Federal Court to be an independent contractor of the hospital in conducting the operation. Among the factors considered by the Court were that Dr. Kok's services were generally not subject to the hospital's control or interference under the doctor's practice agreement. The procedure in question was not performed on behalf of the hospital, but rather

by Dr Kok's own recognisably independent business. Furthermore, Dr. Kok's agreement with the hospital was just to provide for the plaintiff's admission and the necessary facilities for the operation. Considering these, the relationship between the hospital and Dr Kok was not sufficiently akin to employment to give rise to vicarious liability. Therefore, the hospital was not vicariously liable for Dr Kok's negligence.

It is worth noting that while the Federal Court in this case acknowledged the principle of relationships akin to employment, in general, the principle does not apply to truly independent contractors (Wan Azlan and Mohsin, 2019). The rationale for this rule is that the employer has no control over the contractor's act and therefore should not be held accountable for any harm caused by the latter (Berman, 1969). However, this rule is subject to a few exceptions as highlighted by Peh Swee Chin SCJ in *Datuk Bandar Dewan Bandaraya Kuala Lumpur v Ong Kok Peng* [1993] 3 CLJ 205. Among the exceptions are, firstly, where an employer has not exercised care in selecting a competent contractor. Second is when the duty to take care is said to be non-delegable. Literally, non-delegable duty means the duty of care cannot be passed off to another person (Simpson, & Innes, 2021). For better understanding, reference is made to the case of *Cassidy v Ministry of Health* [1951] 2 KB 343, where Lord Denning explained that where a person is under a duty to care, he cannot simply absolve his responsibility by delegating the performance of it to someone else. The rationale for this non-delegable responsibility is to prevent a person alleged of breaching his obligation from evading liability (Amirra, 2022). This principle was adopted in *Dr Hari Krishnankin*, where, based on the evidence presented, the Federal Court concluded that the doctors were independent contractors and not agents, servants, or employees of the hospital. As such, the hospital was not vicariously liable for the negligence of the doctors. Nevertheless, on the issue of non-delegable duty, the Federal Court considered the principles established in *Woodland v Essex County Council* [2014] AC 537 and applied them to the facts of the case as follows:

“... as a patient admitted in the hospital for the second operation, fell into the category of especially vulnerable persons and was dependent on the hospital for protection. ... The role of the hospital was confined to providing the necessary facilities and services for the second operation. ... the plaintiff was dependent on the hospital for the facilities and services indispensable for the second operation, including anaesthetic services. ... Dr Namazie was requested by the hospital to provide his anaesthetic services at the material time and the plaintiff was left with no choice of anaesthetist for the second operation. The hospital had delegated to Dr Namazie the responsibility to administer a second operation. This was an integral part of the positive duty assumed by the hospital to the plaintiff to ensure that care was taken in the provision of anaesthetic services. Dr Namazie was negligent in the performance of the duty delegated by the hospital to him, in mistiming the top up dose and thereby causing the plaintiff to regain consciousness and buck during the second operation.”

Based on these grounds, the hospital was held liable for the breach of its non-delegable duty to the plaintiff to ensure that the anesthetic services were provided with reasonable care. The Federal Court further noted that the duty should only be imposed insofar as it would be fair, just, and reasonable.

The tort is committed within the course of employment

The third condition is that an employer is vicariously liable for a tort committed by an employee in the course of his employment. It is important to note that the test to determine the course of employment has evolved over time. Previously, the test was based on a “frolic of his own.” The test was applied in the Federal Court case of *Samin bin Hassan v Government of Malaysia* [1976] 2 MLJ 211. In this case, the plaintiff (appellant) was riding his motorcycle, when he was

hit and injured by a Land Rover which was driven by the first defendant. The evidence revealed that the driver had not gotten permission from his supervisor to drive the Land Rover. The driver had taken the Land Rover out for his own purposes, going home for lunch. The appellant sued the two defendants for damages, alleging that the first defendant was negligent, and that the first defendant was the servant or agent of the second defendant (Government). However, the claim against the Government was dismissed by the High Court and affirmed by the Court of Appeal on the grounds that the first defendant had taken the Land Rover out for his personal purposes, to go home for lunch, and not for the purpose of the government. Dissatisfied, the appellant appealed to the Federal Court and the appeal was dismissed. In reaching the decision, the Federal Court referred to the case of *Sanderson v Collins* [1904] 1 KB 628, where the court held that the defendant was not liable, as the coachman was not acting within the course of his employment but was indeed on “a frolic of his own”. The term “frolic of his own” was explained by the court in *Lee Woon Jeng v Excel Champ Automobile Sdn Bhd* [2015] MLJU 2380 as “an acts of employees which have nothing to do with their employment or outside the scope of employment.” This case clearly demonstrates that the Government cannot be held vicariously liable because the accident occurred when the first defendant used the Land Rover for personal reasons rather than for government purposes.

However, this test was not followed in the High Court case of *Lee Woon Jeng v Excel Champ Automobile Sdn Bhd* [2015] 5 CLJ 979. At trial court, the suit against the respondent (defendant) for vicarious liability was dismissed as Goh Khan Lee (GKL), the respondent’s sale consultant had acted out of the ordinary course of business (based on “frolic of his own” test) and there was sufficient evidence that the appellant (plaintiff) had been cheated by GKL but with no involvement of the defendant. Dissatisfied with the decision, the appellant filed an appeal to the High Court, which later reversed the trial court’s decision. Unlike the trial court, the High Court in this case applied the “close connection” test and held that it was clear that the collection of money by GKL from the plaintiff was for a purpose within the ordinary course of the defendant’s business. The money collected by GKL was intended to facilitate the sale of Mazda brand vehicles, thereby benefiting the defendant. It was further emphasised by the Court that:

“The fraudulent act of GKL could not be viewed in isolation. The act of the defendant, dishonest as it was, was so closely connected with the acts that GKL was authorised to do that for the purpose of liability of the defendant such acts may fairly and properly be regarded as done by him in the ordinary course of the firm’s business.”

As such, there was a sufficiently close connection between the wrongdoing and GKL’s duties to warrant imposition of vicarious liability on the defendant. In justifying the adoption of the close connection test, the Court referred to *Lister v Hesley Hall Ltd* [2002] AC 215. The facts of the case were a school board employed staff to manage a residential school for vulnerable children. The staff committed sexual abuse against the children. The issue arose of whether the School Boarding house was vicariously liable for the acts of sexual assault committed by the warden. To answer this, Lord Steyn considered a different approach, focusing on the closeness of the connection between the nature of employment and the tort committed. The test applied was “*whether the warden’s torts were so closely connected with his employment that it would be fair and just to hold the employers vicariously liable.*” The House of Lords held that the warden’s close supervision over the boys provided the opportunity for the torts and the acts were so closely connected with employment that it was fair and just to impose vicarious liability. That means the court considered the opportunity to abuse provided by the employer to determine whether there was a close connection between the wrongful act and employment (Calitz, 2007). The Court in *Lee Woon Jeng* further explained the rationale for adopting the close connection test, claiming that it provided greater flexibility like the “fair, just, and reasonable” test formulated in *Caparo Industries Plc v Dickman* [1990] 2 AC 605 for the

principle of duty of care, especially given the wide range of vicarious liability cases that may come before the courts. This flexibility is essential considering the inevitable changes in social development affecting the workplace environment as well as employment relationships.

The “close connection” test was affirmed in the Federal Court case of *GMP Kaisar Security (M) Sdn Bhd v Mohamad Amirul Amin bin Mohamed Amir* [2022] 6 MLJ 369. The details of the case will be thoroughly discussed in the next section of this research. The “close connection” test was later referred to and applied by the High Court in *Iekmal Hisham bin Harun v Siti Norfauziah bt Setapa & Ors* [2023] 9 MLJ 865. In this case, the plaintiff, who was arrested by the first defendant, a police inspector, was subsequently investigated under section 39B of the Dangerous Drugs Act of 1952 (DDA 1952). Following the investigation, the plaintiff was charged in the Magistrate Court under the said section and was held in prison. Later, the Deputy Public Prosecutor filed a police report complaining that the minutes in the investigation files had been forged because the minutes were not in her writing. The plaintiff then sued the defendants, alleging that his fundamental right, namely personal freedom, was violated by the first defendant. Among the issues raised was whether the second to fourth defendants were vicariously liable for the first defendant’s actions, which were done in the first defendant’s own capacity (her own frolic). To answer this question, the High Court referred to the close connection test as adopted in *GMP Kaisar Security (M) Sdn Bhd*. It was held that the falsification of the minutes in the investigation paper was very closely related to the first defendant’s employment, and thus the Court could not accept the reason that this act of forgery was a frolic of her own. As a result, the second to fourth defendants, who were the first defendant’s employers and principals were found to be vicariously liable, and consequently, the plaintiff’s claim against them was successful.

It is important to note that there are situations in which an employee intentionally commits a tort as revenge against their employer. This can be seen in *WM Morrison Supermarkets Plc v Various Claimants* [2020] UKSC 12 (Morrison’s case), where an employee of the supermarket Morrisons, Skeleton unlawfully disclosed personal data of Morrisons’ employees online. This was done to seek personal vengeance on Morrison for his anger over an internal disciplinary dispute earlier. The Supreme Court overturned the Court of Appeal’s decision and held that Morrison was not vicariously liable for the acts of a disgruntled employee. Lord Reed explained that even though Morrison provided the employee with access to the data and trusted him to deal with it in a proper manner, the disclosure in question was unauthorised and was committed for personal revenge, which meant that the ‘close connection’ test was not satisfied. Hopkins (2022) argued that the employee’s motive to harm his employer was said to be relevant to the overall assessment. The Supreme Court went on to explain that the close connection test does not only involve considering whether the acts committed were closely related to the course of employment, but that the acts should also be fairly and properly regarded as done while acting in the ordinary course of employment (Yeung & Bae, 2021). Hopkins (2022) argued that this decision shows that employers are less likely to be held vicariously liable for the torts of employees who engage in acts of vengeance unrelated to their employment. This was echoed by Teoh and Ahmad Muzhaffar (2023), as the judgment clarified the limitation of the test application in absolving an employer from being vicariously liable when an employee commits wrong for personal reasons unrelated to the ordinary course of his employment.

Yeung and Bae (2021) argued that the close connection test should objectively examine the connection between the tortfeasor’s employment and the circumstances surrounding the tort, rather than considering subjective factors such as motive. This is because intentional tortious conduct is often committed for personal reasons such as greed, sexual desire, or anger, which likely depart from the employer’s instructions and harm their reputation. As a result of the approach taken in Morrison’s case, an employee’s conduct based on personal motives is unlikely to pass the “close connection” test, thus limiting the scope of vicarious liability. Yeung and Bae (2021) further suggested following the Supreme Court’s decision in the earlier case

of *Mohamud v Morrison Supermarkets plc* [2016] UKSC 11 (Mohamud's case). In this case, it was decided that motive is irrelevant in determining whether the employer is vicariously liable. The claimant in this case, Mohamud, approached the employee of Morrison's Supermarket, Khan at its petrol station counter to inquire about printing documents from his USB stick. However, Khan used foul and racist language in response to the inquiries and asked him to leave. The claimant returned to his car and was followed by Khan, who proceeded to threaten and assault him. Consequently, the claimant sued Morrison Supermarkets plc for vicarious liability. The Supreme Court found that Morrison was vicariously liable. Among the reasons cited were that it was Khan's job to attend to customers and to respond to their inquiries. In addition, there was an unbroken sequence of events. The next stage was to determine whether there was sufficient connection between his position in which he was employed and his wrongful conduct to make it right for the employer to be held liable. This test was passed due to Khan's actions at the counter until the car was used to keep Mohamud away from his employer's business, which the latter reinforced with violence. In other words, Khan had abused his position and acted in connection with the business in which he was employed to serve customers. The Court further emphasised that Khan's motive was irrelevant based on the facts that he was motivated by personal racism rather than a desire to benefit his employer's business. However, Giliker (2021) explained that Lord Toulson's words in Mohamud's case needed to be placed in context. His assertion that motive was irrelevant did not mean that motive is always irrelevant in all cases. Motive was irrelevant in Mohamud's case because Khan had already been ruled by the Supreme Court to be acting in his capacity as an employee. In other words, Lord Toulson was merely stating that why Khan chose to behave in this manner was not relevant, but motive becomes relevant when the question of whether the employee is acting in their position as an employee remains open.

The following section will discuss the details of the case of *GMP Kaisar Security (M) Sdn Bhd* with a focus on the third condition to comprehend the court's recent approach to assess the course of employment.

Assessing the case of *GMP Kaisar Security (M) Sdn Bhd v Mohamad Amirul Amin bin Mohamed Amir* [2022] 6 MLJ 369

It is important to consider this case because this case extensively discussed the issue of vicarious liability, and it was recently decided by the Federal Court. An examination of this case can help to comprehend the court's recent approach in determining whether the defendant's actions fall within the course of employment.

Facts

In this case, GMP Kaisar Security (M) Sdn Bhd (GMP)(Appellant) was a company that provided armed bodyguard services. Jaafar, an employee of the Appellant, was assigned to Dato' Ong Teik Kwang (Dato' M) as his bodyguard. In carrying out his duty, Jaafar carried a firearm provided by the Appellant. On 1st December 2016, Dato' M was driving his car with Jaafar in the back seat. Jaafar was doing his job as Dato' M's bodyguard. While driving along the Tun Dr Lim Chong Eu Expressway, Jaafar shot and killed Dato' M with a handgun supplied by GMP. The car collided with the back of another vehicle and halted. Jaafar then got out of the car and fired randomly at members of the public with the gun. Meanwhile, Amirul (Respondent) was riding his motorcycle along the Tun Dr Lim Chong Eu Expressway. The Respondent slowed down as he neared the accident spot. He got down from his motorcycle and inquired of Jaafar as to what had happened. Immediately, Jaafar pulled out his gun and shot the Respondent in the chest, injuring him. The Respondent then filed a lawsuit against both Jaafar and the Appellant, holding the latter vicariously liable for the former's actions.

Issue

Among the issues raised was whether the Appellant could be held vicariously liable for its employee's actions.

Laws

In reaching its decision, the Federal Court noted that the scope of vicarious liability has undergone considerable development, particularly in recent years. The Federal Court referred to the High Court case of *Lee Woon Jeng v Excel Champ Automobile Sdn Bhd* [2015] 5 CLJ 979. In this case, the High Court's decision was affirmed by the Court of Appeal pertaining to the test used in determining the scope of employment as follows: "*To come within the scope of employment it is necessary to ascertain if what an employee does at work is sufficiently connected with the duties and responsibilities of the employee.*" This test is also referred to as the close connection test. The test differs from that used in previous cases such as *Lee Beng Choon v Tan Ngiam Kee* [1962], *Sanderson v Collins* [1904] 1 KB 628, and *Samin bin Hassan v Government of Malaysia* [1976] 1 MLJ 315, in which the judges frequently alluded to employees engaging in "frolics of their own" when describing acts of employees that have nothing to do with their employment or are outside the scope of employment. It is important to note that in *Lee Woon Jeng*, the Court further explained that the expression "frolic" is unclear and unhelpful because it does not provide a sufficient basis for determining the existence or limits of vicarious liability. This is supported by *Markesinis and Deakin's Tort Law* (7 edn. 2013) to the effect that the traditional formulation of liability in the case of an employee's actions lacks clarity and meaningful guidance. Labeling an action as a frolic does not provide a satisfactory explanation for why that particular action should be considered as falling outside the scope of employment.

The Federal Court in *GMP Kaisar Security (M) Sdn Bhd (GMP)* further set out guidelines in determining the scope of vicarious liability in a case where the employee committed an intentional wrong is underpinned by the following factors: firstly, the employee must intentionally commit the wrongful act in the course of employment. Secondly, there must be a connection between the wrongful act and the nature of the employment. Thirdly, the nature of the employment should expose the public to the risk of physical or property damage. Fourthly, the employer is responsible for creating the risk due to the nature of their business.

Application

Having considered the relevant principles and in applying the close connection test, the Federal Court concluded that Jaafar had intentionally committed a wrong by randomly shooting and injuring several people, including the Respondent. The shooting occurred while he was carrying out his duties as his client's bodyguard. His employer was GMP, a private company that offers armed bodyguard services. Jaafar was given a firearm and was assigned to work with a Datuk by the GMP. More importantly, GMP oversaw the selection and employment of Jaafar as a personal bodyguard, allowing him to carry the firearm. Hence, GMP created a risk by providing Jaafar with a firearm to perform his duty as personal bodyguard, exposing the public to potential danger. The Federal Court further emphasised that although Jaafar's actions may have been unauthorised by his employer, Jaafar's actions in unlawfully discharging his firearm and causing injury to Mohamad Amirul (Respondent) was so closely connected with his employment that it would be fair and just to hold the employer vicariously liable.

Decision

The Federal Court upheld the lower court's findings that GMP was vicariously liable for Jaafar's wrongful act.

In short, considering the third condition to prove vicarious liability, this case demonstrates that the test to determine the course of employment has evolved over time, transitioning from "frolic of his own" to a "close connection" test. It means that even if an employee deviates from their assigned tasks, the employer may be held vicariously liable if the employee's action was so closely connected with its employment that holding the employer vicariously liable would be fair and just. However, it is worth noting that the issue of motive was not considered in this case (Yeung & Bae, 2021), even though this case involved deliberate wrongdoing when Jaafar shot the Respondent. It would have been better for the Court to also take Jaafar's motives into account when determining whether his actions can be considered related or unrelated to the ordinary course of his employment, as was ruled in Morrison's case. This would ensure a fairer decision regarding the employer's vicarious liability.

Conclusion and Recommendation

In short, there are three conditions that must be met to establish vicarious liability. Once the conditions are met, the employer can be held vicariously liable for its employee's action. The third condition has been subjected to much debate in light of the recent Federal Court decision in *GMP Kaisar Security (M) Sdn Bhd*. It has progressed from "frolic of his own" to "close connection" test. In this case, the Federal Court ruled that although Jaafar's actions may have been unauthorised by his employer, unlawfully discharging his firearm and causing injury to the Respondent was so closely connected with his employment that it would be fair and just to hold the employer (Appellant) vicariously liable. With this approach, it provides more flexibility in determining vicarious liability than the previous test.

Arguably, the close connection test seeks to promote more justice by considering whether it is fair and just to hold the employer responsible for the employee's actions based on the closeness of the connection between the torts and the employment. Having said that, as decided in *WM Morrison Supermarkets Plc v Various Claimants* [2020] UKSC 12, employers are less likely to be held vicariously liable for the torts of employees who engage in acts of vengeance unrelated to their employment. Although the close connection could be established by proving that the employer has given the tortfeasor an opportunity to commit the tort as was decided in *Lister v Hesley Hall Ltd* [2002] AC 215, the Supreme Court in Morrison's case held that mere opportunity alone is insufficient for vicarious liability to arise because the Court could also consider the employee's motive to harm his employer to the overall assessment (Yeung & Bae, 2021). Be that as it may, it is important to note that in cases of intentional wrongdoing, in determining whether the employer is vicariously liable, it is proposed that an employee's motive is considered by the court when determining whether his actions can be deemed as related or unrelated to the ordinary course of his employment. This approach aligns with the precedent set in Morrison's case that could contribute to a more just outcome regarding the employer's vicarious liability.

Notably, the issue of vicarious liability, particularly the recent approach taken by the Federal Court in *GMP Kaisar Security (M) Sdn Bhd* emphasises the importance of effectively managing the risks that can arise in the workplace. The "close connection" test shows that employers now bear a greater burden of carefully selecting qualified employees, especially if the nature of the employment exposes the public to the risk of physical or property damage. It all starts with the hiring process. Employers must conduct thorough employee background checks to

ensure that the chosen ones will follow the company's rules and perform well on the tasks assigned to them (Adebayo, 2021). Nevertheless, it is important to note that a proper hiring process is not the only answer. Employers must also implement appropriate policies and provide comprehensive training and supervision to consistently reinforce the importance of responsible workplace behaviour. By combining these measures, employers can maintain a proactive approach to risk management and create a safer work environment to prevent or minimise any undesirable actions by employees during their employment.

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