FACULTY OF JURIDICAL SCIENCES

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LECTURE 20

TOPIC: VICARIOUS LIABILITY

Usually, we see that a person is not liable for the acts done by the other person. However, under the law of torts, a person can be held liable for another person. Also, for this person to held accountable for the act of the other person, it is necessary that there exists any form of relationship between the person who is accused and the other person. In short, there must be some sort of connection between these people.

Examples of Vicarious Liability

The liability of doing any wrongful act on behalf of another person is based on the concept of respondent superior. Also, this means that the superior should be let liable. Some of the examples of relationship where vicarious liability may arise are principal - agent, master-servant, etc.

1. Master and Servant

In this case, the general rule is that the master is liable for all sorts of acts that are authorized by him. Also, it is included that the acts are done by the servant at the time of his/her employment.

Thus, for the liability to arise, the following conditions should be satisfied. One is that the tort is committed by the servant. And other is that the tort committed by the servant should be at the time of employment.

Although there is a difference between an independent contractor and a servant. An independent contractor is someone who is employed to perform a certain task. Thus, in this, the master cannot determine the way in which the job is to be done.

While a servant is someone who is employed to do the work under the controls of the master and his direction. So, the important thing here to note is that the master is also not liable for the acts that are done by the independent contractor.

For example, the driver you hire is your servant. You can give me advice as to how to drive the car and give him directions. While the taxi driver in this scenario will be the independent contractor. Thus, you can only tell the direction to the taxi driver but you cannot order him.

2. Two Tests

Furthermore, to test the difference between an independent contractor and a servant there are two tests. These tests are hired and fire test and direction and control test. In the hire and fire test, you can whether someone is your employee or not by knowing whether that person can be fired or not.

Also, ask whether that person receive the salary in the form of remuneration? If the answer to both the questions is yes then that person is your employee. Although this test alone cannot be a detrimental factor to decide anything. The other test that you have to do is direction and control test.

In this test, check whether the person that needs to do the job receives the direction regarding the direction from his master? If the answer is yes then that person is a servant.

So, you can see that both the test needs to satisfied to find out whether the person is an independent contractor or a servant.

3. Principal and Agent

Principal, in this case, is a person who authorizes someone to act on his/her behalf. While the other who is advised to act accordingly is called as the agent. It is always stated that the principal is stated liable for any act by his agent. It is important that the act is

authorized by the principal for him to be held liable. The authority that principal acts can be in the form of implication or expressed.

4. Servant and Independent Contractor

A servant and independent contractor are both employed to do some work of the employer but there is a difference in the legal relationship which the employer has with them. A servant is engaged under a contract of services whereas an independent contractor is engaged under a contract for services. The liability of the employer for the wrongs committed by his servant is more onerous than his liability in respect of wrongs committed by an independent contractor. If a servant does a wrongful act in the course of his employment, the master is liable for it. The servant, of course, is also liable. The wrongful act of the servant is deemed to be the act of the master as well. "The doctrine of liability of the master for act of his servant is based on the maxim respondent superior, which means 'let the principal be liable' and it puts the master in the same position as he if had done the act himself. It also derives validity from the maxim qui facit per alium facit per se, which means 'he who does an act through another is deemed in law to do it himself'." Since for the wrong done by the servant, the master can also be made liable vicariously, the plaintiff has a choice to bring an action against either or both of them. Their liability is joint and several as they are considered to be joint tortfeasors. The reason for the maxim respondent superior seems to be the better position of the master to meet the claim because of his larger pocket and also ability to pass on the burden of liability through insurance. The liability arises even though the servant acted against the express instruction, and for no benefit of his master.

For the liability of the master to arise, the following two essentials are to be present:

(1) The tort was committed by the servant.

(2) The servant committed the tort in the course of his employment.

A servant is a person employed by another to do work under the direction and control of his master. As a general rule, master is liable for the tort of his servant but he is not liable for the tort of an independent contractor. It, therefore, becomes essential to distinguish between the two.

A servant is an agent who is subject to the control and supervision of his employer regarding the manner in which the work is to be done. An independent contractor is not subject to any such control. He undertakes to do certain work and regarding the manner in which the work is to be done. He is his own master and exercises his own discretion. And independent contractor is one “who undertakes to produce a given result, but so that in the actual exclusion of the work, he is not under the order or control of the person for whom he does it, and may use his own discretion in things not specified beforehand.”

Example:

My car driver is my servant. If he negligently knocks down X, I will be liable for that. But if he hires a taxi for going to railway station and a taxi driver negligently hits X, I will not be liable towards X because the driver is not my servant but only an independent contractor. The taxi driver alone will be liable for that.

Traditional View: Test of Control

A master is one who not only prescribes to the workmen the end of his work but directs or at any moments may direct the means also; retains the power of controlling the work.

The traditional mode of stating the distinction is that in case of servant, the employer in addition to directing what work the servant is to do, can also give directions to control the manner of doing the work; but in case of an independent contractor, the employer can only direct what work is to be done but he cannot control the manner of doing work. This was stated by MCKARDIE, J. by taking the writings of Pollock on Torts in a case of Performing Right Society Ltd. v Mitchell, etc. Ltd.

In Short V.J. & W. Henderson Ltd. LORD THANKERTON pointed out four indicia of a contract of service:

(1) Master's power of selection of his servant;
(2) Payment of wages or other remunerations;
(3) Master's right to control the method of doing the work, and
(4) Master's right of suspension or dismissal.

The important characteristic according to this analysis is the master's power of control for other indicia may also be found in a contract for services.

This was the traditional test. In Collins v Hertfordshire HILBERY J said; "the distinction between a contract for services and a contract of service can be summarised in this way: In one case the master can order or require what is to be done, while in other case he can not only order or require what is to be done, but how it shall be done."

Modern View: Control Test Not Exclusive

A. The Control Test

The test of control as traditionally formulated was based upon the social conditions of an earlier age and "was well suited to govern relationship like those between a farmer and an agricultural labourer (prior to agriculture mechanisation), a craftsman and a journeyman, a householder and a domestic servant and even a factory owner and an unskilled hand". The control test bricks down when applied to skill and particularly professional work and, therefore, in recent years it has not been treated as an exclusive test.

The Supreme Court in **Dharangadhara Chemical Works Ltd. v State of Saurashtra** laid down that the existence of the right in the master to supervise and control the execution of the work done by the servant is a prima facie test, that the nature of control may vary from business to business and is by its nature incapable of any precise definition, that it is not necessary that the employer should be proved to have exercised control over the work of the employee, that the test of control is not of

universal application and that there are many contracts in which the master could not control the manner in which work was done. The English Courts have also recognised that the control test is no longer decisive.

B. The nature of the employment test

One accepted view is that people who have a contract of service (an employment contract) are employees, but people who have a contract for services (a service contract) are independent contractors. In Ready Mixed Concrete v Minister of Pensions and National Insurance, MACKEMA J., said that three conditions are to be fulfilled for contract of service:

(1) Servant agrees that in consideration of a wage or other remuneration he will provide his own work and skill in the performance of some service for his master;

(2) He agrees expressly or impliedly that in the performance of that service he will be subject to others control in a sufficient degree to make that other master;

(3) The other provisions of the contract are consistent with its being a contract of service.

C. The 'Integral Part of The Business' Test

LORD DENNING, as LORD JUSTICE, in Stevenson Jordan and Harrison Ltd. v Macdonald and Evens, referred to the distinction between a contract of service and a contract for services as a "troublesome question" and observed: "it is almost impossible to give a precise definition of the distinction. It is often easy to recognise a contract of service when you see it, but difficult to say wherein the difference lies. A ship's master, a chauffeur, and a reporter on the staff of a newspaper are all employed under a contract of service; but a ship's pilot, a taxi-man, and a newspaper contributor are employed under a contract for services. One feature which seems to run through the instances is that, under a contract of service, a man is employed as a 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 it is only accessory to it."

D. Allocation of Financial Risk/ The Economic Reality Test/ Multiple Test

In Montreal v Montreal Locomotive Works Ltd. LORD WRIGHT said that in the more complex condition of modern industry, more complicated test have often to be applied. According to him, it would be more appropriate to apply a complex test involving

(1) Control;
(2) Ownership of the tools;
(3) Chance of profit;
(4) Risk of loss; and Control in itself is not always conclusive.

In a later case Market Investigation Ltd. v Minister of Social Security, COOKE J. referred to these factors and said that the fundamental test was; "Is the person who has engaged himself to perform these services performing them as a person in business on his own account?" If the answer is yes, it is a contract for services; if no, it is a contract of service. There is no exhaustive list of considerations relevant to determining this question, and no strict rules about the relative weight the various considerations should carry in a particular case.

The control will no doubt will always have to be considered, although it can no longer be regarded as the sole determining factor; and that factors which may be of importance are:

(1) Whether the man performing the services provides his own equipment;

(2) Whether the person hires his own helpers;

(3) What degree of financial risk he takes;

(4) What degree of responsibility for investment and management he has; and

(5) Whether and how far he has an opportunity of profiting from sound management in the performance of his task

According to the Supreme Court of United States, the test is not "the power of control whether exercised or not over the manner of performing service to the undertaking", but whether the persons concerned were employees "as a matter of economic reality" and the important factors to be seen are "the degrees of control, opportunities of profit or loss, investment in facilities, permanency of relations and skill required in the claimed independent operations."

E. Significant Outcome

DIXON J. in **Humberstone v Northern Timber Mills** made an observation that "The question is not whether in practice the work was in fact done subject to a direction or control exercised by an actual supervision or whether an actual supervision was possible but whether ultimate authority over the man in the performance of his work resided in the employer so that he was subject to the latter's order and directions."

The Supreme Court in Silver Jubilee Tailoring House v. Chief Inspector of Shops, after a review of the most of the authorities mentioned above observed: "In recent years the control test as traditionally formulated has not been treated as an exclusive test. It is exceedingly doubtful today whether the search for a formula in the nature of a single test to tell a contract of service from a contract for service will serve any useful purpose. The most that profitably can be done is to examine all the factors that have been referred to in the cases on the topic. Clearly, not all of these factors would be relevant in all these cases or have the same weigh in all cases. It is equally clear that no magic formula can be pronounced, which factors should in any case be treated as determining ones. The plain fact is that in a large number of cases, the court can only perform a balancing operation weighing up the factors which point in one direction and balancing them against those pointing in the opposite directions. It was also pointed out that the control is obviously an important factor and in many cases it may still be the decisive factor, but it is wrong to say that in every case it is decisive. It was further observed that the degree of control and supervision would be different in different types of business and that "if an ultimate authority over the worker in the performance of his work resided

in the employer so that he was subject to the latter's direction that would be sufficient."

Liability For Independent Contractors

In **Alcock v Wraith**, NEILL LJ stated: where someone employs an independent contractor to do work on his behalf he is not in the ordinary way responsible for any tort committed by the contractor in the course of the execution of the work.

The main exceptions to the principle fall into the following categories:

(1) Cases where the employer is under some statutory duty which he cannot delegate.

(2) Cases involving the withdrawal of support from neighbouring land.

(3) Cases involving the escape of fire.

(4) Cases involving the escape of substances, such as explosives, which have been brought on the land and which are likely to do damage if they escape; liability will attach under the rule in Rylands v Fletcher.

(5) Cases involving operations on the highways which may cause danger to persons using the highway.

(6) Cases involving non-delegable duties of an employer for safety of his employees.

(7) Cases involving extra-hazardous acts.

Judicial Pronouncements

Performing Right Society Ltd. v Mitchell, etc. Ltd., (1924) 1 K.B. 762.

The defendants engaged a band called 'The Original Lyrical five' to play at their dance hall, and the band played two songs without the permission of the claimants, the owners of the copyright. It was held that the members of the band were employees of the defendants who were liable for the breach of copyright.

MCCARDIE J.: The nature of the task undertaken, the freedom of action given, the magnitude of the contract amount, the manner in which it is to be paid, the powers of dismissal and the circumstances under which payment of the reward may be withheld, all these bear on the solution of the question … it seems, however, reasonably clear that the final test, if there be a final test, and certainly the test to be generally applied, lies in the nature and degree of the detailed control over the person alleged to be servant. This circumstance, of course, one only of several to be considered, but it is usually of vital importance. The point is put well in Pollock on Torts, 12th ed., pp. 79, 80.

"The relation of master and servant exists only between persons of whom the one has the order and control of the work done by the other. A master is one who not only prescribes to the workman the end of his work, but directs or at any moment may direct the means also, or, as it has been put, 'retains the power of controlling the work'. A servant is a person subject to the command of his master as to the manner in which he shall do his work, and the master is liable for his acts, neglects and defaults, to the extent to be specified. An independent contractor is one who undertakes to produce a given result, but so that in the actual execution of the work he is not under the order or control of the person for whom he does it, and may use his own discretion in things not specified beforehand."

Mersey Docks and Harbour Board v Coggins and Griffith Ltd., (1946) 2 ALL ER 345.
The harbour board hired out a mobile crane, together with a driver, Mr. Newall, to the defendant stevedores. Mr. Newall was paid and liable to be dismissed by the board, but the contract of hire stated that he was to be regarded as the employee of the stevedores. The stevedores could tell him what to do, but not how he was to operate the crane. Mr. Newall negligently injured Mr. McFarlane. On the question whether the board or the stevedores were to be held vicariously liable for the negligence of Mr. Newall, the board was liable.

LORD PORTER: Many factors have a bearing on the result. Who is paymaster, who can dismiss, how long the alternative service lasts, what machinery is employed, have

all to be kept in mind. The expressions used in any individual case must always be considered in regard to the subject matter under discussion but amongst the many tests suggested I think that the most satisfactory, by which to ascertain who is the employer at any particular time, is to ask who is entitled to tell the employee the way in which he is to do the work upon which he is engaged. If someone other than his general employer is authorized to do this he will, as a rule, be the person liable for the employee's negligence. But it is not enough that the task to be performed should be under his control, he must also control the method of performing it. It is true that in most cases no orders as to how a job should be done are given or required: the man is left to do his own work in his own way. But the ultimate question is not what specific orders, or whether any specific orders, were given but who is entitled to give the orders as to how the work should be done. Where a man driving a mechanical device, such as a crane, is sent to perform a task, it is easier to infer that the general employer continues to control the method of performance since it is his crane and the driver remains responsible to him for its safe keeping. In the present case if the appellants' contention were to prevail, the crane driver would change his employer each time he embarked on the discharge of a fresh ship. Indeed, he might change it from day to day, without any say as to who his master should be and with all the concomitant disadvantages of uncertainty as to who should be responsible for his insurance in respect of health, unemployment and accident. I cannot think that such a conclusion is to be drawn from the facts established. I would dismiss the appeal.

Ready Mixed Concrete v Minister of Pensions and National Insurance, (1968) 1 All ER 433.

The issue in this case is whether an owner-driver of a vehicle used exclusively for the delivery of a company’s ready mixed concrete was engaged under a contract of service or a contract for services.

Ready Mixed Concrete (South East) Ltd (“RMC”) was in the business of making and selling ready mixed concrete. The company had engaged an independent haulage contractor to deliver the concrete to customers but that contract was terminated and

RMC decided to introduce a scheme whereby concrete was delivered by owner- drivers working under written contracts. The owner-drivers entered into a hire purchase agreement with Readymix Finance Ltd to purchase a lorry but the mixing equipment on the lorry was the company's property. In 1965 the company asked the Minister of Social Security for a determination of the employment status of one of the owner-drivers, Mr Latimer. Mr Latimer's written contractual terms included the following:

· he was entitled with the consent of the company to appoint a competent and suitably qualified driver to operate the truck in his place but this was subject to the company's entitlement to require him to drive the truck himself unless he had a valid reason for not doing so

· he was responsible for paying any substitute

· he had to wear a company uniform

· he had to carry out all reasonable orders from any competent servant of the company

· he had to maintain the lorry at his own expense and pay its running costs

· There was a mutual intention that Mr Latimer was an independent contractor.

Other facts found were-

· he did not work set hours and had no fixed meal break

· the company did not tell him how to drive the truck or what routes to take

· the nine owner-drivers in the depot arranged the dates of their own holidays to ensure that only one driver was away at any time and between them. They engaged a relief driver contributing equally to his weekly wage of £25.

· During the busy season the company engaged three or four additional drivers under contracts of service.

The Minister decided that Mr Latimer was employed under a contract of service but, on appeal to the High Court, MACKENNA J. held that he was running a business of his own. In summing up MacKenna J said that Mr Latimer was a “small business man” and not a servant. He concluded that the contract was not one of service but of carriage. In his judgment, MacKenna J considered what is meant by a contract of service. He said “A contract of service exists if these three conditions are fulfilled. (i) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master. (ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other’s control in a sufficient degree to make that other master. (iii) The other provisions of the contract are consistent with its being a contract of service.

· **Market Investigation Ltd. v Minister of Social Security**, (1969) 2 QB 173. In this case the issue was whether an interviewer, who was engaged on a casual basis, was employed under a series of contracts of service or under a series of contracts for services. Market Investigations Ltd was a market research company. It employed a small number of full-time interviewers but, for the most part, drew on a panel of casual interviewers and the case concerned this latter group. The facts found included the following:

· all interviewers were issued with or had access to the company’s ‘Interviewer’s Guide’ which outlined interviewing techniques

· there was no obligation to accept work when it was offered

· interviewers were usually asked to work for two or three days during a 10- or 14-day period
· interviewers were free to work for other firms during this period

· the company did not allow interviewers to send a substitute without prior permission of the company

· on some occasions a briefing meeting was held prior to the start of the assignment
· during a period of 81 weeks Mrs Irving worked for 61 full days and 8 half days and was paid on a daily basis plus expenses

· on the first few assignments Mrs Irving was accompanied by one of the company's supervisors
· the contract did not provide for time off, holidays or sick pay

· the company thought they could not dismiss Mrs Irving in the middle of an assignment

· The mutual intention was for contracts for services.

The Minister of Social Security decided that Mrs Irving did work under a contract of service and the company appealed against that decision. COOKE J. held that Mrs Irving was employed under a series of contracts of service and said that "The fundamental test to be applied is this:" Is the person who has engaged himself to perform these services performing them as a person in business on his own account?" If the answer to that question is 'yes' then the contract is a contract for services. If the answer is 'no' then the contract is a contract of service. No exhaustive list has been compiled and perhaps no exhaustive list can be compiled of the considerations which are relevant in determining whether there is a contract of employment nor can strict rules be laid down as to the relative weight which the various considerations should carry in particular cases. The most that can be said is that control will no doubt always have to be considered, although it can no longer be regarded as the sole determining factor; and that factors which may be of importance are such matters as whether the man performing the services provides his own equipment, whether he hires his own helpers, what degree of financial risk he takes, what degree of responsibility for investment and management he has, and whether and how far he has an opportunity of profiting from sound management in the performance of his task."

Thus, each case has to be considered on its own merits and it is confirmed that control may no longer be the decisive factor. Another finding of fact was that each interviewing arrangement was a separate engagement, each of which was of very short duration.

Nevertheless, the court held that on each occasion there was a separate contract of service. This provides support for the view that a short-term casual engagement can be a contract of service. Cooke J commented on the absence of sick pay and holidays as follows:"The fact that there is no provision for sick pay and holidays is merely a reflection of the fact that the contract is of very short duration. If a man engages himself as an extra kitchen hand at a hotel for a week in the holiday season, there will be no provision for sick pay and holidays, but the contract will almost certainly be a contract of service." Where a short-term contract is concerned, then the absence of employment rights, such as sick pay and holiday pay, will be of no consequence in determining employment status.

· **Salsbury v Woodland**, (1969) 3 All ER 863.

Mr. Woodland wanted a hawthorn tree cut down. The tree was 25 feet high and stood 28 feet from the road, and running across the garden diagonally was a pair of telephone wires. Mr. Woodland engaged Terence Coombe to cut the tree down and he did so negligently. The tree hit the telephone wires which landed in the roadway. The claimant intended to coil up the wires, but on seeing the third defendant, Mr. Waugh, approaching too fast in his Morris Cooper, he flung himself to the ground to avoid being hit by the wires (which would have whipped around being struck by the car). The claimant had a tumour on his spine and the falling to the ground dislodged this and caused damage to the claimant. It was held on allowing the appeal by Mr. Woodland that he was not liable for the negligence of his independent contractor and the driver was also held partly responsible as he was driving too fast.

Exercise:

1. Which of the following should be taken into consideration to determine standard of negligence?

a) Importance of the object to be attained
b) Magnitude of risk
c) Both (a) and (b)

d) None of the above

2. Magnitude of …… determines the precaution which the defendant is expected to take.

a) risk
b) height
c) care
d) depth

3. What does plaintiff have to show?

a) Defendant has bad behaviour
b) Damage caused is not too remote
c) Defendant is alcoholic
d) Damage is not due to plaintiff's action

4. What does nuisance as a tort means?

a) Unlawful interface with person's land
b) Beating up a person without any reason
c) Fighting with stranger
d) Causing traffic jam

5. Which of the following causes interference?

a) Noise
b) Smell
c) Electricity
d) All of these