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Whittling Down of 'Control Test' in Relation to Determining Master-servant Relationship

Kovvuri Suvarshitha*

Abstract

The control test is used to establish the existence of vicarious liability in case of unique relationships. The research paper defines vicarious responsibility and the many sorts of relationships in which a person can be held vicariously accountable. When a person is held liable for the torts committed by another, this is known as vicarious liability. This research paper largely deals with vicarious liability in the case of master-servant relation and the paper further discusses the concept of control test which is applied to distinguish between the contract of service and contract for service. The control test also determines whether the master should be held liable in any of the contracts. The paper also discusses about the traditional and modern view on the control test. The traditional form of the control test mostly checks for the extent of the master's control over the performance of a servant's work to determine vicarious liability. But this form of control test faced criticism during the modern times due to its inefficiency in determining liability. This inefficiency was due to the change in societal circumstances and skillful labor. Changes were accommodated to the existing control test to increase the efficiency of the control and these changes will explained through different case laws. The research paper will take on the method of qualitative data analysis through different case laws to study the evolution of control test, applications of control test and efficiency of the control test.

Keywords: Tort, vicarious liability, control test, master-servant relationship, efficiency

INTRODUCTION

A tort is a wrongful conduct, other than breach of contract, by one person towards another person, for which the remedies may be obtained in the form of damages. In tort, the degree of liability is determined by the intent, motive, and negligence of the action. Normally, the person who commits the tort is held responsible, however, in vicarious liability, one person is held liable for the torts committed by others as a result of a relationship between them.

The research paper mainly deals with vicarious liability in the master-servant relation. The maxims *Qui Facit Per Alium Per Se* and Respondeat Superior are majorly govern the principal of vicarious liability in this kind of relation. As the master is financially sound, he is much suited to compensate any loss caused by the servant's tort and hence deep pocket principle also plays a major role in vicarious liability.

There two types of contracts in which a master can employ workers, they are contract for service and contract of service. The liability of master is different in each of these contracts and hence there is a need to differentiate between the two types. The control test is a test which helps distinguish between the two and it also establishes the extent of master's liability.

***Author for Correspondence**
Kovvuri Suvarshitha
E-mail: suvarshithareddy@gmail.com

Student, Symbiosis Law School, Hyderabad, Telangana, India

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The traditional control test mainly focused on determining the extent of the master’s control over the servant to determine the vicarious liability. As the society changed the traditional control test could not facilitate to provide efficient results in determining the vicarious liability. This was because the servants earlier were mostly manual workers who worked under the master’s instructions and as the times changed skilled workers started increasing and the control of the master decreased and hence the control test was rendered useless in many cases.

As the traditional control test failed in many cases, newer forms of control tests came into existence. These tests considered various factors other than extent of master’s control and these tests were far more efficient than the traditional control test.

LITERATURE REVIEW

The research paper traces the evolution of control test and discusses the efficiency of the control tests by referring to various books, articles and cases.

Ratanlal & Dhirajlal’s The Law of Torts [1]: This book is used as the main source for this research paper. The book provides a detailed description of various topics under torts and it complies both Indian and English case laws to provide a better understanding of concept of torts.

P.S.A. Pillai’s Law of Tort [2]: This books extensively provides about general principals of tort, tortuous liability and it has a separate chapter to discuss about torts in different countries.

R.K. Bangia’s Law of Torts [3]: This book offers a rich content on the law of torts starting from its history, nature and meaning to explaining the concepts in great detail, covering all the landmark cases their judgments and facts.

“An Efficiency Analysis of Vicarious Liability under the Law of Agency” [4]: This is a journal article that provides an analysis regarding the efficiency of control test. The article discusses the concept of vicarious liability deeply to provide the required analysis.

“Recasting Vicarious Liability” [5]: This is a journal article that discusses about vicarious liability. It provides an insight about all the concepts in vicarious liability by analyzing many landmark judgements.

RESEARCH QUESTIONS

This research paper will attempt to answer the question, “*How the control test has evolved to accommodate the modern society”, “Why did a need for advancement in the control test arise”* and *“how efficient is the control test”.* In doing so this paper will trace the development of the control test, what are the circumstances in which the test has been applied and the evolution that has taken place through the various cases under the law of torts.

RESEARCH OBJECTIVES

The objective of the research paper is to trace the evolution of control tests and discuss about the application of control tests though various cases. The paper also aims to analyze the alternatives for the control test.

VICARIOUS LIABILITY AND CONTROL TEST

Vicarious Liability

Normally, the person who commits a tort is held liable for the wrongful act, and one does not bear liability for the actions of others, but vicarious liability is an exception in tort law. In vicarious liability, one person is held liable for the torts committed by others [6]. This liability arises as a result of a relationship between them.

Modes of Vicarious Liability

An individual may be held liable for the tortuous actions committed by another.

Liability by Ratification

The meaning of the word ratify is to sanction and approve an act officially. If a servant performs an act without the consent of the principal and the principal later ratifies the act, the principal is held vicariously liable for the servant's actions.

Liability by Abetment

The word abet means to "encourage or assist someone to do something wrong, especially in committing a crime". In cases where there is abetment, both the person who has executed the tort and the person who has abetted the wrongful deed are held equally liable.

Liability by Relation

In this case, the existence of certain special relations governs vicarious liability. These relations can be:

- Master and Servant
- Principal and Agent
- A Company and its Directors
- Master and Independent Contractor
- Partners in a firm
- Guardian and his ward [7]

Vicarious Liability in Master-servant Relationship

In this kind of relationship a master employs a servant and the servant provides services on the command of the master. If the servant executes a tort while working for the master, the master is made accountable for the tort. This is because of two very important maxims which govern the liability in this kind of relationship.

The first maxim is *Qui facit per alium facit per se.* The phrase is literally translated to "He who acts through another does the act himself" [8]. In the case of *H E Nasser Abdulla Hussain v Dy. City [9]*, takes into account the definition of a "manufacturer" from the book *Halsbury's Laws of England* and further concludes that the "manufacturer" should be held liable under the above mentioned maxim.

The second maxim is Respondeat Superior, this means that since the servant is an employee of the master, the master is answerable and held accountable for the deeds of the servant [10]. An automobile transport company was held liable/accountable for the acts of an employed bus driver in the case of *Automobiles Transport v. Dewalal and ors [11]*. Similarly in the case of *Smt. Savita Garg v. The Director, National Heart Institute [12]*, the Supreme Court ruled that the hospital is accountable for the agent's actions. In both the cases the principal of respondeat superior is used to identify the vicarious liability.

One of the reasons for master being held liable is because of the deep pockets principle. Since the master is in a much better position financially than the servant, if there is any loss as a result of the servant's tort, the master is better suited to compensate the victims of the torts [13]. The case of *Huck v. Wyeth, Inc [14]*, in the Iowa Supreme Court was the first one to call the plaintiffs liability as the "deep pocket jurisprudence". It can be said that this case brought light on the deep pocket principle.

Categories in Master-Servant Relation

The two categories in the master-servant relationship are the contract for service and contract of service. The extent of liability of the master depends on the type of contract between the master and servant. The employment of both a servant and an independent contractor is to perform the employer's work, but the legal relationship of the employer with either of them differs.

The "contract of service" is an employment agreement entered into with employees who provide regular services to the master.

A contract for service must be signed whenever a third party is hired as an independent contractor for a specific project or short-term assignment.

The contract of service is executed between a master and a servant while a contract for service is executed between a master and an independent contractor. The liability of the master for the torts performed by a servant is more strenuous than his liability for the torts done by an independent contractor. As a result, it is necessary to determine the difference between the contract of service and the contract for service. A control test is the one that helps to distinguish between the two and also establishes the extent of the master’s liability [15].

EVOLUTION OF CONTROL TEST

Control Test

There are some tests which have been developed over the years to determine if there is an existence of any special relation between the tortfeasor and the master. Control test, Organization test, and sufficient relationship test are three of such tests. The control test is a test which determines the existence of the master-servant relationship, and it also establishes whether the master is vicariously liable or not.

Traditional View on the Test of Control

The origin of the control test can be imputed to the case *Yewen v Noakes.* In this case a definition for the word employee or servant was put forward. Here the employee is interpreted as “person who is subject to the command of his master as to the manner in which he shall do his work [16].” This indicates that an employee’s work and the way of working is completely under the control of the master.

Lord Thankerton identified the four elements of a service contract in the case of *Short v Henderson [17]*. These four elements are as follows:

1. The master’s ability to pick the servant or employee.
2. The master’s ability to decide the payment of remuneration or wages.
3. The master's right to direct how the duties or work are carried out.
4. The master’s right to suspend or dismiss the services.

These were the points which were usually taken into account to identify the master servant relation and to decide the liability of the master.

The factors mention by Lord Thankerton faced a lot of criticism in the modern times. This was because the traditional control test was mostly suitable in the case of unskilled workmen. Also, this test was based on the conditions of the society in the earlier times and gradually with the expansion of skilled workmen in various areas, the control test started to fail. This was due to the non-necessity of the employer’s/ master’s direction in every step of work. Hence, the control test was not competent enough in case of professional and skilled workers [18]. And therefore there was a need for a change in the control test to determine vicarious liability.

As per the case of *“Union of India v. Abdul Rehman” [19]*, Justice Anand disapproved use of traditional control test. He reasoned that the traditional control test is insufficient to determine the ‘control’ of the master in the recent years due to the advancement in the science and technology.

In *Cassidy v. Ministry of Health [20]*, the plaintiff’s hand was rendered useless due to the negligent post-operative treatment. Here, though the hospital authorities had no control over the method of performing of the task by the employees, The hospital authority has been held vicariously liable for the employees' actions. This is a case where we can see that the traditional test of control is not efficient enough to determine the liability of a master.

Modern View on the Test of Control

In "*Stevenson, Jordan Harrison Ltd v. MacDonald & Evans" [21],* Lord Denning L.J. indirectly proposed a modern form for the test of control. It was said in the case "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 taximan and 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 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 [22].

In the above mentioned case it was laid down that an employee under the "contract of service" is considered as an essential part of the business while an independent contractor is considered as an accessory and not an employee.

In the case of "*Montreal v. Montreal Locomotive Works Ltd" [23],* Lord Wright told that one test to find the absence or presence of a relation to determine the master's liability is not efficient in the modern times and he proposed a more complex and complicated fourfold test to determine liability. The four elements of this test were

1. Control.
2. Ownership of tools.
3. Chance of profit.
4. Risk of loss.

Lord Wright said "Control test in itself is not conclusive"

As per the case of "*Silver Jubliee Tailoring House v. Chief Inspector of Shops" [24],* although it has been stated that control is an important and decisive factor in many cases, it is incorrect to state that control is decisive in every case. It was further noted that the extent of supervision and control would be different from business to 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" [25].

Justice Cooke J laid down in the case of "*Market Investigations Ltd v. Minister of Social Security"* [26] that control will always be contemplated undoubtedly but it can no longer be considered as a lone deciding element and factors which are to be considered of importance are

a. Whether the person performing the services provides his own equipment,
b. Whether he hires his own helpers,
c. What degree of financial risk he takes,
d. What degree of responsibility for investment and management he has
e. The opportunity and profit from the performance of the task

From the cases mentioned we can see there is there is a shift from the traditional form of control test to newer forms of control test or we can observe the addition of various new deciding factors to determine the liability of the master.

Other Tests for Vicarious Liability

Various new tests have been designed to overcome the shortcomings of the traditional control tests. Some of these tests are the organizational test, the multiple test, the mutuality of obligation test.

The 'Organizational Test'

This test is also known as the integration test. The integration test was initially applied in the case *"Cassidy v. Ministry of Health" [27]*. Lord Denning used the test to determine whether a doctor working for the NHS is considered an employee of the Health Authority. Lord Denning later referred to this in "*Jordan Harrison Ltd v. MacDonald & Evan" [28]*, where he indirectly proposed a modern form for the test of control. The organizational test tries to overcome the difficulties due to the broadening of the technical and skilled work.

The 'Multiple Test'

It is also referred to as the economic reality test. This test recognizes that there is no one element that can determine the existence of contract of service. Various factors presume major or minor importance in different situations. This test deduces that to determine any employment status not a single test can be used by itself and this test also concludes that all tests have merit and value. To determine whether a person can be referred as an employee it is mandatory to consider all factors in each and every case. According to the case of "*Ready Mixed Concrete Ltd v. Minister of Pensions and National Insurance" [29],* McKenna J said that the test asks three questions

1. Whether the servant has agreed to dispense his labor or skill to work, in consideration of remuneration or wages?
2. Whether the servant agreed, implicitly or explicitly, to be subjected to the other person's control to the extent that the other person became a master?
3. Whether the contract's other conditions are in accord with it being a contract of service?

The four indicators given by Lord Thankerton in the case of *Short v Henderson* [30] are also considered as a part of this test.

The "Mutuality of Obligation Test"

This test is frequently used to decide the position of casual, part-time, or "agency" workers. In the case of "*O'Kelly v Trusthouse Forte plc" [31]*, this test was used to determine that the part-time catering workers were not employees. It was decided so for the reason that the court had 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 [32]". In the case of *Carmichael v National Power Plc [33],* it was established that mutuality of obligation and control are essential elements of an employment contract.

APPLICATION OF CONTROL TEST

Control Test in Case of Hospital Authorities

Following the traditional test of control, a hospital authority was not held vicariously liable for the carelessness/negligence of the employees in the case of *Hillyer v. The Governors of St.Bartholomew's Hospital [34]*. But as the legal position of traditional control test changed because the test was not effective in all cases and when applied to professional and skilled work, the control test becomes inapplicable, in many cases the hospital authorities were held liable for negligence of their workers. One such case is *Gold v. Essex County Council [35]*. In this case, the hospital was held liable for the carelessness/negligence of a hospital radiographer. In the case Lord Greene stated that "the extent of the obligation which one person assumes towards another is to be inferred from the circumstances of the case. This is true whether the relationship be contractual (as in the case of a nursing home conducted for profit) or non-contractual (as in the case of a hospital which gives free treatment)".

Following the modern test for control there are cases in which the state was held liable/accountable for the negligence of the government hospital's staff. The plaintiff suffered cerebral damage due to the negligent behavior of the staff at the Government General Hospital, Guntur in the case of *Pinnamaneni Narasimha Rao v. Gundavarapu Jayaprakasu [36]*. In this case the state was held vicariously liable following the judgment from *Cassidy v. Ministry of Health [37]*. It was mentioned in that the state authority has the responsibility to provide proper treatment and hence it can be held liable for improper performance of its delegates.

Control Test in Case of Servant Lending

When a servant commits a tort while his services are being lent, the issue of liability arises. To determine whether the real master or the hirer are to be held vicariously liable certain principles are examined.

1. It is firmly assumed that the original employer continues to be the master
2. The permanent or general employer has a burden to prove that there is a transfer of service.
3. The permanent employer should be able to prove that there was a complete transfer of control over the servant and that the servant had expressly or impliedly accepted the transfer of service to release the burden.
4. If there is a clause in the contract between the hirer and the general employer stating who the master will be.

In "*Mersey Docks and Harbour Board Ltd v Coggins and Griffith (Liverpool) Ltd" [38],* the plaintiff lent their crane and their driver and a person was injured during the time. The courts ruled that there was no transfer of control, so the plaintiff is the master and must be held liable/accountable for the tort.

In the case of *Rajastan Road Transport Corporation v. Kailashnath Kothari [39]* the court recognized a transfer of control and hence the corporation was held accountable/liable for the tort performed and the owner was exempted from liability.

While lending a servant, the original employer is held liable if there is no transfer of control but during the performance of work the servant had to follow the orders of the hirer and if a tort is caused, in such a case the hirer is held liable as a joint tort-feasor and the original employer is not liable. The same was observed in the case of *Government of India v. Jeevraj Alva [40]*.

Control Test in the Case of Chattel Lending

In the case of lending a vehicle, there is no master and servant relationship, but the owner can be held liable if control is withheld due to the owner's presence. In the case of *"Samson v. Aitchison" [41]*, the defendant is managing a car dealership. The son of defendant's customer was attempting for a trial drive when an accident occurred. The defendant was held responsible for the damage because the defendant had not given up his right to control of the car.

Even if there is no immediate control of the owner and even if the owner is not in the vehicle, if the vehicle is being driven for the purpose of the owner, then in such a situation the owner can be held liable. In the case of "*Ormrod v Crosville Motor Services Ltd" [42],* a friend was driving the owner's car, carrying the belongings of the owner and the friend was driving the car so that the owner and he could go on a trip together. When a tort was caused the owner was held liable as the friend was driving the car for the friend's purpose.

CRITICAL ANALYSIS

From the research conducted, sources and case laws cited the research paper gives an understanding of the control tests. The control test is used to decide whether the master is vicariously liable or not. The control test was first applied in the case of *Yewen v. Noakes.* Later in the case of *Short v Henderson,* Lord Thankerton proposed four factors to determine vicarious liability. This was the initial stage of the control test. The traditional control test mainly focused on whether control, of the master over the servant, existed or not. This kind of test could not be applied with evolving technology and skilled labor. This was because the master could no longer hold control in certain cases as the work had to be left to be done by the decisions and directions of the skilled workers themselves. Because of this a need for a newer test arose. The case of *Stevenson, Jordan Harrison Ltd v. MacDonald & Evans* saw the proposal of a modern form for the test of control. Lord Wright said that only the test of control cannot be used to conclude the liability and he put forward four factors to determine vicarious liability. Similarly other forms of test for control were proposed in various cases. This led to emergence of various other tests for determination of vicarious liability.

CONCLUSION

The research paper provides various cases to trace the evolution of the control test. As the traditional test for control mostly focused on finding the existence of the master's control, the test could not be put to use in many modern cases as there were many more factors governing vicarious liability other than 'control'. The advancement in skilled labor and technology rendered the control test futile in many cases. Hence a need for evolution of control tests arose.

The new form of control tests accommodated more factors other than control and these tests analyze most of the elements to determine liability. These new tests could now be used to give efficient results in determining liability in the modern society.

New kinds of tests like the organizational test, multiple tests, obligation test have come into existence to facilitate the changing society. These tests are efficient in determining the liability, but it cannot be said that these are the most efficient or determinate tests available. All the tests mentioned have their own short comings. This is because the society is always changing, and the law has to change with the society and hence there is a possibility that the tests for vicarious liability will also change.

SUGGESTIONS

The following suggestions can be given regarding the control test.

- Though the traditional control test is a widely accepted test throughout the world, the newer established tests for vicarious liabilities are more efficient in determining the vicarious liability.
- Different cases require different kinds of tests to determine liability and hence the already present tests are not absolute and similar kinds of tests may or may not be used for many cases.

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