DALAM MAHKAMAH TINGGI MALAYA DI TEMERLOH
DALAM NEGERI PAHANG DARUL MAKMUR, MALAYSIA
RAYUAN SIVIL NO. CB-12B-8-07/2022

ANTARA

TAN YEE SEONG
(Berniaga sebagai Tan Yee Seong Enterprise
No. Pendaftaran Perniagaan 200603078588 (JM 0454326-V)
... PERAYU

DAN

MOHD HUSAINI BIN ABU HASSAN ... RESPONDEN

[DALAM MAHKAMAH SESYEN DI TEMERLOH
DALAM NEGERI PAHANG DARUL MAKMUR, MALAYSIA
SAMAN NO. CB-B53KJ-4-03/2021

ANTARA

MOHD HUSAINI BIN ABU HASSAN ... PLAINTIF

DAN

1. JOHN DOE

2. TAN YEE SEONG
(Berniaga sebagai Tan Yee Seong Enterprise
No. Pendaftaran Perniagaan 200603078588 (JM 0454326-V)
... DEFENDAN-DEFENDAN]

ALASAN PENGHAKIMAN

Pendahuluan

[1] Ini adalah rayuan terhadap keputusan Hakim Mahkamah Sesyen pada 16.06.2022 yang telah membenarkan tuntutan Plaintif terhadap Defendan Kedua dengan kos. Rayuan ini melibatkan isu liabiliti dan kuantum.

[2] Pada 12.03.2015 pada jam 6.00 pagi Plaintif dikatakan telah menunggang motorsikal nombor pendaftaran CDG 8848 telah terlibat dengan kemalangan dengan sebuah motorlori yang tidak mempunyai nombor pendaftaran yang dipandu oleh Defendan Pertama yang tidak dapat dikesan sehingga kini. Ini adalah disebabkan Defendan Pertama telah melarikan diri selepas kemalangan tersebut. Defendan Kedua pula terlibat dalam tindakan ini disebabkan beliau dikatakan mempunyai hubungan dengan motorlori yang dipandu oleh Defendan Pertama.

Keputusan Hakim Mahkamah Sesyen Berkaitan Dengan Liabiliti Dan Membuat Dapatan Fakta

[3] Berdasarkan kepada alasan penghakiman Hakim Mahkamah Sesyen adalah didapati bahawa Hakim Mahkamah Sesyen mendapati keterangan SP1, SP2 dan SP3 menjelaskan bahawa hanya terdapat satu versi kemalangan sahaja dikemukakan di Mahkamah iaitu versi Plaintif iaitu seperti keterangan SP3. Ini adalah disebabkan Defendan Pertama iaitu pemandu motorlori tersebut tidak mengemukakan

keterangan di Mahkamah. Hakim Mahkamah Sesyen juga berpendapat bahawa versi kemalangan Plaintif adalah lebih berkebarangkalian setelah ia disokong oleh keterangan-keterangan senyap iaitu gambar di eksibit P5F, P5G, P5H dan P5K. Kesan kerosakan adalah selari dengan versi Plaintif. Hakim Mahkamah Sesyen berpendapat bahawa versi Plaintif yang menyatakan bahawa motorlori tersebut telah keluar dari simpang kanan memasuki laluan Plaintif dan bertembung di tengah-tengah jalan semasa motorlori tersebut ingin membelok semula ke laluannya dan ia berlaku semasa Plaintif cuba mengelak motorlori tersebut ke kanan sebelum berlaku pertembungan. Hakim Mahkamah Sesyen menerima versi tersebut.

[4] Malahan Hakim Mahkamah Sesyen mendapati bahawa kecederaan yang dialami oleh Plaintif iaitu pada bahagian tangan kiri yang lumpuh dan kaki kiri dipotong juga menunjukkan pertembungan telah berlaku di sebelah kiri Plaintif semasa kemalangan tersebut yang menyokong keterangan SP3 tersebut yang cuba mengelak ke bahagian kanan di laluan motorlori semasa kemalangan berlaku.

[5] Hakim Mahkamah Sesyen juga menerima keterangan SP3 yang menyatakan bahawa semasa kemalangan tersebut, motorlori tersebut tidak mempunyai lampu yang menyebabkan SP3 tidak dapat melihat motolori tersebut keluar simpang secara tiba-tiba sebelum SP3 terpaksa mengelak ke sebelah kanan dan bertembung dengan motorlori pada bahagian kiri.

[6] Hakim Mahkamah Sesyen juga dalam alasan penghakimannya menyatakan berkenaan keterangan SP3 bahawa beliau telah cuba mengelak ke kanan dan berpendapat ia boleh diterima seperti berikut:

> *"Mahkamah telah meneliti keterangan SP3 dan mendapati penjelasan SP3 bahawa kemalangan berlaku di tengah-tengah jalan apabila beliau cuba mengelak ke kanan secara "agony of the moment" iaitu di laluan sah lori sebelum terjatuh di tempat bertanda D yang mendatangkan kesan geseran dan seterusnya berhenti di atas rumput di tempat bertanda E iaitu kesan serpihan plastik. Mahkamah menerima penjelasan tersebut dan mendapati ianya adalah lebih berkemungkinan untuk berlaku berbanding versi kemalangan mengikut pandangan SP1 dan Defendan yang mengatakan ianya adalah sebuah perlanggaran secara hadapan."*

[7] Sementara itu berkenaan dengan isu liabiliti Defendan Kedua adalah didapati bahawa Hakim Mahkamah Sesyen telah berpendapat bahawa hubungan di antara Defendan Pertama dengan Defendan Kedua adalah lebih serupa kepada hubungan sebagai pekerja dan majikan. Oleh itu Mahkamah berpendapat perkhidmatan lori oleh Defendan Pertama tersebut merupakan bahagian penting kepada perniagaan Defendan Kedua dengan pihak FELDA Global Venture (FGV) disebabkan perkhidmatan pemandu lori itu adalah satu-satunya cara untuk Defendan Kedua menjalankan tugasan dan tanggungjawab kontraktualnya.

[8] Di perenggan [33] alasan penghakiman tersebut Hakim Mahkamah Sesyen telah membuat dapatan bahawa Mahkamah memutuskan hubungan Defendan Pertama dan Defendan Kedua adalah lebih serupa sebagai hubungan antara pekerja dan majikan. Oleh itu Defendan Kedua adalah bertanggungan sepenuhnya secara tanggungjawab vikarius.

Analisis

[9] Adalah menjadi prinsip undang-undang yang jelas bahawa Mahkamah Rayuan tidak sewajarnya campur tangan dalam dapatan yang dibuat oleh Hakim Mahkamah Sesyen. Ini adalah disebabkan Hakim Mahkamah Sesyen mempunyai keistimewaan untuk melihat saksi-saksi yang tidak dinikmati oleh Mahkamah yang mendengar rayuan. Walau bagaimanapun sekiranya dapatan yang dibuat bercanggah dengan undang-undang maka Mahkamah Rayuan boleh campur tangan dalam dapatan tersebut. Mahkamah-Mahkamah atasan telah memberikan garis panduan yang jelas berkenaan dengan prinsip ini yang tidak perlu diulang di sini. Ia adalah sesuatu yang telah termaklum di dalam sistem perundangan di negara ini.

[10] Begitu juga Mahkamah yang mendengar rayuan perlu mengambil perhatian kepada pandangan Mahkamah Rayuan berkenaan Mahkamah yang mendengar rayuan tidak sepatutnya memutuskan atau mempertimbangkan perkara-perkara yang tidak dibangkitkan di dalam perbicaraan. Ini dinyatakan dalam kes **Ang Lit Yiang & Ors v Teoh Hing Yeu & Anor [1996] 3 MLJ 277.**

[11] Mahkamah berpendapat dapatan Hakim Mahkamah Sesyen berkenaan dengan kemalangan tersebut adalah berdasarkan kepada keterangan yang dikemukakan oleh pihak Plaintif di dalam ketiadaan keterangan Defendan Pertama yang merupakan pemandu motorlori tersebut. Mahkamah juga mendapati Hakim Mahkamah Sesyen telah mempertimbangkan keterangan-keterangan yang dikemukakan oleh saksi-saksi dan juga keterangan senyap yang lain sehingga membolehkan beliau dapatan yang sedemikian. Adalah jelas dan nyata berdasarkan kepada catatan di dalam nota keterangan Mahkamah ini tidak mempunyai alasan untuk campur tangan di dalam dapatan Hakim Mahkamah Sesyen berkenaan dengan liabiliti dan kuantum terhadap Defendan Pertama yang tidak menjadi isu dalam rayuan ini.

Apakah Defendan Kedua Bertanggungjawab Secara Vikarius Kepada Kecuaian Defendan Pertama?

[12] Apa yang menarik dalam kes ini ialah sama ada Defendan Kedua bertanggungjawab secara vikarius terhadap kecuaian yang dilakukan oleh Defendan Pertama.

[13] Dalam hal ini Hakim Mahkamah Sesyen telah mengaitkan Defendan Kedua dengan Defendan Pertama melalui perhubungan majikan dan pekerja. Hakim Mahkamah Sesyen telah bersetuju dengan hujahan peguam Plaintif dan telah menerima pakai keputusan kes **Dr Kok Choong Seng & Anor v. Soo Cheng Lin & Another Appeal [2017] 10 CLJ 529**. Ini terdapat di perenggan [30] dan [31] alasan penghakiman Hakim Mahkamah Sesyen.

[14] Pada rayuan ini peguam Perayu menyatakan bahawa dapatan Hakim Mahkamah Sesyen berkenaan kebertanggungjawaban Defendan Kedua terhadap kecuaian oleh Defendan Pertama adalah tidak tepat. Ini adalah disebabkan Defendan Kedua bukannya majikan kepada Defendan Pertama. Selain daripada itu tiada juga keterangan yang dikemukakan dan sebarang dokumen berkenaan dengan hubungan majikan dan pekerja antara Defendan Pertama dan Defendan Kedua.

[15] Hakim Mahkamah Sesyen dalam isu ini bersandarkan kepada keputusan Mahkamah Persekutuan dalam kes **Dr Kok Choong Seng & Anor v. Soo Cheng Lin & Another Appeal** (supra). Dalam kes tersebut ia melibatkan tuntutan di bawah kecuaian perubatan yang dikemukakan terhadap sebuah hospital swasta. Pemilik dan pengendali hospital swasta tersebut adalah Dr Kok yang merupakan pakar runding pembedahan ortopedik. Isu yang perlu diputuskan oleh Mahkamah Persekutuan adalah seperti berikut:

> ***"[3]*** *Leave to appeal was granted by this court on 8 August 2016. In Civil Appeal No. 02(f)-59-08-2016(B) (the appeal on liability), there were four questions of law posed:*
>
> *(i) Whether the doctrine of non-delegable duty of care expounded in Woodland v. Swimming Teachers Association And Others [2014] AC 537 applies in Malaysia?*
>
> *(ii) If the doctrine of non-delegable duty of care as expounded in Woodland v. Swimming Teachers Association And Others (supra) is applicable in Malaysia, whether the doctrine can or should apply to private hospitals such that those hospitals would be held liable for*

the tortious conduct or clinical negligence of medical doctors vis-á-vis their patients while practising there as independent contractors?

(iii) Whether the criteria for imposing vicarious liability set out by Lord Phillips in the decision of the Supreme Court of UK in Various Claimants v. Catholic Child Welfare Society [2013] 2 AC 1 and as further explained and elaborated by the Supreme Court of UK in Cox v. Ministry of Justice [2016] AC 660 and Mohamud v. WM Morrison Supermarkets Plc [2016] AC 677 applies in Malaysia?

(iv) Whether private hospitals in Malaysia such as the appellant hospital can or should be held vicariously liable for the tortious conduct or clinical negligence of medical doctors vis-á-vis their patients while practising at such private hospitals as independent contractors?"

[16] Berkenaan dengan isu tanggungjawab vikarius Mahkamah Persekutuan menyatakan seperti berikut:

***"[97]** The test for vicarious liability in Various Claimants requires the court to determine the nature of the relationship between the hospital and the medical practitioner, and the connection between that relationship and the wrongful act by the practitioner. The determination is a question of fact, based on a consideration of multiple factors and calls for an evaluative judgment. The terms regulating the general relationship between a hospital and a practitioner, and the particular terms applicable in the circumstances of the alleged negligence, may vary from case to case. As such, the vicarious liability of the private hospitals for the torts of medical practitioners cannot be determined with a broad brush in a factual vacuum.*

***[99]** In respect of the element of control, it is clear from the doctor's practising agreement that Dr Kok's services were* *generally not subject to the hospital's control or interference. The same can be said in relation to the operation in question. Dr Kok was not directed or required by the hospital to conduct the operation, but advised and arranged it in the course of his own practice at his private clinic. Dr Kok's arrangement with the hospital was merely to provide for the plaintiff's admission and the necessary facilities for the operation. The absence of even a "vestigial degree of control" by the hospital over Dr Kok's operation negates vicarious liability on its part for Dr Kok's negligence in that operation.*

[100] *In considering whether the operation was conducted by Dr Kok on behalf of the hospital as part of its business activity, we note that Dr Kok as a medical practitioner is generally considered as part of the hospital's organisation as a healthcare facility under the Regulations. Nevertheless, we are of the view that the specific operation in question was not undertaken on behalf of the hospital, but attributable to Dr Kok's own "recognisably independent business". The diagnosis of the plaintiff's condition, the advice to undergo the operation and the referral of the plaintiff to the hospital were not carried out in the course of on-call rotations or clinical sessions required by the hospital. Instead, they were done by Dr Kok in the course of his own practice in his private clinic. The fact that Dr Kok charges consultancy and operation fees for his patients, and receives no salary from the hospital, lends further weight to the inference that the operation was part of Dr Kok's independent business.*

[101] *For these reasons, we consider Dr Kok to be an independent contractor of the hospital in conducting the operation. Bearing in mind that the expanded test in Various Claimants does not extend vicarious liability to "truly independent contractors", we do not find that the relationship between the hospital and Dr Kok is sufficiently akin to employment so as to give rise to vicarious liability for Dr Kok's negligence in conducting the operation. Since there is no such relationship, the stage 2 determination of the connection between the relationship and the tortious act does not arise.*

> ***[102]*** *We, therefore, find that the hospital is not liable for Dr Kok's negligence, whether on the basis of non-delegable duty or vicarious liability. The liability for the plaintiff's injuries rests solely with Dr Kok."*

[17] Hakim Mahkamah Sesyen membuat keputusan beliau bersandarkan kepada perenggan [84] kes tersebut yang menyatakan seperti berikut:

> ***"[84]*** *The decision in Various Claimants follows a line of English authorities in expanding the two traditional requirements (see, for instance, Short v. J W Henderson Ltd (1946) SC (HL) 24, Lee Ting Sang v. Chung Chi-Keung & Anor [1990] 2 AC 374, Lister v. Hesley Hall [2002] 1 AC 215, Dubai Aluminium Co Ltd v. Salaam [2003] 2 AC 366, E v. English Province of Our Lady of Charity [2012] EWCA Civ 938). To summarise, at stage 1, relationships akin to employment are now included in the scope of vicarious liability in addition to employer-employee relationships. Multiple factors are to be taken into consideration at this stage, and the element of control is no longer regarded as determinative. At stage 2, the wrongful act needs not be authorised by the employer, but sufficiently closely connected with the relationship of employment. The closeness of connection would be satisfied where the employer uses the employee to carry on its business in furtherance of its interests, thereby increasing the risk of the tort being committed by the employee."*

[18] Penelitian kepada alasan penghakiman tersebut menunjukkan bahawa Hakim Mahkamah Sesyen telah meneliti perhubungan di antara Defendan Pertama dan Defendan Kedua bagi memutuskan sama ada mereka adalah pekerja dan majikan sehingga membolehkan Defendan Kedua dipertanggungjawabkan secara vikarius terhadap

kemalangan tersebut. Penelitian kepada fakta kes tersebut telah mendorong Hakim Mahkamah Sesyen memutuskan bahawa Defendan Pertama bukannya menjalankan perkhidmatan lain melainkan menjalankan tugasan tanggungjawabnya sebagai pemandu lori kepada Defendan Kedua. Defendan Pertama juga dikatakan bukannya sebagai kontraktor bebas yang menjalankan kegiatan sendiri tanpa ada kaitan dengan Defendan Kedua. Hakim Mahkamah Sesyen juga menyatakan bahawa Defendan Pertama adalah pekerja atau agen kepada Defendan Kedua yang menjadi sebahagian penting daripada perniagaan Defendan Kedua.

[19] Perhubungan di antara majikan dan pekerja adalah berdasarkan kepada kontrak atau perjanjian pekerja di antara majikan dan pekerja. Ia adalah satu yang mudah sekiranya terdapat perjanjian bertulis di antara mereka. Apa yang sering menjadi pertikaian adalah apabila tiadanya perjanjian bertulis. Oleh itu Mahkamah telah menggariskan beberapa tatacara ujian bagi menentukan sama ada satu kontrak itu adalah kontrak pekerjaan atau sebaliknya. Ujian-ujian tersebut berkembang daripada ujian yang mudah dan dikenali sebagai ujian kawalan seperti yang dinyatakan dalam kes **Yewens v. Noakes [1880] 6 QBD 530** seperti berikut:

> *"A servant is a person subject to the command of his master as to the manner in which he shall do his work. I think the statute means that the "other person" employed to take care shall be a person who has entered into a contract for that purpose, or who has entered into a contract of service for that purpose. I think, therefore, that this case might be decided on the general considerations to which I have endeavoured to*

> *give expression. But as to this particular case, with very great deference to those who think otherwise, it does seem to me impossible to hold that this particular case can be within the intention, or within the spirit, or even the words of the Act of Parliament. Here are a man and his wife and children, having a servant, residing within this building, which, as far as they are concerned, is as much an occupied dwelling-house to the extent to which they occupy it, as a part of a house can be; and it is impossible to say that this person is not residing, or having the benefit of a residence, with his family, in the house. I think, therefore, that whether we look at those general principles to which I have adverted, or to the circumstances of this particular case, it is not within the statute. I did intend to make one further remark, and that is, that I really do not see where the doctrine contended for is to stop. If, because a man may reside in a house, his wife, his children, and his servant may reside there without rendering the house liable to duty, why may not he have his father and his mother? Why may he not have the children of his wife by a former husband; and why may he not have his wife's father and mother? and why not any number of relations and friends that his sense of benevolence may induce him to make a part of his family? I really cannot see the limit."*

[20] Ujian kawalan ini telah dijelaskan dalam kes **Ready Mixed Concrete (South East) Ltd. v. Minister Of Pensions And National Insurance [1968] 2 Q.B. 497** seperti berikut:

> *"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. I need say little about (i) and (ii).*

As to (i). There must be a wage or other remuneration. Otherwise there will be no consideration, and without consideration no contract of any kind. The servant must be obliged to provide his own work and skill. Freedom to do a job either by one's own hands or by another's is inconsistent with a contract of service, though a limited or occasional power of delegation may not be: see Atiyah's Vicarious Liability in the Law of Torts (1967) pp. 59 to 61 and the cases cited by him.

As to (ii). Control includes the power of deciding the thing to be done, the way in which it shall be done, the means to be employed in doing it, the time when and the place where it shall be done. All these aspects of control must be considered in deciding whether the right exists in a sufficient degree to make one party the master and the other his servant. The right need not be unrestricted.

"What matters is lawful authority to command so far as there is scope for it. And there must always be some room for it, if only in incidental or collateral matters." - Zuijs v. Wirth Brothers Proprietary, Ltd. (1955) 93 C.L.R. 561, 571.

To find where the right resides one must look first to the express terms of the contract, and if they deal fully with the matter one may look no further. If the contract does not expressly provide which party shall have the right, the question must be answered in the ordinary way by implication."

[21] Ia terus berkembang kepada ujian realiti ekonomi seperti dalam kes **Market Investigations Ltd v Minister of Social Security [1968] 3 All ER 732**. Seterusnya ujian kesalinan tanggungjawab seperti dalam kes **Wickens v Champion Employment [1984] ICR 365.** Begitu juga kepada ujian integrasi perniagaan yang dinyatakan dalam kes **Stevenson (or Stephenson) Jordan & Harrison Ltd v MacDonald & Evans [1952] 1 TLR 101** dan ujian kepelbagaian faktor.

[22] Ujian-ujian ini penting bagi menentukan hubungan Defendan Pertama dan Defendan Pertama sebelum dapat dinyatakan sama ada terdapat tanggungjawab vikarius kepada pihak Defendan Kedua. Penelitian kepada keterangan Defendan Kedua berkenaan hubungan beliau dengan Defendan Pertama di mana beliau menyatakan telah dilantik sub kontraktor bebas oleh beliau untuk menjalankan kerja-kerja dengan FGV dalam tugasan mengangkut buah kelapa sawit dari ladang BTS dan PG Relai untuk FGV.

[23] Defendan Kedua juga menyatakan beliau bukannya pemilik lori berkenaan. Beliau juga menyatakan lori tersebut tidak boleh masuk ke dalam ladang sebelum tempoh bekerja. Namun ketika disoal balas oleh peguam Plaintif beliau tidak dapat mengemukakan bukti bahawa lori tersebut tidak boleh masuk sebelum pukul 8.00 pagi. Defendan Kedua mengesahkan beliau bertanggungjawab menyelia pekerja-pekerja. Defendan Kedua bersetuju dengan cadangan bahawa Defendan Pertama mengangkat buah kelapa sawit daripada FGV adalah atas kontrak di antara Defendan Kedua dengan FGV. Namun beliau tidak mengetahui dalam kes ini sama ada Defendan Pertama mengangkat buah daripada ladang FGV atau sebaliknya semasa kejadian itu. Defendan Kedua juga mengakui bahawa selepas kemalangan tersebut pihak FELDA telah menelefon beliau dan memaklumkan bahawa kemalangan tersebut melibatkan pekerja Defendan Kedua.

[24] Defendan Kedua mengesahkan bahawa perhubungan beliau dengan Defendan Pertama adalah secara lisan sahaja dan lori yang

terlibat adalah sebuah lori hantu yang tidak mempunyai nombor pendaftaran.

[25] Defendan Kedua juga menyatakan bahawa beliau tidak mempunyai rekod pembayaran kepada pemandu lori tersebut iaitu Defendan Pertama. Defendan Kedua juga menyatakan beliau tidak pernah menyemak permit kerja Defendan Pertama dan tidak menolak cadangan bahawa FGV telah memberikan tanggungjawab keselamatan kepada Defendan Kedua dalam menjalankan kerja di ladang-ladang berkaitan.

[26] Semasa pemeriksaan semula oleh peguam Defendan, Defendan Kedua menyatakan bahawa pemandu lori adalah orang bebas dan dia akan dapat hasilnya daripada kutipan FELDA dan dia adalah “freelance”. Defendan Kedua juga menyatakan keluar masuk kenderaan tersebut adalah dalam kawalan FGV.

[27] Penelitian kepada keterangan Defendan Kedua tersebut menunjukkan bahawa tiada keterangan yang jelas berkenaan dengan perhubungan di antara Defendan Pertama dan Defendan Kedua. Adalah tidak dapat dinafikan Defendan Pertama telah menjalankan tugas mengangkut buah kelapa sawit di ladang FGV yang mempunyai kontrak dengan Defendan Kedua. Keluar dan masuk ke ladang tersebut diuruskan oleh FGV. Apa yang lebih penting lagi adalah tiada sebarang bayaran yang ditunjukkan telah dilakukan oleh Defendan Kedua kepada Defendan Pertama di atas kerja-kerja mengangkut buah kelapa sawit daripada FGV yang melibatkan Defendan Pertama.

[28] Apa yang lebih menarik ialah tiada keterangan yang menunjukkan siapakah pemilik lori tersebut. Apa yang jelas ialah lori tersebut bukannya dimiliki oleh Defendan Kedua. Pada masa yang sama waktu kemalangan juga berlaku dalam tempoh yang bukan pada lazimnya waktu untuk Defendan Pertama mengangkut buah kelapa sawit daripada ladang ke FGV yang melibatkan kontrak di antara Defendan Kedua dengan FGV. Oleh itu apakah perhubungan di antara pihak Defendan Pertama dan Defendan Kedua? Adakah Defendan Pertama pada setiap masa dalam tempoh pekerjaan beliau hanya boleh mengangkut buah kelapa sawit dengan berdasarkan kepada kontrak di antara Defendan Kedua dan FGV? Adakah Defendan Pertama boleh menjalankan tugasan yang lain mengangkut buah kelapa sawit daripada ladang FGV yang tiada kaitan kontrak di antara FGV dan Defendan Kedua? Adakah semasa kejadian berlaku Defendan Pertama sedang mengangkut buah kelapa sawit orang lain atau kelapa sawit yang melibatkan kontrak Defendan Kedua dan FGV? Mahkamah juga mendapat tiada keterangan yang dikemukakan di Mahkamah yang menunjukkan bahawa Defendan Pertama hanya melakukan tugas ekoran daripada arahan yang melibatkan mengangkut buah kepala sawit di dalam kontrak Defendan Kedua dan FGV.

[29] Apakah Defendan Kedua boleh dipertanggungjawabkan dengan tindakan kecuaian Defendan Pertama sehingga menyebabkan kemalangan sedangkan tiada sebarang keterangan yang dapat mengesahkan bahawa Defendan Kedua adalah merupakan pekerja kepada Defendan Kedua. Apakah disebabkan Defendan Kedua pernah berurusan dan Defendan Pertama dalam konteks sebagai pemandu lori

untuk membawa buah kelapa sawit maka apa sahaja tindakan yang dilakukan oleh Defendan Pertama akan dipertanggunjawabkan secara vikarius kepada Defendan Kedua.

[30] Oleh yang demikian di dalam ujian menentukan sama ada seseorang itu pekerja kepada majikan, fakta dan keterangan dalam kes itu perlu dipertimbangkan dan diperhalusi oleh Mahkamah sebelum memutuskan sama ada ia adalah hubungan majikan dan pekerja. Walaupun kepelbagaian ujian digunakan dalam penentuan hubungan tersebut, fakta dan keterangan memainkan peranan penting dalam penentuan perkara tersebut. Ia tidak boleh dilakukan dengan hanya mengambil satu prinsip undang-undang dan menggunakan secara umum tanpa meneliti keterangan dan fakta dalam sesuatu kes.

[31] Dalam hal ini Mahkamah juga merujuk kepada keputusan Mahkamah Persekutuan dalam kes **GMP Kaisar Security (M) Sdn Bhd v Mohamad Amirul Amin bin Mohamed Amir [2022] 6 MLJ 369** yang telah menjelaskan berkenaan dengan kebertanggungjawaban vikarius majikan terhadap kecuaian pekerjanya. Dalam kes tersebut salah satu isu yang perlu diputuskan oleh Mahkamah dan diberikan kebenaran untuk mengemukakan persoalan tersebut ialah seperti berikut:

> *"**[2]** The appeal was filed pursuant to the granting of leave on the following questions:*
>
> *(i) …*
>
> *(ii) Sama ada di dalam suatu tuntutan di bawah prinsip tanggungan liabiliti secara vikarius, adakah perlu untuk*

Mahkamah perbicaraan (selepas memutuskan bahawa perbuatan pekerja yang dinamakan adalah suatu perbuatan salah) memutuskan gantirugi yang perlu ditanggung oleh pekerja tersebut sebelum memutuskan sama ada majikan boleh dipertanggungjawabkan di bawah prinsip tanggungan liabiliti secara vikarius;

(iii) Sama ada di dalam suatu tuntutan di bawah prinsip tanggungan liability secara vikarius, adakah majikan boleh dipertanggung jawabkan ke atas perbuatan salah pekerjanya semasa bertugas yang jelas bertentangan dengan skop pekerjaannya serta merupakan tindakan pekerja itu sendiri (on his own frolic); and

(iv) Di dalam suatu tuntutan di bawah prinsip tanggungan liabiliti secara vikarius, apakah tafsiran jelas 'di luar skop pekerjaannya' dan 'di atas tindakan pekerja itu sendiri (on his own frolic)'."

[32] Mahkamah Persekutuan menyatakan seperti berikut dalam meneliti undang-undang berkaitan dengan tanggungjawab majikan terhadap kesalahan tort yang dilakukan oleh pekerjanya:

*"**[31]** In our considered opinion, and after considering the prevailing law we have set out in the foregoing discussion, the scope of vicarious liability in a case where the employee committed an intentional wrong is underpinned by the following common denominators:*

(a) the intentional wrong must be committed by the employee in the course of employment;

(b) there must be connection between the wrongful act and the nature of the employment;

(c) the nature of the employment is such that the public at large are exposed to risk of physical or proprietary harm; and

(d) the risk is created by the employer, owing to the features of the business.

[32] *Applying these factors to the instant case, we do not see how the High Court and the majority in the Court of Appeal had erred in applying the close connection test. In our view, there cannot be any blemish on the decisions of the courts below for the following reasons.*

[33] *At the forefront, the standout factor is the feature of GMP's business. It is a private agency that offers the service of armed bodyguards, among others. GMP is the registered owner of the firearms with the carry and use licence issued by the Home Minister. As such, they are obliged to follow all rules and regulations made under s 18 of the Private Agencies Act 1971. It is therefore GMP which equips or provides firearms to its employees who are designated to the position of personal bodyguards. In the instant case, GMP equipped Jaafar with the Glock automatic.*

[34] *More significantly, it was GMP who was responsible for selecting and employing Jaafar to function as a personal bodyguard thus enabling him to carry the said firearm. They cannot now be heard to say they are not responsible if he had acted unlawfully in the course of his duty. It was common ground that on that fateful evening, Jaafar was performing his assignment as a bodyguard albeit in an illegal way.*

[35] *By providing Jaafar with a firearm to perform his duty as personal bodyguard, GMP has created a risk which exposed the public to potential harm. The risk manifested into reality when Jaafar decided to embark on a rampage for reasons only known to him. As reiterated earlier, GMP had created an opportunity for Jaafar to utilise the Glock automatic, albeit for wrongful intent. There is therefore little doubt that the wrongful* *act committed by Jaafar is closely connected with the line of work assigned to him by GMP, and for which GMP equipped him with the lethal weapon. As stated earlier, Jaafar was on duty that fateful day pursuant to his employment as a personal bodyguard.*

[36] *Now, Jaafar's actions may have been unauthorised by his employer but the pertinent question to ask is whether Jaafar's actions in unlawfully discharging his firearm and causing injury to Amirul was so closely connected with his employment that it would be fair and just to hold the employer vicariously liable. On the facts of this case and for the reasons we have already stated, the answer must be yes. To put it in another way, Jaafar's wrongful act was not independent from the task he was employed to do. In this connection, it is apposite to recall the words of Lord Millet in the House of Lords case of Lister and others v Hesley Hall Ltd:*

> *So, it is no answer to say that the employee was guilty of intentional wrongdoing, or that his act was not merely tortious but criminal, or that he was acting exclusively for his own benefit, or that he was acting contrary to express instructions, or that his conduct was the very negation of his employer's duty.*
>
> *…*
>
> *The law is mature enough to hold an employer vicariously liable for deliberate, criminal wrongdoing on the part of an employee without indulging in sophistry of this kind.*

[37] *There was also a common thread in the plethora of cases cited to us (see for example Roshairee bin Abdul Wahab v Mejar Mustafa bin Omar & Ors [1996] 3 MLJ 337; Bohjaraj a/l Kasinathan v Nagarajan a/l Verappan & Anor [2001] 6 MLJ 497; [2001] 3 AMR 3260; Bernard v The Attorney General of Jamaica [2005] 2 LRC 561 and Lister and others v Hesley Hall Ltd) in that, the nature of the work carried out by the employees exposed third parties (the innocent members of the community) to the risk or danger to their lives or safety, and, the same nature of the work allowed the* *malevolent employees the opportunity to commit the intentional wrong on the third parties.*

[38] *In the circumstances, we find that the courts below were right in their assessment that GMP was vicariously liable for Jaafar's wrongful act. Accordingly, the appellant's argument on this issue must fail and the appeal be dismissed. For completeness, I only need to add that my learned sisters concur with the above reasons and conclusion."*

[33] Dalam kes ini penelitian kepada nota keterangan tidak menzahirkan fakta bahawa Defendan Kedua mengawal atau menyelia tindakan Defendan Pertama dalam kerja-kerja mengeluarkan kelapa sawit itu dari ladang FGV. Adalah tidak dinafikan Defendan Pertama adalah dikatakan mengangkut buah kelapa sawit dari ladang FGV yang mempunyai kontrak dengan Defendan Kedua namun tiada keterangan yang jelas bagaimana Defendan Kedua mengatur atau mempunyai kata putus atau kawalan berkenaan proses pengangkutan buah kelapa sawit tersebut. Ini ditambah pula ketiadaan keterangan yang menunjukkan bagaimana bayaran gaji dibuat kepada Defendan Pertama. Adakah ia dibuat berdasarkan 'trip' mengangkut buah kelapa sawit atau dibayar secara muatan atau bulanan terus menjadi persoalan yang tidak berjawab dalam kes ini bagi mewujudkan hubungan majikan dan pekerja Defendan Pertama dan Defendan Kedua.

[34] Mahkamah juga mendapati bahawa tiada keterangan yang menunjukkan Defendan Pertama tidak boleh mengangkut buah kelapa sawit pihak lain semasa menjalankan kegiatan mengangkut buah kelapa sawit daripada Defendan Kedua.

[35] Dalam hal ini mahkamah berpendapat Hakim Mahkamah Sesyen perlu berhati-hati dalam memutuskan sama ada Defendan Pertama adalah pekerja kepada Defendan Kedua dengna tidak hanya melihat kepada hubungan tersebut akin (seolah-olah seperti) majikan dan pekerja dengan hanya berlandaskan kepada satu kes **Dr Kok Choong Seng & Anor v. Soo Cheng Lin & Another Appeal** (supra) sahaja. Sebaliknya mahkamah perlu melihat jenis pekerjaan dan bidang kerja yang melibatkan Defendan Pertama dan Defendan Kedua. Dalam kes **Dr Kok Choong Seng & Anor v. Soo Cheng Lin & Another Appeal** (supra) ia adalah melibatkan tugasan professional perubatan yang boleh ditentukan dengan jelas hubungan majikan dan pekerja dengan munasabah. Sebaliknya dalam kes ini kerja Defendan Pertama sebagai pemandu lori yang dibuktikan sebagai tidak mematuhi undang-undang jalan raya serta kerencaman dan kebebasan Defendan Pertama untuk menggunakan motorlori tersebut semasa tidak berurusan dengan Defendan Kedua perlu diberikan perhatian oleh mahkamah.

[36] Fakta bahawa Defendan Pertama telah mengangkut kelapa sawit untuk Defendan Kedua tidak semestinya menyebabkan telah wujud hubungan majikan dan pekerja di antara mereka. Ia juga tidak menyebabkan Defendan Kedua boleh mempunyai tanggungjawab vikarius.

[37] Mahkamah berpendapat dapatan Hakim Mahkamah Sesyen berkenaan dengan liabiliti Defendan Kedua perlu campur tangan Mahkamah ini. Ia adalah disebabkan Hakim Mahkamah Sesyen tidak meneliti keadaan perhubungan di antara Defendan Pertama dan

Defendan Kedua, sebaliknya hanya berdasarkan kepada prinsip yang dikatakan di dalam kes **Dr. Ko Choong Seng** (supra) yang pada pandangan Mahkamah ini adalah tidak sama dengan kes ini. Ia adalah disebabkan jenis pekerjaan dan hubungan di antara Defendan Pertama dan Defendan Kedua adalah berbeza dengan hubungan majikan dan pekerja dalam kes **Dr. Ko Choong Seng** (supra) tersebut.

[38] Mahkamah ini juga mengambil kira kepentingan keadilan dalam kes ini. Ia adalah disebabkan Defendan Pertama telah tidak dapat ditemui. Oleh itu sekiranya mahkamah berpendapat bahawa Defendan Pertama bukannya pekerja kepada Defendan Kedua yang membawa natijah bahawa Defendan Kedua tidak bertanggungjawab secara vikarius kepada kecuaian Defendan Pertama ia akan menimbulkan kesulitan kepada Plaintif. Ia sejajar dengan pandangan Mahkamah Persekutuan dalam kes **Amgeneral Insurance Bhd v. Sa' Amran Atan & Ors And Other Appeals [2022] 8 CLJ 175** ketika menjelaskan pendekatan yang perlu dilakukan dalam kes-kes melibatkan insuran berkaitan pihak ketiga di mana dinyatakan seperti berikut:

> ***"[263]*** *Before we conclude, perhaps it needs to be said that insurers may complain about the circumstances that make them liable to pay; third party accident victims may complain about being uncompensated. There are two competing interests. Having regard to the object and purpose of the RTA, which is to protect innocent third parties against risks arising out of the use of motor vehicles, we are inclined to the view that the conflicting interests must be resolved in favour of the innocent third party accident victims. The following observations by Justice Sarkar of the Supreme Court of India delivering his judgment in British India General Insurance v. Captain Itbar Singh And Others 1960 (1) SLR 168 on 11 May*

1959, albeit in the context of a claim against the insured himself who caused the injuries, are worth pondering over:

It was said that the assured might be a man of straw and the insurer might not be able to recover anything from him. But the answer to that is that it is the insurer's bad luck. In such circumstances the injured person also would not have been able to recover the damages suffered by him from the assured, the person causing the injuries. The loss had to fall on someone and the statute has thought fit that it shall be borne by the insurer. That also seems to us to be equitable for the loss falls on the insurer in the course of his carrying on his business, a business out of which he makes profit, and he could so arrange his business that in the net result he would never suffer a loss. On the other hand, if the loss fell on the injured person, it would be due to no fault of his; it would have been a loss suffered by him arising out of an accident in the happening of which he had no hand at all."

[39] Namun demikian dalam kes ini mahkamah berpendapat prinsip undang-undang berkenaan hubungan majikan dan pekerja di antara Defendan Pertama dan Defendan Kedua tidak boleh diketepikan melainkan keterangan yang dikemukakan di hadapan Hakim Mahkamah Sesyen dapat menunjukkan perhubungan majikan dan pekerja seperti yang dikehendaki oleh undang-undang yang ia pada hemat mahkamah ini tidak dapat ditunjukkan semasa perbicaraan di hadapan Hakim Mahkamah Sesyen. Ini menyebabkan mahkamah ini tidak bersetuju dengan Hakim Mahkamah Sesyen bahawa terdapatnya hubungan majikan dan pekerja di antara Defendan Pertama dan Defendan Kedua. Ini bermakna tiadanya tanggungjawab vikarius Defendan Kedua terhadap kecuaian yang dilakukan oleh Defendan Pertama terhadap Plaintif.

[40] Dalam kes ini terdapat isu berkenaan beberapa eksibit tidak ditandakan sebagai P semasa perbicaraan. Ianya terutama kepada laporan perubatan. Penelitian kepada Rekod Rayuan menunjukkan bahawa laporan perubatan tersebut dan anggaran perbelanjaan rawatan telah dimasukkan dalam bahagian dokumen yang dibantah oleh Perayu. Persoalannya adakah dokumen-dokumen tersebut boleh diterima sebagai keterangan yang menjadi asas kepada dapatan Hakim Mahkamah Sesyen berkenaan kuantum.

[41] Penelitian kepada nota keterangan menunjukkan bahawa kegagalan menandakan dokumen-dokumen sebagai eksibit adalah arahan hakim bicara kepada pihak-pihak. Pihak-pihak tidak mempunyai pilihan melainkan mematuhi arahan hakim yang membicarakan kes tersebut. Dalam hal ini mahkamah merujuk kepada keputusan Mahkamah Persekutuan dalam kes **Jaafar Shaari & Siti Jama Hashim v. Tan Lip Eng & Anor [1997] 4 CLJ 509** dan **Jaafar Bin Shaari & Anor (Suing As Administrators Of The Estate Of Shofiah Bte Ahmad, Deceased) v Tan Lip Eng & Anor [1997] 3 MLJ 693** yang menyatakan seperti berikut:

> *"Having considered the arguments of counsel on both sides and the authorities cited by them, I am of opinion that the following propositions may be taken as well-settled:*
>
> *(1) Whether the contents of a document that has been included in an agreed bundle may be used by either party to prove or disprove a fact in issue depends entirely upon the terms of the agreement between the solicitors having conduct of an action. If by their agreement, they dispense with formal proof and also agree to the truth of the contents of a particular*

document, then its contents may be relied upon by either side to establish or to disprove a fact in issue. On the other hand, if the agreement is only to forgo proof of the making of the document, then, the contents may not be so used. See Yew Lean Finance Development (M) Sdn Bhd v Tan Gin Thong [1985] 1 CLJ 299.

(2) Where a document is included in an agreed bundle without any qualification, then no question as to its formal proof arises and its contents may be relied upon to establish a fact in issue. See Henry Trading Co Ltd v Harun [1966] 2 MLJ 281; Borneo Co (M) Sdn Bhd v Penang Port Commission [1975] 2 MLJ 204.

(3) A party may rely upon an admission made by his opponent in a police report (whether or not it be first information) or other documentary hearsay included in an agreed bundle on the condition that only its formal proof is dispensed with: MA Clyde v Wong Ah Mei [1970] 2 MLJ 183; Tan Song Gou v Goh Ya Tian [1983] 1 MLJ 60. However, if such a document is wholly exculpatory of the maker, then it is pure hearsay and inadmissible: Wong Thin Yit v Mohamed Ali [1971] 2 MLJ 175; Chuah Ah Chee & Ors v Gurdial Singh & Anor (Civil Suit No 351 of 1979, High Court, Penang). The reasons for its inadmissibility appear sufficiently in the judgment of Ali FJ in Wong Thin Yit and that of Edgar Joseph Jr J in Chuah Ah Chee. They therefore require no reiteration here.

The present appeal has an additional factor that requires to be addressed. It is has to do with the letter written by the respondents' solicitors, which I mentioned earlier in this judgment. It is dated 21 September 1987. The letter, among other things, suggested that the first respondent's police report 'be tendered through its maker dispensing with formal proof'. Although that letter could have been couched in happier language, it is clear what the parties intended.

The first respondent's police report containing his version of the incident was pure hearsay. As observed by Ali Hassan FJ in Wong Thin Yit v Mohamed Ali [1971] 2 MLJ 175 (at p 180):

Putting it at its lowest, even if this case has to be decided on the balance of probability, the learned trial judge, on the materials before him, was entitled to conclude that the appellant was wholly to blame for the accident. I have used the words 'even if' advisedly, for in my view, the police report in this case, though admissible by reason of s 35 of the Evidence Ordinance, was not substantive evidence of the fact, as asserted by the defence, that the plaintiff was knocked down while crossing the road. The report of the police officer who recorded it could only say this: 'This is a statement by the appellant'. To that extent, the report was clearly hearsay evidence. Its inclusion in the agreed bundle was obviously on the assumption that the appellant would appear at the trial to testify. If he had done so, the report would undoubtedly have some value as corroborative evidence within the meaning of s 157 of the Evidence Ordinance. But standing by itself for the purpose of the present dispute, it was clearly hearsay.

The parties in the present instance wanted to get over the barrier imposed by the hearsay rule. That is why they agreed to dispense with formal proof and placed the police report in Pt II of the agreed bundle. If the first respondent had testified on oath, his report could have been used for purposes of cross-examination. As matters transpired, he did not. Does it then follow that in the circumstances of the present case his report was wholly unavailable for use at the trial?

In my considered view, the answer to that question depends upon the determination of another critical question, namely: is the first respondent's police report wholly exculpatory of himself? If it is, then both courts below were right to exclude it from their consideration. If it contained admission(s), then they were plainly obliged to take account of the admissions and weigh them together with the silent evidence when coming to a decision on the facts. This conclusion is obviated by the decisions to which I have earlier referred in this judgment.

The first respondent's police report in the present instance is not wholly self-serving. It contains an admission by him of the *circumstances in which he collided with the deceased. The trial court was accordingly wrong in discounting it altogether as a purely exculpatory statement. So too the learned intermediate appellate judge. Because of their approach to the case, they did not evaluate the available evidence. It now behoves this court to carry out the task."*

[42] Mahkamah juga meneliti kes **Malaysian Assurance Alliance Bhd v Chong Nyuk Lan (Administrator Of The Estate Of Liew Kin On, Deceased) [2002] 6 MLJ 648** di mana telah diputuskan bahawa dokumen yang tidak dikemukakan secara teratur adalah tidak boleh diterima sebagai keterangan. Ia dinyatakan seperti berikut:

"As regards the documents that learned counsel for the appellant/defendant requested this court to consider as exhibits, I am of the view that they should not be admitted as such since they were not properly introduced and tendered during the trial. To do so now at the appellate stage would be highly prejudicial to the opposing party as it would be deprived of the opportunity to further examine its maker or those who had dealt with them. And I do not think the position of those documents in this case could be distinguished from those in the case of Chong Khee Sang v Pang Ah Chee [1984] 1 MLJ 377. Indeed, even in the case of Jafaar bin Shaari & Anor (suing as administrators of the estate of Shofiah bte Ahmad, deceased) v Tan Lip Eng & Anor [1997] 3 MLJ 693, the requirement of mutual agreement of the parties was a condition precedent before the formality in the tendering of documents as exhibits could be relaxed. Hence, in the present case, since there was no document properly tendered as an exhibit to substantiate the assertion and allegation by the appellant/defendant, the issue of non-disclosure of material fact should not arise at all."

[43] Dalam kes ini Mahkamah menerima pandangan yang dinyatakan dalam kes **Jaafar Shaari & Siti Jama Hashim v. Tan Lip Eng & Anor** (supra) dan mendapati laporan-laporan perubatan tersebut telah dirujuk oleh pihak-pihak di dalam kes ini. Oleh itu kegagalan untuk menandakan dokumen tersebut sebagai eksibit tidak menjejaskan pihak Plaintif dan Defendan dalam kes ini. Oleh itu keputusan Hakim Mahkamah Sesyen menerima masuk laporan-laporan tersebut sebagai asas kepada amaun gantirugi yang ditafsirkan oleh Mahkamah adalah wajar dan tidak memerlukan campur tangan Mahkamah ini.

Perintah Akhir

[44] Berdasarkan kepada alasan-alasan di atas Mahkamah ini berpendapat bahawa dapatan Hakim Mahkamah Sesyen berkenaan liabiliti dan kuantum terhadap Perayu iaitu Defendan Kedua dalam kes di Mahkamah Sesyen adalah diketepikan. Rayuan Defendan Kedua dibenarkan dengan kos RM15,000.00 tertakluk kepada fi alokator.

Bertarikh: 20hb. Jun 2023

(ROSLAN MAT NOR)

HAKIM

MAHKAMAH TINGGI MALAYA

TEMERLOH, PAHANG DARUL MAKMUR

PIHAK-PIHAK:

<u>Bagi Pihak Perayu</u>
Kumeraselvam
Tetuan Jacob Goldie S.S Chew
Kuantan, Pahang Darul Makmur

<u>Bagi Pihak Responden</u>
Tiong Hou Yuen
Tetuan N M Tiong & Co
Seberang Jaya, Pulau Pinang