Since June 2004, the firm has contributed articles to Career Times covering various aspects of Hong Kong’s employment laws. ‘Close connection test for vicarious liability’, authored by Mr. Bucky K.H. Chan, Partner of the firm’s Litigation Department was published in Career Times on 15 April 2005.

**Close connection test for vicarious liability**

The concept of vicarious liability holds that a person who is free from any personal blame may still be held liable for another's wrongdoing or tort. However, it requires proof of a particular relationship between the two parties involved and the law recognizes such in the relationship between employer and employee. Therefore, an employer can be vicariously liable for the torts committed by an employee. The basis for this is that if employers can profit from the enterprise in which an employee was engaged when the tort was committed, they should bear liability for any loss. In most cases, employers are also better able to pay damages, so injured plaintiffs stand a better chance of recovering compensation.

For vicarious liability to apply, it must be shown that the employee's tort took place in the "course of employment". If committed in other circumstances outside work, it would clearly be unreasonable to hold the employer liable the actions. It is usually easy to determine this. For example, if a construction site worker drops something from a height and injures a passer-by, he will be held liable and so will his employer, since, obviously, the act was committed in the course of employment.

However, in some situations, there is an element of uncertainty because the employee's actions may have been unauthorized or not approved. If so, should the employer be held vicariously liable?

Since 1907, the UK and Hong Kong courts have applied the Salmond test to determine whether an employee's tort was committed in the course of employment. The test considers if it was either something authorized by the employer or an unauthorized mode of doing
something authorized by the employer. When reviewing an "unauthorized mode", the key question is whether the employee did something which was so closely connected with his normal duties that the employer could be held vicariously liable. The underlying idea is that the injury done must involve a risk so inherent in or characteristic of the employer's business that they should bear the loss.

The House of Lords adopted this "close connection" test in Lister v Hesley Hall Ltd in 2002. In that case, the warden of a boarding house attached to a school had sexually abused pupils residing there. The decision was that the warden's torts were so closely connected with his employment that it was fair and just to hold the employer vicariously liable. Although the acts of abuse were not authorized by the employer, they were determined to be connected with the duties which were authorized. The Hong Kong case of Ming An Insurance Co (HK) Ltd v Ritz-Carlton Ltd in 2003 went to the Court of Final Appeal and the same test was used. A doorman employed by the hotel seriously injured two pedestrians when he lost control of the limousine he was driving along Queensway. The car was hired by the hotel and, if the regular chauffeur was absent, the doorman was sometimes required to move it, which might involve driving along Queensway. Separately, other members of staff used to go out to buy food and, occasionally, would persuade the chauffeur to give them a lift.

On the night of the accident, a bellboy was going out to pick up food for his colleagues and, as the chauffeur was off duty, he persuaded the doorman to take him in the limousine, and the accident occurred on the way.

At first instance and before the Court of Appeal, the hotel was held not to be vicariously liable for the doorman's negligence on the grounds that, in driving the limousine to pick up food, he had been acting beyond the scope of his employment. However, the Court of Final Appeal reversed the decision. They held that, although driving the limousine for the stated reason was not one of the doorman's authorized duties; it was closely connected with them. This rested on the facts that, firstly, the doorman routinely drove the limousine in the course of his employment, sometimes along the route where the accident occurred. Secondly, the limousine, when driven by the chauffeur, was sometimes used to pick up food for hotel staff.

As a decision of the Court of Final Appeal in Hong Kong, this interpretation is authoritative and binding on all future cases. Therefore, it is important for employers to have an understanding of this close connection test in order to minimize the risk of being held liable for the actions of their employees.

**Q1: How should the “close connection” test be applied?**

**A1:** You should ask whether the employee’s tort was so closely connected with his employment that it would be fair and just to hold the employer vicariously liable. For Example, the owner of a nightclub might employ security guards and dishwashers. If a security guard injured an unruly patron in a fight, the owner could be held vicariously liable because the guard’s normal duties are so “closely connected” with that possibility.

However, there would be no close connection for a dishwasher injuring a patron, since they would not deal with them in the normal course of employment.

**Q2: What should the employer do to protect himself from possible claims of vicarious liability?**

**A2:** The employer should closely supervise employees to ensure they do not carry out
their duties in an improper manner. It is not an excuse for an employer to say he has not authorized a specific act. Furthermore, it is always wise to take out insurance to cover any third-party claim.