THE EASTERN CARIBBEAN SUPREME COURT

SAINT VINCENT AND THE GRENADINES

IN THE HIGH COURT OF JUSTICE

SVGHCV2013/006

BETWEEN

MALCOLM E. WEBB

of Middle Street, Kingstown

and

VENDETHA WEBB
Formerly of Middle Street, Kingstown
currently residing in New York,
United States of America

CLAIMANTS

and

EUSTACE AUTO SUPPLIES LIMITED

and

EUSTACE QUAMMIE

of Junction/Diamond

DEFENDANTS

Appearances:

Mr. Julian Jack for the claimants.

Mr. Sten Sargeant for the defendant.

2016: Dec. 8

2017: Apr. 6

JUDGMENT

BACKGROUND

[1] **Henry, J.:** The claimants Malcolm and Vendetha Webb are brother and sister. They own a commercial property ('the subject property') on Middle Street, Kingstown from which Malcolm and his brother Michael Webb operate a retail business. The property shares a common boundary with commercial premises owned by Eustace Auto Supplies Limited, the first defendant ('the company'). Mr. Eustace Quammie, the second defendant is one of its shareholders and directors.

[2] Mr. and Ms. Webb alleged that while patch welding a metal container, the company's employee Monty Gill, negligently caused a fire that escaped and damaged their property. They contended that the company is vicariously responsible for Mr. Gill's actions. They seek compensation in the sum of $243,654.90 from the company and Mr. Eustace. The company and Mr. Eustace deny that Monty Gill was the company's employee or agent. They deny all liability. I have found that them not liable.

ISSUE

[3] The issue is whether Eustace Auto Supplies Limited or Mr. Eustace Quammie is vicariously or otherwise liable to Malcolm Webb and Vendetha Webb for the damage to their property by fire?

PRELIMINARY NOTE

[4] Ms. Webb did not attend the trial. She did not formally seek leave to be absent from the trial. However, her legal practitioner, Mr. Julian Jack represented to the court that she was unable to attend had given her consent to the matter proceeding in her absence and asked to be excused. The trial was conducted in her absence.

ANALYSIS

Issue – Is Eustace Auto Supplies Limited or Mr. Eustace Quammie vicariously or otherwise liable to Malcolm Webb and Vendetha Webb for the damage to their property by fire?

[5] Mr. and Ms. Webb are the owners of the subject property registered by Deed No. 1837 of 2000. The adjoining property is registered by Deed No. 2669 of 1984 in the company's name. The company is

registered under the Companies Act[1] as an automobile dealer and supplier of automotive parts including new and old tyres. On 21st April, 2012 Mr. Monty Gill was on the company's property patch welding a metal container that contained tyres. While he was doing so, the container caught fire which eventually escaped onto Mr. and Ms. Webb's property. It damaged their building.

[6] Mr. Webb and his brother Michael testified that the subject property is used as a home for Michael and a place of business from which they manufacture and sell a non-alchoholic beverage and retail propane gas. Malcolm and Michael Webb recalled that on the fateful day, when they arrived at the site of the fire, it was already ablaze. The Fire Department was notified and the brothers took precautionary measures by placing fire extinguishers in close proximity to the fire. They managed to remove household items from the building which they secured away from the property. The fire raged uncontrollably and spread.

[7] They observed that the fire had escaped from the container and onto a shed on the company's property and then onto their property, where it destroyed two bedrooms and caused extensive damage to the roof and certain sections of ground and first floors of their building. Michael Webb claimed to have lost all of his personal belongings. The Webbs averred that as a consequence of the fire, electricity supply to their property was interrupted for a period and Michael's personal life was affected for several days.

[8] Sgt. Winston Maloney of the Royal Saint Vincent and the Grenadines Police Force was the officer in charge of the investigation. He was present when efforts were made by officers from the Fire Department and others to put out the fire. He confirmed that the Webb's property sustained significant damage.

[9] Sgt. Maloney indicated that he interviewed Mr. Quammie and several other persons. He testified that Mr. Quammie informed him that he had employed Mr. Gill to do some welding work on the roof of the container but had left this detail out of his witness statement. He acknowledged that it is usual for a police officer to put into writing what someone tells him during an interview and admitted doing so

[1] Cap. 143 of the Revised Laws of Saint Vincent and the Grenadines, 2009.

when he interviewed Mr. Quammie. He did not produce his written record. For his part, Mr. Quammie indicated that Sgt. Maloney engaged him in casual conversation that day.

[10] Mr. Quammie admitted that Mr. Gill was welding a door on the container, on the company's behalf when it caught fire. He acknowledged that he engaged Mr. Gill to do the repairs but denied that Mr. Gill was either his or the company's employee. He described Mr. Gill as an independent contractor who runs his own business from premises located at Randy's Supermarket. He stated that Mr. Gill usually brings his own tools when he is engaged by the company or him, to do welding work and that he did so on the day of the fire.

[11] He testified that when the fire started he was in the store looking outside. He saw Mr. Gill running towards the water pipe in the yard. When he enquired of him what happened, Mr. Gill told him that smoke was coming from the container. According to him, no one opened the container.

[12] The Webbs assert that either Mr. Quammie or the company is liable for the damage caused by the fire which arose from the welding. In this regard, they contend that Mr. Quammie or the company is vicariously liable as employer for Mr. Gill's conduct which resulted in the fire.

[13] Mr. and Ms. Webb grounded their claim in the tort of negligence. They also introduced the rule in **Rylands v Fletcher**[2] in their pleadings, as a basis on which to seek relief. However, they made no submissions on that latter limb. The case of **Rylands v Fletcher**[2] enunciated the rule of law by which a cause of action is deemed to arise, against a person who (due to his failure to take necessary precautions) brings dangerous items onto his property, which escapes onto and causes damage on another property. Although Mr. and Ms. Webb did not actively pursue this aspect of their claim in their submissions, it will be addressed since it arises on the pleadings and was dealt with by the company and Mr. Quammie.

Rule in **Rylands v. Fletcher**[2]

[14] At paragraph 5 of their statement of claim, Malcolm and Vendetha Webb pleaded:

[2] (1866) 1 Ex. 265; [1861-1873] All E.R. Rep. 1.

'5. At the said material time when the employee finished the patch welding the metal container caught fire. The employee opened the door of the said container negligently causing the fire to escape unto the Claimants (sic) property, causing extensive damage thereto.' (underlining added)

Mr. Quammie and the company denied this allegation in their defence.

[15] Malcolm Webb, his brother Michael and Sgt. Maloney provided vivid testimony that the fire started on the company's property and spread to the Webb's neighbouring property. This was not denied by Mr. Quammie or the company.

[16] Mr. and Ms. Webb submitted that the company and Mr. Quammie did not appear to have taken any reasonable precautions to prevent the fire from extending to the Webbs' property and therefore failed in their duty to them.

[17] Mr. Quammie and the company countered that at common law, there is no strict liability for dangerous activities. They cited the case of **Read v J Lyons & Co**[3] and quoted Lord MacMillan as authority for that proposition, where he opined:

> '… in the modern law of tort … liability exists only for consequences which a reasonable man would have foreseen. One who engages in obviously dangerous operations must be taken to know that if he does not take special precautions injury to others may very well result. In my opinion it will be impractical to frame a legal classification of things as things dangerous and things not dangerous, attaching absolute liability in the case of the former but not in the case of the latter. In a progressive world things which at one time were reckoned highly dangerous come to be regarded as reasonably safe. … Accordingly I am unable to accept the proposition that in law the manufacturer of high explosive shells is a dangerous operation which imposes on the manufacturer an absolute liability for any personal injuries which may be sustained in consequence of his operations. Strict liability, if you will, is imposed upon him in the sense that he must exercise a high degree of care, but that is all. … in my opinion, … the law in all cases exacts a degree of care commensurate with the risk created. It was suggested that some operations are so

[3] [1946] 2 All ER 471.

intrinsically dangerous that no degree of care however scrupulous can prevent occurrence of accidents and that those who choose for their own ends to carry on such operations ought to be held to do so at their peril. … In my opinion it is not the present law of England.'[4]

[18] Mr. Quammie and the company argued that neither the pleadings nor the evidence alleged that patch welding was a non-natural use of the company's premises, and further, that fire cannot be said to be a 'brought and kept in' or on the company's premises and be allowed to escape. They contended further that liability could not even be imposed as a matter of public policy. They concluded that no strict liability can attach to the company in the circumstances of the case at bar.

[19] Quoting Lord Goff, in a decision of the House of Lords in **Cambridge Water v Eastern Counties**[5] they submitted that the types of activities which could potentially attract strict liability considerations and appropriate duty of care, are best left to Parliament to legislate. That case was concerned with environmental pollution. On that subject, Lord Goff expressed his reservations thus:

'… I incline to the opinion that, as a general rule, it is more appropriate for strict liability in respect of operations of high risk to be imposed by Parliament, than by the courts. If such liability is imposed by statute, the relevant activities can be identified, and those concerned can know where they stand. Furthermore, statute can where appropriate lay down precise criteria establishing the incidence and scope of such liability.'

[20] The classic description of the rule in **Rylands v Fletcher**[2] was articulated in that case by Blackburn J. in the following much quoted passage:

'… the true rule of law is, that the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape. He can excuse himself by shewing that the escape was owing to the plaintiff's default; or perhaps that the escape was the consequence of vis major, or the act of God; … the neighbour, who has brought something on his own

[4] Ibid. at page 477 A-D.

[5] [1994] 2 AC 264.

property which was not naturally there, harmless to others so long as it is confined to his own property, but which he knows to be mischievous if it gets on his neighbour's, should be obliged to make good the damage which ensues if he does not succeed in confining it to his own property. And upon authority, this … is established to be the law whether the things so brought be beasts, or water, or filth, or stenches.'

[21] This principle of law has since then been applied in many cases and has been further refined. As stated by Lord Moulton in **Rickards v Lothian**[6]**:**

'It is not every use to which land is put, that brings into play that principle. It must be some special use bringing with it increased danger to others and must not merely be the ordinary use of the land or such a use as is proper for the general benefit of the community.'

In other words, the escape must be of a thing which is naturally dangerous that does not fit within the categories of activities which are naturally carried out on land in that vicinity.

[22] In **Gore v Stannard (trading as Wyvern Tyres)**[7], Ward L.J. distilled the applicable legal principles which the court considers in making determinations about that issue. He pointed out that liability under the rule in **Rylands and Fletcher**[2] is made out where:

1. the defendant is:
   a) the owner or occupier of land;
   b) has brought, kept or collected an exceptionally dangerous item on his land;
   c) recognized or ought reasonably to have recognized, that there was an exceptionally high risk of danger or mischief if the item escaped, (even if such risk was unlikely);
   d) his use of the land was extraordinary and unusual, in view of all the circumstances including time and place;
2. the thing escaped from his property into or onto another's property; and
3. the escape caused damage to the other property owner's rights and enjoyment of his/her land.

[6] [1911-13] All ER Rep 71.

[7] [2014] Q.B. 1.

[23] He then explored whether the rule can be applied to cases involving fire and observed that such a case would be rare. He explained that the principles cannot be invoked where the fire and not the stored item escapes to another's property. He reasoned that fire may be deemed to have been brought onto the land if it is deliberately or negligently started by the property owner or occupier or by someone for whom he is responsible. Even then, the court is required to determine if starting the fire was a natural use to which the property could reasonably by put.

[24] Applying those principles to the case at bar, the evidence disclosed that the company owned the land on which the fire was started. Mr. Quammie occupied the land as the company's principal. He testified that Mr. Gill brought the welding equipment onto the land to carry out work at the company's request. No evidence was as to what the equipment entailed or regarding the dangers which are posed by using such tools. There is no evidence that such tools are potentially dangerous if used in the way they were used that day.

[25] The testimony provided by all of the witnesses suggests that the fire started when the metal container caught fire. No witness testified regarding the probability of how patch welding a container could produce such a result. There is insufficient evidence of causation of the fire to translate patch welding in those circumstances to a wrongful or negligent act. More significantly, there is no evidence that fire was brought onto the property. There was no evidence that the tools used by Mr. Gill posed an exceptionally high risk of danger of fire, if used for the purpose of repairing the door on the container; or that the company or Mr. Quammie recognized or ought to have recognized such a risk.

[26] Likewise, there is no evidence that use of those unspecified tools to repair the container was an unnatural use of the company's property. While the parties accepted that both properties were used for business purposes, insufficient evidence was supplied regarding the normal uses to which those properties were put on a regular basis. The company's uncontroverted testimony is that it had retained Mr. Gill's services on previous occasions to carry out welding work. It was not suggested that this type of activity was unusual. I therefore make no finding that it was.

[27] The Webbs complained that fire escaped from the company's property. They implied that fire was brought, kept or stored there. The evidence does not disclose that this in fact happened. From all accounts, Mr. Gill was engaged in welding work, not starting a fire. In light of the evidence, one possible inference to be drawn is that use of the patch welding equipment constituted normal use of the property which in and of itself was not a dangerous activity requiring any special precautions against fire. I am obliged to infer that this was the case.

[28] Having regard to the foregoing, Mr. and Ms. Webb have not established the several elements which would ground a claim against the company or Mr. Quammie under the rule in **Rylands v Fletcher**[2]. I therefore find that Mr. Quammie and the company are not strictly liable to Mr. Malcolm Webb and Ms. Venetha Webb on this basis, for escape of the fire.

Negligence

[29] Negligence is a tort or civil wrong which is established by proof of breach of a duty to someone which results in damage to that person. It arises in situations where:

1. a person who owes a duty of care to another,
2. displays a level of care to that person which is less than what someone of ordinary prudence would have exercised under similar circumstances,
3. thereby causing that person to suffer damage.[8]

[30] Mr. and Ms. Webb acknowledged that the law is well-established with respect to independent contractors and vicarious liability, and that generally a person will not be found to be vicariously liable for the negligence of an independent contractor that it has engaged to perform some work. They argued that nonetheless there are clear exceptions as in the case where the independent contractor's work involves special danger to another person's premises. They argued that patch welding a hole in a container with tyres is highly likely to involve the risk of fire unless precautions are taken to avoid those risks.

[8] Donoghue v Stevenson [1932] A.C. 562 per Lord Atkin.

[31] They cited the case of **Honeywill and Stein Limited v Larkin Brothers (London's Commercial Photographers) Limited**[9] as authority for the proposition that certain common law standards are applicable where a person contracts for work to be done which may, in the natural course of things, have injurious or damaging consequences to his neighbor. They did not specify those standards.

[32] Mr. Quammie and the company insisted that Mr. Gill was an independent contractor. They submitted that the key point in the instant case is whether a duty of care can be attached to them vicariously, or otherwise by imposition of a duty of care through operation of law.

[33] They submitted that in the case of **Caparo Industries plc v Dickman**[10] Lord Oliver laid down a three-stage test which is employed to decide whether one party owes another a duty of care. They submitted further that the questions to be resolved in this process are whether the damage caused was reasonably foreseeable; whether there was a relationship of proximity between the claimant and the defendant and whether it is just, fair and reasonable to impose a duty of care. This is indeed the law.

[34] They argued further that **Donahue v Stevenson**[11] introduced the concept of reasonable foreseeability which embodies the 'neighbour principle' which requires proof of knowledge by the defendant that an act if done, or an omission would reasonably cause loss and damage to another. This legal principle has indeed been established as part of the law.

Mr. Eustace Quammie

[35] Mr. Quammie correctly contended that the Webbs did not plead that Mr. Gill was employed by him and led no evidence to his effect. He reasoned that based on the principle of corporate personality enunciated in **Salomon v A Salomon & Co Ltd**[12] no liability could attach to him as a matter of law.

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[9] [1934] 1 K. B. 191.

[10] [1990] 1 All ER 568.

[11] [1932] AC 562.

[12] [1897] AC 22.

By relying on that authority Mr. Quammie was advancing a defence that he was a separate legal entity from the company and was not liable for any of its wrongs.

[36] He concluded that even if the court holds that Mr. Gill was employed by the company, he must be absolved of liability as he was not accused of any personal connection with Mr. Gill. He contended that the claim must be dismissed against him and that costs be awarded to him.

[37] The law makes a clear distinction between a company and its shareholders. They are deemed in law to have separate legal identities and each bears no responsibility for the other's obligations. Malcolm Webb and Venetha Webb neither pleaded nor alleged that Mr. Gill was employed by Mr. Quammie. They have therefore failed to establish any connection between the two. Their claim against Mr. Quammie is therefore dismissed. Mr. Quammie is entitled to recover his costs.

Eustace Auto Supplies Ltd.

[38] The company referred to Mr. Quammie's testimony that he 'employed' Mr. Gill on behalf of the company and Sgt. Maloney's evidence of what Mr. Quammie told him. It submitted that the Webbs placed almost complete reliance on Sgt. Maloney's testimony to establish that Mr. Gill was its employee. The company argued that the word 'employed' is so commonly and loosely used that the layman does not readily understand the distinction between an 'employee' and an 'independent contractor'. It contended and rightly so, that such a determination is a mixed question of fact and law. It submitted further that the common law courts have made a distinction between the loose and legal meanings for these reasons.

[39] The company argued further that the concept was considered by McKenna J in **Ready Mixed Concrete (South East) Ltd v. The Minister of Pensions and National Insurance**[13] where he said that a contract of employment exists if three conditions are satisfied:

1. 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.
2. 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 him master.

[13] [1968] 1 All ER 433.

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

[40] Eustace Auto Supplies Ltd. referenced **Market Investigations Ltd v. Minister of Social Security**[14] and **Lee Ting Sang v Chung Chi-Keung & Shun Sing Construction and Engineering Co. Ltd**[15] and submitted that the fundamental test to determine whether a person was an employee or an independent contractor remained a question of fact for the trial judge and involved a consideration of whether or not he was performing services as a person in business on his own account. In this regard, the judge is required to take certain factors into account including whether the individual concerned pays his own taxes and national insurance contributions; whether he provides his own equipment or hires helpers; what degree of financial risk he takes; what degree of responsibility for investment and management he shoulders; and whether and how far he has an opportunity of profiting from sound management in the performance of his task. I agree that these submissions correctly articulate the legal position.

[41] Eustace Auto Supplies Ltd. submitted that the court could only draw the reasonable inference that Mr. Gill is a skilled welder who must have agreed to do the welding for it, for valuable consideration. It contended that there is no evidence which indicated whether Mr. Gill agreed to be under the control and/or supervision of any person on its behalf; no evidence of the terms of any contract of employment between Mr. Gill and it, that are consistent with the terms of an employer/employee relationship; and no evidence to support a finding of the previously referenced factors that the Court must take into account in making that crucial finding. It contended that the Court would err if it took any other matters into account.

[42] I disagree that the court must infer that Mr. Gill was as skilled welder. There is no factual foundation from which to draw such an inference. As to the assertions that no evidence was led regarding the agreement between the company and Mr. Gill about the level of control the company would exercise over how he welded the container, I agree.

[43] I accept Sgt. Maloney's account that Mr. Quammie told him that he had employed Mr. Gill. Mr. Quammie gave similar testimony before this court. He also attested that Mr. Gill was an

[14] [1969] 2 Q.B. 173.

[15] [1990] 2 WLR 1173.

independent contractor who brought his own equipment to the site to carry out the welding. No details were provided regarding the arrangements made for payment to Mr. Gill. It appears from Mr. Quammie's account that Mr. Gill was on site for the sole purpose of welding the container after which he was free to go about his business. Mr. Malcolm Webb and his witnesses did not refute this or provide contrary evidence. I therefore accept Mr. Quammie's testimony in this regard.

[44] It is not disputed Mr. Gill brought his own equipment to carry out the repairs to the container. Had he been an employee, Eustace Auto Supplies Ltd. would reasonably have been expected to provide those tools. No further details of the relationship between Mr. Gill and the company were adduced. I agree with Eustace Auto Supplies Ltd. that the evidence supplied by the Webbs is inadequate and does not afford sufficient material on which the court can make an informed decision regarding the nature of the contractual arrangement between the company and Mr. Gill. From the available information, it appears that Mr. Gill was an independent contractor retained by Eustace Auto Supplies Ltd. for a specific job. I infer that he was.

[45] In such circumstances, is Eustace Auto Supplies Ltd. liable to the Webbs? Malcolm and Venetha Webb submitted that Mr. Monty Gill as an employee of the company and Mr. Quammie, carried out the welding in a negligent manner. They reasoned that in light of the hazardous nature of the work that Mr. Gill was conducting, Mr. Quammie and the company failed in their duty to them (the Webbs) as their property was in close proximity to the company's. Eustace Auto Supplies Ltd. contended that the welding was not hazardous and it did not fail in its duty.

[46] The company submitted that the general rule was propounded by Lord Bridge of Harwich in the case of **D & F Estates Ltd v Church Commissioners for England and Others** where he said:

> 'It is trite law that the employer of an independent contractor is, in general, not liable for the negligence or other torts committed by the contractor in the course of the execution of work. To this general rule there are certain well-established exceptions or apparent exceptions…. (which) are dependent upon a finding that the employer is, himself, in breach of some duty which he personally owes to the plaintiff. The liability is thus not

truly a vicarious liability and is to be distinguished from the vicarious liability of a master for his servant:'[16]

[47] The company contended that the exception includes liability for 'extra hazardous acts' where the principal was under a 'direct and primary duty to see care is taken' and this duty is 'non-delegable' to the independent contractor. It contended further that the common law has repeatedly shown its unwillingness to accept and approve this broad-brush approach and instead, takes a very restrictive approach by deciding each case upon its own facts.

[48] The company argued further that the case of **Salsbury v Woodland and Others**[17] is quite instructive on this very point. It quoted Lord Justice Widgery who said:

> 'It is trite law that an employer who employs an independent contractor is not vicariously responsible for the negligence of that contractor. He is not able to control the way in which the independent contractor does the work, and the vicarious obligation of a master for the negligence of his servant does not arise under the relationship of employer and independent contractor. I think that it is entirely accepted that in those cases - and there are some - in which an employer has been held liable for injury done by the negligence of an independent contractor are in truth cases where the employer owes a direct duty to the person injured, a duty which he cannot delegate to the contractor on his behalf. The whole question here is whether the occupier is to be judged by the general rule, which would result in no liability, or whether he comes within one of the somewhat special exceptions - cases in which a direct duty to see that care is taken rests upon the employer throughout the operation.'[18]

[49] Eustace Auto Supplies Ltd. adopted a similar statement by Widgery L.J. where he quoted from the textbook **Salmond on Torts**[19] in the following terms:

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[16] [1988] 2 All ER 992.

[17] [1969] 3 All ER 863.

[18] [1969] 3 All ER 863 at page 867 – I, 868 A-H.

[19] 14TH Ed.

> ' ... The mere fact that the work entrusted to the contractor is of a character which may cause damage to others unless precautions are taken is not sufficient to impose liability on the employer. There are few operations entrusted to an agent which are not capable, if due precautions are not observed, of being sources of danger and mischief to others; and if the principal was responsible for this reason alone, the distinction between servants and independent contractors would be practically eliminated from the law.'[20]

[50] Eustace Auto Supplies Ltd. submitted further that according to Widgery L.J. some types of cases impose a duty on the employer to ensure that care is taken by the independent contractor. These cases generally involve situations where 'extra- hazardous acts' are commissioned. They are considered to be so hazardous that the law places a duty on the employer to see that care is taken as in **Honeywill & Stein v Larkin**[9].

[51] Eustace Auto Supplies Ltd. contended that patch welding does fit within the meaning of 'extra hazardous act' and was not the type of case which placed an obligation on it to see that care was taken. It submitted that Mr. Quammie reported seeing smoke coming from inside the container whereas Mr. Gill was welding the outside and that when he saw smoke coming from the container Mr. Gill was already running towards the water pipe in the yard. It submitted that the Court should be slow to impose such a duty in face of Lord Justice Widgery's pronouncement that the act commissioned '… if done with ordinary precaution by skilled men, presented no hazard to anyone at all'.

[52] It urged the court to infer that Mr. Gill as a skilled man could have taken basic fire precaution with water hoses and/or fire extinguishers, and instruct persons authorized to give directions on its behalf to remove the used tyres from the container before he commenced any work. I make no such inference as there is inadequate evidence as to Mr. Gill's training and experience from which to find that he was skilled in the work he undertook to do that day or that he had the requisite authority to either negotiate or arrange for the removal of the tyres from the container.

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[20] Ibid. at page 868 – B of the Salsbury case.

[53] Vicarious liability is a legal 'term of art' which characterizes the rule of law by which legal responsibility for wrongful conduct is transferred from an employee to an employer. The wrongful conduct must necessarily occur with the employer's authority and during the course of the employee's employment.[21] In certain cases, 'vicarious liability' may arise under an agency relationship where the level of risk from dangerous activity is so severe that the law imposes a duty of care on the 'employer'.[22] Eustace Auto Supplies Ltd. and Mr. Quammie have comprehensively outlined the applicable legal principles as rehearsed above.

[54] In the case at bar, those principles may be summarized by reference to the burden and standard of proof which rests on Mr. and Ms. Webb. In order to establish that the company is vicariously liable to them, Mr. and Ms. Webb must prove on a balance of probabilities that:

1. Mr. Gill was employed by Eustace Auto Supplies Ltd.;
2. while so employed, he was engaged in wrongful conduct which caused them loss; or
3. He was engaged by the company as an independent contractor to carry out activity which was so dangerous that the law imposed a duty on Eustace Auto Supplies Ltd. to ensure that care was taken to ensure that no harm arose from a negligent undertaking of the activity.

[55] None of the witnesses were able to say what caused the fire. There is a veiled suggestion that somehow the welding machine was used in a manner which ultimately set the container or possibly the tyres ablaze. I am not permitted to speculate about the causation. From the description provided by Mr. Quammie, Mr. Gill was working on the outside of a closed container when the fire started.

[56] Was the welding works by itself hazardous? Did its proximity to the Webbs' building pose a threat of damage to the building from fire, without more? I do not know. No testimony linking the use of the welding equipment to dangerous consequences was proferred. There are too many unknown variables about what caused the fire and the level of danger posed by the activity undertaken by Mr. Gill (specifically, welding the door of a metal container) to permit me to conclude on a balance of probabilities that use of a welding machine on that day and time and in the circumstances which

[21] Halsbury's Laws of England, Vol. 33 (2013), para. 114.

[22] Bazley v Curry (1999) 174 DLR (4th) 45 at 65 per McLachlin J.

then obtained, posed a serious risk of danger to the Webbs' property. There are just too many gaps in the narrative. Mr. and Ms. Webb have failed to prove that Eustace Auto Supplies Ltd. is liable. Their claim against the company is dismissed.

Costs

[57] Mr. and Ms. Webb claimed damages of $243,645.90. If they had succeeded, the damages would have had to be assessed and could have been less than the amount claimed. No evidence of the value of their purported loss was adduced. Eustace Auto Supplies Ltd. and Mr. Eustace Quammie are entitled to their costs. The parties have agreed costs of $5000.00. Malcolm and Venetha Webb shall therefore pay agreed costs of $5,000.00 to Eustace Auto Supplies Ltd. and Mr. Eustace Quammie.

ORDER

[58] It is ordered:

(1) Malcolm Webb's and Vendetha Webb's claims against Eustace Auto Supplies Limited and Eustace Quammie are dismissed.

(2) Malcolm Webb and Vendetha Webb shall pay costs of $5,000.00 to Eustace Auto Supplies Ltd. and Eustace Quammie.

[59] I wish to acknowledge and express gratitude to counsel for their helpful written submissions.

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Esco L. Henry
HIGH COURT JUDGE