

TERRITORY OF THE VIRGIN ISLANDS

**IN THE HIGH COURT OF JUSTICE
(CIVIL)**

CLAIM NO. BVIHCV 2008/0035

BETWEEN:

MICHAEL SMITH

CLAIMANT

AND

DELTA PETROLEUM (CARIBBEAN) LTD

DEFENDANT

Appearances:

Robert Nader, Forbes Hare for the Claimant;

Terrence Neale and Mishka Jacobs, Mc. W. Todman & Co for the Defendant

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(2012: 30 May, June 7, August 31)
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JUDGMENT

**[Negligence – Employer’s liability -Explosion of Vehicle resulting in injuries to workman/ driver –
Causation – Whether accident as a result of Defendant’s negligence in failing to provide
reasonably safe system of work and safe equipment**

**Contributory negligence – Whether Claimant solely responsible or contributorily negligent -
Apportionment of blame -extent of injuries- Quantum of Damages]**

[1] **Joseph-Olivetti J-** This accident was widely reported in the newspapers at the time. On April 3 2006 the Claimant Mr. Michael Smith was driving the Defendant’s fuel tanker, registration CM-2735 to make a delivery of gasoline in the course of his employment to a customer of the Defendant, Delta Petroleum(Caribbean) Ltd.(“Delta’), at Frenchman’s Cay, in the Territory of the Virgin Islands. The truck exploded in the course of Mr Smith pumping the fuel and he suffered grave injuries. He now sues for damages. Delta has denied liability or alternatively they allege contributory negligence and they counterclaim for return of monies equivalent to the social security

payments paid to Mr. Smith by the Social Security Board after his injuries and whilst he was in receipt of his full salary.

[2] **Issues Arising**

These can be stated as follows;

(1) Whether the accident occurred as a result of Delta's negligence in failing to provide a safe system of work and safe equipment; (2) Whether Mr. Smith contributed to the accident by his negligence and if so the extent of such contribution; (3) What is the nature and extent of Mr. Smith's injuries and, the quantum of damages payable to Mr. Smith (if any), and (4) whether Delta is entitled to payment of monies equivalent to the social security payments paid to Mr. Smith by the Social Security Board after his injuries and whilst he was in receipt of his full salary.

[3] **Whether the accident occurred as a result of Delta's negligence or whether Mr. Smith was solely responsible or alternatively whether he contributed to the accident**

First, the law on an employer's duty to his/her workers. An employer's obligation in the workplace is well established. He/ she has a duty to use reasonable care to provide a safe place of work and a safe system of work, in short to take reasonable care for the safety of his/her workmen or women.

[4] Denning LJ in **Clifford v Charles H. Challen & Son Ltd** [1951] 1 KB 495 at 497 summed up the law succinctly when speaking of the case of a workman who contracted dermatitis at work from the use of a known dangerous substance. The learned judge explained: - **"The question is whether the employers fulfilled their duty to the workman. The standard which the law requires is that they should take reasonable care for the safety of their workmen. In order to discharge that duty properly an employer must make allowances for the imperfections of human nature. When he asks his men to work with dangerous substances, he must provide proper appliances to safeguard them; he must set in force a proper system by which they use the appliances and take the necessary precautions; and he must do his best to see that they adhere to it. He must remember that men doing a routine task are often heedless of their own safety and may become slack about taking precautions. He must therefore, by his**

foreman, do his best to keep them up to the mark and not tolerate any slackness. He cannot throw all the blame on them if he has not shown a good example himself.'My emphasis.

[5] Next, the law on contributory negligence. The burden of proving contributory negligence rests on the party who alleges it. This is so in relation to both fault and causation. It is not necessary to establish that Mr. Smith owed a duty of care to Delta to succeed on an allegation of contributory negligence. Contributory negligence means that Mr. Smith failed to take reasonable care for his safety and thereby contributed to his own damage. See **Kemp and Kemp The Quantum of Damages** Vol 1. para. 7-012 to 7-013.

[6] And see also Denning LJ in **Jones v Livox Quarries Ltd [1952]2 QB 608 p.615-** “**Although contributory negligence does not depend on a duty of care it does depend on foreseeability. Just as actionable negligence requires the foreseeability of harm to others, so contributory negligence requires the foreseeability of harm to oneself. A person is guilty of contributory negligence if he ought reasonably to have foreseen that if he did not act as a reasonable prudent man he might be hurt himself; and in his reckonings he must take into account the possibility of others being careless.**”

[7] **General Factual Findings**

Mr. Smith was employed as a driver and a mechanic with Delta and had been so employed for some 17 years. Shortly after 11 am, April 3 2006 Mr. Smith arrived at Voyage Charters, Frenchman's Cay, and started to pump fuel from the truck into the Voyage Charter's dockside fuel station. To do so he had to run a hose from the truck around a wall to the fuel tank of Voyage Charters. The wall obscured his view of the truck. After attaching the hose Mr. Smith proceeded to monitor both hose and truck continuously, making his way back and forth between the wall and the truck. This lasted for about 30 minutes.

[8] Mr. Smith discontinued this monitoring temporarily to wash his hands while the pump was still in operation. He had not been supplied with gloves and his hands had been contaminated by the

fuel in the process of attaching the hose. The tap that he used was located behind a wall and this also further obscured his vision of the pumping operation. Whilst in the process of his ablutions he heard his name called from behind the wall. He thought that something was wrong with the pumping operation, so he ran back to see what was happening. He intended to switch off the ignition in the truck, but on his approach the truck exploded and the blast threw him in the air and he sustained severe injuries.

[9] From the Police report relied on by Mr Smith it appears that the accident was caused because the truck had mechanical defects and a leakage. No reliable evidence was adduced by Delta to counter that. In particular the truck was in their custody and control after the accident yet they did not bring any evidence to establish that they had had the vehicle examined and what if any defects were found. I have had regard to Mr. Smith's evidence on the poor state of repair of the truck also which I accept. I therefore conclude on a balance of probabilities that the truck was defective and was the cause of the explosion in which Mr. Smith was injured.

[10] Delta's witnesses testified that Mr. Smith was employed as a driver and the chief mechanic, and therefore was directly responsible for repairs to the truck and so was negligent in not bringing any defects to Delta's attention, not repairing the truck and using it in that condition. Further that he failed to check the truck immediately before taking it out and failed to report any defect found to Delta.

[11] I prefer the evidence of Mr. Smith in this respect. He was not Delta's chief mechanic as Delta outsourced major defects for repairs. Although he was a driver, he was also a mechanic but only responsible for ordinary or routine repairs.

[12] Mr. Damien Lettsome, Delta's acting operations manager testified further that Mr. Smith was in breach of strict company policy which forbade the pumping of gasoline from the truck to the dockside fuel station. That the policy required that fuel be gravity fed from the truck to the underground cistern at the Frenchman's Cay location and that Mr. Smith was aware of that policy yet acted in breach of it. He said that Mr. Smith was at a meeting **on 7 October 2005** when management took the decision to cease pumping gasoline to avoid the risk of explosion. This is

supported by the evidence of Mr. Bevis Sylvester the then Island Manager. **An unsigned copy** of minutes of the meeting was produced which noted that all but 4 staff members were present including Mr. Smith. Mr Lettsome said that “based on the severity of the matter everyone was present for the meeting including Mr. Smith”. He further stated that Mr. Smith was fully involved in the discussion about the safety concerns of fuel delivery methods and even offered solutions. I accept Mr. Lettsome’s evidence despite Mr. Smith’s denial that he did attend that meeting but it is very likely having regard to the length of time that had elapsed that he had no recall of having done so.

[13] Mr. Lettsome testified also that he received a letter dated 5 October 2005 from the Island Manager indicating that fuel was not to be discharged other than by gravity feed at the Pasea location, **and that all gasoline should be discharged by gravity feed and that his authorisation was needed to do otherwise.** He said he called a “tool box” meeting with all drivers and staff to discuss this. He told the court that all company policies were documented and that the decision to gravity feed fuel discharges was a company policy that was distributed in writing to all staff members and posted on a bulletin board as is the custom. No evidence of any such document was presented save for the minutes of meetings already alluded to and what is more no evidence that Mr. Smith saw the notices on the bulletin board. Whether or not notices were so published to mind would not be enough to discharge Delta’s duty at common law to take reasonable steps to maintain a safe system of work having regard to the seriousness of the issues involved in the delivery of gasoline- a highly volatile and inflammable substance. More was needed to ensure that all drivers understood the policy and the steps to be taken to implement it and Delta was required to monitor the operations in case drivers defaulted or grew lax as was possible with persons doing routine work, to borrow Lord Denning’s phrase .They needed constant reminding and monitoring and evidence of Mr Smith being told of a policy on delivering gasoline in 2005 does not suffice to discharge their obligation.

[14] Mr. Lettsome testified further that Delta had purchased some ten 20 ft. pieces of hose for gravity feeding and that if one needed to pump gasoline one needed the authorisation of the manager. Further, that a delivery where fuel was pumped required 2 persons, one stationed at the truck and

one at the discharge point. Mr. Smith admitted that he was aware of that latter requirement. However, he denied that the company had sufficient hoses for gravity feeding and that they had a mandatory policy to gravity feed only. Having seen and heard him and Delta not being able to even adduce a purchase order in respect of the hoses or even photographs I am inclined to accept Mr. Smith's evidence on the disputed issues.

[15] I note Delta's attempt through the evidence of Mr. Lettsome to rely on alleged past infractions by Mr. Smith to show that he was most likely to have been at fault on this occasion. I must say that I deplore this practice. If one has erred and the matter was dealt with at the time then that should be the end of it done and dusted as we sometimes say. If the servant is prone to infractions then his employer would have good reason to dismiss the servant. There should be no more about past misdemeanours if the employer has not opted for dismissal or issued warning notices to the employee. The very fact that Mr. Smith despite these alleged infractions was retained by Delta speaks for itself. His past infractions have being forgiven by Delta and ought not to have been introduced as they are not relevant to the issues before the court. Further, an employer knowing that one of his employee's is prone to make errors may well be held responsible for resulting damage to the employee and third parties in allowing him / her to continue especially in regard to such technical and dangerous operations.

[16] Delta through Mr Lettsome raised issues about the ease of gravity feeding at Voyage Charters claiming that it is one of the easiest to gravity feed as the tank was underground and the distance between the truck and the tank is no more than 20 feet. He said that he himself had done it several times. Mr. Smith disputed that one could gravity feed there. I find, having regard to the details given by Mr. Smith as to the distance where one has to park the delivery truck and the intervening wall that it is difficult if not impossible to gravity feed at that site and that he always pumped fuel there. I also find that Delta ought to have known that had they monitored him properly as it would have been clear that when he went to make a delivery at Voyage Charters that he did not take the requisite hose which was allegedly kept in the storeroom.

[17] Mr. Lettsome also testified that all drivers are required to fill out a report of the vehicles readiness for deliveries through their own inspection before taking them out, and that Mr. Smith did not fill

out and submit any such report. The implication here is that had he done a check, he would have discovered the mechanical problems, reported it and that he would have been issued with another truck to do the deliveries.

[18] It is highly unlikely and impracticable that a driver about to undertake a delivery would be expected to carry out an extensive check of his vehicle immediately prior to leaving the depot. I therefore accept Mr. Smith's evidence that the extent of the daily checks to vehicles amounted to a quick 15 minute check of oil and water levels and tire conditions and that a report in writing is only made if there is something amiss in these areas. He did not make a report because nothing was amiss.

[19] Mr. Smith denies as alleged by Delta that at the hospital after the accident that he told Mr Sylvester that he was sorry for what had happened and that he pumped the fuel because he was in a hurry and was trying to get his deliveries for that day completed. I accept his denial as it is unlikely that a person so seriously injured at the time would be in any position to make a coherent response to issues of fault.

[20] I find having regard to all the evidence that the vehicle was mechanically faulty and that some mechanical failure caused the explosion. I also find that this accident arose from Delta's failure to use reasonable care to ensure that its vehicles were safe for the purpose for which they were being used. They could not simply rely on drivers to check the vehicles before taking them out, more was required, for example regular substantive overhauls. I note that they only had 3 vehicles at that time of some vintage and that only two were operational that day, no doubt putting an added responsibility on the drivers to fulfil their workloads. I find further that the system of delivering fuel employed by Delta was unsafe and likewise that they had failed to provide Mr. Smith with any training or protective clothing. The belated attempt to hand him a safety manual at the hospital could not remedy the breaches. Delta was therefore responsible for the accident and resulting injuries.

[21] However, I find that Mr. Smith was aware of the possibility of an explosion whilst pumping gasoline and that he was also aware that constant monitoring of the truck whilst engaged in such operation was needed and that that could only be done with 2 persons. Further he admitted that he could

not see the truck at all times and when he went to the washroom he could not see the truck at all, yet he did not take the precaution of turning off the ignition to facilitate his visit to the tap. He therefore contributed to this accident and I find that responsibility should be shared and that Delta should be held 60% liable. This strikes me as a fair apportionment in all the circumstances of the case. I now turn to the issue of damages.

[22] **Damages**

The principles which inform the assessment of damages for personal injuries are settled. See Sir Hugh Wooding C.J in **Cornilliac v St. Louis**¹, and **Alphonso and Others v Deodat Ramnath**.² The main factors to be taken into account are:- the nature and extent of the injuries sustained; the nature and gravity of the resulting physical disability; the pain and suffering endured; the loss of amenities; and the impact on Mr. Smith's pecuniary prospects. At the end the court is called upon to make a fair and reasonable award for the loss suffered having regard to awards for similar injuries in cases from its own jurisdiction as well as from jurisdictions with similar socio-economic structures.

[23] **The nature and extent of Mr. Smith's injuries and resulting physical disability**

Mr. Smith is now 47 years old. After the explosion he was taken to Peebles Hospital in Road Town where he was treated, his wounds dressed and his arm was placed in a sling. He was discharged from the hospital on 10 April 2007.

[24] Mr Smith suffered the following injuries :-

- a) Partial thickness second degree skin burns to the face and both forearms;
- b) L5-S1 disc tear without herniation;
- c) Aggravation and acceleration of previously asymptomatic I4-5 degenerative disc disease;
- d) Subluxation of the right acromio clavicular joint;
- e) Smoke-inhalation injury;
- f) Post-traumatic stress disorder;
- g) Depression.

¹ (1965) 7 WIR 491

² (1997) 56 WIR 183

- [25] After his discharge he continued to receive treatment for his burns and for the psychological effects of the accident. He also received and continues to receive treatment for back pain at the University of Miami Hospital in the United States of America. He claims that he will require more permanent and invasive solutions to manage his back pain and he presented in court with a battery operated ANS device attached to his waist that alleviated the pain with varying degrees of tolerance being initiated with a dial.
- [26] He said that the pain in his back causes him difficulty sleeping and sitting. He cannot work. The skin on both his face and arms has not fully healed and this causes him great embarrassment and distress and he continues to suffer from post traumatic stress syndrome often experiencing flashbacks. He related a flashback incident that caused him to climb to the roof of his home and attempt to jump off. He said that he is unable to assist his wife with household chores or contribute equally as before because he is now forced to leave the brunt of the work to his wife who is a nurse who works shifts. He also experienced loss of libido which has no doubt affected his marital relationship. He also spoke of his inability to enjoy pastimes that he engaged in before the accident.
- [27] Dr. June Samuel testified in support of in her report of November 2010. She said that Mr. Smith suffers from post traumatic stress disorder and chronic pain from burns and lower back injuries. She found that Mr Smith has significant functional and social impairments and will require **long term medication and continuous psychological review**. That his ability to work will be impaired by his psychiatric injury and he will need to be assessed for his readiness for work. That his day to day existence is severely affected by his injuries as he suffers with depressed moods and experiences flashbacks brought on by certain stimuli. That he has suffered significant psychological impairment. That he will need continued therapy for the foreseeable future including bi-weekly sessions to help address self esteem and monitor his mood and suicidal risk. He will need to remain on medication mid to long term as there is no cure for his illnesses. In her opinion there is no prospect of a full recovery for Mr. Smith.
- [28] We also had reports submitted by agreement by Dr. Tattersall and Dr. Buring which spoke to his orthopaedic injuries and to the burns. I find having regard to the nature of the accident giving rise

to the injuries and to Dr. Samuels' report as well as to the reports of Dr Tattersall and Dr. Buring and the evidence of Mr. Smith that his physical and psychological injuries resulted from the accident. I accept their findings on his physical condition. I find that in respect of his burn injuries that he has made a full recovery although the skin is sensitive and he will have to use sun screen and moisturizers, see Dr. Tattersall's report tab 10 of the Trial Bundle. In respect of his other physical injuries and impairment I accept the report of Dr. Buring at tab 8 Trial Bundle to the effect that he has no prospect of making a full recovery and has had as a result a reduction of life expectancy of 5 to 10 years.

[29] I also note that Dr. Buring is of the view that it is possible that Mr. Smith could eventually return to work though it would have to be in a sedentary occupation with the implant in place. That he would need extensive re-training and vocational rehabilitation and that taking into account the pain level this would have to be on a part time basis and more likely in a self employed capacity where he can adjust his working hours on a day to day basis.

[30] This report coupled with that of Dr. Samuels on continuing psychological trauma experienced by Mr. Smith constrains me to find that it is highly unlikely that Mr. Smith would ever return to full time employment and that his earning ability and his earnings will suffer a great reduction as much as 75% and he must be compensated for that. I remark Delta's attempt to establish that he has exaggerated his injuries but that falls away in light of the medical reports and also in view of Mr. Smith's evidence to the effect that he hopes to return to his native shores, Jamaica, and to start up his own mechanic shop.

[31] I must observe that since the accident, even with liability undetermined that Delta has assisted Mr. Smith handsomely with his medical costs and expenses. They also paid his full salary and he received social security payments as well which gave rise to the counterclaim. They were prepared to continue to employ him as a guard with minimal hours on his full salary but after little effort he refused this employment as he claimed it was too traumatic to see the trucks and smell the fumes. Therefore on 1 December 2007 Delta dismissed him. Delta is to be highly commended for their humane stance.

[32] It was submitted that Mr. Smith failed to mitigate losses when he refused to undergo surgery locally and refused to undertake light work with Delta citing boredom and discomfort caused by injuries and flashbacks from being in the vicinity of equipment etc. I am satisfied that his decision not to have surgery here was not unreasonable as it appears that that type of operation had never been done here and clearly he did not want to be a guinea pig. I am also satisfied based on his own evidence and that of Dr Samuels that his refusal to work in the new post given him by Delta was not unreasonable because he continues to suffer from post traumatic stress disorder and chronic back pain. In the circumstances I hold that he has not failed to mitigate his losses.

[33] **General Damages**

Mr. Smith is 47 years old and the injuries he suffered are grave by any standards. Having regard to the factors to be taken account of as elucidated in **Cornilliac** and having regard to the wealth of authorities cited, in my judgment the sum of \$75,000 as general damages would have been fair and reasonable compensation for the nature and extent his injuries and resulting disabilities had Delta been wholly responsible. As it is not, he is awarded 60% of that amount.

[34] **Pain and suffering Loss of Amenities**

In addition he is awarded 60% of \$20,000 for loss of amenities as I find having regard to his evidence and that of his medical witnesses that he has suffered and will continue to suffer long term serious loss of amenities.

[35] **Special damages**

In relation to special damages I am satisfied that the following losses were proved and he is awarded 60% of same.(Although I am satisfied that prior to the accident he earned extra by washing cars for Delta and working overtime I am not satisfied that he is entitled to recover for any long term for those losses as he had no contractual or other rights to receive them from Delta or third parties and therefore he cannot claim for such losses for any length of time. Therefore, an award of 60% of one month's overtime earnings based on an average of \$850 and one month's earnings from car washing will be made as it is reasonable to expect that some notice albeit non-contractual could be given and any expectation he would have had to receive those would cease. His loss of future earnings will therefore be calculated on his net earnings).

[36] **The losses on which 60% is awarded are:-**

loss of earnings from termination of employment (1 December 2007) to date of trial- (43 months)
less social security contributions equivalent to half of his salary =\$24,819.60;
loss of additional pay of \$100 per month for washing trucks at
Delta's premises = \$100.00, loss of 1 month's overtime earnings =\$850.

[37] **Future medical expenses-**

Monthly visits for 2 years at \$120 each for psychiatric treatment = \$1732.80;
Future medical treatment as result of burns = \$5565;

[38] **Loss of Future Earnings**

Having regard to all the evidence on his medical condition I have found as previously stated that I am satisfied that Mr. Smith will be unable to return to any full time employment and he will suffer about a 75% reduction in earnings for the remainder of his working life. Therefore he is to be compensated on the well-established principles for that loss. Having regard to his pre -accident earnings I find that a multiplicand of \$73,881.60 is appropriate, that is based on his basic salary as he has no contractual right to overtime and car washing remuneration.

[39] In determining the multiplier I have regard to his present age of 47, the normal working life of 65 and to the fact that he has a reduced life expectancy of about 5 years. I find taking into account all normal contingencies of life and present receipt of a lump sum that a multiplier of 8 is fair and just. He is therefore entitled to damages under this head amounting to 60% of 8 times three-quarters of his basic salary.

[40] **Interest**

The court has a discretion to award pre-judgment interest and it is the norm to do so in personal injury cases on some awards. Therefore, on general damages Mr Smith is awarded interest at 2.5%per annum from the date of the service of the claim form to date of judgment.
And, on special damages Mr Smith is awarded interest at the rate of 5 % per annum from date of service of claim form to date of judgment.

No interest is awarded on the future medical expenses or on future loss of earnings awards.

[41] **Costs.**

Mr. Smith is to have his prescribed costs.

[42] **Delta's Counterclaim for \$11,301.94.**

I find for Delta as I accept its evidence on this. I do not accept that any representation was made to Mr. Smith by anyone authorised by Delta to do so that he would be paid his full salary as well as have the full benefit of social security payments. I accept Delta's evidence to the effect that they continued to pay full salary not knowing that Mr. Smith was in receipt of social security payments as well. Therefore this was monies paid under a mistake in law and Delta is entitled to the refund of those monies. I note that Mr. Smith is not in principle averse to refunding the monies claimed (and rightly so) but his difficulty appears to be that he spent it as he was not aware that he had to refund it and now does not have the means to do so. That is easily dealt with as Delta is entitled to set off that sum from the damages awarded to Mr. Smith here. I will also award interest on that sum from the date the counterclaim was filed to date of judgment at the statutory rate of 5% until judgment. I make no order as to costs on the counterclaim as this was a very minor issue in the entire case.

[43] **Summary**

In conclusion, for the reasons advanced the court held that Delta was 60% liable for the accident in which Mr. Smith was injured and Mr. Smith is 40 % as he contributed to the accident by his negligence.

[44] Mr. Smith is awarded damages as set out herein and counsel are kindly requested to calculate the sums due on the basis set out herein and so ensure that the formal order correctly reflects the awards made.

[45] Delta succeeded on its counterclaim and Mr. Smith must pay to Delta \$11,301.94 with interest on that sum from date counterclaim was filed to date of judgment at the rate of 5% until judgment.

Delta is entitled to set-off that sum from monies adjudged to Mr. Smith. No order as to costs was made.

[46] **Postscript**

I thank counsel for their invaluable assistance herein.

I note that Mr Smith makes claims for severance pay and monies allegedly withheld by Delta in relation to his employment.

These matters do not appear to be contested but they are not properly before this court and the court declines to address them. Suffice it to say that the court fully expects Delta to meet with Mr. Smith to resolve these issues without further delay.

Rita Joseph-Olivetti
Resident Judge,
Territory of the Virgin Islands.