

SAINT VINCENT AND THE GRENADINES

THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

CIVIL CLAIM NO. 29 OF 2002

BETWEEN:

DWIGHT MAYERS of **ARNOS VALE** Claimant

AND

CARL WILLIAMS of **ARNOS VALE** Defendants
SHELL ANTILLES AND GUIANAS LIMITED

Appearances:

Mr. Richard Williams for the Claimant
Mr. Stanley John for the Second Defendant

2003: September 24
 October 1, 15
 December 15
2004: April 20

JUDGEMENT

- [1] **BLENMAN, J:** Mr. Dwight Mayers claims damages against Shell Antilles and Guianas Limited (Shell), for injuries he sustained to his fingers while putting fuel in the M V Rita on 22nd February 2004.
- [2] Shell employed Mr. Carl Williams to deliver its fuel by truck to ships. Mr. Williams in turn employed Mr. Mayers to work on the truck as a driver's mate, in the delivery of the fuel to ships. Mr. Mayers' fingers were crushed when he M V Rita he was refueling
- [3] He bought these proceedings alleging that he was injured when the MV Rita collided with the MV Barracuda while he was working for Shell and that it breached

its common law and statutory duty of care to him. He claims that both Mr. Williams and Shell Antilles were negligent in failing to provide a safe system of work for him, and effective supervision. He was hospitalized and incurred expenses, as a result of his injuries. Shell financed some of his medical bills. He seeks special damages in the sum of \$23, 100, together with general damages from Shell.

He contends that Shell personally employed him during his lunch hour and since it was during this period he was injured, it was responsible for providing a reasonably safe system of work and effective supervision which it failed to do.

- [4] In its defence, Shell Antilles denied that Mr. Mayers was its employee. It asserts that Mr. Carl Williams, an independent contractor, was responsible for providing instructions to his employees, and Mayers was one of his employees. In its pleadings, Shell stated that it does not have an agreement with Mr. Mayers and denies that he was injured while refueling the M V Rita as alleged. Shell contends that he was solely responsible for the injuries that he sustained, and alternatively that he is guilty of contributory negligence. By way of written agreement titled **Contract For Services**, Shell employed Mr. Carl Williams to provide various services to it including the cleaning of depots weekly gardening, and importantly, to provide a driver's mate on a daily basis from 7:30 a.m. – 4:30 p.m. Monday to Friday. Work outside of those hours was to be paid for separately. Shell paid Mr. Williams \$2,685 per month and the latter in turn contracted Dwight Mayers as a full time driver's mate, and paid him his salary from the monies obtained from Shell. Mr. Mayers was paid lunch allowance by Shell when he worked through his lunch period. Shell argues it is not liable for the injury he has suffered. In any event, it has given its contractor booklets on the safety measures that should be followed in order to prevent injuries to persons whom the contractors employed and it provides ongoing training programmes and invites its contractors and employees to attend in order to improve their safety awareness, Mr. Carl Williams and Mr. Mayers have participated in various training programmes hosted by Shell.

- [5] The issues that arise for determination are as follows:
- (a) Whether Mr. Dwight Mayers was the servant or agent of Shell?
 - (b) If so, whether Shell was in breach of its common law and/or statutory duty to Dwight Mayers and is liable to compensate him for the injuries he has suffered?
 - (c) Whether Dwight Mayers through his negligence contributed to the injuries he sustained?
- [6] Both parties filed witness statements and led oral evidence in the matter. It is necessary that I deal at length with the evidence in this matter.

CLAIMANT'S CASE

- [7] **DWIGHT MAYERS:** Mr. Mayers is a young man who was originally employed as a gardener, and later as a driver's mate on a truck owned by Shell to deliver fuel. Mr. Chester John, the driver of the truck was a permanent employee of Shell and was responsible for giving him instructions in relation to where, when and how to perform his job. He was provided by Shell with its uniform to wear. On the 22nd February 2004 MV Rita was berthed alongside the MV Barracuda. During the lunch period, himself and Mr. Chester John were sent by Shell in a truck driven by Mr. Chester John, to the wharf to deliver fuel to the MV Rita. While at the wharf, Mr. John sent him to put the nozzle of the fuel pump into the MV Rita's tank, in order for them to deliver the fuel. He was holding the nuzzle of the pump with his right hand while holding on to the rail of the boat, when due to the movement of the water, the two boats rubbed against each other, crushing his fingers and injuring others. While he was refueling the MV Rita, Mr. John was sitting in the truck talking to a friend and the windows of the truck were turned up. Mr. Chester John was not supervising him. When he worked during his lunch period he was paid \$22.00 by Shell. Since he commenced working for Shell through his employment with Mr. Williams, he has taken instructions from Shell's employees,

including its drivers and supervisors, such as Mr. Bertram Walker, and Mr. Huggins.

[8] He was vigorously cross-examined by Learned Counsel Mr. Stanley John, and was adamant that the fuel tank on the boat was next to the side of the boat. The boats were about 3 feet apart with the MV Barracuda being the bigger of the two. He left the wharf to get on the MV Rita so as to put fuel in the boat and did not observe that the boats were moving due to the waves. There was no string on the nozzle to keep it in the tank he had to hold it down. He had no doubt that he did not signal to Mr. John with both hands, since he sustained injuries just after he commenced pumping the fuel. It was his responsibility to put the hose into the tank under the instructions of the driver (Chester John). He admitted that his salary was \$500 EC per month, and Mr. Carl Williams paid him his salary. He received no instructions from Mr. Williams as to how he should perform his duties and was since that Shell retained him to work during the lunch hour and specifically paid him.

[9] **KACEY MALONEY:** Mr. Kacey Maloney, a seaman who was employed on the MV Rita, gave evidence in support of Mr. Dwight Mayers. He witnessed when Mr. Mayers was fueling the boat, and holding the nozzle down into the fuel tank, while holding on to the rail. The MV Rita was berthed alongside the MV Barracuda. He testified that Mr. Mayers' hand was crushed as a result of the boats moving and coming into contact with each other. He was adamant that at that time when Mr. Mayers was fueling the MV Rita, Chester John was sitting in the truck.

[10] In cross-examination, he stated that as a seaman he would not hold onto the rail of boats because he knew they could collide, since they moved with the waves. However, Mr. Mayers was a layman and may not know that. He knew Mr. Mayers as diesel man, and saw him previously fueling the MV Rita, Mayers usually puts the nozzle in the tank and held the nozzle down until the boat was loaded. He was clear that one person would stay by the truck to check the meter while the other

operated the pump. On the day in question, he was about 8 – 10 feet away from Mayers while he was putting the fuel in the MV Rita. He saw him holding the rail, but he did not see when the boat collided with his hand, even though he was clear from his experience, the boats usually move all of the time, while they are berthed, and sometimes the MV Barracuda would go a little on the wharf as a consequence of the movement of the waves.

- [11] **DR ARVIN SALIAN:** Dr. Arvin Salian is a Consultant Orthopedic Surgeon, employed at the Kingstown General Hospital. On the 22nd February 2000, he examined Mr. Dwight Mayers, who had sustained injuries to the fingers of his right hand, as a result of an accident. He operated on his fingers, two of which were totally crushed, and had to be amputated. He has kindly provided a medical report, which indicated that Mr. Mayers' index and middle fingers were fractured, and gave detail in relation to the amputation.

DEFENDANT'S CASE

- [12] **BERTRAM WALKER:** Mr. Bertram Walker, the Operation Supervisor of Shell was its the main witness. He stated that Mr. Williams was employed by Shell, under a Contract For Services, which was produced in evidence. According to the contract, Mr. Williams was responsible for the provision of a full time driver's mate, and an additional mate, depending on the nature of the delivery Shell had to make. Mr. Mayers was not employed by Shell, but instead by Mr. Williams the latter who was solely responsible for his assignment. Under the heading "Responsibility for Personnel" Clause 4 of the contract between Williams and Shell provides "that the contractor shall be responsible for all persons employed by him hereinafter called "employees" and shall ensure that employees engaged in carrying out the works or services shall comply with all statutory provisions, as well as all Company Safety Rules & Regulations. In so far as may be necessary, to ensure compliance with Statutory Provisions and with the requirements of the company in respect of the nature or quality of work, **the Company shall be**

entitled to give such instructions to any employee as may be necessary in the absence of the contractor.”

[13] In cross-examination, he admitted to being responsible for safety matters at Shell. Over the years Shell had conducted several safety training programmes and has safety manuals. Mr. Dwight Mayers attended some training programmes hosted by Shell; however he was not sure that he attended safety-training programmes. He stated that if a worker arrived at his place of work and found the condition of work unsafe, he is required to call the depot and make a report, the depot in turn is obliged to advise him of the report. The conditions under which Mayers worked on that day were safe. The mate's duty was not to hold the nozzle down since the nozzle remained in the fuel tank by itself. The driver's duty was to ensure that he managed the operation of the truck during the discharge of fuel. Mr. Carl Williams was responsible for instructing Mr. Mayers. Shell members of staff determine where the truck goes and assigns the driver. He recanted later and admitted that instructions to all contractors, sub-contractors and employees emanate from him, but the contractors specifically instruct sub-contractors. Even though a string or cord can be used as a back up to maintain a nozzle in the tank, he later conceded that at all times, the nozzle should be manned. Shell employees when they work during their lunch hour, are paid \$22. He stated subsequently that Shell does not pay their workers the \$22, but would provide a meal. Counsel showed him a receipt which he admitted that Mayers was paid \$20 by Shell and not Mr. Carl Williams. Subsequently he stated that Shell provides a meal to the driver and mate, when they work during the lunch period.

[14] During his intense questioning, Mr. Walker conceded that in the absence of the contractor, he was responsible for giving instruction to Mr. Dwight Mayers on safety matters. He gave Mr. Mayers directives on the manner in which he should carry out his work. In his or Carl Williams' absence, there is a person junior to him who gives Mr. Mayers instruction. The driver is in charge of the operation when the truck leaves the yard and the driver is his servant or agent. He reluctantly

conceded that Shell provided a shirt with its logo to Mr. Mayers. He opined that while the driver is responsible for ensuring that the delivery of fuel is done in a safe manner, he is not responsible for giving instructions to the driver's mate, in relation to the delivery of fuel. He has no obligation to tell the mate that the place is unsafe if he is aware that it is unsafe, rather he should call the station and report the matter if it is unsafe. Later, he admitted that if Mr. Carl Williams is not present at the place of work, he is responsible for the safety of Dwight Mayers, so too as are his servants/agents. It is unusual for Mr. Carl Williams to be at the wharf and importantly he was not present on the day, so Shell Antilles was responsible through its servants/agents for Mr. Mayers' safety. Mr. Chester John was Shell's agent. Shell has safety guidelines entitled "Working Safely for Shell," but he was unaware of whether Mr. Chester John or Mr. Dwight Mayers had even seen the booklet.

- [15] **CHESTER JOHN**: Mr. Chester John was the second witness who testified in support of Shell. He is employed at Shell as a relief driver. On the 22nd February 2000, he was assigned by Mr. Gittens of Shell, to deliver fuel to the MV Rita. He loaded the truck at Arnos Vale, Dwight Mayers was with him. He drove the vehicle to the wharf, where the MV Rita was berthed alongside the MV Barracuda, and parked alongside the MV Rita. Both of them got out of the truck and he took out the hose from the compartment on the truck that contains the meter, and gave it Mr. Mayers who boarded the MV Rita with the hose and placed the nozzle in the tank and tied it down. Mr. Mayers left the tank and stood on the wharf next to him. He re-entered the truck and released the clutch so that the fuel could flow from the pump into MV Rita's tank. They completed placing 1500 gallons of fuel in the MV Rita and went back into the truck to turn off the pump so that Mr. Mayers could transfer the nozzle from the left tank to the right tank, to place the other 1500 gallons into the next side. He had expected Mr. Mayers to tie down the nozzle in the tank and was still in the truck. Mr. Mayers signaled him by waving both hands, that he should activate the pump which he did and came out of the truck

door whereupon he saw Mr. Mayers holding one of his hands telling him that his hand got damaged.

- [16] In cross-examination, he stated that he ensured that Mayers had put the hose properly in the tank. Mr. Mayers was on the boat when it was being fueled. The boat was about 3 – 4 feet apart from the truck. He asserted that once Mr. Mayers had tied the nozzle down on the boat, there was no need for Mr. Mayers to remain on the boat even though it was not safe to tie it down. He had never spoken to Mr. Mayers about unsafe practices, even though at times they took chances and did things that were unsafe. At the time of the accident, he was in the truck activating the pump, but is sure that nothing on toward happened during the fueling of the MV Rita, since the fuel tank was nowhere near to the two boats. He never spoke to Mr. Mayers about his injuries, even though he is aware of them. While he did not see how Mr. Mayers sustained the injuries he was sure that it was not as a result of the boats coming together, since Mr. Mayers was not in any position close to where the two boats met, and in any event he had used both hands to signal him to release the pump and none of his hand was injured then. He had no personal knowledge about how Mr. Mayers' fingers were injured up to the date of trial.

FINDINGS OF FACT

- [17] In a civil matter, it is important for the court to determine the factual issues where there are disputes. There are several disagreements in relation to what was the true nature of Mr. Dwight Mayers' employment, and more importantly in what circumstances did he sustain the injuries.
- [18] Mr. Chester John's and Mr. Bertram Walker's evidence is substantially at variance with that of Mr. Dwight Mayers, and Mr. Kacey Maloney's. I am at a loss at to what Mr. Chester John is saying, in relation to the circumstances in which Mr. Mayers was injured. He was in the truck when Mr. Mayers was injured, but seem to be saying that Mr. Mayers should not have been on the boat at the time. His

evidence was very unconvincing, when he maintained that, the rubbing together of the boats did not injure Mr. Mayers. It is strange that he never saw it fit to enquire from Mr. Mayers the circumstances in which he was injured, even though a substantial length of time has passed. I do not believe that the pump's nozzle was tied down on the fuel tank, as Mr. Chester John tried to persuade the court. He stated that they adopted unsafe practices at times and took chances. I believe this; I do not accept his account of the events, and reject his testimony. He is not truthful and was extremely evasive and has not even attempted to give an explanation as to how Mayers was injured. He seemed to be unconcerned about Mr. Mayers based on his admission that, he saw the two boats rubbing against each other, and did not alert Mr. Mayers. He parked the truck alongside the MV Rita; I do not believe Mr. John's evidence about Mr. Mayers waving both hands to him. His assertion that the MV Barracuda was no where near the position where Mayers was standing is untrue.

- [19] I was not impressed with Mr. Bertram's Walker evidence; he struck me as a very untruthful witness. Most of his credible testimony was given under persistent cross examination. I am satisfied from the evidence that Shell had direct control over Mr. Mayers in relation to work he was employed to do and his manner of doing it. I was not persuaded by his statements nor the written Agreement that Mr. Carl Williams was responsible for instructing him. The evidence before the court including Mr. Chester John's and his evidence is consistent with Shell being in actual and ostensible control of Mr. Mayers. Mr. Walker admitted that the safety and conditions of Mr. Mayers' work were his responsibility, in the absence of the contractor. There is no dispute that on 22nd February 2000, Mr. Williams was not present on the wharf, so Mr. Walker and ultimately Shell, was responsible for ensuring that Mr. Mayers worked in a safe system. I also believe that Shell paid its workers including Mayers the sum of \$22 EC for (overtime) work during the lunch period.

[20] Mr. Mayers and his witnesses' evidence proved to be very helpful to the court's determination of the matters raised. I am more attracted to the testimony of Mr. Mayers and his witness, Mr. Kacey Maloney. Mr. Maloney is very forthright and credible person whose evidence was not vigorously tested, since he appears to be just a simple, honest person, who has no interest in the matter, other than to speak the truth. I believe his account of how Mr. Mayers sustained the injuries to his fingers even though the witness did not see the accident. He was present during Mr. Mayers' fueling of the MV Rita, and was only a few feet away at the time of the accident. Mr. Dwight Mayers was extremely candid with the court. His testimony was not shaken. He was forthright in relating the circumstances in which he was injured. I have no reason to disbelieve his account. It is very clear that his hand was injured when the MV Rita, which was berthed near MV Barracuda, came into contact with each other. At that time, he was fueling the MV Rita and holding on to its rail. Mr. Chester John was in the truck and did not witness the accident.

[21] Having reviewed the evidence, I make the further findings of fact on Mr. Mayers' employment. Mr. Carl Williams retained his services as a driver's mate to work on Shell's truck, to assist the drivers in the delivery of fuel. Mr. Carl Williams had a contractual agreement with Shell to provide to it a variety of services, such as gardening, cleaning and other services including the provision of a full time driver's mate. Shell paid Mr. Williams the sum of \$2685 EC, out of which he paid Mayers \$500 EC per month. Even though the agreement provided that Mr. Williams was responsible for giving safety instructions to his employees, I have no doubt, based on Mr. Bertram Walker's evidence, and that of Mr. Mayers, that Mayers received instructions in relation to the manner and mode of work came from Shell, either through Mr. Walker or other Shell employees while Mr. Carl Williams provided the labour he had no authority to give instructions in relation to the work itself.

SUBMISSIONS AND ANALYSIS

NATURE OF EMPLOYMENT

- [22] It is essential to determine whether, Mr. Carl Williams was a contractor or an employee of Shell's and, the nature of Mr. Mayers' relationship with Shell. Learned Counsel Mr. Stanley John argued that Mr. Carl Williams is an independent contractor and therefore Mr. Mayers who was his employee cannot be held to be Shell's employee since he was employed by Mr. Carl Williams. Learned Counsel Mr. Stanley John cited the case **Cassidy v Ministry of Health (1951)2KB 343** in support of his proposition that an employer can escape the responsibility for collateral on casual acts of negligence if he can show that the negligent person was employed not under a contract of service but only under a contract for services. Mr. Mayers was employed under a **Contract For Services** therefore Mr. John opines that Shell is not liable for any damage he may have suffered.
- [23] Mr. Richard Williams submitted that Mr. Dwight Mayers was Shells' employee. He submitted that the court must examine all of the surrounding factors in order to ascertain the true nature of the relationship. The fact that the parties have labeled the Agreement "Contract for Services", which label usually indicates that the relationship that exists is one of Employer and Contractor, by itself is not conclusive of its nature. In **Lane v Shire Rooting Company (Oxford) limited 1995 PIQR 417** the Court of Appeal held that there was a public policy interest in finding that relationship of employer/employee exists, due to the responsibilities imposed by common law and Statute, rather than an independent contractor.
- [24] In determining the nature of the relationship. I must examine the facts to see who lays down what is to be done, the way in which it is to be done, the means by which it is to be done and the time within which it is to be done, who provides the material, equipment and tools required, If the employer is responsible for most of the areas mentioned the relationship is consistent with that of master and servant.

[25] I am of the view that control by itself is insufficient to determine whether a person is a servant or an independent contractor. The court must examine other factors including the name the parties have ascribed to their contractual relationship. In **Len v Cheng (1990) 2 AC 374** the Privy Council stated that the matter has never been put better than by **Cook J. in Market Investigations Ltd, Minister of Social Security** where he stated that

“The most that can be said is that control will no doubt always have to be controlled, although it can no longer be regarded as the sole determining factor; and that factors which may be of importance are such matters as whether the man performing the services provides his own equipment, whether he hires his own helpers, what degree of financial risk he takes, what degree of responsibility for investment and management he has and whether and how far he has an opportunity of profiting from sound management in the performance of his task”

On that basis in *Len v Cheng* although the plaintiff worked for different persons, the court held that he was an employee who earned his living by working for more than one employer. He was not a contractor.

[26] Applying these principles to the factual circumstances, I am of the view that the relationship that existed between Shell and Mr. Williams and Shell and Mr. Mayers is that of master and servant. Carl Williams is not a contractor he is Shell's servant. There are several other cases that support this view, including **Garrard v Southey & Co. and Arther (1952) 1 All E.R. 597** in which contractors assigned their employees/ electrician to work exclusively in a factory. The contractors paid the employees directly and retained the right to dismissing. They were supplied by the factory with all materials, tools, plant and equipment. The court held that the occupiers of the factory and not the electrical contractors owed the electrician the

common law duty of a master to his servant to provide proper plan and equipment, and therefore were liable to him for breach of that duty.

COMMON LAW DUTY

- [27] Learned Counsel, Mr. Richard Williams posited that Shell breached its common law duty of care to Mr. Mayers since it failed to provide him with a safe place to work and adequate supervision. Mr. Stanley John, learned counsel submitted that Shell did not breach any duty it may have had to Mayers, since at no time during the course of trial did Mr. Mayers challenge the reasonable safeness of the system of work. Mr. Dwight Mayers has the onus of proving that Shell has breached his duty to him and that breach caused the injury. Mr. Stanley John maintained that Mr. Mayers was not employed by Shell, rather he was employed by Carl Williams, the contractor. Mr. Williams opined that Shell was in breach of this element of its common law duty of care to Mr. Mayers since it sent him to the wharf to the fuel M.V Rita, during the lunch period to work and was responsible for paying him for the work in conditions that were unsafe.

SAFE PLACE OF WORK

- [28] Though not specifically mentioned by **Lord Wright in Wilson and Clyde Co. v English [1938] AC57**, it is clear that the employer's duty of care extends to the duty to provide safe place of work and in some cases may even apply even to the means of access to the place of work. Even where the employer has no control over premises in the occupation of a third party he could still owe a duty of care to provide the employee with a safe place of work. Even if the employer is not responsible for defects in someone else's premises yet he may be under a duty to give advice, instructions or orders about commonly encountered hazards. In **King v Smith 1995 ICR 329** it was held that the employer of a window cleaner should place an embargo on cleaning upper floor windows by standing on the sill unless there are anchored points for safety awareness.
- Parker L.J. said in Wilson v Tyneside Window Cleaning Co. (1958) 2QB 124 at "that where the master is not in control over the premises on which the**

employee was injured the court should determine as an issue of fact whether or not the employer took reasonable care in all of the circumstances.”

[29] The fact that Mr. Mayers worked as a driver’s mate for several years does not absolve Shell from its duty of care towards him. Mr. Chester John was in charge of the operation and he observed the boats rubbing together and did not see it fit to point that out to Mr. Mayers. It was unsafe to work while the boats are rubbing against each other. There is no evidence before the court that Mr. Mayers received any instructions that addressed his safety while delivering fuel in similar circumstances and even though Mr. Carl Williams was provided by Shell with its safety manual, Mr. Mayers was not. The fact that Mr. Mayers attended other safety awareness courses sponsored by Shell is insufficient to enable it to discharge its duty to him. They ought to have provided him with specific instructions on his safety in the delivery of fuel to vessels that are berthed along side others.

[30] Accordingly, I hold that given the danger inherent in the delivery of fuels to boats that are berthed next to other boats, Shell had the duty to ensure that his place of work was safe and that it has breached that duty.

Safety System of Working

[31] Mr. Stanley John asked the court to find that the system of working must refer to the central system of delivering the fuel into tanks of vessels. He stated that Mr. Mayers did not seek to disprove the reasonable safeness of the system of work. The court is of the view that the system of work must be taken to mean the delivery of fuel into the tanks of vessels that are berthed alongside other vessels. The specific facts of this case must be examined. He contends that Mr. Mayers was senior to Mr. John so Mr. John could not be expected to supervise him. This submission is at variance with the evidence of Mr. Walker, Shell’s main witness, who clearly stated that Chester John was in charge of giving instructions to Mr. Mayers and that Mr. Chester John was in charge of the operations on that day.

[32] Even though Mr. Walker stated that Mr. Mayers was well acquainted and assisted Shell in devising the system of discharging fuel into boats and that he started working as a gardener and moved up to a driver mate after 2 months, which latter position he held the position of over eight years, these factors by themselves do not relieve Shell of its duty to provide a safe system of working to Mayers.

[33] Mr. Richard Williams argued that Shell had a duty to instruct Mayers about the probable dangers of his job such as the accident that occurred. He should have been given specific instructions also about how to refuel boats when they are berthed close to other boats and the attendant risks. He was not a seaman like Mr. Kacey Maloney who was familiar with the risks. Mr. Chester John did not provide adequate supervision to Mr. Mayers as he was obliged to do at law. He expects the court to believe that up to today he never asked Mr. Mayers how he sustained the injuries. Chester John stated that he was unaware of the circumstances in which Mr. Mayers' fingers were injured. He seemed unconcerned altogether. Mr. Richard Williams asserts that Chester John was not providing effective supervision to Mayers as he was obliged to. Counsel relied on **General Cleaning Contractors Ltd. v. Christmas 1953 AC 180** in support of his contention. In this case Lord Oaksey stated at pg 189-190

"In my opinion, it is my duty of an employer to give such general safety instructions as a reasonably careful employer who has considered the problem presented by the work would give to his workmen. It is, I think, well known to employers, and there is evidence in this case that it was well known to the appellants, that their work people are very frequently, if not habitually, careless about the risks which their work may involve. It is, in my opinion, for that very reason that the common law demands *190 that employers should take reasonable care to lay down a reasonably safe system of work. Employers are not exempted from this duty by the fact that their men are experienced and might, if they were

in the position of an employer, be able to lay down a reasonably safe system of work themselves. Workmen are not in the position of employers. Their duties are not performed in the calm atmosphere of a board room with the advice of experts. They have to make their decisions on narrow window sills and other places of danger and in circumstances in which the dangers are obscured by repetition.

The risk that sashes may unexpectedly close, as the sashes in this case appear to have done, may not happen very often, but when it does, if the workman is steadying himself by a handhold, his fall is almost certain. If the possibility is faced the risk is obvious. If both sashes are closed there is no longer the handhold by which the workman steadies himself. If either sash is kept open the handhold is available and, on the evidence in this case, is, in my opinion, reasonably safe. But the problem is one for the employer to solve and should not, in my opinion, be left to the workman”.

[34] At common law, an employer also has a duty to provide a safe system of working. This includes, ensuring that the sequence in which the work is to be carried out, the provision of warnings and notices and the issue of special instructions. The employer should so far as possible minimise the danger of a worker’s own foreseeable carelessness. Secondly, the employer must exercise reasonable care to see that his system of working is complied with by those for whose care it is instituted.

[35] I accept Mr. Richard Williams’ submissions and applying the legal principles I have no doubt that Mr. Chester John failed to provide Mr. Mayers with adequate supervision. The system of working was defective and Shell has breached its common law duty to provide a safe system of working to Mr. Mayers. The breaches have caused the injury to Mr. Mayers for which Shell is liable.

STATUTORY DUTY

[36] The employer's statutory duty is strict and exists quite apart from its common law duty. The Compensation for Injuries Act Cap 83 of The Laws of Saint Vincent and the Grenadines imposes duties on the employer in addition to its common law duties. Section 4 it provides as follows:

“where personal injury is caused to a workman –

- (a) by reason of any defect in the condition of the ways, works, machinery or plant connected with or used in the business of the employer;
- (b) by reason of the negligence of any person in the service of the employer, who has any superintendence entrusted to him, whilst in the exercise of such superintendence.
- (c) By reason of the negligence of any person in the service of the employer to whose orders or directions the workman at the time of the injury was bound to conform and did conform where such injury resulted from his leaving.....
- (d) By reason of the act or omission of a person in the service of the employer any person delegated with the authority of the employer in that behalf.

The workman shall be entitled to be compensated.

[37] Mr. Richard Williams argued that Shell has breached its statutory duty to Mr. Mayers. Mr. Stanley John disputes this.

[38] I am satisfied that the condition on the day in question, in which Mr. Mayers worked, was unsafe. Mr. Chester John who had responsibility for supervising him failed to properly do so. Mr. Chester John ought to have warned Mr. Mayers not to

hold on to the rail, it was very foreseeable that he may do that if the boat was moving while he was refueling it. More importantly, Mr. John saw the boat rubbing the other, and said nothing. Had Mr. John pointed out the rubbing of the boat to Mr. Mayers, he may have had his fingers today since he may not have held the rail while refueling. Shell has breached section 4 (b) of the Act since Mr. Chester John's supervision of Mayers was non-existent. In accordance with section 4 (c) Mr. Bertram Walker Supervisor of Shell was obliged to instruct Mr. Mayers and he failed also to do so, thus gives rise to Shell's breach of its statutory duty of care to Mr. Mayers.

CONTRIBUTORY NEGLIGENCE

- [39] Learned Counsel Mr. Stanley John argued that Mr. Mayers is guilty of contributing negligence in that he failed to take responsible care for his own safety. He should not be able to recover for the loss he has suffered since he was at fault. He should have taken reasonable precautions to avoid placing his hands on the rails when it was obvious that the two boats were rubbing together. Mr. Richard Williams submitted that there is no evidence of negligence on the part of Mr. Mayers since he acted as a reasonable prudent man would in all of the circumstances.
- [40] Mr. Mayers sustained injuries when held on to the side of the boat where he was refueling it. The question the court must determine is whether he was at fault in this regard. There is the helpful evidence Mr. Maloney that a layman may not be aware of the risks involved due to the possibility of the two boats touching, due to the movement of the water while a seaman, would.
- [41] Winfield & Jolowicz On Tort 15th Edition at page 238 states that a person is guilty of contributing negligence if he ought reasonably to have foreseen that, if he did not act as a reasonable prudent man, he might hurt himself, he has an obligation to take into account the possibility of others, being reckless. It is a defence to both breach of common law and statutory duty. The damages recoverable by the

injured person is reduced if the court finds that the case of contributory negligence made out against him, to the extent that the court considers it fit and equitable based on his share in the responsibility for the damage.

[42] The court should be slow to find a worker guilty of contributing negligence where the defendant is in breach of his statutory duty. Where the claimant's case rests upon an unsafe system of work on the defendant's failure to provide a safe place of work, it would be rare for the claimant to held in this to account to be guilty of contributory negligence. **State Railway Authority v Woegold (1991) 25 NSW 500.**

[43] Applying the legal principles to the facts as stated earlier, I am of the view that there is no basis on which the court can find that Mr. Mayers is guilty of contributory negligence. Shell is solely responsible for the injuries Mr. Dwight Mayers suffered as a consequence of the accident.

CONCLUSION

[44] In the circumstances, there will be judgment for Mr. Dwight Mayers against Shell. I hereby order that Mr. Dwight Mayers is entitled to damages against Shell Antilles and Guianas Limited to be assessed if not agreed together with costs.

[45] I thank both learned counsel for their assistance.

Louise Esther Blenman
High Court Judge

