

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO C.L. 2002/P045

BETWEEN LYMAN PEARCEY CLAIMANT

A N D INDUSTRIAL GASES LIMITED DEFENDANT

Lord Anthony Gifford, Q.C. and Miss Stacy Kong Quee instructed
By Gifford, Thompson and Bright for the claimant

Mr. Ransford Braham, Miss Daniella Gentles and Mr. Matthew Hogarth
instructed by Livingston, Alexander and Levy for the defendant.

Heard: 4th, 5th, 6th June, 9th July and 17th October, 2003

M. S. Cole-Smith J. (Ag.)

The claimant Lyman Pearcey was employed to the defendant Industrial Gases Limited (hereinafter referred to as IGL”) at the Ferry location when an explosion occurred and he sustained injuries. His employment spanned over a number of years from January 1966 to March 2001 and during this period he received several promotions and training.

On the 13th July 2000 Mr. Pearcey was advised that the purifier, a photograph of which was received in evidence (Exhibit 1) was leaking. He initiated a Work Request Form (Exhibit 4) for the maintenance crew to be assigned to repair the purifier and after signing the form the purifier was

released to the maintenance crew whose supervisor was Mr. Owen Bennett. The maintenance crew was comprised of Mr. Cleveland Wilson, Mr. Marvin Williams and Mr. Clayton Tomlin. The maintenance crew went to the acetylene plant and worked on the purifier.

Mr. Pearcey states that around 10:00 a.m. the same day he went over to the area where the purifier was being repaired to obtain a progress report and he was informed that the problem was located. He did not enquire what was the nature of the problem and as he was about to leave the area he heard an explosion. He turned around and saw a ball of fire heading towards him and he was injured.

Whereas Mr. Pearcey was the only witness for his case there were five witnesses for the defendant.

Mr. Stephen McKay, a Consultant with IGL gave expert evidence that in his opinion the likely cause of the explosion was the presence of acetylene mixed with air, which was ignited by a spark by the use of a metal scraper. In cross-examination he states that if it was not the use of the scraper it was some careless act of the maintenance crew.

In cross-examination Mr. Pearcey says he has no knowledge of the use of the scraper and he does not know what caused the explosion.

During Mr. Pearcey's tenure at IGL he held a number of responsible positions in the acetylene plant. In 1999 he was promoted to Production Supervisor of the acetylene plant and he was also Production Supervisor of the oxygen plant.

There is evidence from the defendant and Mr. Pearcey confirms that he has received training in the operations of the acetylene and oxygen plants from the representatives of Rexarc the American manufacturers of the acetylene plant of the defendant. A representative of Rexarc conducted workshops in Jamaica annually for IGL and the manuals were made available to all the supervisors including Mr. Pearcey. There is also evidence from the defendant that Mr. Pearcey was on the safety committee of IGL which was responsible for establishing, maintaining, monitoring and enforcing procedures at IGL.

IGL instituted its own operating procedures in relation to maintenance work by way of a document "IGL Limited Standard Practice Instruction (SPI) Maintenance Work Request Form (WRF) exhibited to witness statement of Junior Gregory as J.G.I. provides.

The following are the guidelines for the use of the Work Request Form:

Procedure

1. A WRF **MUST** be completed prior to the start of **ALL** maintenance type activities.
2. The WRF must be Initiated by the Operations Supervisor or his Nominee and must be accepted by the Maintenance Supervisor or his Nominee.
3. Maintenance type activities carried out by OPERATORS on the 2:00 p.m. – 10:00 p.m. and 10:00 p.m. – 6:00 a.m. shifts must be done only after the completion of the WRF with the Senior Shift Operator acting as Both Operation and Maintenance supervisors i.e. initiating an accepting job. The form must be submitted to the operations supervisor the following day.
4. The description of work requested must be as concise as possible and where necessary special instructions must be given.
5. Subsequent to the completion of the job it must be **RETURNED** by the Maintenance Supervisor or his NOMINEE and **ACCEPTED** by the Operations Supervisor or his Nominee.
6. A cold or hot work permit must accompany the Work Request Form at **ALL TIMES**.

7. Valves, electrical controls etc., must have the appropriate clearance tags as part of the safety clearance procedure.
8. All activities carried out including the spare parts used and the time spent on the job must be completed on the reverse side of the Work Request Form. The accuracy of this information must be checked and verified by the Maintenance Supervisor or his Nominee.
9. The completed WRF must be submitted to the Maintenance control section.

Lord Anthony Gifford on behalf of the claimant in his submissions states that he would not be pursuing the aspect of the pleadings that dealt with Breach of Statutory Duty. I am therefore left to consider the Negligence aspect of the claim.

The fundamental issue to be decided is whether the defendant was negligent to the claimant as an employee or whether the explosion was caused by the negligence of the claimant.

The general rule is that an employer owes a duty to take reasonable care for the safety of employees. In the case of Wilson and Clyde Coal Co. Ltd. v. English (1937) 3 All ER 628 it was held:

- “(1) the employers were not absolved from their duty to take due care in the provision of a reasonably safe system of working by the appointment of a competent person to perform that duty. Although

the employers might and in some events were bound to appoint someone as their agent in the discharge of their duty, the employers remain responsible.”

IGL by providing training for the claimant in the operations of the acetylene and oxygen plants and making available to him Rexarc manuals and also by the implementation of “IGL Limited Standard Practice Instruction (SPI) Maintenance Work Request Form” (“Exhibited as S.J.I”) made provision for a reasonable safe system of work provided the procedures were adhered to.

Mr. Pearcey by virtue of Exhibit 4 released the purifier to Mr. Bennett the Acting Maintenance Supervisor. Mr. Pearcey maintains that the purifier (Exhibit I) was never handed back to him.

Mr. Cleveland Wilson states that Mr. Bennett his supervisor handed him a Work Request Form which was signed by him and on the form it stated that the gasket on the acetylene purifier needed immediate repairs.

Mr. Bennett said he needed himself and Marvin Williams to repair it.

The safety clearance certificate on the Work Request Form was signed by Mr. Pearcey indicating that the acetylene purifier was safe from all hazards. He tightened the bolts around the purifier and left and a few minutes later Mr. Pearcey called advising them that acetylene was pumped back into the purifier and the machine was restarted but the purifier was still leaking.

He states that he went back to the acetylene plant and began working on the purifier as instructed by Mr. Pearcey. He released the bolts half way and Mr. Pearcey told Mr. Clayton Tomlin to get a scraper from the stores. He got it and returned with it. The scent of gas was strong and he asked Mr. Pearcey if he could take five minutes and as he was walking away he heard an explosion.

In cross-examination he said he saw the scraper in Mr. Tomlin's hand but he didn't see him do any work with it and that he left Mr. Pearcey around the purifier with Mr. Marvin Williams and Mr. Tomlin.

Mr. Clayton Tomlin states that Mr. Pearcey asked himself and Mr. Cleveland Wilson to repair a leak to the purifier. They worked on it and about fifteen to twenty minutes later Mr. Pearcey called himself and Mr. Wilson to the plant because the purifier was still leaking. He observed that the rubber seal was not sealed properly. Mr. Pearcey who was standing beside him said because of the rust around the edge the rubber seal was not sealed properly. On Mr. Pearcey's instructions he went for a scraper and he told him to use it to scrape the area where there was rust. He started to scrape and Mr. Pearcey instructed him to hand the scraper to Mr. Marvin Williams who started to use it to scratch the rust from the acetylene tank. Mr. Cleveland Wilson asked Mr. Pearcey if he could leave as the gas was

getting too strong for him and Mr. Wilson left. He said he heard a "boomb" and realized fire was on his body.

In cross-examination he states that he was not telling a lie on Mr. Pearcey.

The evidence of Mr. Cleveland Wilson and Mr. Clayton Tomlin is very crucial in deciding the fundamental issue.

Mr. Junior Gregory is the Operations Manager for the acetylene plant of IGL. In 1999 he prepared and implemented standard operating practice instructions for maintenance work to be carried out at IGL. Mr. Pearcey reported to him and every Friday IGL conducted operations meeting and safety on the acetylene plant and other plants is discussed. Mr. Pearcey is present at these meetings.

He states that given the nature of acetylene special tools are designated for use in the plant and where the standard operating procedures are followed it is not necessary for the maintenance supervisor to be present.

Mr. Clayton Brown, Mechanical Engineer by training and presently a Consultant in LPG (Liquid Petroleum Gas) for Petcom was employed to IGL from 1974 to 1999. He states that in addition to the practical experience which Mr. Pearcey gained by working in various positions in the acetylene and oxygen plants he also received formal training in acetylene, its

operations and the safety procedures to be followed. By virtue of this he was one of the most experienced and knowledgeable persons in acetylene.

Lord Anthony Gifford in his submissions states that Mr. Pearcey was a highly experienced employee who was highly regarded by Mr. McKay and Mr. Clayton Brown. It was highly improbable that he would have ordered the crew to use such a tool and then to have stood by the purifier in the face of danger.

I accept the evidence of Mr. Cleveland Wilson and Mr. Clayton Tomlin that they worked on the purifier twice. I reject Mr. Pearcey's evidence that the purifier was not worked on twice. I also accept the evidence of Mr. Clayton Tomlin and Mr. Cleveland Wilson that Mr. Pearcey sent Mr. Tomlin for the scraper from the store to scrape the rust from the edge of the purifier so that the gasket could be properly seated to prevent the gas leak. I also accept the evidence of Mr. Cleveland Wilson that Mr. Pearcey told him that acetylene was pumped into the purifier and it was still leaking and they should repair it.

Mr. Stephen McKay in his witness statement at paragraph 13 states in part that

“Some of the standard operating procedures implemented at the acetylene plant, which IGL Limited has taken directly from the Rexarc manuals are as follows:-

- (vi) The proper purifier purging procedure must be followed at anytime air has been allowed to enter the purifier. The matter of purging air out of the acetylene equipment is of the first importance. Take every precaution to do a thorough job, so that no air acetylene mixtures are compressed into the cylinder. Keeping air out of the acetylene lines is a basic safety precaution.
- (vii) After repair acetylene-handling component/equipment be sure to purge it of all air before the next plant start up.
- (viii) In doing maintenance or repair work on acetylene equipment use extreme care in handling tools to avoid causing sparks. Use only rubber or raw hide hammers, and spark resistant tools. To minimize the possibility of sparks, wet tools with oil or water before use. Most vessels containing acetylene are made of steel or iron so tools to be used in this plant are made from bronze or brass, which do not generate a spark when struck against a steel vessel.
- (ix) “When cleaning generator tank interior, do not use a metal tool or scraper that might cause sparks; use a wooden paddle.”

In his submissions Mr. Braham states that it is not incumbent on the employer to tell an experienced skilled workman about matters, which he is well aware or precautions that ought to be adopted when using plant and appliances unless there is reason to believe that he will not adopt them or

the dangers are hidden. He cites the case of Baker v. T. Clarke (Leeds) Limited (1992) P.I. Q.R. 262

Stuart Smith Lord Justice:

“But it is not necessary in my judgment for an employer to tell a skilled and experienced man at regular intervals things of which he is well aware unless there is reason to believe that that man is failing to adopt the proper precautions or through familiarity, becoming contemptuous of them.”

There is evidence that Mr. Pearcey was highly experienced and received the necessary training so there was no need to tell him at regular intervals things he should be aware of.

In the case of Leach v. British Oxygen Co. Ltd. 109 S. J. 157 it was stated that where a workman fails to make a proper use of equipment provided, where the workman chooses the wrong tool as an act of folly on his part the employer is not liable.

I therefore find on a balance of probabilities that Mr. Pearcey was the author of his own misfortune in that he did not follow the safety procedures laid down by IGL seeing that the purifier was worked on twice. On the second occasion the purifier should have been vented or purged in accordance with Exhibit “SM-I” training, operating and maintenance manual acetylene plant referred to in paragraph 13 of the Witness Statement of

Stephen McKay. I accept that acetylene was pumped into it and quite likely there would be air in it.

When Mr. Clayton Tomlin was leaving the witness box as he passed Mr. Pearcey, Mr. Pearcey stretched out his hand and held Mr. Tomlin's hand and appeared to be observing it because Mr. Tomlin had given evidence that he was also injured. This further impels me to accept the evidence of Mr. Tomlin as this is not the reaction of a claimant who feels that a witness has given evidence adverse to his case.

Judgment for the defendant with costs to be taxed if not agreed.