ST VINCENT AND THE GRENADINES

IN THE HIGH COURT OF JUSTICE

CIVIL SUIT NO.492 OF 1999

BETWEEN:

O'CAINE SHARPE

Plaintiff

and

GIBSON CONSTRUCTION LIMITED

Defendant

Appearances:
Richard Williams for the Plaintiff
Paula David for the Defendant

2001: May 17, 23, 31

JUDGMENT

[1] MITCHELL, J: This was a case of a mason suing his employer for injury to his eye caused by cement plaster falling in it. He claimed that the employer's failure to provide him with goggles amounted to negligence in that the employer had failed to provide a safe system of work.

[2] The action commenced on 14 October 1999 by the issue of a Specially Endorsed Writ. The Plaintiff claimed that he was employed by the Defendants as a mason; that on or about 21 November 1997 in the course of his employment by the Defendant construction company in the construction of the Georgetown Secondary School, he sustained an injury to his right eye when plaster fell into it as he was plastering; that the accident was caused by the negligence of the Defendants in failing to provide a safe and proper working environment by failing to provide goggles to protect the Plaintiff's eyes; and that, as a result, he suffered injury to

his eye. The Plaintiff claimed alternatively that the Defendants were liable pursuant to section 4 of the Compensation for Injuries Act, Cap 83 of the laws of St Vincent and the Grenadines. The Plaintiff also relied on the doctrine of res ipsa loquitor.

[3] By a Defence filed by consent out of time on 18 February 2000, the Defendants pleaded that the injury was not caused by any negligence of the Defendant but was caused solely or contributed to by the negligence of the Plaintiff in that contrary to specific instructions he had constructed the scaffold on which he worked too far below the beam which he was plastering resulting in the Plaintiff having to stand too directly under the beam which he was plastering so creating the circumstance which resulted in plaster falling into his eye; further and alternatively he carried out his work so carelessly that he caused the plaster to fall into his eye.

[4] The order on the Summons for Directions was made on 29 September 2000. The Request for Hearing was filed on 6 October 2000. On 15 March 2001 at a Case Management Conference, the Master gave certain directions, including an order that the Plaintiff an agreed bundle of documents on or before 6 April. No agreed bundle was in fact filed. At the commencement of the trial both counsel agreed that the bundle was not necessary for the determination of the matter. They had agreed that the only issue that was before the Court was that of liability. Most of the documents related to the issue of quantum, and would be presented to the court on affidavit evidence at a later stage should the Defendant be found liable. In the circumstances, the trial began and was completed over a period of one day. Addresses were helpfully buttressed with written submissions on the law and the facts.

[5] The liability of the Defendant to the Plaintiff is governed by the Compensation for Injuries Act, Cap 83 of the Laws of St Vincent and the Grenadines. This is an 1884 Act. Sections 4 and 5 apply in this case. They provide:

4. 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 having so conformed; or

(d) by reason of the act or omission of any person in the service of the employer, done or made in obedience to the rules or regulations of the employer, or in obedience to the particular instructions given by any person delegated with the authority of the employer in that behalf;

the workman, or in case the injury results in death, the legal personal representatives of the workman and any person entitled in case of death, shall have the same right of compensation and remedies against the employer, as if the workman had not been a workman of nor in the service of the employer nor engaged in his work.

6 (1) Notice in respect of an injury under this Act shall give the name and address of the person injured and shall state in ordinary language the nature and cause of the injury and the date at which it was sustained, and shall be served on the person liable for such injury, or his attorney or agent, or left at the last known residence or place of business of any such persons.

The requisite notice had duly been given by the Plaintiff to the Defendant in this case. The Act does not alter or replace the ordinary common law duties of an employer to provide a safe place of work to an employee. It ensures, rather, that the employer cannot raise the plea of *volenti* in his defence when an employee makes a claim against him. This case fell to be decided based on the ordinary rules governing the duties of an employer to an employee as they apply to the facts.

[6] The witnesses for the Plaintiff were the Plaintiff himself and Zeno Samuel, a co-worker who had been employed with him on the project. Giving evidence for the Defendant were Byron Glasgow, the senior foreman on the project, and Russell Lavia, another foreman on the project. A number of documents were put in evidence. These included the Plaintiff's letter before action and medical reports from Onu, Bacchus, Thomas and Ambrose.

[7] The facts as I find them are as follows. On the day in question, the Plaintiff was employed by the Defendants as a mason on the Georgetown Secondary School construction project. He was assigned to plastering. The Plaintiff had been a mason for about 5 years before the incident. He had been working at plastering at the Georgetown School for about a month before the incident. At the time in question, he was engaged in plastering the lower side of a beam in the ceiling of the first floor of the building. To do so, he had built up a scaffold of 8 inch blocks and placed 2x4 inch scantling on top of the blocks and ¾ inch ply on top of the scantling. This was so that he could stand on the scaffolding and reach up to the beam that he was plastering. He mixed his own slush of cement and water to rub onto the beam with a trowel. I accept that the slush is likely to splash from the trowel in the normal course of plastering. I accept that a slush of cement and water is very caustic. On the 21st November 1997, as the Plaintiff was applying this form of plaster to the underside of the beam in question, some of it fell from his trowel into his right eye. He ran to a nearby pipe where his co-worker, who gave evidence on his behalf, attempted to wash the cement out of his eye. He

reported the matter to his foreman who released him to go to the nearby hospital in Georgetown for medical treatment. He testified that, as a result, the eye was swollen and his entire head was painful and he could not see clearly from his right eye up to the present time.

[8] The Defendant sent the Plaintiff to visit Dr Onu, who is a well-known eye surgeon in Kingstown. Dr Onu reported that he saw the Plaintiff on 2 December 1997. The Plaintiff was suffering from a chemical conjunctivitis in the right eye for which he was given eye drops. He found the Plaintiff to be in need of a pair of glasses, which he also prescribed. The Plaintiff testified that he had never purchased the eye glasses because he could not afford them. Dr Bacchus, an ophthalmologist of Kingstown, reported examining the Plaintiff on 30 December 1997. He found a mild infection of a conjunctiva for which the Plaintiff was successfully treated. He was of the view that the Plaintiff's conjunctivitis was not due to the incident at work. He did not explain how he came to this conclusion. Dr Bacchus issued a further report on 27 May that he had been seeing the Plaintiff over the past months; that with each visit his condition had improved, although he complained of discomfort. He reported that he had referred the Plaintiff to the ENT surgeon for an evaluation. The ENT surgeon at the time in St Vincent was Dr St Clair Thomas. Dr Thomas first saw the Plaintiff on 6 March 1998. He found the Plaintiff's nose to be affected by "enlarged inferior turbinates with somewhat of a decreased air entry in both nostrils. His right eye appeared inflamed and enlarged. His vision was normal". He recommended an X-ray and advised the Plaintiff to follow up his care with the ophthalmologists. The X-ray report is dated 12 February 1998 and is signed by Dr Ambrose, a consultant radiologist. The X-ray report reveals a "hazy (R) frontal sinus and maxillary antrum. The (R) nasal terminate is grossly enlarged, with only a slither of air within the (R) nasal passage." Dr Thomas certified that he had examined the Plaintiff on 30 November 1998. The Plaintiff was complaining of headaches, pain and soreness in the eyes and a darkness in the right eye which interfered with his vision. Dr Thomas expressed the opinion that the Plaintiff was suffering from opthalmagia secondary

to the accident of 23 November 1997. He based his opinion on the literature that chronic pain can exist in the eyeball long after external abrasions have healed. He found no evidence of sinus pathology. He recommended that the Plaintiff should be managed by ophthalmologists. Dr Thomas's opinion on the opthalmagia finding is to be considered in the light of the fact that he is an ENT specialist and not an opthalmologist. Additionally, there is mention in the reports of examinations by Dr Varunny, and a Dr Tracey, a visiting consultant opthalmologist. Dr Tracey also found no scarring or defect other than that the Plaintiff was in need of glasses as his vision was slightly reduced.

[9] There is to be detected in the above medical reports a difference of opinion as to the cause of the Plaintiff's continued pain and suffering. Dr Onu and Dr Bacchus appear to doubt that the falling of the slush in the eye was responsible. Dr Onu and Dr Tracey found that the Plaintiff was suffering from poor eyesight, though they do not conclude that the Plaintiff's headaches are caused by his failure to wear eyeglasses as prescribed. Dr Thomas is of the contrary view to Dr Onu and Dr Tracey. He believes that the cement falling in the eye is the likely cause of the pain that the Plaintiff continues to complain of. For the purposes of this case I am prepared to find on a balance of probability that some injury was caused to the Plaintiff's right eye by the cement slush falling into it, while some of his pain and suffering may be due to other causes such as his need to wear glasses. It is reasonable to accept that a caustic material such as cement slush falling into a person's eye would cause some inflammation and pain and suffering, even if only temporary. It is not every injury that an employee suffers on the job for which an employee is responsible at common law. In the absence of a statutory provision, an employee may be injured and the employer may not be liable in negligence. The real question is, was there something that this employer should have done that he had failed to do and thereby made himself liable to the employee for the loss and damage the employee had suffered?

[10] The Plaintiff gave evidence that he had asked the foreman on the job for goggles. He testified that if he had got the goggles he would not have been injured. He and his witness testified that goggles are supplied by some employers for this kind of plastering work. The Defendant's witnesses by contrast testified that the Plaintiff never asked for the goggles and that in any event goggles are never supplied for this type of work nor that any mason would normally ask to be provided with goggles for this type of work.

[11] The real question that this case raises is whether a construction company in St Vincent is under any obligation to supply a mason who is doing plastering work with industrial goggles. If the court accepts the evidence of the Plaintiff to the effect that it is an industry norm to supply goggles to masons doing this type of plastering, then the Court could find that the Defendants were under an obligation to meet the norm. if the court found that this type of work was so intrinsically dangerous that a mason is in need of additional protection to be able to safely do the work, then the court could find that there was an obligation on the Defendant not only to supply this protection when asked, but to oblige all employees doing this type of work to take the necessary steps to protect themselves, whether or not they requested the protection. In such circumstances, failure to have provided the goggles, whether or not the Plaintiff requested them, would be evidence of negligence on the part of the Defendant. It is convenient at this stage to dispose of the issue that the Plaintiff had negligently constructed his scaffold. No evidence was led by the Defendant that the Plaintiff had negligently constructed his scaffold as pleaded. I do not find that he had negligently constructed his scaffold. What is apparent is that the Plaintiff must have been standing right under his trowel as he applied the plaster. Only then could the plaster have fallen back onto his face. Is there anything the Defendant could have done to prevent that occurring? Or is the situation that only the Plaintiff, as an experienced mason and plasterer, could have taken the necessary precaution of positioning himself so that the plaster that he was applying did not fall back into his own face. I am not satisfied that construction companies and other employers of masons in St Vincent supply

goggles to men doing plastering work. I do not accept that any such standard exists. I do not accept that it is a necessary precaution in the industry. I believe that any mason attempting to wear goggles while doing overhead plastering would soon find the goggles so obscured with drips of slush that he would be unable to work if he held his goggled face right under the place where he was plastering. The responsibility is rather on the mason to position his face so that the slush does not fall back directly into it. I do not believe that the Plaintiff and his witness ever made any request of their supervisor for goggles. I believe that this allegation was invented in order to bolster the claim that the Defendants had supplied an unsafe working environment.

[12] In the circumstances, I find that the Plaintiff has failed to prove that the Defendant did not provide a safe working environment for the Plaintiff. There is no credible evidence that the Defendants had failed to do all that a reasonable employer could be expected to do for the safety of their workmen.

[13] The action is dismissed with costs to the Defendants, to be taxed if not agreed.

I D MITCHELL, QC
High Court Judge