SAINT VINCENT AND THE GRENADINES

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 18 OF 2001

BETWEEN:

O'CARNIE SHARPE

Appellant

and

GIBSON CONSTRUCTION LIMITED

Respondent

Before:

The Hon. Sir Dennis Byron — Chief Justice
The Hon. Mr. Satrohan Singh — Justice of Appeal
The Hon. Mr. Ephraim Georges — Justice of Appeal [Ag.]

Appearances:

Mr. Richard Williams for the Appellant
Mr. Stephen Huggins for the Respondent

2002: July 15;
2003: January 28.

JUDGMENT

[1] BYRON, C.J.: The appellant was a mason employed with the Respondent company in the construction of the Georgetown Secondary School in St. Vincent. He sustained injury to his right eye on 21st November 1997, when plaster fell into it as he was doing plastering work in the course of his employment. On the 31st of May 2001, after a trial lasting 2 days, Mitchell J dismissed his claim that the injury was sustained because the respondent negligently failed to provide a safe system of work by failing to supply him with goggles to protect his eyes while plastering.

[2] In his appeal, the appellant sought to challenge the factual findings of the learned trial Judge and his application of the law regarding the respondent's duty to provide a safe system of work for its employees.

The Pleaded Case

[3] In his statement of claim the Appellant alleged that the respondent had been negligent by failing to supply him with goggles to protect his eyes while he was plastering and claimed special and general damages. The respondent denied any negligence on its part and alleged that the injury sustained by the appellant was due to his own fault, he having failed to obey specific instructions in relation to the positioning of the scaffolding on which he was to stand while plastering, and alternatively that he had been careless in carrying out his work.

The Evidence

[4] The witnesses in the case were the appellant and a co-worker Zeno Samuel and for the respondent, Byron Glasgow the senior foreman on the project and Russel Lavia another foreman. In addition, a number of documents including medical reports were tendered in evidence. There was a conflict of medical opinion as to whether the condition of the appellant's eye for which he received treatment from opthalmogists, resulted from the incident as alleged or from a condition of long standing origin. It is not necessary to consider this aspect of the evidence on this appeal. There was little dispute on the way the injury was sustained. The appellant was instructed by his supervisor Byron Glasgow to plaster the roof of the first floor. He built a scaffolding on which to stand. While he was plastering some cement dropped into his right eye and he was sent to the hospital where his eye was flushed with eye wash. The respondent's witness Russell Lavia, a foreman on the job gave evidence that he had given the appellant instructions on how to build the scaffolding and the instructions were not carried out. The learned trial judge did not give weight to this evidence and it did not form part of his rationale for judgment.

[5] The major area of conflict in the evidence was that the appellant testified that he thought that goggles were necessary and he had asked Mr. Glasgow for a pair but did not receive any. His witness another mason on the job, testified that while he was engaged on that job he too had asked Mr. Glasgow for goggles to do masonry work because he thought that they were necessary and never received any. This testimony was tested in cross examination.

[6] On this issue the learned trial judge accepted the evidence given by Byron Glasgow who denied this categorically and explained:

> "I do not think that any mason has ever asked me to supply him with goggles. As a mason myself by profession a goggles has never been a good protection for any mason to work with over their eyes. If you use a goggles doing masonry, after a couple of seconds the goggles would become frosted and you would hardly be seeing anything from the goggles as a mason. We will supply any person on the job with goggles if they are chipping with a hammer or chisel or any electrical tool. Goggles are used for chipping concrete work or whenever something might fly in your eye, or if you are using a sanding machine as the sand will fly in your eye."

The Relevant Findings

[7] The learned trial Judge considered that the appellant's case would have been made out if there was a norm in the industry to supply goggles to masons doing this type of work, or if the work was so intrinsically dangerous that there was need of this protection to be able to safely perform it. The judge after considering the evidence did not accept the appellant's contentions on that point. At paragraph 11 of the judgment, the judge stated:

> "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 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."

[8] He concluded that the injury was sustained because the appellant was standing right under his trowel as he applied the plaster. The judge found that there was nothing that the respondent could have done to prevent that occurrence because it was only the appellant who could have taken the necessary precaution to position himself, so that the plaster he was applying would not have fallen back into his own face.

(1) The submissions of the appellant did not amount to any more than an appeal to prefer the testimony given by the appellant and his witness. The practice of an appellant court in being reluctant to review findings of fact based on the credibility of witnesses is already well settled. The general rule is that the court of appeal does not lightly interfere with findings of fact based on the credibility of witnesses. In Louvina Alexander-Raymond v Marie Anne Skelly et al [St. Lucia] Civ. App. No. 8 of 1995, at page 3, the Court of Appeal in applying the principle laid down in Watt v Thomas (1947) 1 All E.R. 582 held:

> "It has well been settled that where a trial Judge had the advantage of seeing the witnesses, an advantage which this court did not enjoy an appeal court usually is, and should be, slow to reverse any finding of fact which appears to be based on the Judge's assessment of the credibility of the witnesses".

[9] Review of the evidence established that there was ample evidence to support the findings of fact made by the learned trial judge. In this case there was no reason for disturbing any findings of fact made by the learned trial Judge.

The Legal Principles

[10] After considering the carefully reasoned judgment of the learned trial Judge and considering the submissions of the appellant and the respondent I would rule that the legal principles applicable are not in doubt. The statutory provision governing the liability of the respondent is the Compensation for Injuries Act, Cap 83 of the Laws of St. Vincent and the Grenadines, Cap 83. This is an 1884 Act. Section 4 provides that, *inter alia*, where personal injury is caused to a workman by reason of any defect in the condition of works, machinery or plant connected with or used in the business

of the employer, or the negligence of any person in the service of the employer, who has superintendence entrusted to him or by any act or omission of any person in the service of the employer, "the workman shall have the same right of compensation and remedies against the employer, as if the workman had not been a workman nor in the service of the employer nor engaged in his work". This case fell to be determined on the basis of the common law rules governing the duties of an employer to an employee as they applied to the facts as the Act does not alter or replace the common law duties of an employer to provide a safe place and system of work to an employee. It ensures, rather that an employer cannot raise a plea of *volenti* in his defence when an employee makes a claim against him. The cases put before the court to explain the extent of the duty of the employer were a House of Lords case of Latimer v A.E.C. LD (1953) A.C. 643 and a case from the Jamaican Court of Appeal, Jamaica Omnibus Services Ltd v Hamilton (1970) 16 W.I.R 316 (this latter case being primarily concerned with the application of *res ipsa loquitur*.) The duty of the employer can be briefly expressed by stating that an employer discharges his duty to provide his employees with a safe working environment when he does all a reasonable employer could be expected to do for the safety of his workers having regard to the degree of risk posed to his workers by the nature of their work.

[11] These were the principles applied by the learned trial Judge and I do not think there is any merit in the complaint of error of law in this case. He analysed the nature and extent of the risk posed by the plastering and concluded that the risk did not require the use of protective goggles as alleged by the appellant.

Conclusion

[12] I am satisfied that the learned trial judge adequately assessed the degree of risk and the reasonable precautions that were required and was justified in finding that the respondents had discharged their duty of care. I would uphold the finding of the learned trial Judge that there was no statutory or common law duty imposed on the

respondent to supply the appellant mason with goggles while he was engaged in plastering work on the construction site. I would therefore dismiss this appeal with costs to the Respondent.

Costs

[13] Costs were not assessed in the court below and I would vary the order of the trial judge that costs be taxed if not agreed. This was a claim for special and general damages. The value of the special damages was $8,798.34. The general damages claimed was not specified. The parties did not agree on the value of the claim. The principles for assessment of the costs where the amount claimed is specified are set out in CPR 2000 Part 65.5 (2)(b)(i) –

> (*2)"In determining such costs the value of the claim is -*
>
> *….*
>
> *(b) in the case of a defendant –*
>
> *(i) the amount claimed by the claimant in the claim form"*

and where the amount is not so specified the principles are set out in CPR 2000 Part 65.5 (2)(b)(ii) –

> (*2)"In determining such costs the value of the claim is -*
>
> *….*
>
> *(b) in the case of a defendant –*
>
> *(ii) if the claim is for damages and the claim form does not specify an amount that is claimed – such sum as is agreed between the party entitled to it and the party liable for, the costs or, if not agreed, a sum stipulated by the court as the value of the claim;*"

Although there was some conflict as to the extent of the injury sustained, for the purposes of assessment of costs in this case I would make a nominal assessment of $15,000.00 as the overall value of the litigation. The assessment is to be based on *Appendix B – Scale of prescribed costs (1) Not exceeding $30,000 – 30%]* $4500.00 *[2/3 at Court of Appeal in accordance with Part 65.13 = $3000.00.*

Order

[14] The appeal is dismissed. The order of the learned trial Judge is varied to case dismissed costs to the respondent assessed at $4,500.00. The appellant to pay the respondent the costs of the appeal assessed at $3,000.00.

Sir Dennis Byron
Chief Justice

I concur

Satrohan Singh
Justice of Appeal

I concur

Ephraim Georges
Justice of Appeal [Ag.]