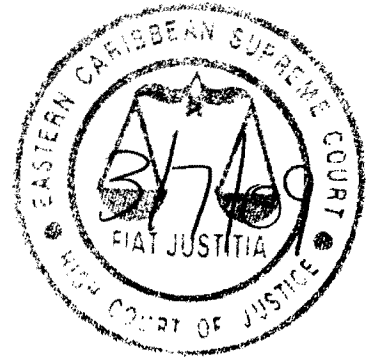


SAINT VINCENT AND THE GRENADINES

IN THE HIGH COURT OF JUSTICE
(CIVIL)



CLAIM NO 463 OF 2006

BETWEEN

ASQUITH MC LEAN

Claimant

AND

SHELDON BYNOE

Defendant

Appearances

Ms Niara Frazer for the Claimant

.....
2009: June 29
July 3
.....

JUDGMENT ON ASSESSMENT OF DAMAGES

- [1] **LANNS, MASTER:** This is an assessment of damages in a personal injury claim following default judgment entered up on 27th November 2007. I am satisfied that the defendant was properly served with the proceedings on 12th February 2007 and that he failed to acknowledge service or put in a defence and that the default judgment for damages to be assessed dated 27th November 2007 is a valid judgment.
- [2] Asquith McLean (Asquith) was born on 6th November 1975. He is presently 33 years old. At the time of the incident he was 29 years of age.
- [3] On 3rd April 2005, the Defendant (Sheldon) struck Asquith with a cinder block to the left side of his head. As a result of the assault, Asquith sustained a 4cm laceration to the left

parietal region of the scalp. He received initial treatment at the Accident and Emergency Unit of the Milton Cato Memorial Hospital where his wound was sutured. He was then placed on antibiotics and pain medication and then discharged. He was subsequently admitted to the hospital for observation after complaining of headaches, vomiting and light headedness. There, he remained for six days. After his discharge, he attended the outpatient clinic for follow up treatment. He then attended at the Caribbean Medial Imaging Center for a CT Scan which revealed no evidence of acute intracranial hemorrhage. There was no focal parenchynal masses and the ventricular system was described as "unremarkable". There was no evidence of skull vault fracture.

- [4] Asquith was off work for about three months while he recovered. During that time he endured intense pain and could not engage in his sporting activities like football and dominoes.

Special Damages

- [5] Special damages must be pleaded and proven. (**British Transport v Gourley** [1953] 3 All ER 803); See also **Heerallal v Hack Brothers (Construction) Ltd (1977) 24 WIR 117**.
- [6] Asquith claims special damages in the sum of \$5,700.00 being \$50.00 for medical report; \$1100.00 for CT Scan and \$4500.00 representing loss of income for the period 3rd April to July 11th 2005.
- [7] Asquith has by Exhibit "AM 4" proven his expenditure of \$1100.00 for the CT Scan. But he has not satisfactorily proven his loss of income of \$4500.00 and the sum of \$50.00 for the medical report.
- [8] In **Bonham-Carter v Hyde Park Hotel** (1948) 64 TLR 177 at 178 Lord Goddard CJ, who found it possible to arrive at a conclusion despite the extremely unsatisfactory evidence as to damages said:

‘Plaintiffs must understand that, if they bring action for damages, it is for them to prove their damage; it is not enough to write down particulars and, so to speak, throw them at the head of the court, saying: “This is what I have lost, I ask you to give me these damages”. They have to prove it.”

- [9] However, His Lordship went on to find that the probability existed that some loss resulted and went on to make his own assessment on the primary facts alone. In that case, the claimants claim was reduced.
- [10] In the Trinidadian case of **Grant v Motilal Moonan Ltd**, the Court of Appeal held that the Master should have accepted the Appellant's claim in full even though the Appellant did not have receipts for certain items of household appliances, furniture, kitchen utensils clothing etc that were destroyed as a result of the accident.
- [11] I do not think that in a case of this kind, I should adopt the approach taken in **Grant's** case in respect of Asquith's loss of earning.
- [12] Asquith deposed that **immediately** before the accident he was employed by one **Sylvester** France as a mason and carpenter at an average of \$65.00 per day. He was injured on 3rd April 2009 and was last employed by Ms France on an unknown date in March 2005.
- [13] Exhibit “AM3” is a certificate of one Ms **Sylventer** France certifying that Asquith was employed by her from January to March 2009 at \$65.00 per day. On the other hand, Asquith, in answer to the court, said that he was employed with Ms France for a little over a year. Apart from the certificate referred to at paragraph 3, Ms France has presented no proof of the wages she allegedly paid to Asquith and it is unclear whether Asquith was at the time of the assault in the employ of Ms France. She has not been called to give evidence and she has not sworn any Affidavit in support of the assessment.

[14] I do not think it is unreasonable to expect Asquith or Ms France to be able to produce some document to prove his earnings as a carpenter/mason although I am aware that in some cases it is unlikely that some persons would have documented proof of income earned or wages paid. To my mind, however, Ms France should have some form of accounting pertaining to her expenditure on project.

[15] In the end I can find no plausible evidence that Asquith was under the employ of Ms France at the time of his injuries or that his injuries occurred while he was in the employ of Ms France. Neither can I find any plausible evidence as to his loss of earnings.

[16] Notwithstanding the inadequacy of the evidence in respect of earnings as carpenter/mason, I am prepared to find and hold that Asquith was employed as a mason and carpenter prior to the accident and that as a result of the assault, he was prevented from seeking employment from 3rd to 11th July 2005. However, I am unable accept without more that he earned \$65.00 per day. I propose to simply "pluck a figure from the air" as Lord Justice Edmund-Davies ventured to do in **Ashcroft v Curtin** [1971] 1 WLR 173), accordingly, I assess Asquith's loss of earnings in the sum of \$55.00 per day for 60 days = \$3,300.00.

[17] In relation to the amount claimed for the medical report, I am prepared to accept that the probability existed that Asquith paid the sum of \$50.00 which I find to be reasonable. I therefore award him the sum of \$50.00 as claimed for medical certificate.

[18] In summary then, Asquith is entitled to special damages as follows:

• Loss of earnings	\$3300.00
• CT scan	1100.00
• Medical report	<u>50.00</u>
Total	<u>\$4450.00</u>

General damage

[19] Pain and suffering: In her written submissions, Asquith's learned Counsel Ms Niara Frazer (Ms Frazer) suggests a figure of \$18,000.00 for pain and suffering and loss of amenities. Counsel very helpfully provided me with cases pertaining to similar injuries including

- **Barrow v Yard; Francis v Trotman** - both referred to in the case of **Kenneth Thomas v John Francis Trading et al** – Dominica Civil Appeal No 423 of 1998.

[20] I think **Barrow v Yard** is most useful as the injury there is somewhat similar to the injury in the present case. In **Barrow's** case, decided in 1988, the Claimant sustained a 4 cm laceration to the left temporal area. His upper incisor tooth was ripped and his mouth injured. The claimant was awarded \$5,551.20 for pain and suffering and loss of amenities. I think the sum of \$15000.00 is reasonable for Asquith's pain, suffering and loss of amenities.

[21] Aggravated Damages: In his Statement of Claim, Asquith pleads aggravated damages. In written submissions, Ms Frazer suggests a figure of \$8000.00. She relies on the case of **Owen Joseph et al v Richard Frederick** Claim No. 108 of 2001 - St Lucia. There, the Claimant was awarded \$5000.00 for aggravated damages.

[22] In my judgment, the circumstances there were different to the circumstances in the present case. In fact, there was overwhelming evidence before the court upon which the court could have made a finding that the claimant was entitled to aggravated damages. In the present case there is no evidence upon which I can make a finding that Asquith is entitled to an award for aggravated damages. I therefore make no award under this head.

The Order

[23] **IT IS HEREBY ORDERED AND ADJUDGED** that:

1. The Defendant Sheldon Bynoe must pay to the Claimant Asquith McLean the sum of \$4,450.00 as special damages, together with interest at the rate of 2½ per cent per annum from 3rd April 2005 to the date of entry of Default judgment that is, 27th November 2007.
2. The Defendant Sheldon Bynoe must pay Mr Mc Lean the sum of \$15000.00 for pain and suffering and loss of amenities together with interest at the rate of 5% per annum from the date of filing of the Claim on 2nd November 2006 to date of entry of Default Judgment - 27th November 2007.
3. The Defendant Sheldon Bynoe must pay to Mr MacLean post judgment interest at the rate of 5% per annum from today's date until final payment.
4. The Defendant Sheldon Bynoe must pay Mr McLean costs as prescribed under CPR 65.5 Appendix C in the sum of \$3,501.00.

[25] I am grateful to counsel for her very helpful submissions and authorities.


PEARLETTA E LANNIS
MASTER