

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

SAINT LUCIA

SLUHCVP2022/0001

BETWEEN:

TERRANCE AMEDEE

Appellant

and

MARCUS MODESTE

Respondent

Before:

The Hon. Mr. Mario Michel

Justice of Appeal

The Hon. Mde. Margaret Price-Findlay

Justice of Appeal

The Hon. Mr. Trevor Ward

Justice of Appeal

Appearances:

Ms. Sherene Francis for the appellant

Mrs. Maureen John-Xavier for the respondent

2023: March 22;
November 9.

Civil appeal – Assessment of damages – Interest on damages – Costs – Loss of future earnings – Award for loss of future earnings/loss of earning capacity – Loss of earning capacity – Calculation of loss of earning capacity - Award for handicap on the labour market – Smith v Manchester award – Award for pain and suffering – Cornilliac v St. Louis – Quantum of award for pain and suffering – Nominal award for domestic services under the head of general damages – Pleading and proving special damages – Pre-judgment interest on general damages – Award of pre-judgment interest on general damages from the date of service of the claim to the date of payment – Pre-judgment interest on special damages – Differentiating between an award of pre-judgment interest and post-judgment interest on special damages

The appellant, Terrance Amedee, was the owner of a motor car which was being driven at the material time by his nephew, Hervan Amedee (referred to hereafter as “Hervan”). While driving the appellant’s motor car from Soufriere to Laborie with the respondent, Marcus Modeste, as the front seat passenger, Hervan lost control of the vehicle and hit an electric pole off the pitched surface of the road. All occupants of the vehicle were taken to the St. Jude’s Hospital in Vieux Fort, where they were treated and discharged the same day.

The respondent instituted proceedings against the appellant and Hervan claiming against them jointly - "damages for pain, injury and loss and damages suffered as a result of [the] road traffic accident". The respondent alleged that the accident was caused by Hervan's negligent driving of the motor car and that Hervan was driving the car "with the express permission, authority and consent of the [appellant]". Despite being served with the claim form and statement of claim, Hervan never filed an acknowledgement of service and so a request was filed by the respondent for judgment in default against him. The appellant was also served with the claim form and statement of claim and filed an acknowledgement of service and a defence. The respondent subsequently filed an application to strike out the appellant's defence for his failure to comply with a case management order, and applied as well for judgment to be entered against the appellant.

Judgment was entered against Hervan for damages to be assessed, resulting from his failure to file an acknowledgement of service, whilst the court struck out the appellant's defence for his failure to comply with a case management order and entered judgment against him for damages to be assessed. Subsequently, the respondent applied for an assessment of damages, and the Master gave judgment on the assessment of damages, as follows: an award for pain and suffering to the respondent in the sum of EC\$85,000.00, at 6% interest from the date of the service of the claim form to the date of payment, inclusive of a nominal amount of EC\$5,000.00 for domestic services; an award for loss of future earnings/loss of earning capacity to the respondent, in the sum of EC\$432,000.00, with no interest; no order as to handicap on the labour market; an award for special damages to the respondent in the sum of \$24,401.95, with interest at the rate of 3% per annum from the date of service of the claim to the date of payment; and prescribed costs pursuant to Appendices B and C of Rule 65 of the Civil Procedure Rules 2000 (as amended).

Being dissatisfied with the judgment of the Master, the appellant appealed, challenging several findings of fact and law by the Master. The appellant abandoned his first ground of appeal and persisted with the following issues to be determined by this Court: (i) whether the Master erred in fact and in law in making an award for loss of future earnings/loss of earning capacity; (ii) whether the Master erred in arriving at the sum of \$85,000.00 for pain and suffering and loss of amenities; (iii) whether the Master erred in including the sum of \$5,000.00 as a nominal award for domestic services under the head of general damages; (iv) whether the Master erred in finding that the sum of \$24,401.95 for special damages was actually pleaded and proved; (v) whether the Master erred in law in that he awarded pre-judgment interest on general damages at 6% from the date of service of the claim form to the date of payment; (vi) whether the Master erred in law in that he did not differentiate the award of pre-judgment interest and post-judgment interest on special damages.

Held: making the orders set out in paragraph 102 of the judgment, that:

1. The Master erred in fact and law when he made a single award for loss of future earnings and loss of earning capacity. These two heads of loss are totally different and cannot be addressed together to produce a single amount of loss. Loss of future earnings is the loss occasioned to an injured party consequent on his inability to work as a result of the injuries which he sustained or the diminution in his income consequent on his diminished capacity to work as a

result of his injuries. To qualify for this award, the injured party must satisfy the court by medical or other cogent evidence that he was rendered incapable of working or his ability to work was impaired to the extent that the income which he earned from his employment was lessened as a result of his injuries. In this case, the respondent provided no such cogent evidence. There was an obvious contradiction in the evidence provided by the respondent as to his trade, averring in his witness statement that he was a carpenter while his employment letter stated that he was a painter. This was a relevant consideration, because the latter trade is less likely to be affected by the nature of the injuries sustained by the respondent. Further, the respondent did not submit that his injuries had rendered him incapable of working or were likely to cause a reduction in his income. It was therefore not open to the Master on the evidence to make the finding that he did and, as a matter of law, it was not open to him either to make a single award for loss of future earnings and loss of earning capacity. The learned Master's award of \$432,000.00 for loss of future earnings/loss of earning capacity is accordingly set aside.

Smith v Manchester City Council (or Manchester Corpn) (1974) 17 KIR 1 considered; **Alphonso v Deodat Ramnath** (1997) 56 WIR 183 applied.

2. On the actual facts and applicable law, it may have been open to the Master to make an award for loss of earning capacity. However, when one considers that (i) the Master failed to appreciate that an award for loss of earning capacity was equivalent to an award for handicap on the labour market and expressly determined that no award would be made for handicap on the labour market; (ii) the Master conflated the award for loss of earning capacity with loss of future earnings and made a single award, using the multiplicand-multiplier method which was unsuitable in the circumstances; and (iii) neither party to the appeal challenged the determination of the Master, it is clear that any inclination to or disposition towards overruling the Master on this determination is stymied.

Steadroy Matthews v Garna O'neal BVIHCVAP2015/0019 (delivered on 16th January 2018, unreported) followed.

3. The assessment of general damages for pain and suffering is a matter within the discretion of the judge or master undertaking the assessment, and the burden on an appellant who invites a court of appeal to interfere with the assessment is a very heavy one. The appellate court ought not to interfere unless it is satisfied that the judge or master failed to apply the relevant principles or failed to take into consideration matters that he should have and/or took into consideration matters that he should not have, and that as a result he made an award which was outside of the range of awards which could reasonably have been made on the facts and circumstances of the case and was therefore clearly or blatantly wrong. In this case, the Master erred in taking into account matters that he should not have and failed to take into account matters that he should have. In making the award for general damages, the Master erred in having regard to facts which he should not have because they were erroneous and in failing to have regard to facts which he should have because they were relevant. In so doing, the Master made an award of general damages which was outside the range of awards which should reasonably have

been made on the facts and circumstances of the case and was therefore clearly or blatantly wrong. The Master's award of \$80,000.00 for pain and suffering is accordingly set aside.

Cornilliac v St. Louis (1965) 7 WIR 491 applied; **Cedric Dawson v Cyrus Claxton** BVIHCVAP2004/0023 (delivered 23rd May 2005, unreported) considered; **CCAA Limited v Julius Jeffrey** Civil Appeal No. 10 of 2003 (delivered on 2nd March 2004, unreported) applied.

4. In computing the quantum of general damages for pain and suffering and loss of amenities, the court should take into account the nature and extent of the injuries sustained; the nature and gravity of the resulting physical disability; the pain and suffering which had to be endured; the loss of amenities suffered; and the extent to which, consequentially, the claimant's pecuniary prospects have been materially affected. Further, the court should, in general, award such sum within the broad criterion of what is reasonable and in line with similar awards in comparable cases as represents the court's best estimate of the claimant's loss. In doing so, the court should have regard to recent comparable awards in its own and other jurisdictions with similar social and economic conditions. Given the nature and extent of the injuries sustained by the respondent, the nature and gravity of the resulting physical disability, and the pain and suffering endured by the respondent, and with the assistance of comparable cases, the appropriate award to be made in this case by way of general damages under the head of pain and suffering is \$60,000.00. No consideration was given to any loss of amenities, because its exclusion from the Master's award was not contested by either of the parties, particularly the respondent who might have had an interest in challenging the Master's exclusion of loss of amenities in making an award on general damages in a personal injury case.

Williamson Hippolyte v Shammal Charles SLUHCV2007/0104 (delivered 4th March 2009, unreported) considered; **Joseph Joseph v Peter Hilton et al** SLUHCV2012/01025 (delivered 29th June 2017, unreported) considered; **Harvey Taliam et al v Kurt Duncan et al** SLUHCV2018/0418 (delivered 26th April 2019, unreported) considered; **Kim Russell Romney v John Chinnery** BVIHCV2014/0230 (delivered 12th January 2017, unreported) considered; **Annie Benn v Community First Coop. Credit Union Ltd** ANUHCV2007/0725 (delivered 20th October 2009, unreported) considered; **Wadadli Cats Limited v. Frances Chapman** Civil Appeal No. 16 of 2004 Antigua and Barbuda considered; **Kelsick v Josiah** ANUHCV 0412 OF 2000 (delivered 18th May 2004, unreported) considered; **Martha Leblanc v Augustus Thomas et al** DOMHCV2009/0296 (delivered 6th July 2011, unreported) considered; **Celia Hatchett v First Caribbean International Bank et al** BVIHCV2006/0227 (delivered 29th November 2007, unreported) considered; **Dubois v Jerome et al** GDAHCV2011/0088 (delivered 7th March 2012, unreported) considered; **Sheena David et al v Bowen et al** GDAHCV2007/0055 (delivered 7th June 2013, unreported) considered; **Lenroy Connor v Cynthia Flemming** SKBHCV2012/0053 (delivered on 14th January 2016, unreported) considered.

5. The learned master erred in including the sum of \$5,000.00 as a nominal award for domestic services under the head of general damages, when it was pleaded and ought to have been accounted for as an aspect of special damages. The Master's award of a nominal amount of \$5,000.00 for domestic services is therefore set aside.
6. Special damages must be specifically pleaded and strictly proved. Pleading an item of special damages without proving it does not earn a claimant an award of damages, neither does proving an item of special damages without pleading it. It is of the very nature of special damages that it has occurred before the trial and is either quantified or quantifiable by the time of the trial. Also, a claim for special damages is made in a pleading or statement of case, not in witness statements or submissions.
7. In this case, when reviewing the Master's overall award of special damages in the amount of \$24,401.95, it is clear that the Master erred in making this award, because 5 of the 6 constituent parts of the Master's award were either not pleaded or not proved. The amount both pleaded and proved by the respondent for medical expenses was \$2,341.95, and not the \$2,441.95 claimed by the respondent or the \$2,651.95 awarded by the Master. The amount pleaded and proved by the respondent for medical reports was \$500.00, and not the \$1,250.00 which the respondent produced receipts for. The respondent claimed \$200.00 for a traffic accident report, but although he exhibited a traffic accident report with his statement of claim, the report did not indicate that it was sought or obtained by him and there was no receipt or anything else to indicate that it was paid for by him. The respondent's claim for \$300.00 for preparation and service of a lawyer's letter was both pleaded and proved. The respondent's claim for \$14,000.00 for loss of income was not proved, there being nothing but a bald statement in his witness statement that he was not able to work for a period of 7 months and that he wished to claim loss of income at the rate of \$1,000.00 per fortnight for that period. Moreover, this claim did not square with his employment letter or medical reports. Similarly, the respondent's claim for \$6,000.00 for domestic assistance was also not proved, there being no evidence that he incurred this or any expense for domestic assistance. Although special damages of \$6,000.00 for domestic assistance was not proved and cannot, therefore, be awarded, it cannot all the same be denied that the respondent may well have needed and obtained some assistance, at least in the immediate aftermath of his sustaining the injuries complained of, for which a nominal amount of compensation can be awarded to him. In the circumstances, an award of a nominal amount of \$1,000.00 should be made to the respondent, instead of the \$6,000.00 awarded by the Master. The Master's award of special damages in the sum of \$24,401.95 is accordingly set aside and replaced with an award of special damages in the sum of \$4,141.95.
8. Interest should be awarded on general damages at the statutory rate of interest from the date of service of the claim to the date of judgment. The Master therefore erred in law when he awarded pre-judgment interest on general damages at 6% from the date of service of the claim form to the date of payment.

Alphonso v Ramnath (1997) 56 WIR 183 applied; **Steadroy Matthews v Garna O'Neal** BVIHCVAP2015/0019 (delivered on 16th January 2018, unreported) applied.

9. Interest on general damages is to be paid from the date of service of the claim form to the date of judgment, while interest on special damages should be from the date of the loss to the date of judgment. It is not uncommon for interest on special damages to be awarded from the date of the filing or service of the claim form or the date of the accident or incident giving rise to the claim, instead of from the date the loss or expense was incurred. If interest is payable from the date of the filing of the claim or of the accident, the claimant will get an unintended bonus, because there can be a long time between the accident/incident and the incurring of a loss, during which time the claimant will be receiving interest on a loss or expense which has not yet been incurred. Interest on special damages is payable from the date of the loss to the date of judgment. The Master accordingly erred in so far as he did not differentiate between the period during which interest is to be paid on general damages and on special damages.

Martin Alphonso and Others v Deodat Ramnath (1997) 56 WIR 183 applied; **Steadroy Matthews v Garna O'Neal** BVIHCVAP2015/0019 (delivered on 16th January 2018, unreported) applied.

JUDGMENT

- [1] **MICHEL JA:** This is an appeal against the judgment of a Master awarding damages, interest and costs to the victim of a road traffic accident.
- [2] The appellant, Terrance Amedee, was the owner of a motor car which was being driven at the material time by his nephew, Hervan Amedee (referred to hereafter as "Hervan"). The respondent, Marcus Modeste, was the front seat passenger in the motor car. There was a third occupant of the motor car, who was a back seat passenger, but he did not feature in the proceedings here or in the court below.

Background

- [3] It was about 3.20 am on Sunday 26th February 2017. Hervan was driving the appellant's motor car from Soufriere to Laborie when, on a wet, dark road, Hervan apparently lost control of the vehicle, which skidded and hit an electric pole off the pitched surface of the road. All three occupants of the vehicle were

taken to the St. Jude's Hospital in Vieux Fort, where they were treated and discharged the same day.

- [4] By claim form and statement of claim filed on 23rd January 2018, the respondent (who was the claimant in the court below) instituted proceedings against the appellant and Hervan (who were the defendants in the court below) claiming against them jointly "damages for pain, injury and loss and damages suffered as a result of [the] road traffic accident"¹. The respondent alleged that the accident was caused by Hervan's negligent driving of the motor car that morning in February 2017 and that Hervan was driving the car "with the express permission, authority and consent of the [appellant]"².
- [5] Hervan was served with the claim form and statement of claim, but he never filed an acknowledgement of service, so a request was filed by the respondent for judgment in default against Hervan (the first-named defendant). The appellant was also served with the claim form and statement of claim (as the second-named defendant) and filed an acknowledgment of service and a defence, together with an application to be removed as a defendant. He, however, withdrew his application to be removed as a defendant when it came up for hearing. The respondent subsequently filed an application to strike out the appellant's defence for his failure to comply with a case management order and applied as well for judgment to be entered against the appellant.
- [6] By order dated 18th February 2020, judgment was entered against Hervan for damages to be assessed, resulting from his failure to file an acknowledgement of service. The court also struck out the appellant's defence for his failure to comply with a case management order and entered judgment against him for damages to be assessed.
- [7] By an application filed on 25th June 2020, the respondent applied for an assessment of damages, as per the order dated 18th February 2020 for

¹ Paragraph 1 of the claim form.

² Paragraph 2 of the statement of claim.

damages to be assessed, and also filed submissions in support of his application. When the matter came before the Master on 10th November 2020 for the assessment of damages, counsel for the respondent requested that the assessment be done on paper, which request the Master acceded to and undertook the assessment on paper.

[8] On 2nd December 2021, the Master gave judgment on the assessment of damages, making the following orders:

- “a. pain and suffering EC\$85,000.00 at 6% interest from the date of the service of the claim form to the date of payment inclusive of a nominal amount of EC\$5,000.00 for domestic services;
- b. loss of future earnings/loss of earning capacity – EC\$432,000.00 at no interest;
- c. no order as to handicap on the labour market;
- d. ‘Special damages’ is awarded to the claimant, in the sum of \$24,401.95, with interest at the rate of 3% per annum from the date of service of the claim to the date of payment;
- e. Prescribed costs pursuant to Appendices B and C of Rule 65 Civil Procedure Rules 2000 (as amended).”³

[9] Being dissatisfied with the judgment of the Master, the appellant appealed. Notably, the driver of the motor car, Hervan Amedee, who – although named as a defendant in the court below – took no part in the proceedings in the High Court, was not named as a party to the appeal.

The appeal

[10] The notice of appeal was filed on 13th January 2022, challenging several findings of fact and law by the Master and containing the following grounds of appeal:

- “i. The Learned Master, having made the order dated 10th November, [2020] to hear the assessment on paper and subsequently determined the matter on 2nd December, 2021 in accordance with that said order, acted in breach of CPR 16.2(5)(b);
- ii. (a) the Learned Master erred in fact and in law in making an award for loss of future earnings/loss of earning capacity;
(b) further and/or in the alternative, the award of \$432,000.00 for loss of future earnings/loss of earning capacity was excessive and not supported by the evidence;

³ Paragraph 105 of the judgment.

- iii. The Learned Master erred in arriving at the sum of \$85,000.00 for pain and suffering and loss of amenities;
- iv. The Learned Master erred in including the sum of \$5,000.00 as a nominal award for domestic services under the head of general damages, when this was pleaded and ought to have been, or had been, accounted for as an aspect of Special Damages;
- v. The Learned Master erred in finding that the sum of \$24,401.95 for Special Damages was actually pleaded and proved;
- vi. The Learned Master erred in law in that he awarded pre-judgment interest on General Damages at 6% from the date of service of the claim form to the date of payment;
- vii. The Learned [Master] erred in law in that he did not differentiate in the award of pre-judgment interest and post judgment interest on Special Damages.”

Ground 1

- [11] The appellant’s first ground of appeal challenged the Master’s decision to do the assessment of damages on paper, contending that the Master’s decision and action in so doing were inconsistent with some of the provisions of rule 16.2 of the **Civil Procedure Rules 2000** (the CPR). At the hearing of the appeal though, the appellant abandoned this ground of appeal.

Ground 2

- [12] The appellant’s second ground of appeal challenged the making of an award by the Master for loss of future earnings/loss of earning capacity. Alternatively, the appellant challenged the quantum of the award.
- [13] The appellant submitted that the Master, having found that the respondent had no handicap on the labour market, proceeded to make an award for loss of earning capacity. The appellant contended that the test for loss of earning capacity and for handicap on the labour market is the same and cited the cases of **Smith v Manchester City Council (Manchester Corpn)**⁴ and **Martin Alphonso and Others v Deodat Ramnath**⁵ in support.

⁴ (1974) 17 K.I.R. 1.

⁵ (1997) 56 WIR 183.

[14] The appellant submitted that for an award of loss of earning capacity, the respondent had to be employed at the date of the assessment and there must be a real risk that he would lose his employment at some time in the future as a result of his injury and be thrown onto the labour market where he would be at a disadvantage in obtaining comparable employment. The appellant contended that there was no evidence that the respondent was at risk of losing his employment and that the 2017 letter from his employer did not indicate any diminution in his capacity to perform his job as a painter.

[15] The appellant submitted that, despite recognizing that loss of future earnings and loss of earning capacity were two different heads of losses, with two different tests, the Master conflated the two, dealt with them together, and made one award for both of them. The appellant cited the authority of **Alphonso v Ramnath** where this Court distinguished between the two, determining that an award for loss of earning capacity compensates the claimant for his diminished ability to do his job, whereas an award for loss of future earnings compensates a claimant for actual loss of earnings it is anticipated he will suffer. The appellant contended that there was no evidence of any actual loss of earnings and so no award should have been made for loss of future earnings.

Analysis/Discussion on Ground 2

[16] In my view, the Master did err in fact and in law when he made a single award for loss of future earnings and loss of earning capacity. These two heads of loss are totally different and cannot be addressed together and produce a single amount of loss. Indeed, one can only be made if the other cannot.

[17] I will first address what a loss of future earnings award is and the circumstances in which such an award can be made and then give similar treatment to a loss of earning capacity award.

[18] Loss of future earnings is the loss occasioned to an injured party consequent on his inability to work as a result of the injuries which he sustained or the diminution in his income consequent on his diminished capacity to work as a result of his injuries. To qualify for this award, the injured party must satisfy the

court by medical or other cogent evidence that he was rendered incapable of working or his ability to work was impaired to the extent that the income which he earned from his employment was lessened as a result of his injuries. There was no such evidence in this case.

[19] In his statement of claim, the respondent alleged that prior to the accident he was employed with Shikel Jn. Jules as a painter, earning a fortnightly salary of \$1,000.00, and that since the accident he has not been able to work. Exhibited to his statement of claim, however, as exhibit "M.M. 6", is a copy of what is described as "the letter of employment" from Mr. Shikel Jn. Jules dated 7th September 2017 stating that the respondent has been employed with him for the past two years as a painter; his basic wage is \$1,000.00 fortnightly; he takes his duties very seriously; he is always willing to work overtime to make sure the job is completed; and he is a very reliable and dependable worker. There is no mention by his employer that his employment ever ceased or his wages ever decreased as a result of his injuries, or even that his capacity to do his job was in any way impaired. The averment in the statement of claim about his inability to work was not supported, indeed it was contradicted, by the respondent's so-called "employment letter" exhibited to the very statement of claim and exhibited also to his witness statement.

[20] In his witness statement filed on 25th June 2020, the respondent says: "Since the accident, I have found it very difficult to perform my duties as a carpenter and is not able to maintain a job"⁶. This of course contradicts his employment letter exhibited to his statement of claim and exhibited as well to the very witness statement, and no evidence was given as to the reason for the stark difference in the actual pleading and the document(s) exhibited to it, which are intended to prove the averment(s) in the statement of case. It is noteworthy that over three years elapsed between the date of the employment letter (7th September 2017) and the date of the assessment of damages (10th November 2020), yet no update had ever been provided to the court, or any evidence given (whether from the employer, Mr. Shikel Jn. Jules, or otherwise) as to the employment

⁶ Paragraph 5 of the witness statement.

status of the respondent, or of any change in his employment status between the date of the letter and the date of the assessment.

[21] In the submissions filed on behalf of the respondent for the assessment of damages, it was not submitted that he had been or was going to be rendered unable to work as a result of his injuries. It was submitted only that his injuries are “naturally going to affect his job as a carpenter” and that he is claiming “the sum of \$86,400.00 or a nominal amount as a result of the pecuniary prospects that he will suffer as a result of injuries sustained”.

[22] It should be noted that in his submissions, the respondent is being referred to as a carpenter and not as a painter (as stated in his employment letter) and that the latter trade is less likely to be affected by the nature of his injuries. More importantly, though, is that the respondent did not submit that his injuries had rendered him incapable of working or were likely to cause a reduction in his income; and it is one of these two circumstances which alone can attract an award for loss of future earnings. That his injuries were naturally going to affect his job as a carpenter, in the absence of cogent evidence of loss of or diminution in his income, can only possibly attract a *Smith v Manchester* award, about which more will be said later. Indeed, the respondent’s submission that he should be awarded \$86,400.00, instead of the \$432,000.00 gifted to him by the Master, or “a nominal amount as a result of the pecuniary prospects that he will suffer as a result of the injuries sustained”, points to a loss of earning capacity award and not a loss of future earnings award.

[23] In terms of the award actually made by the Master, despite the fact that the medical doctor who examined, treated and provided medical reports on the respondent never said that the respondent will be unable to work as a result of his injuries; despite the fact that the respondent’s employment letter never said that he had not continued to work unimpaired by his injuries; despite the virtual concession in the respondent’s submissions for the assessment of damages that he was not disabled from working; and despite the Master himself

specifically stating in his judgment⁷ that four years since the accident the respondent continues to be employed; the Master somehow made a finding that the respondent should be compensated for loss of future earnings. He then proceeded to calculate that loss by taking the respondent's age at the date of the accident, deducting it from the age of retirement, applying a discount to it, and thus arriving at a multiplier, which he then multiplied by the gross annual wages of the respondent to arrive at his \$432,000.00 award for loss of future earnings/loss of earning capacity.

[24] It was not open to the Master on the evidence before him to determine that the respondent was not able to work as a result of his injuries, or that there was a diminution in his income on the basis of which he could make an award for loss of future earnings. It was also not open to the Master as a matter of law to make a single award for loss of future earnings and loss of earning capacity.

[25] The question then arises as to whether it was open to the Master to make an award for loss of earning capacity and, if so, whether the award of \$432,000.00 made by him was in fact an award for loss of earning capacity, because - as a matter of grammar and punctuation - "loss of future earnings/loss of earning capacity" may be interpreted to mean either loss of future earnings or loss of earning capacity.

[26] On the actual facts and applicable law, it may well have been open to the Master to make an award for loss of earning capacity. Such an award is referred to as a **Smith v Manchester** award. In giving judgment in this Court in the case of **Steadroy Matthews v Garna O'neal**⁸ Michel JA stated the following:

"... a Smith v Manchester award is made in a situation in which the injured party is in regular employment at the date of the trial but has a partial disability resulting from the injury which puts him at a disadvantage in the labour market because he may lose his employment and may not be able to get another similarly-remunerated job. In such a situation, the English Court of Appeal in Smith v Manchester considered that it would be impractical to try to work out a multiplier and a multiplicand on which to arrive at an award for loss of

⁷ Paragraph 84 of the judgment.

⁸ BVIHCVAP2015/0019 (delivered on 16th January 2018) unreported.

earnings and that the better approach was to make an award to the injured party for loss of earning capacity consequent on the injuries sustained.”

- [27] Notwithstanding the clear statement of principle in the **Steadroy Matthews** case, which seems to have favoured the making of a Smith v Manchester award to the respondent in the present case, the Master expressly determined that an award for handicap on the labour market, which is the same as an award for loss of earning capacity, would not be made in this case. Indeed, he made a specific determination (at sub-paragraph c. of his order) - “no order as to handicap on the labour market”. Any inclination to or disposition towards overruling the Master on this determination is stymied by the fact that neither of the parties challenged this determination by the Master. Moreover, the respondent, who would have had the onus upon him to cross appeal this determination by the Master, did not do so, either by submitting that the Master erred in making a determination that there be no order as to handicap on the labour market, or that the Master’s award of \$432,000.00 for loss of future earnings/loss of earning capacity was indeed a misnamed Smith v Manchester award.
- [28] If the respondent was somehow able to have cleared these hurdles, he would still have encountered the formidable hurdle of the Master’s error in the determination of the quantum of the award. An award for loss of earning capacity or for handicap on the labour market cannot be quantified by using the multiplier-multiplicand method; it would have to be an award in general damages made by the Master with the aid of any comparable awards available to him.
- [29] If it had been open to the Master to make an award for loss of earning capacity on the **Smith v Manchester** principles, he squandered that opportunity by conflating it with an award for loss of future earnings, evidently failing to appreciate that an award for loss of earning capacity was equivalent to an award for handicap on the labour market, and expressly determining that no award will be made for handicap on the labour market. If there was still any life left in the Master’s \$432,000.00 award after knocking down all of the hurdles, it was snuffed out by the use of the multiplicand-multiplier method to quantify a Smith

v Manchester award, when the Smith v Manchester award was virtually conceived to cater for the situation when the multiplicand-multiplier method was unsuitable.

[30] Having determined that the Master erred in making an award for loss of future earnings/loss of earning capacity, it is not necessary to address the issue of whether the award would in any event be excessive and not supported by the evidence. I will say though, without elaboration, that an award of \$432,000.00 arrived at by using the gross amount of the injured party's income to determine a multiplicand and including in the calculation of the multiplier at least four years during which the injured party likely continued in his employment without loss of salary, must have been the result of judicial error.

[31] I will accordingly allow the appeal on ground 2 and set aside the Master's award of \$432,000.00 for "loss of future earnings/loss of earning capacity".

Ground 3

[32] The appellant's third ground of appeal is that the Master erred in arriving at the sum of \$85,000.000 for pain and suffering and loss of amenities.

[33] Before addressing this ground of appeal, it will be helpful to quote the Master's precise award. The award was for "pain and suffering EC\$85,000.00 at 6% interest from the date of the service of the claim form to the date of payment inclusive of a nominal amount of EC\$5,000.00 for domestic services".

[34] Two aspects of this award must be highlighted. Firstly, it specifically states that it was for "pain and suffering" and not "pain and suffering and loss of amenities". Secondly, it specifically states that the \$85,000.00 was "inclusive of a nominal amount of EC\$5,000.00 for domestic services". As a consequence, no consideration will be given to any loss of amenities, because its exclusion from the Master's award was not contested by either of the parties, particularly the respondent who might have had an interest in challenging the Master's exclusion of loss of amenities in making an award on general damages in a personal injury case. Secondly, the award specifically states that the \$85,000.00

was “inclusive of a nominal amount of \$5,000.00 for domestic services”. As a consequence, the award for pain and suffering will be dealt with under this ground of appeal as being an award of \$80,000.00, while the \$5,000.00 nominal amount for domestic services will be dealt with under ground 4.

[35] In my judgment in the **Steadroy Matthews v Garna O’neal** case, to which I referred earlier, I dwelt a bit on the issue of the assessment of damages, and much of what follows in the next two paragraphs hereof is extracted from that judgment.

[36] The assessment of general damages, particularly for pain and suffering and loss of amenities, is a matter within the discretion of the trial judge, since the quantum of the damages cannot be monetarily measured. The burden on an appellant, therefore, who invites a court of appeal to interfere with a judge’s assessment of general damages (or a master in this case) is a very heavy one.

[37] Whilst I agree with the view expressed by Gordon JA in delivering judgment in this Court in the case of **CCAA Limited v Julius Jeffrey**⁹ that the discretion of a trial judge in making awards of general damages in personal injury cases ‘must be curtailed by attempting to achieve consistency in awards within the jurisdiction of this Court’, I do not consider that this derogates from the established principle that before an appellate court can be justified in interfering with a discretionary order of a trial judge in circumstances such as the present, the court must be satisfied that the trial judge failed to apply the relevant principles and to take into consideration matters that he should have and/or took into account matters that he should not have and that as a result he made an award which was outside the range of awards which could reasonably have been made on the facts and circumstances of the case, and was therefore clearly or blatantly wrong.

⁹ SVG Civil Appeal No. 10 of 2003 (delivered on 2nd March 2004, unreported)

[38] The appellant in this case argued that, although the Master applied the correct principles as enunciated by Wooding CJ in **Cornilliac v St. Louis**¹⁰, in making the award for general damages the Master erred by considering matters which he should not have and by failing to consider matters which he should have and made an award which was clearly or blatantly wrong.

[39] The appellant contended that although the Master did pay regard to the two medical reports of Dr. Dagbue on the respondent, one dated 19th August 2017 (the 2017 report) and the other dated 11th March 2020 (the 2020 report) he erred in several respects in dealing with the content of these reports. The errors pointed out by the appellant as having been made by the Master in his judgment on assessment include the following:

- (i) that the 2020 report indicated that the respondent was last seen by Dr. Dagbue on 11th March 2020, when in fact it was 25th February 2020;
- (ii) that the respondent had not reached maximum medical improvement, which was stated to be the case as of the date of the 2017 medical report, which report also stated that maximum medical improvement may take up to 2 years from the date of the injury, that is, up to February 2019, so there was no basis for the Master's finding;
- (iii) that there was a prognosis of possible post-traumatic spondylosis, when this was not mentioned in the 2020 report, although mentioned in the earlier 2017 report;
- (iv) that the respondent was managed with rest and physiotherapy at St. Jude's Hospital on 26th February 2017 to alleviate the stiffness and restore range of motion to his neck, when in fact the 2017 report clearly states that on 26th February 2017 the respondent was taken to St. Jude's Hospital where he was treated and discharged and that, at the date of the report (19th August 2017) the respondent

¹⁰ (1965) 7 WIR 491

was “being managed with rest and physiotherapy to alleviate stiffness and restore range of motion to the neck;

- (v) that the respondent would be dependent on physiotherapy in the future, when the 2020 report stated that the respondent was previously managed with physiotherapy and did not indicate that the respondent would require further physiotherapy treatment;
- (vi) that the respondent has to contend with excruciating pain and be dependent on physiotherapy and pain killers for relief and comfort from the severe pains, when there was nothing in the evidence to that effect;
- (vii) that the respondent would have permanent stiffness in the neck region and on-going pains associated with the stiffness in his neck, when no mention of this was made in the 2020 report;
- (viii) that when the respondent was assessed in 2020 he complained of difficulty running, a limp whilst walking, pain in his left wrist, and off and on pain in his left knee, when there was no mention of any of these in the 2020 report;
- (ix) that the respondent was surgically treated for his injuries, when there was no such indication in either of Dr. Dagbue’s reports.

[40] The appellant further contended that the Master failed to have regard to the fact that, apart from going to St. Jude’s Hospital on the morning of the accident where he was treated and discharged, the respondent only sought treatment for his injuries well over 3 months after the accident, which was relevant to a consideration of a possible reduction in the amount awarded for general damages on the basis of the failure of the respondent to mitigate his loss by seeking prompt medical care.

[41] As the learned author of **McGregor on Damages** notes:

“the claimant must take all reasonable steps to mitigate the loss to him consequent upon the defendant’s wrong and cannot recover damages for any such loss which he could have avoided but has failed, through unreasonable action or inaction, to avoid.”

[42] In the BVI case of **Cedric Dawson v Cyrus Claxton**¹¹ this Court noted that a claimant is not under a duty to mitigate, as is frequently stated, but rather, the defendant will only be liable for losses occasioned by his actions. Sir John Donaldson MR put it this way in his judgment in the Court of Appeal of England and Wales in *The Solholt*¹²:

“A Plaintiff is under no duty to mitigate his loss, despite the habitual use by lawyers of the phrase ‘duty to mitigate’. He is completely free to act as he judges to be in his best interests. On the other hand, a defendant is not liable for all loss suffered by the plaintiff in consequence of his so acting. A defendant is only liable for such part of the plaintiff’s loss as is properly caused by the defendant’s breach of duty.”

[43] On the facts of this case, the respondent was treated and discharged on the day of the accident in February 2017 and delayed for over three months in seeking medical care. There was no explanation as to why the respondent waited over three months to seek medical treatment if the pain and stiffness he experienced were as bad as he said. Had the Master taken this delay into account, it may have led to a lower award. This delay was therefore a relevant factor and the Master erred by failing to consider it in undertaking an assessment of damages for pain and suffering.

[44] The appellant contended too that the Master also failed to have regard to the fact that Dr. Dagbue made no mention of any disability suffered by the respondent as a result of his injuries, the nature and gravity of which, if there was disability, is a significant factor in determining the quantum of general damages to be awarded in respect of an injury.

[45] The appellant concluded that - “All in all ... the Master erred in fact and in law in making an award of \$85,000.00 for pain and suffering and for domestic care, as

¹¹ BVIHCVAP2004/0023, (delivered 23rd May 2005, unreported).

¹² [1983] Lloyds Rep. 605 at 608.

the award was unjustifiable and unsupported by the evidence, and the relevant principles were not properly applied”, and that the award should be set aside.

- [46] In response to the appellant’s submissions on Ground 3, the respondent conceded that there are matters which the Master ought not to have considered or taken into account in his assessment, but that the award is not so inordinately disproportionate as to be plainly wrong. As a result, the respondent submitted that there is no justification for any disturbance of the award, apart from the fact that the nominal sum of \$5,000.00 for domestic care should not have been included under the head of general damages.

Analysis/Discussion on Ground 3

- [47] As I stated earlier, the assessment of general damages for pain and suffering is a matter within the discretion of the judge or master undertaking the assessment, and the burden on an appellant who invites a court of appeal to interfere with the judge or master’s assessment of general damages is a very heavy one. Again, as I stated earlier, the appeal court ought not to interfere unless it is satisfied that the judge or master failed to apply the relevant principles or failed to take into consideration matters that he should have and/or took into consideration matters that he should not have, and that as a result he made an award which was outside of the range of awards which could reasonably have been made on the facts and circumstances of the case and was therefore clearly or blatantly wrong.
- [48] I agree with the appellant that the Master erred in taking into account matters that he should not have and failed to take into account matters that he should have. I do not agree with the respondent that, although the Master did so, “the award is not so inordinately disproportionate as to be clearly or blatantly wrong.”
- [49] I take the view, therefore, that in making the award for general damages, the Master erred in having regard to ‘facts’ which he should not have (because they were erroneous) and in failing to have regard to facts which he should have (because they were relevant). In so doing, the Master made an award of general damages which was outside the range of awards which should reasonably have

been made on the facts and circumstances of the case and was therefore clearly or blatantly wrong. I will accordingly set aside the Master's award of \$80,000.00 for pain and suffering.

[50] Having set aside the Master's award, I must now either remit the assessment of general damages to the High Court to be undertaken by a Judge or Master, or this Court must itself determine the quantum of the award to be made by way of general damages for pain and suffering. Having regard to the fact that nearly five years had elapsed between the respondent's injuries being sustained (26th February 2017) and the judgment by the Master on the assessment of damages (2nd December 2021) and nearly two years have elapsed between the delivery of that judgment and the delivery of this one, the better approach would be for this Court to determine the quantum of the award of general damages. This Court, it should be noted, is in at least as good a position as the Master was in assessing the damages to be awarded, because the Master made his award on paper, without hearing evidence or oral submissions from either of the parties.

[51] In computing the quantum of general damages for pain and suffering and loss of amenities, Wooding CJ in **Cornilliac v St. Louis** outlined five factors which ought to be taken into account in the assessment:

- a) the nature and extent of the injuries sustained;
- b) the nature and gravity of the resulting physical disability;
- c) the pain and suffering which had to be endured;
- d) the loss of amenities suffered; and
- e) the extent to which, consequentially, the [claimant's] pecuniary prospects have been materially affected.

[52] The medical report by Dr. N.A. Dagbue, dated 19th August 2017, describes the respondent's injuries as follows:

"There was no history of loss of consciousness. He was taken initially to St. Jude Hospital emergency room where he was treated and discharged.

Clinical and radiological assessment on presentation including a CT scan done confirmed that he sustained a type II odontoid process fracture...

His last visit to me was on August 19th 2017 at which time he complained of continued stiffness in the neck and pain at the end of range of motion.”

[53] The doctor noted that the fracture which the respondent sustained is an injury which is expected to heal non-operatively, since he presented late, but he will most likely have some persistent stiffness of the neck and post-traumatic cervical spondyloses in the future. The doctor noted too that the respondent could perform most basic activities of daily living, like washing, bathing, cooking etc., but with some difficulty as he will have pain in the neck when he lifts up heavy items and bends for prolonged periods of time. He noted that the respondent had a period of temporary partial impairment from the time of the accident till date, and that maximum medical improvement may take up to two years at which point an assessment of permanent impairment could be done.

[54] In the medical report dated 11th March 2020, the doctor described the respondent as stable at the point of treatment. He stated that the respondent was not expected to suffer any sudden incapacitation over the next year because of the injuries. He stated too that while the fracture had healed well, residual pain will most likely remain for the rest of his life. At the time of examination, the doctor noted that the respondent could perform daily living activities, but with difficulty, because he will have pain whenever he lifts heavy items. The doctor noted too that residual pain will affect the respondent's job as a carpenter, because he could not lift heavy items or bend his neck for prolonged periods to work.

Comparable cases

[55] In determining the quantum of general damages to be awarded as compensation for pain and suffering, the court should, in general, award such sum within the broad criterion of what is reasonable and in line with similar awards in comparable cases as represents the court's best estimate of the claimant's loss. In doing so, the court should have regard to recent comparable awards in its own and other jurisdictions with similar social and economic conditions.

- [56] In **Williamson Hippolyte v Shammal Charles**¹³ (a 2009 decision from Saint Lucia) the claimant sustained injuries as a result of an accident caused by the defendant. The claimant lost consciousness and was taken to the hospital where he was warded for several weeks. Medical investigation revealed that he had a displaced odontoid process (C2) fracture with associated weakness of the left upper limb. His injury was surgically managed and he had post operative care for rehabilitation for about eighteen (18) months. Up to the date of trial he still had residual weakness of the left upper limb muscles which the Consultant Orthopaedic surgeon, Dr Dagbue, assessed at a 30% impairment to the whole person. The claimant was awarded EC\$25,000.00 in general damages.
- [57] In **Joseph Joseph v Peter Hilton et al**¹⁴ (a 2017 decision from Saint Lucia) the claimant's injuries were described as severe tenderness of the posterior aspect of his neck; grade 4/5 in both lower limbs; subluxation of C4-C5 vertebrae. Upon review on 11th October 2011, it was observed that the 4th cervical vertebrae had shifted about 10% over C5. The claimant continued to suffer discomfort over his shoulders, with back and some neck stiffness. The medical report stated that the claimant was expected to improve within a year, but with permanent discomfort producing a permanent disability of about 15%. A further medical review on 1st June 2016 described the claimant's complaints of stiffness and discomfort over his neck, shoulders and upper back, with decreased power in his right upper limb. The back pain was aggravated by prolong standing. The claimant was assessed with 25% permanent disability. The report further stated that the claimant will be unable to continue playing his favourite sports of football and cricket and will also be unable to continue to work as a bartender. The court awarded \$100,000.00 for pain and suffering and loss of amenities.
- [58] In **Harvey Taliam et al v Kurt Duncan et al**¹⁵ (a 2019 decision from Saint Lucia) the first claimant, Mr. Harvey Taliam, who was 39 years old at the time of the accident, was admitted at the Victoria Hospital and discharged on the following day on a course of analgesia, with follow-ups at the orthopedic outpatient clinic.

¹³ SLUHCV2007/0104 (delivered 4th March 2009, unreported).

¹⁴ SLUHCV2012/01025 (delivered 29th June 2017, unreported).

¹⁵ SLUHCV2018/0418 (delivered 26th April 2019, unreported).

He was diagnosed as having suffered soft tissue injury to the cervical spine (whiplash injury), soft tissue injury to the upper and lower back, and a right index finger sprain. On his last visit to the doctor on 27th November 2017, Mr. Talam complained of continued pain in the upper neck and index finger, with episodes of numbness in the right upper and lower limb. The medical report revealed that there was full recovery with no permanent disability. He was able to perform most activities, but with pain when he turns. However, at the time of his last report in 2017, he had not reached maximum medical improvement. With respect to loss of amenities, Mr. Talam had given evidence that his intimate life was affected, as was activities with his son. The court awarded \$25,000.00 to Mr. Talam for pain and suffering and loss of amenities.

[59] The second claimant, Ms. Adline Eudovique, suffered musculo-skeletal pains and was discharged on the same day of the accident with painkillers, and was advised to rest. Upon further examination, she was diagnosed with tenderness in her shoulders and neck, which worsened on movement. She also had a decreased range of movement on the neck on flexion and on hyper-extension. As was the case with Mr. Talam, in respect of loss of amenities, she had given evidence that her intimate life was affected, as were activities with her son. She was awarded \$15,000.00 for pain and suffering and loss of amenities.

[60] In **Kim Russell Romney v John Chinnery**¹⁶ (a 2017 decision from the BVI) the claimant suffered the following injuries as a result of an accident: (1) C3-C4 minimal left posterolateral disc bulge without stenosis; (2) C4-C5 mild left posterolateral disc bulge without stenosis; (3) C5-C6 mild to moderate right posterolateral disc with herniation with mild lateral recess stenosis, affecting the exiting right C6 root; (4) C6-C7 moderate circumferential disc bulge with right posterolateral prominence with borderline central stenosis without cord involvement, and mild bilateral recess stenosis; (5) questionable ill-defined area of hypodensity at upper brainstem at the level of quadrigeminal plate near midline; and (6) right upper extremity weakness. In addition, the physiotherapist, Dr Tania Medley, reported that the Claimant had limited passive/active range of

¹⁶ BVIHCV2014/0230 (delivered 12th January 2017, unreported).

motion in the cervical spine, significant muscle spasm in the deep and superficial cervical muscles, and upper Trapezius muscle on the right, and facet joint swelling on the right upper cervical spine.

[61] The claimant averred that she suffered from a loss of range of motion in her neck and was in constant pain, radiating down her arms. The claimant's condition worsened, and she had to undergo surgery on 4th September 2012 and was hospitalized for five days. She also stated that, even after the surgery, she continued to experience discomfort and pain. The Claimant also underwent surgery on 11th September 2015. She experienced difficulties driving, because of a diminished ability to twist her neck and body. She could not lift heavy items and had to get assistance to carry groceries. There was no evidence produced of any permanent disability. The claimant was awarded US\$10,000.00 for pain and suffering and US\$15,000.00 for loss of amenities.

[62] In **Annie Benn v Community First Coop. Credit Union Ltd**¹⁷ (a 2009 decision from Antigua and Barbuda) the claimant suffered from injuries to her neck, shoulders, lower back and hips. The evidence was that she continued to experience intermittent pain for in excess of one year. She underwent physiotherapy and medication to assist with her pain. The claimant experienced flare ups which hampered her ability to drive and the performance of her normal household chores. In 2007 she was awarded \$40,000.00 in general damages for pain, suffering and loss of amenities.

[63] In **Wadadli Cats Limited v. Frances Chapman**¹⁸ (a 2005 decision from Antigua and Barbuda) the Court of Appeal awarded the respondent \$40,000.00 for pain and suffering and \$80,000.00 for loss of amenities. The Respondent had severe bruising to the head, severe pain in the neck and arm, bruising of the inner ear, together with cervical spondylosis which impacted negatively on both her professional and social life.

¹⁷ ANUHCv2007/0725 (delivered 20th October 2009, unreported)

¹⁸ Civil Appeal No. 16 of 2004 Antigua and Barbuda,

[64] In **Kelsick v Josiah**¹⁹ (a 2004 decision from Antigua and Barbuda) the claimant suffered severe whiplash, soft tissue cervical spine injury, fracture of spur in the tip of right olecranon, with local cyst formation and haemarthrosis to his right elbow, ligament strain to his left wrist joint, partial tear to his talo-fibular and calcaneo-fibular ligament of right ankle joint. The medical evidence indicated that Mr. Kelsick had shown signs of post traumatic degenerative joint disease and that on an evaluation of Mr. Kelsick on 22nd September 2003, he had lost permanently on average about 2% of the normal range of movement in his neck. The examining doctor gave an assessment of 8% impairment as a whole person.

[65] Mr. Kelsick gave evidence that he was in pain frequently, that he has a constant pain in his right ankle every day and intermittent pains in his neck and elbow. He was required to take analgesics to alleviate his pain and also underwent physiotherapy. He could no longer take part in triathlons as he could no longer run - running being one of the events in a triathlon. The court awarded the sum of \$40,000.00 for pain and suffering and also took into account that it is very likely from the evidence that Mr. Kelsick will have to live with the pain for the rest of his life and that his condition will continue to degenerate in accordance with the examining doctor's prognosis, with increasing adverse effect on his work. An award of \$20,000.00 for loss of amenities was made, as his way of life has been so severely affected.

[66] In **Martha Leblanc v Augustus Thomas et al**²⁰ (a 2011 decision from the Commonwealth of Dominica) the claimant, aged 41 at the time, suffered a traumatic disc prolapsed of the C5-C6 cervical vertebrae. There was also a partial tear of the spinal muscle. She experienced neck pain which a doctor in his report said will persist. The doctor was unsure whether surgery will alleviate this pain. The court received some indication of the level of pain from the medical treatment. The claimant was prescribed mild painkillers for one week. The only disability the claimant suffered is a loss of mobility in flexing her neck. No special loss of amenities was pleaded, but in her evidence the claimant said that her

¹⁹ ANUHCv 0412 OF 2000 (delivered 18th May 2004, unreported).

²⁰ DOMHCV2009/0296 (delivered 6th July 2011, unreported)

ability to have sex has been affected. No medical evidence to support this was led. The court awarded \$16,000.00 for pain and suffering.

[67] In **Celia Hatchett v First Caribbean International Bank et al**²¹ (a 2007 decision of the BVI) the claimant was injured in an accident on 8th January 2001 and sustained a fracture to her 3rd cervical vertebrae without displacement, and also central disc herniation of her lumbar L5/S1 vertebrae with degenerative disc disease at L4/L5 disc level. She was treated with bland cervical collar, analgesics and absolute rest. The medical reports indicate that Mrs. Hatchett experienced and was still experiencing chronic pain and discomfort in her neck and lower back. The court noted that Mrs. Hatchett is not disabled, she however will require further medical attention in the form of facet joint injections to alleviate her pain and discomfort. She has not and will not make a complete recovery and, according to the medical report, her condition will only get worse with or without surgery as she ages. She was awarded US\$20,000.00 for pain and suffering and loss of amenities.

[68] In **Dubois v Jerome et al**²² (a 2012 decision from Grenada) the claimant sustained soft tissue injuries of the left shoulder, chest, face and knees and a displaced closed comminuted right distal radial fracture with dislocation of the right ulnar head. He complained of pain in the left anterior chest and left shoulder which stretches to his left upper limb. He had pain in his right hand and right wrist, which is also stiff, and he had difficulty with delicate right-hand movements. He could not lift weights greater than 20lbs, and felt weakened, as he could not flex the fingers and thumb of his right hand with any force. There was pain in the joints of the fingers and thumb, and numbness in the right thumb. The claimant had been left with a very stiff right wrist with a markedly reduced range of motion and mildly stiff right fingers and thumb, which the examining doctor concluded will permanently present difficulty with delicate and laborious activities due to the reduced range of motion and pain. He was awarded \$27,500.00 in general damages.

²¹ BVIHCV2006/0227 (delivered 29th November 2007, unreported).

²² GDAHCV2011/0088 (delivered 7th March 2012, unreported)

[69] In **Sheena David et al v Bowen et al**²³ (a 2013 decision from Grenada) the first named claimant Sheena David suffered from soft tissue injury to the neck and shoulders, ligamentous strain and muscle spasms, significantly reduced range of motion of the cervical spine and neck pain. The prognosis of Dr Douglas Noel, on 15th November 2006, was that the shoulder symptom would resolve, and that Ms. David may in the future have intermittent pain in the neck according to activities such as lifting or moving her head to the extremes. Dr Noel reported that Ms. David would have increased incidence of arthritis developing in the neck in the future. A final examination was conducted on 21st October 2010 when Dr Noel found that the neck pain and lower back pain continued, and Ms. David continued to be symptomatic. Dr Noel noted that Ms. David had chronic ligamentous inflammation in these regions and that her pains will continue on and off in the future according to posture and movements. Dr Noel noted too that Ms. David also had arthritis developing in the cervical and lumbosacral spine which will contribute to those pains.

[70] In relation to the second named claimant, Alana David, she was noticed to have tenderness of the back of the neck. She developed back pain soon after the accident. On examination by Dr Noel, she was found to have reduced sensation to touch in the right C5 and C6 dermatomes. There was also reduced range of motion of the lumbosacral spine. X-rays of the lumbosacral spine revealed no fracture or dislocation or subluxation. There was slight scoliosis of the lumbar spine. She was treated with non-steroidal anti-inflammatory medication and was directed to continue using a cervical collar issued by the casualty department. Further medical examinations were conducted by Dr Noel on 17th November 2007, 12th February 2008 and 11th October 2010. At the date of the last report, examination revealed that Ms. Alana David suffered with left knee and left hip pain associated with her lower back injury. Clinical examination of these joints was normal. It was determined that spinal, cervical and lumbosacral pain may continue on and off indefinitely and may worsen by lifting, jogging and sitting. She has an increased chance of arthritis developing in the lumbosacral region and with the radiological findings of scoliosis, she has an increased chance of

²³ GDAHCV2007/0055 (delivered 7th June 2013, unreported).

arthritis developing in the lumbosacral spine which can lead to chronic back pain. Her neck pain due to cervical spine soft tissue injury from the accident will continue off and on into the future, and there is increased chance of cervical spondylosis (arthritis) developing in the cervical spine.

[71] The court noted that while the injuries sustained by both claimants were soft tissue injuries, they continued to endure pain which places some restriction on their daily activities. The first named claimant suffered with neck pain and lower back pain and found that her ability to discharge her duties as a teacher had been made difficult. The second named claimant also suffered with similar pain and her confidence to pursue her career path was undermined. The court awarded general damages (excluding loss of pecuniary prospects) of \$37,000.00 to the first named claimant and \$35,000.00 to the second named claimant.

[72] In **Lenroy Connor v Cynthia Flemming**²⁴ the claimant was awarded the sum of \$65,000.00 in general damages for pain, suffering and loss of amenities. In that case, the claimant suffered from tightness and weakness of the posterior neck muscles, episodic pain in the left neck radiating down to the shoulders and then to the fingers, sticking of the left little finger, episodic falling of the left thumb into the palm and painful spasms of all the fingers which lasts for a short time before wearing off. It was determined by the doctor that arthritis would develop in a few years, resulting in cervical spondylosis.

[73] It is apparent from this review of related cases that there is no directly comparable case involving injuries of the same type as those of the respondent in this case and involving the same level of pain and suffering. The closest one gets to the same type of injury is the case of **Williamson Hippolyte v Shammal Charles**, a 2009 high court case from St. Lucia where the court awarded \$25,000.00 for general damages for pain and suffering. But it is apparent that the \$25,000.00 award is on the lower end of the range of awards. At the upper end is the award of \$100,000.00 by the high court in St. Lucia in 2017 in the

²⁴ SKBHCV2012/0053 (delivered on 14th January 2016, unreported).

case of **Joseph Joseph v Peter Hilton**. The claimant's injuries in **Joseph Joseph** were clearly more significant though than those of the respondent in this case, and the award included damages for loss of amenities, which in that case included the claimant being unable to play his favourite sports of football and cricket. Also in the upper range of comparable awards is the award of the high court in St. Kitts in 2016 in the case of **Lenroy Connor v Cynthia Flemming**, where the court made an award of general damages of \$65,000.00 for pain, suffering and loss of amenities. There was no specific finding though of loss of amenities.

- [74] Given the nature and extent of the injuries sustained by the respondent, the nature and gravity of the resulting physical disability, and the pain and suffering endured by the respondent, and with such assistance as can be obtained from the cases discussed in paragraphs 56 to 72 hereof, I believe that the appropriate award to be made in this case (in 2023) by way of general damages under the head of pain and suffering is \$60,000.00.

Ground 4

- [75] The appellant's fourth ground of appeal is that the Master erred in including the sum of \$5,000.00 as a nominal award for domestic services under the head of general damages, when this was pleaded and ought to have been, or had been, accounted for as an aspect of special damages.
- [76] In his statement of claim, the respondent specifically pleaded that he was entitled to compensation for domestic assistance for a period of 1 month during which he was totally incapacitated and 5 months during which "he need[ed] assistance with cleaning and washing", and he claimed \$6,000.00 compensation by way of special damages. In his witness statement, the respondent stated that he suffered a period of total incapacity for 1 month for which he was claiming \$1,500.00 for domestic assistance provided by his mother during that period and an additional sum of \$4,500.00 because he "required assistance with cleaning and washing" for a period of 6 months. He repeated his claim for special damages of \$6,000.00 for domestic assistance.

[77] In paragraph 105 of his judgment, the Master said that he accepted the submission that the respondent would have required domestic services and that this expense should ordinarily be allowed. In his final order, the Master awarded the respondent the full amount of \$24,401.95 claimed by him as special damages, including the amount of \$6,000.00 claimed for domestic assistance. Notwithstanding this award of special damages for the full cost of domestic assistance claimed by the respondent, the Master proceeded to include in the award of general damages for pain and suffering “a nominal award of \$5,000.00 for domestic services”.

[78] In paragraph 20 of his skeleton arguments in response to the appeal, the respondent stated:

“Having considered the issue of domestic care as an item of special damages, the Respondent agrees that the nominal sum of \$5,000.00 should not have been included under the head of general damages”

Further, in paragraph 46 of his skeleton arguments, the respondent specifically stated that he agreed with ground 4 of the appeal. This ground of appeal, having been conceded, will accordingly be allowed and the Master’s award of “a nominal amount of \$5,000.00 for domestic services” will be set aside.

Ground 5

[79] The fifth ground of appeal challenged the Master’s finding that the sum of \$24,401.95 for special damages was pleaded and proved.

[80] It is trite that special damages must be specifically pleaded and strictly proved, and one is not sufficient without the other; so pleading an item of special damages without proving it does not earn you an award of damages, neither does proving an item of special damages without pleading it. It is of the very nature of special damages that it has occurred before the trial and is either quantified or quantifiable by the time of the trial.

[81] The first item of special damages claimed by the respondent (as the claimant in the court below) was medical expenses of \$2,441.95. In his judgment, at paragraph 26, the Master found that “the claimant claimed and is able to prove”

medical expenses of \$2,651.95. But the claimant (the respondent in this appeal) did not either claim or prove medical expenses of \$2,651.95; he claimed medical expenses of \$2,441.95²⁵ and proved medical expenses of \$2,341.95; the difference between the two amounts is the sum of \$100.00 shown as having been paid to Dr Ulric Mondesir for “a medical visit”, the receipt for which does not connect it to the respondent’s medical treatment arising from the injuries which he sustained on 26th February 2017; neither is there any other evidence connecting the visit to Dr Mondesir with the injuries sustained by the respondent in the accident of 26th February 2017. The appellant also questioned the receipt for \$40.00 for “medicine local”, but the date of that receipt corresponds with a medical consultation with Dr Dagbue on that same day, so I consider it to be sufficient proof of a medical expense of \$40.00 connected to the respondent’s treatment for his injuries sustained in February 2017.

[82] The second item of special damages claimed by the respondent was \$500.00 for a medical report. This expense is verified by a receipt for that amount dated 5th August 2017, just preceding the date of the 2017 report.

[83] In his statement of claim filed on 23rd January 2018, the respondent claimed special damages of \$23,441.95, which included the sum of \$500.00 paid by him for a medical report, which report and receipt of payment for which were exhibited to the statement of claim.

[84] In his witness statement and written submissions for the assessment of damages, both filed on 25th June 2020, the respondent stated that he had spent monies for his medical care, which included the sum of \$1,250.00 paid by him for medical report(s), receipts for payment of which were exhibited with the witness statement and written submissions.

[85] In his judgment dated 2nd December 2021, the Master simply repeated (in paragraph 26 of his judgment) the statement made in the claimant’s written submissions that: “The Claimant claims and is able to prove the following

²⁵ See Particulars of Special Damages on page 3 of the Statement of Claim.

amounts representing special damages as hereinafter claimed ... the sum of \$1,250.00 for the Medical Report". The Master, however, erred when he said that the respondent had claimed the sum of \$1,250.00 for "the Medical Report" when the respondent did not claim \$1,250.00 for medical report(s), whether in his claim form, statement of claim, amended statement of claim or reply.

- [86] A claim for special damages is made in a pleading or statement of case, not in witness statements or submissions, and the respondent (as claimant in the court below) did not claim or plead special damages of \$1,250.00 for medical report(s); he pleaded special damages of \$500.00 for a medical report, which was proved by his averment in his witness statement, supported by a receipt from the medical clinic where he was treated for his injuries.
- [87] The third item of special damages claimed by the respondent was \$200.00 for a traffic accident report on the accident in which the respondent sustained the injuries. In this instance, the respondent did plead that he had paid the sum of \$200.00 for the traffic accident report, but he failed to prove that he had paid for it. The report was not addressed to him, and he had no receipt evidencing payment for the report. So, although on this occasion the respondent did plead an item of special damages, he was not able to prove it.
- [88] The fourth item of special damages claimed by the respondent was \$300.00 paid to his lawyer for preparation and service of a pre-action letter. The respondent pleaded that expense and proved it with his receipt exhibited to his statement of claim.
- [89] The fifth item of special damages claimed by the respondent was loss of income of \$14,000.00, based on his fortnightly earning of \$1,000.00 for a period of 7 months from 27th February 2017 to 27th September 2017.
- [90] With respect to this claim, the Master simply repeated (in paragraph 26 of his judgment) the following statements contained in the respondent's submissions for the assessment of damages:

“Prior to the accident, the Claimant was employed with Shikel Jn. Jules as a painter earning \$1,000.00 fortnightly. He was not able to work for a period of 7 months. He claims loss of income at the rate of \$1,000.00 per fortnight for that period.”

[91] The appellant submitted that there was no evidence that the respondent was unable to work and earn income during those 7 months. The appellant submitted too that the letter from the respondent's employer put into evidence by the respondent gave no indication that the respondent did not work and earn his customary income during that period. On the contrary, Mr. Jn. Jules' letter dated 7th September 2017 stated that “Marcus Modeste is employed with Shikel Jn Jules for the past two years as a painter” and “is paid a wage of \$1,000.00 fortnightly”. Indeed, in the course of her oral submissions during the hearing of the appeal, counsel for the respondent, Mrs. Maureen John-Xavier, conceded that there was no evidence before the Master that the respondent was not earning income during the period between February and September 2017.

[92] The fourth item of special damages claimed by the respondent was domestic assistance of \$6,000.00. The respondent claimed that, as a result of his injuries, he endured a period of 1 month of total incapacity and required domestic assistance as a result. He claimed \$50.00 per day for that month and \$25.00 per day for the next 6 months during which period he would need assistance to perform domestic duties, like washing his clothes and cleaning around the house.

[93] In his witness statement, the respondent stated that his mother provided domestic assistance to him throughout, but it is unclear whether he meant throughout the month of his alleged total incapacity or throughout the 6 or 7 months during which “[he] required assistance with cleaning and washing”.

[94] In his judgment, the Master referred to and quoted from the following text and cases relied on by the respondent to justify his claim of \$6,000.00 for domestic assistance: Halsbury's Laws of England – Fourth Edition – Para. 891; **Hunt v Severs** (1994) 1 ER 385; **Lewis v Trinidad and Tobago Electricity Commission** H.C.A. CV-S587 of 1984; **Anderson v Donacien et al**, Claim No.

SLUHCV2013/0965 and **Faucher v Donacien et al** Claim No. SLUHCV2013/0964. The Master also referred to and reproduced an excerpt from Kemp & Kemp, Quantum of Damages, Volume 1, Page 114 relied on by McDonald-Bishop J in the case of **McCalla v Atlas Protection Limited**, Claim No. HCVO4117/2006. Without further analysis, the Master concluded:

[121] “Given the nature and extent of the injury, the medical evidence confirming the current claimant’s injuries and impairment for the last several months and the medical evidence, I, on principle, accept the submission that the claimant would have required these services and that this expense should ordinarily be allowed.”

[95] I am not certain what the Master meant when he said that “the claimant would have required these services”, in particular, whether he meant the services allegedly performed by the respondent’s mother during his alleged total incapacity, or whether he meant services performed during a 6 or 7 month period of impairment. Part of my difficulty arises from the fact that there is no witness statement, affidavit or any other documentary evidence from the respondent’s mother, or anyone else, of having provided any domestic services to him at any time. The respondent’s medical reports also do not indicate that he was totally incapacitated for 1 month and unable to wash his clothes and clean around the house for 5 or 6 months afterwards. In fact, the medical report dated 19th August 2017 states that: “At this point in his treatment he can perform most basic activities of daily living (ADL) like washing, bathing, cooking etc.” The respondent’s employment letter, dated 7th September 2017, also gave no indication that he was either incapacitated for 1 month or thereafter unable to function effectively for any period of time. The evidence which was before the Master could not therefore have enabled him to make a determination that special damages of \$6,000.00 for domestic assistance was proved by the respondent.

[96] Looking at the Master’s overall award of special damages in the amount of \$24,401.95, it is clear that the Master erred in making this award, because 5 of the 6 constituent parts of the Master’s award were either not pleaded or not proved. The amount both pleaded and proved by the respondent for medical expenses was \$2,341.95, and not the \$2,441.95 claimed by the respondent or

the \$2,651.95 awarded by the Master. The amount pleaded and proved by the respondent for medical reports was \$500.00, and not the \$1,250.00 which the respondent produced receipts for. The respondent claimed \$200.00 for a traffic accident report, but although he exhibited a traffic accident report with his statement of claim, the report did not indicate that it was sought or obtained by him and there was no receipt or anything else to indicate that it was paid for by him. The respondent's claim for \$300.00 for preparation and service of a lawyer's letter was both pleaded and proved. The respondent's claim for \$14,000.00 for loss of income was not proved, there being nothing but a bald statement in his witness statement that he was not able to work for a period of 7 months and that he wished to claim loss of income at the rate of \$1,000.00 per fortnight for that period. Moreover, this claim did not square with his employment letter or medical reports. Similarly, the respondent's claim for \$6,000.00 for domestic assistance was also not proved, there being no evidence that he incurred this or any expense for domestic assistance. Although special damages of \$6,000.00 for domestic assistance was not proved and cannot, therefore, be awarded, it cannot all the same be denied that the respondent may well have needed and obtained some assistance, at least in the immediate aftermath of his sustaining the injuries complained of, for which a nominal amount of compensation can be awarded to him. In the circumstances, I believe that an award of a nominal amount of \$1,000.00 should be made to the respondent, instead of the \$6,000.00 awarded by the Master. The Master's award of special damages in the sum of \$24,401.95 will accordingly be set aside and replaced with an award of special damages in the sum of \$4,141.95.

Ground 6

- [97] The appellant's sixth ground of appeal is that the Master erred in law in that he awarded pre-judgment interest on general damages at 6% from the date of service of the claim form to the date of payment. The appellant's submission on this (contained in paragraph 98 of his skeleton arguments in support of the appeal) is that: "The learned Master ought to have awarded pre-judgment interest on general damages at the rate of 3% per annum (half of the statutory rate) and post-judgment interest at the statutory rate of 6% per annum". Although in his skeleton arguments in response to the appeal, it is stated that

“[t]he respondent accepts this ground of appeal”, the appellant’s submission is without merit. The dicta of the learned judge in the consolidated high court cases of **Mendy Phillip et al v Sheldon Gaston et al** and **Julienne Fadlin et al v Sheldon Gaston et al**, to which the appellant referred, is in fact an incorrect statement of the law. At paragraph [153] of her judgment, the learned judge stated:

“Regarding awards for pain and suffering, pre-judgment interest is permitted at half the statutory rate from the date of service of the claim and post judgment at the statutory rate until payment.”

The correct legal position on the issue of pre-judgment interest on general damages, as reflected in the cases of **Alphonso v Ramnath** and **Matthews v O’Neal**, is that interest should be awarded on general damages at the statutory rate of interest (which in St. Lucia is 6%) from the date of service of the claim to the date of judgment. This statement of principle comes from the decision of this Court in the case of **Alphonso v Ramnath**, which has been followed consistently by courts in the Eastern Caribbean for the last quarter of a century. I should mention that the actual words of Satrohan Singh JA on the period during which interest should be paid were “from the date of service of the writ to the date of trial”. Of course, civil actions are now instituted by claim form and not writs, and the date of judgment is the correct end date, not the date of trial, because there can be a very long period between trial and judgment, during which the defendant can benefit from an unintended interest free lacunae at the expense of the uncompensable claimant. The Master also erred therefore when he ordered that interest on the general damages run from the date of service of the claim to the date of payment. The end date, as indicated, is the date of judgment.

[98] Ground 6 of the appellant’s grounds of appeal will therefore be allowed.

Ground 7

[99] The appellant’s seventh and final ground of appeal reads as follows: “The Learned [Master] erred in law in that he did not differentiate in the award of pre-judgment interest and post-judgment interest on Special Damages”. I am not sure as to what exactly is the complaint of the appellant to be derived from this

ground. I note the order of the Master that: "Special Damages is awarded to the claimant ... with interest at the rate of 3% per annum from the date of service of the claim to the date of payment". I note too the submission of the appellant in his skeleton arguments in support of the appeal that: "The learned Master similarly did not differentiate between pre-judgment interest and post-judgment interest on special damages. As such, he awarded interest on special damages at a rate of 3% per annum from the date of service of the claim to the date of payment." The appellant further submitted that "any interest on special damages ought to have been pre-judgment interest from the date of the accident to the date of the trial at half the statutory rate (3%), not to the date of payment."

[100] I agree that the Master erred in so far as he did not differentiate between the period during which interest is to be paid on general damages and on special damages. Interest on general damages is to be paid from the date of service of the claim form to the date of judgment, while interest on special damages should be from the date of the loss to the date of judgment. There is the important distinction not made in **Alfonso v Ramnath** or, indeed, in several of the cases on damages, that the start date of interest on special damages should be the date of the loss and not the date of the filing or service of the claim form or the date of the accident or incident giving rise to the claim. If interest is payable from the date of the filing of the claim or of the accident, the claimant this time will get the bonus, because there can be a long time between the accident/incident and the incurring of a loss during which time the claimant will be receiving interest on an expense which has not yet been incurred.

[101] Ground 7 of the grounds of appeal will also have to be allowed.

Conclusion

[102] Based on the foregoing, I make the following orders:

- (1) Ground 1 of the appellant's grounds of appeal, having been abandoned by the appellant, is dismissed.

- (2) Ground 2 of the appellant's grounds of appeal is allowed and the Master's award of \$432,000.00 for loss of future earnings/loss of earning capacity is set aside.
- (3) Ground 3 of the appellant's grounds of appeal is allowed and the award of \$85,000.00 for pain and suffering is set aside and replaced by an award of \$60,000.00.
- (4) Ground 4 of the appellant's grounds of appeal is allowed and the Master's award of \$5,000.00 as a nominal amount for domestic services is set aside.
- (5) Ground 5 of the appellant's grounds of appeal is allowed and the Master's award of special damages in the sum \$24,401.95 is set aside and replaced by an award of \$4,141.95.
- (6) Ground 6 of the appellant's grounds of appeal is allowed in part, to the extent that - (a) the award of interest on general damages is varied as follows: interest on general damages will run from the date of service of the claim form to the date of judgment at the rate of 6% per annum and (b) the award of interest on special damages is varied as follows: interest on special damages will run from the date of each of the three expenses allowed (\$2,441.95 for medical expenses, \$500.00 for a medical report and \$300.00 for preparation and service of a lawyer's letter) to the date of judgment at the rate of 3% per annum, and 3% interest as well on the award of the nominal amount of \$1,000.00 for domestic services from the date of the accident to the date of judgment.
- (7) Ground 7 of the appellant's grounds of appeal is allowed.
- (8) The appellant having been successful (in whole or in part) on 6 of the 7 grounds of appeal, and the quantum of the damages awarded having been substantially decreased on the appeal, the respondent shall pay

70% of the appellant's costs here and in the court below; which costs must be determined in accordance with Appendices B and C to Part 65 of the CPR and paragraphs 2 to 4 of rule 65.5 of the CPR.

I concur.
Margaret Price-Findlay
Justice of Appeal

I concur.
Trevor Ward
Justice of Appeal

By the Court

Chief Registrar