

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

SAINT LUCIA

SLUHCVP2018/0032

BETWEEN:

THE ATTORNEY GENERAL OF SAINT LUCIA

Appellant

and

[1] GODFREY FERDINAND

[2] TAMAR FERDINAND

(Acting by her next friend Godfrey Ferdinand)

Respondents

Before:

The Hon. Dame Janice M. Pereira, DBE

The Hon. Mde. Gertel Thom

The Hon. Mr. Michael J. Fay, QC

Chief Justice

Justice of Appeal

Justice of Appeal [Ag.]

Appearances:

Mr. Dexter Theodore, QC with him Ms. Kozel Creese and Ms. Sueanna Frederick,
for the Appellant

Mr. Leslie Prospere and Ms. Megan Du Boulay Lee for the Respondents

2020: March 12;
June 25.

Civil appeal – Personal injury – Assessment of damages – Appeal against award of damages – Approach of appellate court to master’s award of damages – Loss of use of car – Mitigation of damages – Whether it was reasonable to rent a vehicle – Quantum of general damages – Whether the award of general damages made by the learned master was fair and reasonable in the circumstances – Pain and suffering and loss of amenities – Future medical care – What was the appropriate multiplier for future care up to the age of 18 – Loss of earning capacity – Whether master erred in making an award for loss of earning capacity – Costs – Part 65 of the Civil Procedure Rules 2000

On 1st October 2015, a bus operated and owned by the Bordelais Correctional Facility, which is represented by the Attorney General (“the appellant”), collided with property owned by the first respondent, Mr. Godfrey Ferdinand (“Mr. Ferdinand”) and thereafter struck his car. The car then struck Shauna Dantes and the second respondent, Tamar

Ferdinand ("Tamar"), who was then 8 years old. Tamar suffered severe injuries which resulted in a below the knee amputation to her right leg and subsequently, she was fitted with a prosthetic limb. Mr. Ferdinand's car was also completely destroyed as a result of the collision.

Proceedings were commenced against the appellant by four claimants, including Mr. Ferdinand and Tamar. Liability was determined on an application for summary judgment and the assessment of damages came before a master of the High Court (hereafter "the learned master" or "the master"). On 6th August 2018, the learned master made several awards in respect of: (i) Mr. Ferdinand, for loss of the car and loss of use of the car; and (ii) Tamar, for special damages, general damages, future medical care and loss of earning capacity.

Being dissatisfied with the awards made by the learned master, the appellant has appealed, arguing that the master made awards that are unreasonably high and/or excessive in the circumstances, in so far as Mr. Ferdinand and Tamar are concerned. The main issues which arose on appeal were: (i) whether the award made for loss of use (in favour of Mr. Ferdinand) was unreasonable and excessive, (ii) whether the awards of general damages (in favour of Tamar) exceeded the generous ambit within which reasonable disagreement is possible and was therefore blatantly wrong, (iii) whether the multiplier of 7 for future medical care is excessive in all the circumstances, and (iv) whether the learned master erred in awarding damages for loss of earning capacity to Tamar.

Held: dismissing the appeal against the award made in favour of Mr. Ferdinand for loss of use of the car; allowing the appeal in part against the awards made in favour of Tamar; making the orders set out at paragraph 77 of this judgment; and ordering that the appellant pay the costs of the appeal, that:

1. As between a claimant and a tortfeasor the onus is on the latter to show that the former has unreasonably neglected to mitigate damages. The onus was therefore on the appellant to have adduced evidence to show that it would have been reasonable mitigation to use a minibus rather than to rent a car, and not (at least in the first instance) for Mr. Ferdinand to adduce evidence to show to the contrary. However, no such evidence was produced. In all the circumstances, it was entirely reasonable for Mr. Ferdinand to rent a vehicle for the period which he did.

Morris v Richards [2003] EWCA Civ 232 considered.

2. The award of damages is a matter for the exercise of the trial judge's judicial discretion, and this Court will not interfere unless the judge's award exceeded the generous ambit within which reasonable disagreement is possible and was therefore clearly or blatantly wrong. In this case, although the learned master took the correct approach in determining the quantum of damages, she failed to take into account that the injuries sustained in the case of **Courts Jamaica Limited v Kenroy Biggs**, on which she relied, were significantly more extensive than the injuries suffered by Tamar. She also failed to explain why she made awards that

were significantly higher than those made in the cases of **Mark Andrew Carter v St. Clair Latham et al** and **Eddeoin Ballantyne v Donald John** which concerned similar injuries. It follows therefore that the awards for pain and suffering and for loss of amenities fell outside the generous ambit within which reasonable disagreement is possible.

Alphonso and Others v Deodat Ramnath (1997) 56 WIR 183 applied; **Cornilliac v St. Louis** (1965) 7 WIR 491 considered; **Courts Jamaica Limited v Kenroy Biggs** [2012] JMCA Civ 50 distinguished; **Mark Andrew Carter v St. Clair Latham et al** SVGHCV2005/0524 (delivered 21st April 2006, unreported) distinguished **Eddeoin Ballantyne v Donald John** SVGHCV1993/0277 (delivered 26th October 2007, unreported) followed; **Karen John v David Dibique** SVGHCV2009/0359 (delivered 20th March 2014, unreported) distinguished; **CCAA Limited v Jeffery** SVGHCAP2003/0010 (delivered 2nd March 2004, unreported) distinguished; **Violine Joseph v Terese Morris** ANUHCV2006/0113 (delivered 29th June 2009, unreported) distinguished; **Wadadli Cats Limited v Frances Chapman & Keithley George et al v Gerald Khoury** ANUHCVAP2004/0016 and ANUHCVAP2004/0019 (delivered 25th April 2005, unreported) distinguished; **Sherma Mathurin v Rain Forest Sky Rides Ltd** SLUHCV2008/0551 (3rd August 2010, unreported) distinguished; **Ronald Fraser v Dalrimple et al** ANUHCV2004/0513 (delivered 5th May 2010, unreported) distinguished.

3. It was open to the master to accept the suggestion in the medical report, that Tamar required a yearly prosthesis replacement, and upon that basis, consider a multiplier of 7. However, having determined to start at a multiplier of 7, it would have been appropriate for the master to factor in the uncertainties and/or vicissitudes of life and make an appropriate adjustment. The master failed to consider whether any discount would be appropriate. Accordingly, in the circumstances of this matter, the multiplier should be discounted from 7 to 5.
4. When assessing loss of earning capacity, the starting point is to determine whether the injury suffered is likely to cause loss of earnings. It is only if and when the court determines that the injury is likely to cause a loss of earning that the issue as to the correct multiplicand becomes relevant. In the present case, the learned master did not seem to consider whether Tamar's injuries were likely to limit her earning capacity, and proceeded on the basis that Tamar will never work and should therefore be compensated. In all the circumstances, it is likely that Tamar will succeed in life and whilst the loss of her lower leg may limit her career choices, there is no reason to suppose that her earning capacity will be negatively impacted by the injuries that she suffered. It follows that it was not appropriate for the master to make an order for loss of earning capacity on the multiplicand/multiplier basis.

Smith v Manchester Corporation [1974] 17 KIR 1 distinguished; **Blamire v South Cumbria Health Authority** [1993] PIQR Q1 distinguished.

JUDGMENT

- [1] **FAY JA [AG.]:** The appellant, the Attorney General who is the representative of the State, filed a notice of appeal on 17th September 2018 against parts of the judgment of a master of the High Court (hereafter “the learned master” or “the master”) dated 6th August 2018 in which she made awards of damages to, inter alia, the first and second respondents. In her judgment, the learned master referred to the first respondent as Mr. Ferdinand and to the second respondent by her first name, Tamar - I will do the same in this judgment. This appeal was heard on 12th March 2020 and judgment was reserved. I apologise for the delay in producing this judgment.
- [2] On 1st October 2015, a bus operated and owned by the Bordelais Correctional Facility collided with the boundary wall at the property owned by Mr. Ferdinand and thereafter struck his car. The car struck Tamar, who is Mr. Ferdinand’s daughter and who was then 8 years old, and Shauna Dantes. Tamar occasioned an open comminuted fracture of her right tibia and fibula. She suffered severe injuries which resulted in a below the knee amputation to her right leg and subsequently, she was fitted with a prosthetic limb.
- [3] Proceedings were commenced against the appellant by four claimants, including Mr. Ferdinand and Tamar. Liability was determined on an application for summary judgment, and the assessment of damages came before the learned master on various dates in 2017 and 2018. Since Mr. Ferdinand’s car was completely destroyed as a result of the collision, he claimed for loss of use of his vehicle and for the costs of leasing a car at a comparable value.¹
- [4] On 6th August 2018, the learned master delivered a written judgment with respect to the claims made by all four claimants. The Attorney General has appealed the

¹ Record of appeal, Bundle 1, Tab 4 at p.68.

judgment in so far as Mr. Ferdinand and Tamar are concerned. There is no appeal against the sums awarded to the third and fourth claimants.

[5] In her judgment dated 6th August 2018, the learned master made the following awards in respect of Mr. Ferdinand and Tamar:

- (a) Mr. Ferdinand
 - (i) Loss of car and police report - EC\$24,000.00
 - (ii) Loss of use of car - EC\$12,300.00
- (b) Tamar
 - (i) Medical expenses - EC\$73,581.89
 - (ii) General damages for:
 - i. pain and suffering - EC\$175,000.00
 - ii. loss of amenities - EC\$225,000.00
 - (iii) Future medical care -
 - i. Prosthetics to age of 18 - EC\$300,269.90
 - ii. Prosthetics as an adult - EC\$495,588.32
 - (iv) Loss of earning capacity EC\$314,219.52

[6] The appellant challenges parts of the awards made in favour of Mr. Ferdinand and Tamar on the following grounds:

(a) Grounds 1 and 2 – relating to the award of EC\$12,300.00 for loss of use of the car:

- “(i) The award ... for loss of use was unreasonable and excessive having regard to the evidence.
- (i) [T]he learned master failed to consider adequately, or at all, that the reasonable foreseeability test applied in determining [Mr. Ferdinand's] means”.

(b) Grounds 3 and 4 – relating to the award of general damages to Tamar:

- “(i) The quantum of damages awarded to [Tamar] in respect of general damages is excessive having regard to the evidence.
- (ii) That the learned master, in assessing the damages for [Tamar], erred in law in that she failed to take into account the following:
 - a. that comparable cases should only be relied on if they have been determined in the same jurisdiction or in a neighbouring locality where [similar] social, economic and

- industrial conditions exist and when there is a range of such decisions from which a trend may be discerned; and
- b. Jamaica is not a jurisdiction with similar social, economic and industrial conditions, and even if it were, it is unsafe to rely on a single case from that jurisdiction from which no trend of damages may be gleaned;
 - c. Although the learned master stated that she was following the guidelines established by the Judicial Studies Board which does not differentiate between awards of children and adults, the learned master erred in that she ... disregarded awards to adult amputees from this jurisdiction”.

(c) Ground 5 – relating to the multiplier for future care to the age of 18:

“That the multiplier ... is excessive in all the circumstances and particularly in the face of the evidence by the doctor who testified that [Tamar’s] prostheses would probably need to be replaced every two years until she stopped growing, and that growth spurts in girls is related to puberty and can start between the ages of 9 and 14 and last for 2 to 2.5 years”.

(d) Ground 6 – relating to the award for future aids and appliances post 18 years of age:

“That the award ... is excessive in that the learned master did not discount the award on account of accelerated receipt”.

(e) Ground 7 – relating to the quantum of general damages, and in essence a further formulation of grounds 3 and 4 referred to above:

“That the quantum of general damages awarded to [Tamar] ... is so inordinately high that it must be a wholly erroneous estimate of the damage”.

(f) Grounds 8 to 11 – relating to the award of damages to Tamar for the use of the swimming prosthesis:

I note that these grounds were not addressed in the written submissions filed by the appellant but were the subject of oral submissions.

(g) Grounds 12 to 18 – relating to the award for a loss of earning capacity:

“(i) That there was no evidence of a loss of earning capacity.

- (ii) Alternatively, that if a loss of earning capacity award was indicated, such award should have been by way of a **Smith v Manchester Corporation**² or **Blamire v South Cumbria Health Authority**³ type award.
- (i) That the learned master erred in making a loss of earning capacity award in a sum higher than the sum sought by Tamar.
- (ii) That the award for loss of earning capacity was excessive and unreasonable having regard to the evidence.
- (iii) That the learned master erred in law and fact by failing to consider the extent to which Tamar's incapacity may or may not affect her future earning capacity.
- (iv) That the learned master erred in failing to discount any award for risks other than mortality and/or the vicissitudes of life.
- (v) That the learned master erred in considering affidavit evidence filed on behalf of Tamar after the trial and without leave".

[7] The essence of the case made by the appellant is that whilst Mr. Ferdinand and Tamar are entitled to damages to compensate them, in so far as money can compensate, for loss and damage that they have suffered, the learned master made awards that are unreasonably high and/or excessive in the circumstances of the matter. Mr. Theodore, QC who appeared for the appellant, made his submissions on the appeal clearly and concisely, whilst at all times recognising the seriousness of the awful injury that Tamar has suffered as a consequence of the accident caused by the State employee. He accepted that the appellant faces a heavy burden in seeking to challenge an award of damages made by a master following an assessment of damages in the High Court, and submitted that the appellant met that burden in respect of each of the grounds of appeal. He summarised his submissions at paragraph 6 of his skeleton argument as follows:

"... the awards for loss of use, and general damages (in particular the awards for pain and suffering and loss of amenities, future medical care, loss of earning capacity) are so inordinately high that they amount to a wholly erroneous estimate of the damage."

² [1974] 17 KIR 1.

³ [1993] PIQR Q1.

[8] This Court considered the burden that an appellant must satisfy on an appeal against an assessment of damages in **Alphonso and Others v Deodat Ramnath**.⁴ Satrohan Singh JA, giving the judgment of the Court⁵ held that:

“In appeals, comparable in nature to the present one,⁶ it must be recognised that the burden on the appellant who invites interference with an award of damages that has commended itself to the trial Judge is indeed a heavy one. The assessment of those damages is peculiarly in the province of the judge. A Court of Appeal has not the advantage of seeing witnesses especially the injured person, a matter which is of grave importance in drawing conclusions as to the quantum of damage from the evidence that they give. If the judge had taken all the proper elements of damage into consideration and had awarded what he deemed to be fair and reasonable compensation under all the circumstances of the case, we ought not, unless under very exceptional circumstances to disturb his award. The mere fact that the Judge’s award is for a larger or smaller sum than we would have given is not itself a sufficient reason for disturbing the award.

But, we are powered to interfere with the award if we are clearly of the opinion that, having regard to all the circumstances of the case, we cannot find any reasonable proportion between the amount awarded and the loss sustained, or if the damages are out of all proportion to the circumstances of the case. The court will also interfere if the Judge misapprehended the facts, took irrelevant factors into consideration or applied a wrong principle of law, or applied a wrong measure of damages which made his award a wholly erroneous estimate of the damage suffered. The award of damages is a matter for the exercise of the trial judge’s judicial discretion and unless we can say that the judge’s award exceeded the generous ambit within which reasonable disagreement is possible and was therefore clearly or blatantly wrong we will not interfere.”

[9] Whilst the principle is stated in numerous other cases, the formulation as set out above does not call for further explanation. Mr. Theodore, QC and Mr. Prospere agreed that those words set out the proper and appropriate approach that this Court should take when considering the grounds of appeal discussed below.

Grounds 1 and 2 – relating to the award EC\$12,300.00 for loss of use of the car

⁴ (1997) 56 WIR 183.

⁵ Matthew JA dissented on the issue of contributory negligence.

⁶ The appeal in *Alphonso v Ramnath* is comparable to the present one – Alphonso negligently drove his car so as to knock Ramnath off his bicycle.

- [10] The appellant contends in these grounds of appeal that: (i) the award of EC\$12,300.00 to Mr. Ferdinand for the loss of use of his car was unreasonable and excessive having regard to the evidence; and (ii) the learned master failed to consider adequately, or at all, that the reasonable foreseeability test applied in determining Mr. Ferdinand's earnings.
- [11] Mr. Theodore, QC dealt with this aspect of the appeal relatively briefly in both his written and oral submissions. At paragraph 7 of his written submissions, he accepted that a claimant who reasonably hires a replacement vehicle whilst his own vehicle is being repaired can normally claim the hire charges he would have incurred, provided that it is not unreasonable. At paragraph 8 of his skeleton argument, he contended that Mr. Ferdinand failed to mitigate his loss, in that it was not reasonable for him to rent a replacement vehicle for an extended time when he owned other vehicles which he might have utilised.
- [12] It is apparent that in the proceedings before the master, the appellant had put its case in a slightly different way – namely, making a submission at paragraph 12 of its skeleton argument before the master, that Mr. Ferdinand should have only been entitled to rent an alternative vehicle for a period of 2 weeks and that he should have used his personal resources to purchase a new vehicle.⁷
- [13] Mr. Ferdinand did own three minibuses which were income generating for him. He sold one of those minibuses in order to raise cash to fund repairs that were required to be done to the other two minibuses.
- [14] The learned master found that it was inconceivable that Mr. Ferdinand would use his limited funds to purchase a replacement vehicle instead of paying his daughter's urgent medical needs. I agree entirely with that statement, and note that it would have been reasonable for Mr. Ferdinand to not only want to preserve

⁷ See Record of Appeal Bundle 2, Tab 2 at p. 236.

his limited resources for urgent medical bills which he might have to pay immediately, but also for unknown expenses that might arise as a consequence of the severe injuries caused to Tamar.

[15] Mr. Theodore, QC did not press that submission before this Court, and rather advanced in his oral submissions, an argument that Mr. Ferdinand should have used one of his minibuses for his personal travel requirements.

[16] Mr. Prospere noted, at paragraph 36 of his written submissions, that the learned master referred to and applied the principles set out in **Morris v Richards**⁸ when she considered the question of reasonableness. In that case, the English Court of Appeal in arriving at its decision adopted the approach of the court in **Melia v Key Terrain Ltd.**⁹ wherein Sachs LJ stated as follows:

“As between a plaintiff and a tortfeasor the onus is on the latter to show that the former has unreasonably neglected to mitigate the damages. The standard of reasonable conduct required must take into account that a plaintiff in such circumstances is not to be unduly [pressed] at the [instance] of the tortfeasor. To adopt the words of Lord Macmillian in the well-known Waterlow case, the claimant’s conduct ought not to be weighed in nice scales at the instance of the party which has occasioned the difficulty.”

[17] In considering whether it was reasonable for Mr. Ferdinand to rent a vehicle for the period of time that he did, I note where the burden of proof rests and I pay heed to the caution given in **Melia**. The position might have been somewhat different if the appellant had, during the period of the rental, offered to pay Mr. Ferdinand a sum such that he could have purchased a new car – however the evidence did not suggest that any such offer had been made.

[18] In my view, it was entirely reasonable for Mr. Ferdinand to rent a vehicle for the period prior to him leaving Saint Lucia to accompany Tamar for medical attention in the United States of America (“the USA”). It would, in the alternative, also have

⁸ [2003] EWCA Civ 232.

⁹ (1969) No 155 B.

been reasonable for him to have taken one of the minibuses out of his income producing service to use for his personal needs – however, it was not unreasonable for him to elect to rent a car instead.

[19] Mr. Theodore, QC accepted that in the event that Mr. Ferdinand did use one of his minibuses, there would then have been a difficult assessment as to the loss of profit to Mr. Ferdinand caused by taking that minibus out of its regular income producing role. Mr. Prospere submitted, at paragraph 40 of his written submissions that the ‘...loss of earnings from the minibus...would have easily outstripped the daily rental value for a comparable car’. I assume that Mr. Prospere intended to refer to a loss of profit rather than a loss of earnings, and I note that there was very limited evidence upon which either a loss of profit or a loss of earnings could be calculated.

[20] In the circumstances, there is no proper basis for Mr. Prospere’s submission. However, given that the burden of proof to show any failure to mitigate rests on the appellant, it seems to me that it would be for the appellant to have adduced evidence to show that it would have been reasonable mitigation to use a minibus rather than to rent a car, and not (at least in the first instance) for Mr. Ferdinand to adduce evidence to show to the contrary. Even, if such evidence had been produced at the trial, it seems to me that it would not be conclusive as to the question of reasonable mitigation and it may not have been reasonable to expect Mr. Ferdinand, given all that was going on with Tamar, to have carried out that assessment for himself at the time.

[21] In the circumstances, I am satisfied that the award of EC\$12,300.00.00 made by the master was entirely justified and I do not propose to disturb that award. I would therefore dismiss grounds 1 and 2 of the appeal.

Grounds 3 and 4 – relating to the award of general damages to Tamar

- [22] The master awarded general damages in the sum of EC\$400,000.00 – comprising EC\$175,000.00 for pain and suffering and EC\$225,000.00 for loss of amenities.
- [23] The appellant contends that the quantum of damages is excessive having regard to the evidence and argued that the learned master, in assessing the damages, erred in law in that she failed to take into account that comparable cases should only be relied on if they have been determined in the same jurisdiction or in a neighbouring locality where similar social, economic and industrial conditions exist, and when there is a range of such decisions from which a trend may be discerned. The appellant argued further that Jamaica is not a jurisdiction with similar social, economic and industrial conditions, and even if it were, it is unsafe to simply rely on a single case from that jurisdiction from which no trend of damages may be gleaned. The appellant also submitted that though the learned master stated that she was following the guidelines established by the Judicial Studies Board which does not differentiate between the awards for children and adults, she erred in that she disregarded awards to adult amputees from this jurisdiction.
- [24] As the learned master correctly recited at paragraph 9 of her judgment, the proper approach to the assessment of a claim for damages is considered in the seminal case of **Cornilliac v St Louis**.¹⁰ In that case, Wooding CJ, sitting in the Court of Appeal of Trinidad & Tobago, held¹¹ that the court should bear in mind the following considerations when assessing damages:
- (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

¹⁰ (1965) 7 WIR 491.

¹¹ Ibid at p. 492.

- (e) the extent to which the claimant's pecuniary prospects have been materially affected.

[25] The findings of the master in respect of the first four of those considerations are set out in paragraphs 10 to 14 her judgment as follows:

“[10] Nature of extent of Injuries Suffered

Tamar, 8 years at the time of the accident, endured a traumatic and life changing experience. Dr Arlette Charles, who examined Tamar at the Victoria Hospital states that the injuries were confined to the right lower leg. Tamar was diagnosed with an open comminuted (multiple fragments) fracture of both tibia and fibula with multiple floating, splintered fragments of bone. The muscle was completely stripped off the bone in places with significant tissue loss. The ankle joint was completely destroyed and could be splayed like an open book with the ligaments all completely torn. The laceration of the skin around the muscle started anteriorly and extended medially separating the heel from the dorsum of the foot. The limb was cold without pulses and assessed as unsalvageable. Tamar's parents eventually consented to a below the knee amputation.

Nature and gravity of the resulting physical disability

[11] Tamar was fitted with a prosthetic lower right limb with recommended replacement intervals into adulthood. Extensive counselling and psychological support were recommended to manage her traumatic amputation.

Pain and Suffering

[12] Tamar had to be anaesthetized on admission at the hospital due to the immense pain. She suffered excruciating pain throughout the period of hospitalisation until she was discharged on 8th October 2015. The severity of the pain interrupted her sleep as the prescribed regular pain killers were incapable of bringing relief. On 11th October 2015, Tamar was returned to the hospital with shooting pain in the stump and was diagnosed with post amputation pain.

[13] Due to the lack of local facilities, Tamar was referred and admitted to the Kings County Hospital, New York, USA on 26th October 2015 for further evaluation and long term management of her pain. She was discharged on 4th November 2015 with post routine weekly outpatient clinics, counselling and physiotherapy sessions. She returned to St. Lucia in March 2016 and continues to suffer pain and shock spasms due to the friction of the leg stump against the prosthetic leg.

Loss of Amenity

[14] Prior to the accident, Tamar lived a normal active life of a young child. She was an avid swimmer and enjoyed playing football, skipping, cooking, modelling and participating in physical education activities at school. She can no longer enjoy running and playing games with her school colleagues, young relatives and friends."

[26] The master made the further findings of fact at paragraphs 22 to 24 of her judgment:

"[22] On 2nd October 2015, Tamar at the tender age of 8 underwent a devastating and life changing experience. The traumatic amputation has no doubt significantly diminished her general quality of life and will continue to do so. The psychological and emotional effects of losing a limb at such a tender age cannot be overemphasized. No sum can sufficiently compensate a teenage girl being left with such a disability which has shattered her self-confidence for the rest of her life.

[23] Prior to the accident, Tamar was an avid swimmer. Counsel for the defendant contends that the prosthetic limb does not rule Tamar out of participating in sports as a special swimming prosthesis will facilitate her swimming ambitions.

[24] It is the evidence that Tamar is deeply distraught by her reduced mobility and the inability to enjoy her pre-accident childhood pursuits. She exhibits discomfort with her infirmity to the extent that she will not readily swim in the presence of her friends. She continues to wear long pants or stocking to conceal her prosthetic limb. While it is agreed that the prosthesis will enable her to pursue her interest, there is very little that she can do to reduce the appearance or to conceal the prosthetic, when for example she is on a beach or by a swimming pool in swimwear. In my view, the physical impairments may not be obvious and can be disguised with the prosthetic, but it does not take away the fact that the amputation suffered at this tender age is permanent and will restrict Tamar's ability to pursue a normal life."

[27] No evidence, or medical reports, were adduced by the appellant at the assessment of damages, and it merely relied on the evidence adduced in support of Tamar's claim and the cross-examination of those witnesses.

[28] None of the primary findings of facts made by the learned master are challenged on appeal. The only finding of fact challenged on appeal is the finding at

paragraph 30 of the judgment as to the appropriate replacement intervals for Tamar's prosthetic leg. I will return to that issue below.

[29] It is the appellant's case that, notwithstanding the findings of fact referred to above, the awards for pain and suffering and the award for loss of amenity are too high and lie outside the range within which reasonable disagreement is possible.

[30] Counsel for the appellant and counsel for Tamar relied on various authorities as to quantum before the master. I will return to those authorities below. Nonetheless, I note here that it is evident that the master had some reservations about the relevancy and applicability of those authorities to the present case. The following paragraphs of the master's judgment deals with her approach to the authorities cited to her, and her general approach to the determination of the appropriate award of damages.

"[26] I accept the paucity of comparatives and also note that some of the authorities cited by both counsel are not recent and are of limited assistance as comparatives to determine an appropriate award in this case. The Privy Council in *Seepersad v. Persad* [2004 64 WIR 378], has frowned on the practice of relying on older decisions and employing an adjustment formula to arrive at a likely award. Lord Carswell in delivering the judgment stated as follows:

'Pain and Suffering and Loss of Amenity

15.Their Lordship entertain some reservations about the usefulness of resort to awards of damages in cases decided a number of years ago, with the accompanying need to extrapolate the amounts awarded into modern values. It is an inexact science and one which should be exercised with some caution, the more so when it is important to ensure that in comparing awards of damages for physical injuries one is comparing like with like. The methodology of using comparisons is sound, but when they are of some antiquity such comparisons can do no more than demonstrate a trend in very rough and general terms.'

[27] The absence of comparative awards for a minor with an amputation requires the court to make an arbitrary but reasonable award. In *Andrews v Grand & Toy Alberta Ltd* [1977 83 DLR (ed) 452] Dickson J. observed:-

'The monetary evaluation of non-pecuniary losses is a philosophical and policy exercise more than a legal or logical one. The award must be fair and reasonable, fairness being

gauged by earlier decisions; but the award must also of necessity be arbitrary or conventional. No money can provide true restitution.'

[28] The arbitrary nature of the exercise was also recognised in *Heeralall v Hack Bros* [(1977) 25 WIR 119] where Haynes CJ said at 125 that 'the judicial exercise in measuring in money such things as pain and suffering or the impairment of capacity to lead life to the full really involves dealing in incommensurables'. The Privy Council in *Scott v The Attorney General and another (Bahamas)* [[2017] UKPC 15] states further:

'Given the essentially artificial, and therefore arbitrary, nature of the exercise involved in the assessment of general damages, there is a risk of markedly different levels of compensation resulting from individual assessments of what they should be. The need for some general guidance as to the appropriate amounts in similar cases is obvious. It was that need which prompted the statement in *Heil v Ranking* in para 25 to the following effect:

'The assessment of general damages requires the judge to make a value judgment. That value judgment has been increasingly constrained by the desire to achieve consistency between the decisions of different judges. Consistency is important, because it assists in achieving justice between one claimant and another and one defendant and another. It also assists to achieve justice by facilitating settlements. The courts have become increasingly aware that this is in the interests of the litigants and society as a whole, particularly in the personal injury field. Delay in resolving claims can be a source of great injustice as well as the cause of expense to the parties and the justice system. It is for this reason that the introduction of the guidelines by the Judicial Studies Board ('JSB') in 1992 was such a welcome development'."

[31] I am satisfied that the learned master took the correct approach in determining the quantum of damages and properly applied the relevant law in so doing. I therefore turn to consider whether, having adopted the correct approach, the award made by the master was fair and reasonable in the circumstances. As noted above, given that the learned master correctly directed herself as to the relevant law, the question that I must ask myself is not whether I would have made the same awards as those made by the learned master but whether the awards she made

exceeded the generous ambit within which reasonable disagreement is possible and were therefore clearly or blatantly wrong. In order to answer that question, I must consider the findings of fact made by the learned master, such previous decisions of the courts as may be of assistance in determining an appropriate figure, and any other relevant considerations.

[32] The learned master referred to the awards made in several cases, which are set out below.

[33] Firstly, she referred to the Jamaican Court of Appeal decision of **Courts Jamaica Limited v Kenroy Biggs**.¹² Mr. Biggs was 19 years old on 23rd March 2003 when he was knocked down by a vehicle which pinned him to a wall from his stomach down to his feet. He suffered: (i) abrasions to the right side of his chest and upper abdomen; (ii) abrasions to the medial aspect of his right arm; (iii) a mangled left lower leg wound extending from mid-thigh across the posterior aspect of the knee down through his leg - he had no sensation below the knee with a diminished pulse; (iv) fractures to the right and left superior and inferior rami of the pelvis; (v) an open fracture of his left femur with injury to the pelvis; and (vi) a transection of his urethra with a consequent inability to pass urine. He underwent several surgical procedures both in Jamaica and in the USA. The attempts to save his leg were unsuccessful resulting in an amputation six months after the accident. He experienced problems with the stump failing to heal. He was unable to urinate properly and was likely to have to use a urine bag for the rest of his life – he suffered with urethral narrowing requiring very painful urethral dilation and faced having to have major urethral reconstructive surgery. Three years later it was discovered that: (i) a bony spur had developed to the rear and side of the end-bone where the amputation had occurred; (ii) there was anterior ligament instability of the right knee and a diminution of the joint space in the right knee; (iii) chronic urinary tract infection; (iv) mid-tarsal arthrosis; and (v) a butterfly fracture to his pelvis with mild misalignment of the united bones. His combined impairment

¹² [2012] JMCA Civ 50.

was assessed at 55% of the whole-body person. He was awarded the equivalent of EC\$371,900.00 for pain and suffering in the High Court, and that award was confirmed by the Jamaican Court of Appeal on 8th November 2012.

[34] It was suggested by Mr. Theodore, QC that the Court should take into account that Mr. Biggs was an adult, whereas Tamar was only 8 years old, at the date of the respective accident. Age is not the most relevant criterion by which to judge the question of damages for pain and suffering (unless the suffering is likely to continue for a long period after initial pain caused by the accident). Also, damages for loss of amenity might be higher for a younger person since the loss of amenities will be likely to continue for a longer period.

[35] Mr. Theodore, QC also argued that Jamaica has different social, economic and industrial conditions to Saint Lucia. He relied on the statement of Lord Morris of Borth-y-Gest in **Singh (an infant) v Toong Fong Omnibus Co.**¹³ that:

“... to the extent to which regard should be had to the range of awards in other cases which are comparable, such cases should as a rule be those which have been determined in the same jurisdiction or in a neighbouring locality where similar social, economic and industrial conditions exist.”

It was also implicit in Mr. Theodore's submissions that awards in Jamaica might therefore be higher when compared to awards in Saint Lucia, Saint Vincent and the Grenadines and Antigua and Barbuda.

[36] I agree with Mr. Theodore, QC that the Court should be wary of reliance on decisions made by courts sitting in jurisdictions with unsimilar social, economic and industrial conditions. However, where a party wishes to suggest that there are unsimilar social, economic or industrial conditions it seems to me that it is incumbent, save where the court might be able to take judicial notice of such difference, for that party to put some material showing the differences before the court. Such material might not be evidence in the traditional sense, and might be

¹³ [1964] 3 All ER 925.

official or academic statistics which illuminates the differences. It seems to me that it would be a matter for the trial court to determine what material it would require to persuade it that there is a material difference between the social, economic and/or industrial conditions.

[37] Mr. Theodore, QC did not put any evidence or other material before the Court to suggest that the social, economic and industrial conditions in Jamaica are so different to those in the States and Territories served by this Court. If such differences do exist, they are not so obvious to me that I could or should take judicial note of them. In those circumstances, I am satisfied that it was appropriate for the learned master to consider the **Biggs** case when determining the level of damages she should award to Tamar. I also note that: (i) the award in **Biggs** was made in respect of an accident that occurred in 2003, and was confirmed by the Jamaican Court of Appeal in 2012, and (ii) without wishing to, in any way, diminish the extent of the injuries suffered by Tamar, that the injuries suffered by Mr. Biggs were significantly more serious.

[38] Second, the learned master relied on the decision of **Mark Andrew Carter v St. Clair Latham et al.**¹⁴ In that matter, Mr. Carter was 39 years old in May 2004 when he was run over by a bulldozer. He sustained: (i) a crush injury to the right leg resulting in an above the knee amputation; (ii) fractures to the lateral metacarpals proximal 1-3; and (iii) a fracture to the ischio-iliox pubic rami bilaterally. The court found that by November 2004, Mr. Carter's wounds, including the amputation stump, had healed and that he was mentally normal. Prior to the accident, he had been an avid footballer. He also loved swimming, and it is implicit from the judgment that the master in that case found that he would no longer be able to swim. I find that the award of damages to Mr. Carter is relevant to the determination of the damages that the master should have awarded to Tamar.

¹⁴ SVGHCV2005/0524 (delivered 21st April 2006, unreported).

[39] Third, the master relied on **Eddeoin Ballantyne v Donald John**.¹⁵ Mr. Ballantyne was 27 years old when he was struck by a motor vehicle and pinned against a wall in April 1993. He suffered severe injuries including fractures to his ribs, but his most severe injury was to his left leg which was crushed. Surgical attempts failed and the leg eventually had to be amputated above the knee. He suffered intensive pain, and various surgeries to try and save the leg before it was amputated. He was awarded EC\$90,000.00 for pain and suffering and EC\$40,000.00 for loss of amenity on 26th October 2007. The judgment specifically notes that Mr. Ballantyne did not rely on any particular matters in support of his claim for loss of amenity, but that he lost the simple pleasure of doing those things which young persons enjoy that require the use of two legs. It follows therefore that the award of damages to Mr. Ballantyne is relevant to the determination of the damages that the master should have awarded to Tamar.

[40] Fourth, is the case of **Karen John v David Dibique**.¹⁶ Ms. John was a 22 year-old bartender when she was shot in the upper chest. She suffered: (i) a fractured right clavicle and injuries to the subclavian artery and branchial artery; and (ii) a large aneurysm communicating with the subclavian branchial vein. Venous grafting was attempted to harvest the saphenous vein from her right thigh to regenerate her arm but proved unsuccessful. She underwent five surgeries, three to try and save her dominant right arm and two for amputation – the first involving an amputation below the elbow, and the second involving an amputation at the shoulder. The medical treatment of Ms. John was complicated, and she had to endure the surgical and mental problems associated with the attempts to first save her arm, and then have it progressively amputated. Following the incident, Ms. John was not able to work as a bartender, was not able to pick up her children and found it difficult to do her domestic chores or care for herself. She also suffered from a lack of self-confidence, and was unable to continue to play netball. In an extensive judgment, which considered various authority and the UK Judicial

¹⁵ SVGHCV1993/0277 (delivered 26th October 2007, unreported).

¹⁶ SVGHCV2009/0359 (delivered 20th March 2014, unreported).

Studies Board Guidelines, Ms. John was awarded EC\$110,000.00 for pain and suffering and EC\$120,000.00 for loss of amenity. In my view, the award of damages to Ms. John is of less relevance to the determination of the damages that the master should have awarded to Tamar than the previous cases because, it involved an arm amputation at the shoulder rather than a below knee amputation.¹⁷

[41] Fifth, she considered the decision of **CCAA Limited v Jeffery**.¹⁸ Mr. Theodore, QC relied on this case for the proposition that the court can look at the quantum of awards for wholly dissimilar injuries when assessing damages. Undoubtedly that submission is correct, and the court can look at awards made with respect to wholly dissimilar injuries in an appropriate case. However, an award made by a court in a jurisdiction with similar social, economic and industrial conditions in respect of a similar (albeit not identical injury) will be much more helpful. It is possible that in a future case, a party might seek to make a comparison between awards made in our court against the recommendations for similar injuries in the UK Judicial Studies Board Guidelines. If that comparison demonstrates that the level of awards made in those Guidelines is typically higher or lower than awards made for similar injuries in our court, then it might be useful to apply that difference to the importation/reliance of an award suggested in the Guidelines for an injury where there is no local similar award. However, that exercise was not carried out in this matter.

[42] Sixth, is the consideration of **Violine Joseph v Terese Morris**.¹⁹ Mrs. Joseph, who was 48 years old at the material time, was standing at the side of Bolans Main Road in November 2003 when she was struck down by a vehicle. She was initially admitted to a hospital in Antigua where she was treated for reconstructive surgery to her right leg. Mrs. Joseph was subsequently treated in Florida where after a

¹⁷ By way of example of the difference in quantum for amputations, in the latest Guidelines for England & Wales the bottom range for an amputation at the shoulder equates to the top range for a below the knee amputation.

¹⁸ SVGHCAP2003/0010 (delivered 2nd March 2004, unreported).

¹⁹ ANUHCV2006/0113 (delivered 29th June 2009, unreported).

number of surgeries to try and save her leg, it was eventually amputated. She returned to Antigua, where she was fitted with an artificial limb. An award of EC\$85,000.00 was made for pain and suffering and EC\$50,000.00 for loss of amenity. In my view, the award of damages to Mrs. Joseph is of less relevance to the determination of the damages that the master should have awarded to Tamar than the previous cases.

- [43] Seventh, the decision of **Wadadli Cats Limited v Frances Chapman & Keithley George et al v Gerald Khoury**²⁰ was considered by the learned master. Ms. Chapman was injured in a boat accident resulting in her suffering: (i) shock; (ii) severe bruising to the head; (iii) severe pain in the neck and arm; (iv) bruising to the inner ear and post-concussion syndrome; (v) paraesthesia (pins and needles) in her right arm; (vi) numbness over the right thumb and forefinger; and (vii) cervical spondylosis and a mild degree of carpal tunnel syndrome. The trial judge found that the most significant personal injuries suffered by Ms. Chapman were pain and suffering, and a loss of balance. He found that she was liable to fall over, and that the lack of sensitivity in her fingers gave rise to a risk of injury from sharp instruments. An award in the sum of EC\$500,000.00 was made for pain and suffering and loss of amenity. Unsurprisingly, the award was set aside by the Court of Appeal which found that it could not find any reasonable proportion between the award and the loss sustained. The Court of Appeal made an award of EC\$40,000.00 for pain and suffering and EC\$80,000.00 for loss of amenity. Mr. Khoury suffered injuries when he was hit by a van whilst stationary on his moped. He suffered: (i) shock and severe pain; (ii) multiple bruises and swelling of his left ankle and leg; (iii) a severely comminuted and crushed intra-articular fracture to the lower ends of his tibia and fibula; and (v) bruising and operation scars to his left ankle. An award in the sum of EC\$120,000.00 was made for pain and suffering and loss of amenity. There was no appeal against such award. The injuries suffered by Ms. Chapman and by Mr. Khoury were significantly different, and less serious, than the injuries suffered by Tamar. In the circumstances, I do

²⁰ ANUHCVP2004/0016 and ANUHCVP2004/0019 (delivered 25th April 2005, unreported).

not consider that the decision in **Wadadli Cats** is very helpful to the assessment of damages in the matter at hand – save possibly to see the level of awards made for significantly less serious injuries.

[44] Eighth, she considered the decision of **Sherma Mathurin v Rain Forest Sky Rides Ltd.**²¹ Ms. Mathurin was injured in a gondola accident on 27th July 2006 – she fell from a tree to the floor, landing on her right leg. She suffered: (i) a displaced intra-articular open fracture of the low end of the right tibia and a fracture of the fibula; and (ii) multiple grazes and bruises to the forehead and right upper limb. She required immediate surgery and the internal fixation of plates and screws along with bone grafting of the fracture. She developed arthrosis, and required a surgical fusion which would limit the lateral movement of the foot, and would result in a permanent impairment of the right foot – preventing her from taking long walks, standing for prolonged periods or walking on inclined surfaces (or wearing heels). She continued to suffer pain, was unable to carry her child and suffered difficulty in sexual relations. An award of EC\$150,000.00 was made for pain and suffering and loss of amenity – without any distinction between the two heads of loss. The injuries suffered by Ms. Mathurin were significantly different, and less serious, than the injuries suffered by Tamar. In the circumstances, I do not consider that the decision in **Mathurin** is very helpful to the assessment of damages in the matter at hand – save possibly to see the level of awards made for significantly less serious injuries.

[45] Lastly, the learned master considered the decision of **Ronald Fraser v Dalrimple et al.**²² Mr. Fraser, who was then 48 years old, injured his left leg on 28th February 2004 when he fell from the back of a truck. He suffered: (i) a severely comminuted fracture of his left ankle and lower 1/3 of his leg; (ii) a fracture to the left medial malleolus of his left tibia; (iii) a severely comminuted fracture of the lower end of his fibula; (iv) lateral dislocation of his left ankle, tibio talar dislocation with lateral

²¹ SLUHCV2008/0551 (3rd August 2010, unreported).

²² ANUHCV2004/0513 (delivered 5th May 2010, unreported).

shift of talus with ankle diastases; and (v) severely contaminated compound wound with neuro-vascular compromise. The infection in the ankle meant that he was unable to have the bones fused for 9 months. He required a further fusion 18 months after the accident. Mr. Fraser required further surgeries, and at one point it was thought that he might have to undergo an amputation. After an extensive review of previous awards, including a number of the awards referred to above, Michel J (as he then was) made an award of EC\$85,000.00 for pain and suffering and EC\$65,000.00 for loss of amenity. The injuries suffered by Mr. Fraser were significantly different, and less serious, than the injuries suffered by Tamar in that his leg was not amputated. However, his surgical procedures were significantly more extensive than those undertaken on Tamar. Also, the judgment suggests that he suffered pain for a longer period than she did. In the circumstances, I do not consider that the decision in **Fraser** is particularly helpful to the assessment of damages in the matter at hand.

[46] At paragraph 29 of her judgment, the learned master stated that:

“I am guided by the range of award suggested by the Judicial Board Personal Injury Guidelines for below the knee amputation and also the award made by the Supreme Court of Jamaica in the Biggs case above.”

[47] I note that a number of different Guidelines appear in the Record of Appeal:

- (i) a copy of the 4th edition of the Guidelines for the Assessment of General Damages in Personal Injury Cases in Northern Ireland published on 4th March 2013 appear at page 149 of the Record – as an attachment to the Claimant’s Written Submissions filed in the High Court on 28th September 2017 – those guidelines suggest a range of EC\$ 383,176.00 to EC\$ 666,394.00 (GBP 115,000 to GBP 200,000) for a below the knee amputation; and
- (ii) a copy of the undated 9th edition of the Guidelines for the Assessment of General Damages in Personal Injury Cases (I assume for England & Wales) appear at page 325 of the Record – as an attachment to the Defendant’s Written Submissions filed in the High Court on 18th

January 2018 – those guidelines suggest a range of EC\$ 194,913.00 to \$278,209.00 (GBP 58,500 to GBP 83,500) for a below the knee amputation.

I also note:

- (i) The 5th edition of the Guidelines (for Northern Ireland), which I understand to be the latest edition, record a range of EC\$466,377 to EC\$816,160 (GBP 140,000 to GBP 245,000) for a below the knee amputation.
- (ii) The 14th edition of Guidelines (for England & Wales) record that the range for a below the knee amputation is between EC\$278,376 to EC\$365,070 (GPB 83,550 and GBP 109,570) for a below the knee amputation.

[48] It is unclear as to whether the learned master is referring to the 4th edition of the Northern Ireland Guidelines, the 9th edition of the England & Wales guidelines or another version of the Guidelines for England & Wales or for Northern Ireland. The range referred to in the four sets of guidelines referred to above varies from a low figure of EC\$194,913.00 to a high figure of EC\$816,160.00. In **Biggs**, Mr. Biggs was awarded EC\$371,900.00 for a more serious injury suffered in 2003 – 12 years before the accident in which Tamar was injured.

[49] It is apparent that general damages awards for pain and suffering and for loss of amenity made in the Eastern Caribbean Supreme Court are often, at least in respect of more serious injuries, lower than the range of awards suggested by the Judicial Studies Board Guidelines for England & Wales and for Northern Ireland. This may be reflective of different social, economic and industrial conditions found in those two jurisdictions and in the States and Territories of the Eastern Caribbean. As far as I am aware, this is not a matter that has been considered in any detail in any judgment of this Court. Nor did I hear any submissions or

explanation as to why the guidelines applicable in Northern Ireland are so much higher than the guidelines applicable in England & Wales.

[50] In contradistinction to the view I expressed with respect to Jamaica, I am satisfied that the social, economic and industrial conditions in England & Wales or Northern Ireland are sufficiently different to those existing in the States and Territories of the Eastern Caribbean that I can take judicial note of the same, and that I do not need to be referred to any evidence or materials to establish that there are differences. It follows from the decision in **Singh v Toong Fong** referred to above, that our courts ought to be cautious before arbitrarily applying any such Guidelines to cases being tried in this jurisdiction – if reference is made to those guidelines the court is careful to recognise that the ranges specified therein may not be appropriate in light of the differences in social, economic and industrial conditions. The court must consider whether there are, in addition to matters of social, economic and industrial differences, policy considerations that mean that the quantum of damages is higher in one jurisdiction than other. It would seem surprising that social economic and/or industrial conditions applicable in Northern Ireland are so different when compared with the social economic and/or industrial conditions applicable in England & Wales to justify the higher guidelines applicable in Northern Ireland. Further, it would seem that there must be another factor, whether policy or otherwise, in play and our Court ought to be careful not to rely too heavily on any such guidelines without understanding the true reasons for the suggested guidelines.

[51] The learned master did not specifically:

- (a) state, when at paragraph 29 she said that she was guided by the award made in **Biggs**, that the injuries in **Biggs** were significantly more extensive than the injuries suffered by Tamar. However, it is also relevant to note that the accident in **Biggs** occurred in 2003; or
- (b) explain why she made awards that were higher than those made in cases of **Carter** and **Ballantyne**, although it is clear from her judgment that she

had those decisions in mind even though they were not mentioned in paragraph 29.

[52] Notwithstanding the decision in **Biggs**, and considering the difficulties in applying the Guidelines from England & Wales and/or Northern Ireland, it is my view that the award of EC\$175,000.00 for pain and suffering, and the award of EC\$225,000.00 for loss of amenity are too high in that they exceed the generous ambit within which reasonable disagreement is possible, and are therefore clearly or blatantly wrong. In those circumstances, it is appropriate for me to set aside those awards and to determine what the awards should be.

[53] I remind myself of the various awards that I have referred to above. In particular:

- (a) The appellant relies, inter alia, on the decisions in **Carter** and **Ballantyne**. Both those cases involved a leg amputation, although the claimants, respectively aged 39 and 27, were significantly older than Tamar. The awards made in those cases for pain and suffering and for loss of amenity were respectively in the sums of EC\$60,000.00 and EC\$50,000.00 for Mr. Carter, and EC\$90,000.00 and EC\$40,000.00 for Mr. Ballantyne.
- (b) Whilst the appellant suggested an award of EC\$65,000.00 for pain and suffering and an award of EC\$35,000.00 for loss of amenity at the assessment before the master,²³ Mr. Theodore, QC submitted to this Court that the authorities suggested an award (encapsulating both heads of damage) in the region of EC\$ 150,000.00.
- (c) Tamar relies, as did the master, on the decision in **Biggs** and the Judicial Studies Board Guidelines. However, Mr. Biggs suffered significantly more serious injuries than Tamar, and continued to suffer with the urological issues in addition to losing his leg. He was an adult, although just 19 years old. Whilst I am entitled to consider the Guidelines, it is not appropriate for me to arbitrarily apply them in this matter.

²³ See paragraph 18 of the judgment.

- (d) I note that **Chapman** and **Khoury**, whilst not particularly helpful on the assessment of general damages for an amputation case, do show that relatively high awards have been made in respect of less serious injuries. There was no appeal against the combined award to Mr. Khoury of EC\$120,000.00 for pain & suffering and for loss of amenity as a consequence of his serious injury (which required no amputation). Of relevance however is that the Court of Appeal set aside a combined award of EC\$500,000.00 and replaced it with an award of EC\$40,000.00 for pain and suffering, and EC\$80,000.00 for loss of amenity, to Ms. Chapman notwithstanding that her injuries were arguably less serious than those suffered by Tamar.
- (e) It is also relevant, albeit it far from conclusive, to consider the award that was made to Shauna Dantes in this matter. Ms. Dantes was also struck by the car that caused the injury to Tamar and there must be some proportionality between the award made to Ms. Dantes and the award made to Tamar. Ms. Dantes was 34 years old at the date of the accident. She suffered: (i) tenderness and pain to the lower abdomen – which resolved relatively quickly; and (ii) a swollen left knee injury to her left knee, with a suggestion of a ligamentous injury and hypertrophy of the quadriceps muscles. She was admitted to hospital one day after the accident and stayed overnight. The following day she was discharged and referred to the orthopaedic outpatient clinic. She was expected to recover within 12 months of the accident. She gave evidence that she was unable to walk or stand for approximately two weeks after the accident, and that she eventually walked with a limp and was unable to climb stairs normally. She returned to work after five weeks but stated that she suffered from flashbacks and insomnia, and that she was unable to return to her usual fitness and volunteerism activities. Clearly the injuries suffered by Ms. Dantes were significantly less serious, less painful, and less debilitating than the injuries suffered by Tamar. The master made an award of EC\$25,000.00 for pain and suffering and EC\$10,000 for loss of amenity.

The award appears, prima facie, to be appropriate although I make no finding on the appropriateness of that award because there is no appeal against it. Whilst it is relevant that there is no appeal against that award, I acknowledge that even if the appellant had considered that the award was too high (upon which I repeat that I express no opinion), it might not have appealed the award on a cost/benefit analysis. Whilst the award to Ms Dantes is for an entirely different type of injury, I am entitled to take that award into account when considering the appropriate award that should be made to Tamar. As I noted above, it is important that there is some degree of proportionality between the awards.

[54] I am satisfied that in all the circumstances of this matter, and applying the principles set out above, that an appropriate award would be:

- (a) for pain and suffering, EC\$110,000.00 – In my opinion, such an award is indicated in the circumstances, and I note that an award of any lower sum would not sit comfortably with the award of EC\$25,000.00 made to Ms. Dantes in this matter; and
- (b) for loss of amenity, EC\$160,000.00 – I note that in determining the appropriate damages for loss of amenity, I have specifically taken into account Tamar's young age and the impact that her injuries will have on her future life and career choices. Whilst age is not necessarily always a relevant factor, I am satisfied in the circumstances of this case that it serves to increase the quantum of the damages for loss of amenity. I have also taken into account recent improvements that have been made to the functionality of leg prostheses when compared to cases considered by the courts in the past – this factor serves to reduce the appropriate figure from what it might otherwise be (but may have the effect of increasing the value of any claim for special damages for the cost of such prosthesis).

Ground 5 – the multiplier for future care to the age of 18

[55] Ground 5 of the notice of appeal asserts that:

“The multiplier of 7 for future medical care during early adulthood (up to the age of 18) is excessive in all the circumstances and particularly in the face of the evidence by the doctor who testified for the Respondents that [Tamar’s] prostheses would probably need to be replaced every two years until she stopped growing and that growth spurts in girls is related to puberty and can start between the ages of 9 and 14 and last for 2 to 2 and a half years.”

- [56] The appellant submits that an appropriate multiplier would be 3 or 4 rather than 7.
- [57] Tamar claimed for the costs of three different types of prosthesis – namely a bath prosthesis, an everyday prosthesis with an energy return foot, and a sports prosthesis. The quotation for the three prostheses amounted to EC\$42,895.70. The report from Tulio Rivera of Ultrapædics Ltd. suggested that, having regard to Tamar’s age and anticipated growth, that the prosthesis should be replaced every year until Tamar reached the age of 18, and every two to three years thereafter.²⁴ It appears that the contents of the report were not challenged, and that the master accepted the suggestion made in the report that there should be yearly replacement, and upon that basis applied a multiplier of 7 (Tamar then being 11 years old).
- [58] In the circumstances, the question of whether exactly when Tamar might undergo growth spurts is not particularly relevant – the evidence, which the master accepted, was that yearly replacements would be required. Once the master accepted such evidence, it was only logical that her starting point would be to consider a multiplier of 7. However, having determined to start at 7, it would have been appropriate for the master to factor in the uncertainties and/or vicissitudes of life and make an appropriate adjustment. The master failed to consider the question of whether any discount would be appropriate, and it therefore falls for me to exercise my own judgment in that respect. In my view, it is appropriate in the circumstances of this matter to discount the multiplier from 7 to 5.

²⁴ Record of Appeal, Bundle 1, Tab 1 at p. 91.

- [59] I would therefore allow ground 5 of the notice of appeal, set aside the award in the sum of EC\$300,269.90 and make an award of EC\$214,478.50 in its place.

Ground 6 – relating to the award for future aids and appliances post 18 years of age

- [60] The appellant contends in ground 6 of its notice of appeal that the award is excessive in that the learned master made no discount on account of accelerated receipt. However, the ground is not addressed in the written submissions and was not canvassed during the hearing of the appeal. It was not expressly abandoned.

- [61] The appellant did not adduce any evidence relating to the costs of prostheses, and in particular did not adduce any evidence that the cost is not likely to rise at a rate that matches inflation. Absent such evidence, the master was entitled to assume that the cost of prostheses would rise in line with inflation. Tamar will hopefully be able to conservatively invest this part of the award, and see it grow at least in line with inflation. In those circumstances, the award will hopefully provide her with sufficient money to replace the prosthesis as and when required during her lifetime.

- [62] It follows that it would not be appropriate to reduce the award on account of accelerated receipt since the effect would be to fail to compensate Tamar for the cost that she is likely to incur in replacing the prosthesis in the future.

Ground 7 – relating to the quantum of general damages, and in essence a further formulation of grounds 3 and 4 referred to above.

- [63] The appellant asserts that the quantum of general damages awarded to Tamar is so inordinately high that it must be a wholly erroneous estimate of the damage. This ground merely reformulates grounds 3 and 4 of the notice of appeal, and has been dealt with above.

Grounds 8 to 11 – relating to award of damages to Tamar for the use of the swimming prosthesis

- [64] These grounds were not addressed in the written submissions filed by the appellant however, they formed part of the oral submissions. The appellant complains that the master should not have made an award for replacement swimming prostheses for Tamar after the age of 18.
- [65] The master accepted that Tamar was an avid swimmer prior to the injury, and that she continues to pursue private swimming lessons even though she is uncomfortable swimming in public. There was no evidence, or reason to suggest, that Tamar would cease swimming when she turns 18. It is implicit from the judgment that the master accepted that Tamar is likely to continue swimming. The master was entitled to make that finding, and the appellant has no basis to challenge it. I would therefore dismiss grounds 8 to 11 of the appeal.

Grounds 12 to 16 – relating to the award for a loss of earning capacity

- [66] The appellant contends that there was no evidence of a loss of earning capacity. The learned master dealt with the claim for loss of earning capacity at paragraphs 37 to 44 of her judgment. She correctly noted that estimating a loss of income for a child aged 8 is challenging.
- [67] At paragraph 39 of her judgment the learned master stated that:
- “When assessing in such circumstances, the starting point is to look at the national average wage as the multiplicand. The Court of Appeal in **Croke v Wiseman** [(1982) 1 WLR 71] adopted a common approach taking into account parental backgrounds and achievements to determine an average earning. The court may apply a higher multiplicand to a clearly intelligent child or to one whose family background indicates that he/she would have been likely to enter a profession and earn an above average salary.”
- [68] I do not agree that this is the starting point. In my opinion, the starting point is to determine whether the injury suffered is likely to cause a loss of earnings to Tamar. It is only if and when the master determines that the injury is likely to

cause a loss of earnings, that issues as to the correct multiplicand become relevant.

[69] In the present case, the learned master did not seem to have consider whether Tamar's injuries are likely to limit her earning capacity, and proceeded on the basis that Tamar will never work and should therefore be compensated. Unfortunately, I am of the view that the master fell into error in so doing.

[70] If the master had asked herself the question as to whether the injury was likely to cause Tamar to earn less than she might otherwise have earned, it seems to me that on the evidence before the court, the master would have been very likely, and possibly obliged, to find that there was no likelihood of any such loss occurring by reason of the terrible injuries suffered by Tamar. Whilst there is no doubt that it is likely that Tamar would have limited choices in terms of the type of employment that she may undertake in the future, there is no reason to suspect that her earnings will be any less than her earnings might have been but for the accident. Tamar is a bright young lady who works hard and has excelled at school both before and after the accident – indeed she was sufficiently bright and hard working to earn a place at St. Joseph's Convent. Tamar comes from a strong and successful family. Her father owns a small minibus company and was (and possibly still is) President of the National Council for Public Transport. Her mother is a senior cashier/salesclerk. Her older sister also excels at school. St Joseph's Convent is one of the premier schools in Saint Lucia and only the brightest and most hardworking girls are accepted as students there. Its graduates typically, albeit not always, are highly sought after by employers in Saint Lucia and go on to achieve success in life in professional, quasi professional and administrative positions. There is no reason to suspect that such opportunities will not be open to Tamar, nor to suspect that she will not seize such an opportunity.

[71] In summary, it is likely that Tamar will succeed in life and that her earning capacity will not be negatively impacted by the injuries that she suffered. It follows that it

was not appropriate for the master to make an order for loss of earning capacity on the multiplicand/multiplier basis; and, it is not appropriate to make either **Smith v Manchester** award, or a **Blamire** award. As I noted above, the fact that certain employment opportunities might be denied to Tamar as a consequence of her injuries has been compensated for in the award of damages for loss of amenity. I would therefore set aside the award made by the master for loss of earning capacity.

- [72] In those circumstances, the question of whether the master erred in considering affidavit evidence filed on behalf of Tamar after the trial and without leave does not arise or need to be decided. However, I would note that such evidence may have been validly filed pursuant to rule 26.9(2) of the **Civil Procedure Rules 2000** (“the CPR”) and should the matter occur again, it might be sensible for any party objecting to a filing to make an application to strike out the filing.

Costs

- [73] The appeal entirely failed against Mr. Ferdinand and partially failed, and partially succeeded, against Tamar. In those circumstances, I propose to make an order that the appellant pay the costs of the appeal unless it has paid a sum into court (in respect of the claims made by Mr. Ferdinand and Tamar) that equals or exceeds the judgment sum now awarded to Mr. Ferdinand and Tamar. The quantum of the costs payable shall be determined pursuant to rule 65.13(1) of the CPR in a sum equal to two-thirds of the prescribed costs awarded in the court below. In the event that there was such a payment into court, I would not make an order for costs immediately, and invite the parties to file submissions on the incidence and quantum of the costs of this appeal within 7 days of being notified of this judgment. I do not propose to interfere with the costs order made by the master in the court below.

Conclusion

- [74] For the reasons above, it is my opinion that:

- (i) There is no merit in the appeal against the award of damages made in favour of Mr. Ferdinand.
- (ii) In some respects, the awards of damages made to Tamar do exceed the generous ambit within which reasonable disagreement is possible and were clearly wrong.

[75] In those instances, I would:

- (i) Dismiss the appeal against the award of damages made in favour of Mr. Ferdinand.
- (ii) Allow, in part, the appeal against the award of damages made in favour of Tamar and make the new awards as set out below.

Order

Accordingly, I would make the following orders:

- (a) The appeal against the award of damages made by the master to Mr. Ferdinand for loss of use of his car in the sum of EC\$12,330.00 is dismissed.
- (b) The appeal against the award made by the master to Tamar of:
 - (i) general damages for pain and suffering in the sum of EC\$175,000.00 is allowed – the award is set aside and an award of EC\$110,00.00 is made in its place.
 - (ii) general damages for loss of amenity in the sum of EC\$225,000.00 is allowed – the award is set aside and an award of EC\$160,000.00 is made in its place.
 - (iii) damages for future medical expenses:
 - i. until the age of 18 in the sum of EC\$300,269.90 is allowed. The award is set aside and an award of EC\$214,478.50 is made in its place

- ii. past the age of 18 to Tamar is dismissed.
- (c) The appeal against the award to Tamar of EC\$314,219.52 for loss of earnings is allowed, and that award is set aside.
- (d) The appellant shall pay the costs of the appeal²⁵ in a sum equal to two-thirds of the prescribed costs awarded in the court below.

Varied Order

[76] The master's order (as varied by this judgment) would therefore now provide that:

It is ordered that the defendant shall pay the claimants the following awards:

(a) Special Damages

- (i) Godfrey Ferdinand – Loss of car and police report EC\$24,000.00
- (ii) Tamar Ferdinand – Medical expenses EC\$73,581.00
- (iii) Samuel Harrigan – Cost of repairs to property EC\$12,300.00
- (iv) Shauna Dantes – Medical and incidentals EC\$ 3,248.95
- (v) Godfrey Ferdinand – loss of use of vehicle EC\$12,300.00

to be paid with interest at the rate of 4% from the date of the accident until 6th August 2018 and at the rate of 6% from 6th August 2018 until payment in full.

(b) General Damages to Tamar Ferdinand:

- (i) for pain and suffering EC\$110,000.00
- (ii) for loss of amenity EC\$160,000.00

(b)(i) and (b)(ii) with interest at the rate of 6% per annum from 6th August 2018 until payment in full.

- (iii) future medical care
 - 1. to the age of 18 EC\$214,478.50

²⁵ Subject to the caveat referred to above if the appellant has made a payment into court.

2. post the age of 18 EC\$495,588.32
(b)(iii)(1) and (b)(iii)(2) with interest at the rate of 6% per annum
from 6th August 2018 until payment in full.

(c) General Damages for Shauna Dantes:

(i) For pain and suffering EC\$25,000.00

(ii) For loss of amenity EC\$10,000.00

to be paid with interest at the rate of 6% from 6th August 2018
until payment in full.

(d) Prescribed costs on the global award in accordance with CPR 65.5
with interest at the rate of 6% per annum from 6th August 2018 until
payment in full.

I concur.
Dame Janice M. Pereira, DBE
Chief Justice

I concur.
Gertel Thom
Justice of Appeal

By the Court



Chief Registrar