EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

TERRITORY OF THE VIRGIN ISLANDS

BVIHCVAP2015/0019

BETWEEN

STEADROY MATTHEWS

Appellant

and

GARNA O'NEAL

Respondent

Before:

The Hon. Mde. Louise Esther Blenman	Justice of Appeal
The Hon. Mr. Mario Michel	Justice of Appeal
The Hon. Mr. Humphrey Stollmeyer	Justice of Appeal [Ag.]

Appearances:

Mr. Terrance Neal and Ms. Elizabeth Ryan for the Appellant
Dr. Alecia Johns for the Respondent

2016: November 25;
2018: January 16.

Civil appeal – Personal injury – General damages for pain, suffering and loss of amenities – Special damages – Rule 8.7 Civil Procedure Rules 2000 – Loss of future earnings – Multiplicand and Multiplier – Pre-judgment interest – Blamire award – Smith v Manchester award – West Indies Associated States Supreme Court (Virgin Islands) Act – Computation of damages

On 14th June 2010, the respondent was crossing a minor road as a pedestrian when she was struck by a motor vehicle owned and driven by the appellant. The respondent sustained serious injuries as a result of the collision and on 6th June 2013 she instituted legal proceedings against the appellant claiming damages for personal injury and consequential loss occasioned by his negligence.

Although the appellant filed a defence on 27th June 2013 disputing liability, on 10th July 2014 he entered into a consent order with the respondent conceding liability for the collision, but leaving the issue of damages for assessment by the court. The assessment hearing took place before a master on 10th October 2015 and judgment was given by the master on 27th November 2015 making the following orders:

i. An award in the sum of $100,000.00 for general damages, with interest at 5% per annum from the date of filing the claim to the date of the judgment.
ii. $197,155.00 in special damages for loss of earnings and $180,507.21 for pre-trial medical and miscellaneous expenses, plus 3% interest from date of judgment to date of payment.
iii. Loss of future earnings in the sum of $630,896.00, with no interest before judgment.
iv. $18,580.02 pursuant to rule 65.5 of the Civil Procedure Rules 2000 for prescribed costs.

On 31st December 2015, the appellant filed a notice of appeal, which was amended on 18th January 2016, appealing against the aforesaid orders of the master. The appellant appealed on ten grounds, which can be condensed into four grounds, as follows:

1. The master erred in making the award of $197,155.00 as special damages for loss of earnings.
2. The master erred in the determination of the multiplicand and multiplier in making the award of $630,896.00 for loss of future earnings.
3. The master erred in law in awarding pre-judgment interest on general damages when the court had no jurisdiction to do so.
4. The master improperly exercised her discretion in the assessment of general damages for pain and suffering and loss of amenities.

The respondent filed a counter notice of appeal challenging a single finding made by the master that "the claimant states that her ability to practice as a qualified nurse and acupuncturist has been severely diminished as a result of the accident".

Submissions were filed by both the appellant and the respondent and the appeal was heard on 25th November 2016.

Held: allowing the appeal in part; affirming the order for prescribed costs made against the appellant in the court below and ordering that the parties to the appeal shall bear their own costs in the appeal, that:

1. Special damages must be specifically pleaded and strictly proved. It was not open to the master to award $197,155.00 as special damages for loss of earnings when there was an absence of both specific pleadings and strict proof. The award must therefore be set aside.

   Rule 8.9 of the Civil Procedure Rules 2000 applied.

2. The master erred in using a multiplier of 10, which is well outside any margin of reasonable disagreement. The multiplier is determined by the number of years which the injured party would have been earning income but for her injuries. The multiplier must then be discounted to take into account the vicissitudes of life which may result in the injured party being unable to continue to earn income for the period between assessment and retirement. The multiplier should be discounted by 40%. The appropriate multiplier in this case (rounded to the nearest decimal point) is 4.6. The master also erred in using a multiplicand of $78,862.00, which made no provision for income tax. The multiplicand is adjusted to 67,719.00 to take account of the income tax which would have been payable by the respondent. The master's award of $630,896.00 for loss of future earnings is set aside and the award of $311,507.40 is substituted.

   Alphonso v Ramnath (1997) 56 WIR 183; **Pritchard v J.H. Cobden** [1988] Fam. 22; **McGregor on Damages** (19th Edition, 2014) applied.

3. Neither a **Smith v Manchester** award nor a **Blamire** award is appropriate on the facts of this case. 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 not be able to get similarly-remunerated employment. The respondent was not at the date of the trial, or at any time since the accident, in any real income earning employment. The appropriate award is an award for loss of earnings. In the case of a **Blamire** award, the judge is entitled to reject the multiplier-multiplicand approach because of uncertainties as to the amount the injured party would have earned as well as the future pattern of earnings. The court is of the view that there is sufficient certainty in this case as to the income which the respondent would have earned to make the multiplier-multiplicand approach appropriate.

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

4. The assessment of general damages for pain, suffering and loss of amenities is a matter within the discretion of the trial judge and there is no basis for this Court to interfere with the award made by the master in the court below. The award of $100,000.00 for general damages, with interest at the rate of 5% per annum from the date of filing the claim to the date of judgment is affirmed.

   CCAA Limited v Julius Jeffrey SVG Civil Appeal No. 10 of 2003 (delivered on 2nd March 2004, unreported) considered.

5. A court in the BVI has jurisdiction to award pre-judgment interest on general damages and the decision of the master in this case to award pre-judgment interest on general damages from the date of the claim to the date of judgment is affirmed.

Alphonso v Ramnath (1997) 56 WIR 183; **Andrey Adamovsky et al v Andriy Malitskiy et al** BVIHCMAP2014/0022 (delivered on 3rd February 2017, unreported); **Creque v Penn** (2007) 70 WIR 150 applied.

Panacom International Inc v Sunset Investments Ltd et al (1994) 47 WIR 139; **Veda Doyle v Agnes Deane** Grenada Civil Appeal No. 20 of 2011 (delivered 16th April 2012, unreported) distinguished.

JUDGMENT

[1] **MICHEL JA:** On 14th June 2010, the respondent, Garna O'Neal, was crossing a minor road as a pedestrian when she was struck by a motor vehicle owned and driven by the appellant, Steadroy Matthews. The respondent sustained serious injuries as a result of the collision and was taken by ambulance to Peebles Hospital in Road Town, Tortola where she underwent emergency surgery. The respondent was then transferred to a hospital in Puerto Rico for further medical attention where she again underwent surgery. She remained as a patient at the hospital in Puerto Rico for nearly three months undergoing medical care before being discharged and returning to Tortola.

[2] The respondent sustained the following injuries as a result of the collision:

1. 8 broken ribs,
2. a collapsed lung,
3. internal injuries necessitating the removal of her spleen,
4. laceration of her liver,
5. a broken right arm,
6. a chipped tooth,
7. temporary urinary incontinence,
8. extensive burns and scarring on her abdomen and arms,
9. scarring of her thighs due to removal of skin for skin grafts, and
10. loss of muscle tissue in arms requiring the internal placement of permanent titanium rod and plate in her arms.

[3] On 6th June 2013, the respondent instituted proceedings against the appellant claiming damages for personal injury suffered by her and consequential loss as a result of the negligence of the appellant.

[4] Although the appellant filed a defence on 27th June 2013 in which he disputed liability for the collision and the loss and damage occasioned to the respondent as a result, on 10th July 2014 he entered into a consent order in which he conceded liability for the collision, leaving the issue of damages for assessment by the court. On 17th July 2014, Master Glasgow made an order granting the respondent's application for judgment on admission on the terms of the consent order entered into by the parties on 10th July 2014.

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[5] The making of the consent order and the entry of a judgment on admission closed the issue of liability for the collision, including the issue of contributory negligence raised by the appellant, leaving the parties in dispute only as to the measure and quantum of the resultant loss and damage.

[6] Between 17th July 2014 and 21st January 2015, directions were given by the court for the filing of various documents by the parties for the assessment of damages.

[7] The assessment hearing took place before a master on 10th October 2015 and judgment was given by the master on 27th November 2015. The master made the following orders:

(1) General damages for pain, suffering and loss of amenities in the sum of $100,000.00, with interest at 5% from the date of filing the claim until the date of judgment.

(2) Special damages of $197,155.00 for loss of earnings and $180,507.21 for pre-trial, medical and miscellaneous expenses, with interest at the rate of 3% from the date of judgment to the date of payment.

(3) Loss of future earnings in the sum of $630,896.00, with no interest before judgment.

(4) Prescribed costs in the sum of $18,580.02 pursuant to CPR 65.5.

The Appeal

[8] By notice of appeal filed on 31st December 2015 and amended on 18th January 2016, the appellant appealed against the judgment of the master. The appellant's grounds of appeal are as follows:

(a) The master improperly exercised her discretion in the assessment of general damages for pain and suffering and loss of amenities as she appeared to have treated loss of earnings and/or the ability to carry on an occupation as one of the factors to be considered under this head and further relied on the claimant's inability to work for 3 years after the accident despite the fact that there was no medical evidence to support her finding.

(b) The master improperly exercised her discretion to award special damages which were not specifically pleaded and proven and was only supported by an unfiled and incomplete US IRS tax return which was not accompanied by any supporting documentation and had been created by the respondent specifically for the purposes of the litigation.

(c) The master improperly exercised her discretion to award damages for loss of earnings on the basis of a multiplier and multiplicand in circumstances where there was no reliable medical evidence of permanent injury to the respondent or inability to continue working.

(d) The master erred in law in her calculation of future loss of earnings since she held that the relevant period should be from the date of the accident to the date of retirement (resulting in a total of 14 remaining years and a multiplier of 10) instead of from the date of the trial to the

date of retirement (which would have resulted in a total of 10 working years and consequently a much smaller multiplier).

(e) The master erred in holding that a multiplier of 10 was appropriate in this particular case for the calculation of future loss of earnings and fell into error in her finding that the respondent had 14 years of working life remaining.

(f) The master erred in law in her calculation of loss of past and future earnings by failing to take into consideration or to make any allowance for the payment of income tax by the respondent on her annual earnings which should have been deducted in keeping with well-established legal principles.

(g) The master improperly exercised her discretion in the calculation of special damages for loss of earnings (both past and future) by failing to take into account the complete failure of the respondent to mitigate her losses as well as the possible sums that she could reasonably expect to earn during this period.

(h) The master erred in law in relying on the evidence of a medical expert witness who had not been granted leave by the court to adduce evidence or complied with the requirements of CPR 2000 Rule 32 and was also not qualified in the particular field of medicine.

(i) The master erred in law in awarding pre-judgment interest on general damages in circumstances where the court has no jurisdiction to do so.

(j) The master erred in law in awarding special damages for loss of earnings for the period June 2010 through to December 2013 in circumstances where the evidence before the court was that the respondent resumed working in December 2012.

[9] On 3rd February 2016, the respondent filed a counter notice of appeal challenging a single finding made by the master, that to wit - "The claimant states that her ability to practice as a qualified nurse and acupuncturist has been severely diminished as a result of the accident".

[10] On 23rd June 2016, the appellant filed written submissions in support of his appeal. On 15th July 2016, the respondent filed written submissions in response and in support of her counter appeal, and on 20th July 2016 she filed supplemental submissions. Then on 10th August 2016, the appellant filed submissions in reply to the respondent's submissions.

[11] The appeal was heard on 25th November 2016, with counsel for both parties - Mr. Terrance Neale for the appellant and Dr. Alecia Johns for the respondent - making oral submissions to augment the parties' written submissions.

Appellant's Submissions

[12] In the submissions filed on 23rd June 2016, the appellant submitted (in support of ground (d) of his notice of appeal) that the master erred in law in her calculation of future loss of earnings since she held that the relevant period should be from the date of the accident to the date of retirement, instead of from the date of trial to the date of retirement. The appellant submitted too that the master compounded the error when she also awarded the respondent special damages for loss of earnings from the date of the accident in June 2010 to December 2012, resulting in double damages for that period.

[13] In support of ground (e) the appellant submitted that the master erred when she accepted the submission of the respondent that she was 51 years old at the time of the accident and that, based on a retirement age of 65, she had 14 working years remaining and that the multiplier should be 10. The appellant submitted that this was an obvious error because the respondent's date of birth was 2nd July 1958 and the accident occurred on 14th June 2010, so that the respondent was just short of her

52nd birthday at the time of the accident and the starting point for the determination of the multiplier (even disregarding the double damages for June 2010 to December 2012) should therefore be 13 and not 14 years, resulting in a much lower multiplier than 10.

[14] In support of ground (j) and elements of ground (c) the appellant submitted that the master erred in the calculation of the multiplicand by not taking into consideration or not giving sufficient weight to the fact that the respondent had resumed her acupuncture business in 2012 and that she also had the option to return to the USA to continue her business there, because she had the potential to earn much more there than in the British Virgin Islands. The appellant also submitted in this regard that there was no proper basis for the master to have made an award for loss of earnings from the date of the accident to the remainder of the respondent's working life when there was really no credible evidence that the respondent could not resume her duties as a practical nurse and acupuncturist.

[15] In support of ground (f) the appellant submitted that the master erred in law in her calculation of loss of past and future earnings by failing to take into consideration or to make any allowance for the payment of income tax by the respondent on her annual earnings, which should have been deducted in keeping with well-established legal principles.

[16] Finally, in relation to the multiplicand and the multiplier, and in support of ground (c), the appellant submitted that the master erred in awarding damages for loss of earnings on the basis of a multiplier and a multiplicand in circumstances where there was no reliable medical evidence of permanent injury to the respondent or inability to continue working. He submitted that in the circumstances of this case, the many imponderables and uncertainties made the use of the multiplier and the multiplicand totally inappropriate and its use resulted in excessive damages being awarded to the respondent. He submitted that the master should have attempted to arrive at an overall figure for damages resulting from loss of future earnings after taking into

consideration all the circumstances of the case without reference to a multiplier or multiplicand. An alternative approach, he submitted, would have been for the court to make a separate award (referred to as a **Smith v Manchester**[1] award) on the basis that the respondent had been disadvantaged in the labour market because of her injury and that an award for loss of earning capacity was more appropriate than an award for loss of earnings, because the respondent had not lost her ability to earn an income, but her earning capacity was reduced by her injuries.

[17] In support of ground (b), the appellant submitted that the master improperly exercised her discretion to award special damages which were not specifically pleaded and proven and, in the case of the award for loss of earnings, was only supported by an unfiled and incomplete United States IRS tax return form which was created by the respondent specifically for the purpose of the litigation and was not accompanied by any supporting documentation.

[18] The appellant submitted that it is a well-established principle that special damages which are generally capable of exact calculation have to be specifically pleaded and proven and that in circumstances where the claimant is a self-employed sole trader, business accounts will usually be required, along with income tax returns. The appellant submitted that where business accounts or income tax returns for the relevant period are unreliable, the court is entitled to reject them when assessing the claim for loss of earnings. He submitted that the respondent had failed to produce any credible evidence to justify her claim for loss of earnings and that the court should either have dismissed the respondent's claim for loss of earnings on the basis that she had failed to provide any credible evidence to support it or should have awarded her loss of earnings on the basis of the national average income for practical nurses in the USA.

[1] Smith v Manchester City Council (or Manchester Corporation) (1974) 17 KIR 1.

[19] In support of ground (a), the appellant submitted that the master improperly exercised her discretion in the assessment of general damages for the nature and extent of the respondent's injuries, resulting disabilities, pain and suffering and loss of amenities as she appeared to have treated loss of earnings and/or the ability to carry on an occupation as one of the factors to be considered under this head and further relied on the respondent's inability to work for three years after the accident, despite the fact that there was no medical evidence to support this finding. The appellant submitted that, in the circumstances, the award of general damages of $100,000.00 for pain and suffering was excessive and the reliance on the period that the respondent could not work was wholly erroneous, resulting in an excessive award under this head of damages. The appellant submitted that the award should be reduced to $60,000.00 to reflect the level of awards made by the court in similar personal injury cases, such as **Darryl Christopher v Benedicta Samuels**[2] and **Leane Forbes v Ulbano Morillo**.[3]

[20] In support of ground (i), the appellant submitted that the master erred in awarding pre-judgment interest on the sum of $100,000.00 for general damages for pain, suffering and loss of amenities in circumstances where there was no legal basis for doing so. He submitted that at common law and in equity, interest is payable in certain circumstances none of which are applicable in this case. He submitted too that a right to interest may be conferred by statute, such as the **Judgment Act**[4], which allows interest on judgments at the rate of 5% per annum, but that there is no statutory provision in the BVI allowing interest on damages. He submitted that the practice of exercising a discretion to award pre-judgment interest in personal injury cases in the BVI appears to be based on the decision of the Court of Appeal in **Alphonso v Ramnath**[5] where the court held that:

> "no interest should be awarded before judgment on general damages in respect of loss of future earnings, but interest should be awarded from the date of service of the writ to the date of trial at the rate payable on money

[2] BVIHCV 2008/0183(delivered on 18th March 2010, unreported).
[3] BVI Civil Appeal No. 8 of 2005 (delivered on 20th February 2006, unreported).
[4] Cap. 35 of the Revised Laws of the Virgin Islands.
[5] (1997) 56 WIR 183.

> in court placed on short-term investment in respect of damages payable for loss of amenity and for pain and suffering; interest payable on special damages should be awarded from the date of the accident to the date of trial at half that rate."

He submitted, however, that this decision of the Court of Appeal was based on the decision of the English Court of Appeal in **Jefford v Gee**[6], which was based on section 3 of the **Law Reform (Miscellaneous Provisions) Act**, 1934, as amended by section 22 of the **Administration of Justice Act**, 1969. He submitted too that there are no equivalent statutory provisions in the BVI and that, in effect, **Alphonso v Ramnath** was wrongly decided on the issue of interest on damage.

Respondent's submissions

[21] As to the first of the grounds of appeal addressed by the appellant in his written submissions – that the master erred in her calculation of loss of future earnings from the date of the accident to the date of retirement, instead of from the date of trial to the date of retirement, and that she compounded the error by awarding special damages for loss of earnings from the date of the accident in June 2010 to December 2012 - the respondent submitted that the award of damages is a matter of the court's discretion and that the court will only interfere if the measure of damages is out of all proportion to the circumstances of the case. The respondent further submitted that even if the appellant was correct, this would not justify adjusting the multiplier by more than 1 since the difference is approximately 3 to 4 years and the multiplier is not derived solely by number of years.

[22] As to the second ground of appeal addressed by the appellant in his written submissions - that the master erred in her finding that the respondent had 14 working years remaining, from her age of 51 at the time of the accident to a retirement age of 65, when the appellant was a mere 18 days short of her 52nd birthday at the date of the accident - the respondent appeared to have made the

[6] [1970] All ER 1202.

same response about the award of damages being within the discretion of the court.

[23] As to the third ground of appeal addressed by the appellant in his written submissions - that the master erred in the calculation of the multiplicand by not taking into consideration or not giving sufficient weight to the fact that the respondent had resumed her acupuncture business in 2012 and that she also had the option of returning to the USA to continue her business there, and that there was no credible evidence that the respondent could not resume her duties as a practical nurse and acupuncturist - the respondent treated with this complaint as if it was an attack on the credibility of the medical doctor who gave the medical report on the respondent's injuries, instead of as a complaint against the approach of the master in disregarding or downplaying the respondent's resumption of work in 2012 and her declining to exercise the option of returning to greener pastures in the USA.

[24] As to the fourth ground addressed by the appellant - that in her calculation of the multiplicand, the master erred in her failure to make any allowance for the payment of income tax by the respondent on her annual earnings - the respondent appeared to resort once again to the difficulty of an appellant in challenging a judge's finding of fact.

[25] As to the fifth ground addressed by the appellant - that the master erred in awarding damages for loss of earnings on the basis of a multiplier and a multiplicand in circumstances where there was no reliable medical evidence of permanent injury to the respondent or inability to continue working - the respondent treated with this complaint by the appellant just as she had treated with the complaint of the master's failure to give any or any sufficient consideration to the respondent's resumption of business in 2012, as an attack on the credibility of the doctor rather than as a complaint against the approach by the master to the evidence of the respondent's injuries.

[26] As to the sixth ground of appeal advanced by the appellant – that the master improperly exercised her discretion to award special damages which were not specifically pleaded and proved and was only supported by an unfiled and incomplete US IRS tax return form which was not accompanied by any supporting documentation and had been created by the respondent specifically for the purposes of the litigation – the respondent resorted to her refrain of the heavy burden on an appellant to challenge a factual finding of a trial judge and also argued that the modern approach of the courts is to permit a claim for special damages to be proved in witness statements and supporting documents, provided that the existence of the claim is clear from the statement of claim.

[27] As to the seventh ground of appeal advanced by the appellant – that the master improperly exercised her discretion in the assessment of general damages for the nature and extent of the respondent's injuries, resulting disabilities, pain and suffering and loss of amenities and that in the circumstances the award of $100,000.00 was excessive – the respondent resorted again to her refrain of the heavy burden on the appellant and also argued that there was no basis on which the master may be said to have misdirected herself.

[28] As to the eighth and final ground of appeal advanced by the appellant – that the master erred in awarding pre-judgment interest on the sum of $100,000.00 for general damages for pain, suffering and loss of amenities in circumstances where there was no legal basis for doing so – the respondent submitted that the master's approach was consistent with the practice of the Eastern Caribbean Supreme Court and that it is not apparent from a reading of **Alphonso v Ramnath** that the court there relied on **Jefford v Gee** in the manner described or so as to make it wrong. The respondent submitted, in effect, that in any event the master was correct in following the binding precedent of this Court on the issue of pre-judgment interest on awards of general damages.

Issues for determination

[29] Having reviewed the grounds of appeal and counter appeal and the various submissions on them made both orally and in writing by counsel on both sides, I am of the view that there are really four issues to be determined in this appeal. The first issue is whether the master erred in making the award of $197,155.00 as special damages for loss of earnings. The second issue is whether the master erred in the determination of the multiplicand and multiplier in making the award of $630,896.00 for loss of future earnings. The third issue is whether there is a basis and justification for this Court to interfere with the award of $100,000.00 made by the master for pain, suffering and loss of amenities. The fourth issue is whether a court in the BVI has jurisdiction to award pre-judgment interest on general damages.

Special damages for loss of earnings

[30] In terms of the special damages award for loss of earnings, it is now trite that special damages must be specifically pleaded and strictly proved. Before the advent of the witness statement containing the evidence to be given by a witness at trial, each of the parties to a case was required to set his case out in detail in his pleadings, because - barring any particulars requested, ordered and provided - the pleadings were all that a party would receive from any other party before trial as to the case which the latter intends to present at the trial. Now that the parties are required to file witness statements containing their evidence and that of any other witness that they propose to call, the pleadings (or statements of case as they are titled under the **Civil Procedure Rules 2000**) are no longer required to contain significant detail about the party's case. Rule 8.7 (1) of the CPR states that - "The claimant must include in the claim form or statement of claim a statement of all the facts on which the claimant relies", which means that he must state all the facts necessary for the purpose of formulating a complete cause of action.[7] It is to the witness statements that litigants now turn to sift the details of the other party's case.

[7]See White Book 2005 Volume 1, page 367.

[31] The bar is, however, higher in personal injury claims, and rule 8.9 of the CPR sets out additional requirements with which a claimant making a claim for personal injuries must comply. Sub-rule (5) states: "The claimant must include in or attach to the claim form or statement of claim a schedule of any special damages claimed".

[32] In the claim form commencing these proceedings, the respondent (as the claimant in the court below) claimed special damages for loss of earnings from the date of the accident until the date of trial. In her statement of claim, she averred that as a result of the accident she had lost the profits she would otherwise have earned in carrying on her business as an independent and successful nursing and acupuncture practitioner and (as in the claim form) she claimed special damages for loss of earnings from the date of the accident until the date of the trial. There was no schedule included in or attached to the claim form or statement of claim of the special damages claimed by the respondent.

[33] In her witness statement for the assessment of damages, the respondent averred that as a result of the accident she had lost her clients and her business and income from it. She averred that in the year preceding the accident she had earned considerable income in the USA, some of which she quantified, including what she described as "cash income" of $78,862.00. She averred that in 2012 she received a trade licence in the BVI and started an acupuncture practice, but she had not been able to earn enough money from it to pay her overhead expenses and support herself. In viva voce evidence at the assessment hearing, the respondent produced an IRS form from the USA which purported to show her gross income in 2009 as $108,987.00 and a net income of $78,862.00.

[34] The master accepted the amount of $78,862.00 shown on the IRS form as evidence of the respondent's income and made the award for special damages of $197,155.00 for loss of earnings on this basis.

[35] The appellant appealed against this award and contended that the amount awarded was not specifically pleaded and proved and was only supported by an unfiled and incomplete United States IRS tax return form which was not accompanied by any supporting documentation and had been created by the respondent specifically for the purposes of the litigation.

[36] In light of the failure of the respondent (as the claimant in the court below) to comply with the requirements of rule 8.9 (5) of the CPR by including in or attaching to the claim form or statement of claim a schedule of the special damages claimed for loss of earnings, and in the absence of both specific pleading and strict proof of the damages awarded, it was not open to the master to make the award that she did for special damages of $197,155.00 for loss of earnings. I will accordingly set aside this award.

Determination of multiplicand and multiplier

[37] The issue of the determination of the multiplicand and multiplier arises from the appellant's challenge of the sum of $630,896.00 awarded to the respondent for loss of future earnings. The master arrived at this amount by her determination of a multiplicand of $78,862.00 and a multiplier of 10, and a discount of 20% on the global sum to "[take] into account the vicissitudes and uncertainties of life".[8]

[38] The multiplicand is the net annual amount which the injured party would have been earning but for her injuries, less any amount which she is capable of earning in the future. Where the injured party is in salaried employment and is rendered completely incapable of working by the injury, the calculation of a multiplicand is fairly easy. Where, however, as in the present case, the injured party was self-employed and is capable of doing some amount of income-earning, the calculation of the multiplicand is fairly difficult. The calculation, however, is a factual determination to be made by the finder of fact, which in this case is the master who undertook the assessment of damages.

[8] See para. 30, lines 10 -12 of the judgment.

[39] Having heard the evidence of the respondent as to her pre-accident income and as to her efforts to earn an income post-accident, which proved to be impossible in her capacity as a nurse and unprofitable in her capacity as an acupuncturist, the master made a finding that the respondent's pre-accident income was $78,862.00 and that her income-earning capacity had been diminished to such an extent as to effectively render her incapable of earning an income. The master accordingly made a factual determination that the respondent's loss of earnings was $78,862.00 per annum. There was evidence on the basis of which the master could have made the determination that she did, but for her obvious error in treating the amount referred to in the tax return form as net income as being net of income tax. The document relied on by the master to make her factual determination, however, clearly shows that from the net income of $78,862.00 the sum of $11,143.00 should have been deducted as provision for income tax and that the actual net income, based on the evidence accepted by the master, was $67,719.00 ($78,862 less $11,143). This then is the value of the multiplicand to which the multiplier should be applied to arrive at the amount to be awarded for loss of future earnings.

[40] The multiplier is the amount by which the net annual income should be multiplied in order to arrive at the quantum of the award for loss of future earnings. This is determined by ascertaining the number of years which the injured party would have been earning that income but for her injuries. According to McGregor on Damages[9], "[t]he starting point in the calculation of the multiplier is the number of years that it is anticipated the claimant's disability will last; the calculation falls to be made from the date of trial".

[41] In the case of **Pritchard v J. H. Cobden**[10], the English Court of Appeal held that damages for loss of earnings for a living claimant should be assessed as special damages for the earnings lost between injury and trial, with a calculation of the future loss of earnings from trial by selecting a multiplier from the date of trial to compensate

[9] See para. 38-100 of the 19th edition, published in 2014.
[10] [1988] Fam. 22.

the claimant for the likely loss of earnings for his future working life. The starting point for the calculation of the multiplier in the present case, therefore, is 10th October 2015 when the assessment of damages was conducted, which was the trial to determine the quantum of damages to be paid by the appellant to the respondent. The end point of that calculation is the injured party's likely retirement date which in this case was accepted by both parties as being the respondent's 65th birthday – 2nd July 2023. This will result in loss of future earnings for a period of 7 years, 8 months and 22 days, yielding a multiplier of 7.74. This undiscounted multiplier of 7.74 is then to be discounted by reason of the fact that the injured party will receive an advance lump sum payment for his loss of earnings, instead of monthly payments over a period of nearly 93 months, and to take account of the vicissitudes and contingencies of life which may result in the injured party's inability for any of many reasons to continue to earn the loss income for the entire period between assessment and retirement.

[42] In the seminal case of **Alphonso v Ramnath**, this Court – having reviewed the principles to be applied in determining the multiplier to be used in assessing loss of future earnings in personal injury claims, and having considered comparable awards - adjusted a multiplier of 15 set by the High Court and substituted a multiplier of 12 in arriving at the award to be made for loss of earnings to a 45 year old man with an anticipated working life of 20 years between trial and retirement. Adopting the mathematics of Satrohan Singh JA, who delivered the principal judgment in the Court of Appeal, the multiplier of 7.74 should be discounted by 40% and yield a discounted multiplier (rounded to the nearest decimal point) of 4.6.

[43] At first blush a 40% discount might seem high, but when one considers not only the advance receipt of the anticipated loss earnings as against receiving it over a period of nearly 8 years, but also the possibility that the respondent may not in any event have continued to earn income at the rate of the multiplicand until age 65, and the possibility too (not ruled out by the medical evidence) that she may well be able to restart a profitable practice as a practical nurse and acupuncturist before age 65, the merits of the 40% discount become apparent.

[44] The master clearly erred therefore when she used a multiplier of 10, which is well outside of any margin of reasonable disagreement, when the appropriate multiplier ought to have been 4.6.

[45] The adjusted multiplicand of $67,719.00 and the corrected multiplier of 4.6 will result in an award of $311,507.40 for loss of future earnings. I will accordingly set aside the master's award of $630,896.00 for loss of future earnings and substitute an award of $311,507.40.

[46] Before moving on to address the award of general damages for pain, suffering and loss of amenities, I should address the submission made by counsel for the appellant that instead of making an award for loss of earnings on the basis of a multiplier and a multiplicand, the master ought to have made a **Smith v Manchester** award. But 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 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.

[47] This is not the situation in the present case. As a result of the injuries which she sustained in the accident, the respondent was not at the time of the trial, or at any time since the accident, in any real income-earning employment and the master made a finding that, because of her injuries, the respondent is not likely to ever resume such employment. The appropriate award in the circumstances of this case is therefore an award for loss of earnings, which is the award made by the master.

[48] Although counsel for the appellant, Mr. Terrance Neal, did not specifically mention a Blamire award, his submission on ground (c) of the appellant's grounds of appeal was broad enough to include both a **Smith v Manchester** award and a Blaimire award.

[49] In the case of **Blamire v South Cumbria Health Authority**[11], the English Court of Appeal held that the trial judge was entitled to reject the multiplier-multiplicand approach in assessing the injured party's future loss of earnings, given the number of uncertainties in that case as to the amount the injured party would have earned if she had not been injured, as well as the likely future pattern of her earnings. The judge accordingly decided, and the Court of Appeal upheld his decision, to award a global sum for loss of future earnings.

[50] In the present case, although there were uncertainties which arose in the calculation of both the multiplier and the multiplicand, there was sufficient certainty to have enabled the master to arrive at what she considered to be an appropriate multiplier and multiplicand for making an award of damages to the respondent for loss of earnings. I disagree with the value of both the multiplier and the multiplicand arrived at by the master, but I agree with her decision – implied in her judgment – that there was sufficient certainty to have enabled her to determine what she considered to be their appropriate value.

General damages for pain, suffering and loss of amenities

[51] The third issue for determination is whether there is a basis and justification for this Court to interfere with the award of $100,000.00 made by the master for pain, suffering and loss of amenities.

[52] The assessment of general damages, particularly for pain, suffering and loss of amenities, which cannot be monetarily measured, is a matter within the discretion of the trial judge. The burden on an appellant, therefore, who invites a court of appeal to interfere with a judge's assessment of general damages, and I would stress,

[11] [1993] PIQR Q1;[1992] Lexis Citation 2222.

particularly for a head of damages which cannot be monetarily measured, is a very heavy one.

[53] Whilst I agree with the view expressed by Gordon JA in delivering the judgment of this Court in the case of **CCAA Limited v Julius Jeffrey**[12] 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 first determine that the trial judge failed to apply the relevant principles and take cognizance of comparable awards and that 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 manifestly wrong. This is so even if each member of the appellate court might have made a higher or lower award if the discretion was his or hers to exercise.

[54] The master considered a significant number of authorities addressing both the principles applicable to the determination of awards for pain, suffering and loss of amenities in personal injury cases and the quantum of awards made in comparable cases before arriving at what she deemed to be a fair and reasonable award in the circumstances of this case. There is therefore no basis or justification for this Court to interfere with the award made by the master for pain, suffering and loss of amenities and I would affirm the award of the master and dismiss the appeal against it.

Pre-judgment interest on general damages

[55] The last of the four issues I have identified for determination in this appeal is the question of whether a court in the BVI has jurisdiction to award pre-judgment interest on general damages. The master made an award of interest on the damages for pain, suffering and loss of amenities at the rate of 5% per annum from the date of the

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

filing of the claim to the date of judgment. The appellant challenged this award of interest on the basis that the jurisdiction of a court to award interest on damages is based on common law, equity or statute and that on the facts of this case none of the conditions on which an award would be made at common law or in equity are present and there is no statutory provision in the BVI providing for the award of interest on damages.

[56] The appellant submitted that at common law interest is payable – (1) where there is an express agreement to pay interest, (2) where an agreement to pay interest can be implied from the course of dealings between the parties or from the nature of the transaction or a question of usage, trade or profession concerned and (3) in certain cases by way of damages for breach of contract (other than a contract merely to pay money) where the contract if performed would, to the knowledge of the parties, entitle the plaintiff to receive interest.

[57] He submitted that in equity interest may be recovered in certain cases where a particular relationship exists between the creditor and debtor, such as mortgagor and mortgagee, obligor and obligee on a bond, personal representative and beneficiary, principal and surety, vendor and purchaser, principal and agent, solicitor and client, trustee and beneficiary, or where the debtor is in a fiduciary position to the creditor.

[58] He submitted too that a right to interest is conferred by statute in certain cases, such as the **Judgment Act**[13], which allows interest on judgments at the rate of 5% per annum, but there is no provision in the BVI allowing interest on damages. By contrast, he submits, section 35A of the UK **Supreme Court Act** provides that:

> "(1) Subject to the rules of court, in proceedings (whenever instituted) before the High Court for the recovery of a debt or damages there may be included in any sum for which judgment is given simple interest, at such rate as the court thinks fit or rules of the court may provide, on all or any part of the period between the date when the cause of action arose and … in the case of the sum for which judgment is given, the date of judgment…."

[13] Cap. 35 of the Revised Laws of the Virgin Islands.

He submitted therefore that the UK **Supreme Court Act** gives the court a discretion with respect to the awarding of interest in various situations, including between the date when the cause of action arose and the date of judgment, but that there is no equivalent provision in the BVI.

[59] The appellant submitted that the practice of exercising a discretion to award pre-judgment interest on general damages in personal injury cases in the BVI appears to be based on the judgment of the Court of Appeal in **Alphonso v Ramnath**, which judgment was based on the decision of the English Court of Appeal in **Jefford v Gee**. He submitted further that **Jefford v Gee** was itself based on the statutory provisions of section 3 of the **Law Reform (Miscellaneous Provisions) Act**, 1934 (the UK Act) as amended by section 22 of the **Administration of Justice Act** 1969. He submitted that the error of the court in improperly exercising the discretion was recognized by Bannister J (Ag.) in **Ocean Conversion (BVI) Limited v The Attorney General of the Virgin Islands**.[14]

[60] The appellant concluded his submissions on this ground of appeal with the statement that, in the circumstances, the awarding of interest by the master was clearly wrong in law. In response to this ground of appeal and submissions in support, the respondent submitted that the decision of this Court in **Alphonso v Ramnath** that pre-judgment interest should be awarded on general damages from the date of service of the claim to the date of trial reflects the current legal position on this issue. She submitted too that the power to award pre-judgment interest on damages is an important power incidental to the court's jurisdiction and could be derived from the English High Court by virtue of section 7 of **the West Indies Associated States Supreme Court (Virgin Islands) Act**[15] (the BVI Act) which gives to the BVI High Court the same powers and authorities incidental to its

[14] BVIHCV2008/0192 (delivered 1st December 2009, unreported).
[15] Cap. 80 of the Revised Laws of the Virgin Islands.

jurisdiction as those vested in the High Court of Justice in England as of 1st January 1940.

[61] In answering the question as to whether the BVI Court has jurisdiction to award pre-judgment interest on general damages, I take the view that the court has this jurisdiction based on the judgment of this Court in **Alphonso v Ramnath** where the court held that:

> "interest should be awarded from the date of service of the writ to the date of trial at the rate payable on money in court placed on short-term investment in respect of damages payable for loss of amenity and for pain and suffering".

It may well be that in making this decision the court applied the reasoning and conclusion of the English Court of Appeal in **Jefford v Gee**, but the court did not specifically peg its decision on the judgment in **Jefford v Gee**. Instead, it made a pronouncement which has since been followed by courts throughout the Eastern Caribbean.

[62] In any event, the court was perfectly entitled to peg its decision on the judgment of the English Court of Appeal in **Jefford v Gee**. In that case, the English Court of Appeal awarded pre-judgment interest on general damages in a personal injury case on the basis of section 3 (1) of the UK Act, which provides that:

> "In any proceedings in any court of record for the recovery of any debt or damages, the court may, if it thinks fit, order that there shall be included in the sum for which judgment is given interest at such rate as it thinks fit on the whole or any part of the period between the date when the cause of action arose and the date of the judgment."

[63] I am of the view that section 3 (1) of the UK Act is applicable in the BVI by virtue of section 7 of the BVI Act, which provides that:

> "The High Court shall have and exercise within the Territory all such jurisdiction (save and except the jurisdiction in Admiralty) and the same powers and authorities incidental to such jurisdiction as on the first day of January, 1940 was vested in the High Court of Justice in England."

The effect of section 7 of the BVI Act is to give to the High Court in the BVI the same jurisdiction, and the powers and authorities incidental to the jurisdiction, as was vested in the English High Court as of 1st January 1940. The High Court of Justice in England, being vested (at least by 1934) with the jurisdiction to award pre-judgment interest on damages, the High Court of the Territory of the Virgin Islands would, therefore, be vested with the same jurisdiction.

[64] There are cases from our court, most notably the case of **Panacom International Inc v Sunset Investments Ltd et al**[16] in which Floissac CJ opined that the provision in the **Supreme Court Act of St Vincent and the Grenadines**[17] identical to section 11 of the BVI Act does not import into the law of St Vincent and the Grenadines English substantive law, including the statutory provisions on the award of interest on judgment debts, and the case of **Veda Doyle v Agnes Deane**[18] in which Pereira CJ agreed with Floissac CJ and stated that section 11 of the BVI Act also does not import English substantive law, including the statutory provisions on the award of interest on judgment debts. None of these cases addresses section 7 of the BVI Act or pronounces on the applicability to the BVI of section 3 (1) of the UK Act, which gives jurisdiction to the High Court in England to award pre-judgment interest on general damages. These cases do not therefore move the needle for me on the discretion of a court in the BVI to award pre-judgment interest on general damages, whether by virtue of the application of section 3 (1) of the UK Law Reform (Miscellaneous Provisions) Act, 1934, the common law principle enunciated by Herschell LC in the **London, Chatham and Dover Ry Co v South Eastern Ry Co**[19] case, or the pronouncements by this Court in **Alphonso v Ramnath** and **Andrey Adamovsky et al v Andriy Malitskiy et al**[20] or by the Privy Council in **Creque v Penn**[21] - all BVI cases. (I will shortly address the principle enunciated and the pronouncements made.)

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[16] (1994) 47 WIR 139.
[17] Cap.34 of the Revised Laws of Saint Vincent and the Grenadines 2009.
[18] Grenada Civil Appeal No. 20 of 2011(delivered on 16th April 2012, unreported).
[19] [1893] AC 429.
[20] BVIHCMAP2014/0022(delivered on 3rd February 2017, unreported).
[21] (2007) 70 WIR 150.

[65] Moreover, in **Jefford v Gee**, Lord Denning MR, who delivered the judgment of the English Court of Appeal, opined that section 3 (1) of the UK Act was intended to give effect to the principle enunciated by Lord Herschell LC in 1893. In the case of **London, Chatham and Dover Ry Co v South Eastern Ry Co**, Lord Herschell LC stated that:

> "I think that when money is owing from one party to another and that other is driven to have recourse to legal proceedings in order to recover the amount due to him, the party who is wrongfully withholding the money from the other ought not in justice to benefit by having that money in his possession and enjoying the use of it, when the money ought to be in the possession of the other party who is entitled to its use. Therefore, if I could see my way to do so, I should certainly be disposed to give the appellants, or anybody in a similar position, interest upon the amount withheld from the time of action brought at all events."

Lord Denning went on to state (at page 1206) that section 3 (1) of the UK Act "may therefore be regarded as giving statutory effect to Lord Herschell's principle".

[66] All of the above point clearly to the fact that the case of **Alphonso v Ramnath**, which has been followed and applied by our courts in the last twenty years, represents the existing law in the Territory of the Virgin Islands and must continue to be followed and applied by our courts unless overruled by a higher court or determined by this Court to have been made per incuriam.

[67] In the two decades which have elapsed since this Court delivered judgment in **Alphonso v Ramnath**, the judgment has not been overruled by any higher court. Instead, the dicta on pre-judgment interest have been reinforced by the judgment of the Privy Council in another BVI appeal in the case of **Creque v Penn**. In that case, the Privy Council held that: "They are satisfied that the court had jurisdiction to award pre-judgment interest on the unpaid purchase price, and that Mrs Creque has an equitable entitlement to such interest". Although the damages award in **Creque v Penn** was for compensation to the claimant for the unpaid purchase price of land sold by the claimant to the defendant, the jurisdiction of the court in the BVI

to exercise a discretion to award interest on damages to a claimant from the date of the loss to the date of judgment springs from the same well.

[68] I also take the view that the decision of this Court in **Alphonso v Ramnath** was not made per incuriam, not only for the reasons which I have expressed in the preceding paragraphs, but also because of the judgment of this Court in **Andrey Adamovsky et al v Andriy Malitskiy et al** where the court, in a judgment delivered by me last February, with which the Chief Justice and the other judge of the court agreed, reviewed several cases and examined relevant statutes and concluded that:

> "It cannot be disputed that a party wrongfully deprived by another of money to which the first party is entitled ought to be compensated for his loss, not just by an award to him of the sum of money to which he was entitled, but so too by an award of the time value of the money from the date of its appropriation to the date on which it is ordered to be paid to him. This latter award is what is referred to as an award of pre-judgment interest."

Again, although (as in **Creque v Penn**) the damages award was for a different kind of compensation, in that case for the diminution in the value of the claimant's shares in a company, the jurisdiction of the BVI court to exercise a discretion to award pre-judgment interest on damages to the respondent/claimant in this case also springs from the same well. Similarly, although I referred in the **Adamovsky** judgment to "the date of appropriation of the money", this is not to be understood to mean that my words apply only to cases where money was wrongfully appropriated from the person claiming the interest. In fact, in the **Adamovsky** case, no money was appropriated from the party claiming interest; the money was appropriated from a company of which the party was a shareholder, and the position which I took in **Adamovsky** would be no different if, as in the present case, the issue is compensation to a party for loss occasioned to him by virtue of the tortious liability of the other party.

[69] I note that the only authority referred to by counsel for the appellant in support of his submission that pre-judgment interest on damages could not be awarded by the

court in the Virgin Islands is a decision of Bannister J (Ag.) in the case of **Ocean Conversion (BVI) Limited v The Attorney General of the Virgin Islands**, where Justice Bannister said everything other than that he was not going to follow the decision of the Court of Appeal in **Alphonso v Ramnath** which, as a High Court judge, he was obligated to follow.

[70] In the circumstances, I am of the view that the master did not err in awarding pre-judgment interest on the general damages for pain, suffering and loss of amenities and that her jurisdiction to do so was founded on the doctrine of stare decisis which mandated her to follow the precedent set by this Court in **Alphonso v Ramnath**. I am also of the view that **Alphonso v Ramnath** is now settled law in the Territory of the Virgin Islands on the issue of pre-judgment interest on damages, and that its authority is buttressed by the judgment of this Court in **Adamovsky v Malitskiy** and the judgment of the Privy Council in **Creque v Penn**.

[71] The challenge to the jurisdiction of the master to award pre-judgment interest therefore fails and I accordingly affirm her decision to award interest on the general damages of $100,000.00 for pain, suffering and loss of amenities at the rate of 5% per annum from the date of filing the claim (6th June 2013) to the date of judgment (27th November 2015).

Conclusion

[72] In my judgment, for the above-stated reasons, the appellant succeeds on the following grounds of appeal:

(1) ground b, in which he challenged the master's award of special damages for loss of earnings which were not specifically pleaded and proved;

(2) ground d, in which he challenged the master's calculation of loss of future earnings from the date of the accident instead of from the date of trial;

(3) ground e, in which he challenged the master's calculation of the number of working years which the respondent had before her retirement; and

(4) ground f, in which he challenged the master's failure to make any allowance for the payment of income tax by the respondent in arriving at her net annual income.

The appellant did not pursue or did not succeed on his remaining 6 grounds of appeal.

[73] I did not address the respondent's counter appeal because specific consideration of the issue raised by it was not necessary to the resolution of the issues required to be determined in this appeal.

[74] In terms of costs in the court below, the master's order of prescribed costs to the respondent pursuant to CPR 65.5 is affirmed, subject to the calculation of the costs in accordance with the revised awards. In terms of costs on the appeal, having regard to the appellant's success in 4 of his 10 grounds of appeal and on the effective diminution of the damages awarded to the respondent by nearly 50%, the parties shall bear their own costs on the appeal.

[75] My order is as follows:

(1) The appeal against the order of the master awarding general damages of $100,000.00 to the respondent for pain, suffering and loss of amenities, with interest at the rate of 5% per annum from the date of the filing of the claim to the date of judgment, is dismissed and the master's order is affirmed.

(2) The appeal against the order of the master awarding special damages of $197,155.00 to the respondent for loss of earnings is allowed and the master's order is set aside.

(3) The order of the master awarding special damages of $180,507.21 to the respondent for pre-trial medical and miscellaneous expenses (less $76,335.00 already paid to the respondent) is affirmed.

(4) The appeal against the order of the master awarding general damages of $630,896.00 to the respondent for loss of future earnings is allowed to the extent that the sum of $311,507.40 is substituted for the sum of $630,896.00.

(5) The order of the master awarding prescribed costs in the court below to the respondent in accordance with CPR 65.5 is affirmed, with the quantum of the costs to be calculated on the global sum derived from an aggregation of the amounts resulting from the awards made in paragraphs 1, 3 and 4 of this order.

(6) The parties shall bear their own costs in the appeal.

I concur
Louise Esther Blenman
Justice of Appeal

I concur
Humphrey Stollmeyer
Justice of Appeal [Ag.]

By the Court

Chief Registrar