

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA  
IN COMMON LAW

SUIT NO. C.L J 096/99

**BETWEEN                      MELVERTON JAMES                      PLAINTIFF**  
**AND                      CABLE AND WIRELESS JAMAICA LTD                      DEFENDANT**

CONSOLIDATED WITH:

SUIT NO. C.L N 213/99

**BETWEEN                      DELROY NEEDHAM                      PLAINTIFF**  
**AND                      CABLE AND WIRELESS JAMAICA LTD                      DEFENDANT**

Heard: April 8, 10, 11, 25 and 30 2002

Mr. Ernest Smith and Miss Marsha Smith instructed by Ernest Smith and Company for the Plaintiffs.

Mr. Garth McBean instructed by Dunn Cox for the Defendant.

**HARRISON J**

I completed hearing this matter on the 25<sup>th</sup> instant and had promised to deliver judgment on the 30<sup>th</sup> April. I now seek to fulfill this promise.

The causes of actions

The plaintiffs have brought these actions and are claiming damages for negligence and/or nuisance arising out of a motor vehicle accident that occurred on the 29<sup>th</sup> July, 1997 along Dumfries Main Road in the Parish of Trelawny. Both actions were consolidated by order of the Court.

On the aforesaid date, the defendant's servants and/or agents (Senior's Woodwork and Construction) had dug a trench and constructed underground conduits on the Dumfries roadway for and on behalf of Cable and Wireless, formerly Telecommunications of Jamaica. Sometime between 7:00 and 8:00 p:m, the plaintiff Needham, who was driving

his motor vehicle drove into the excavation and this caused damage to the motor vehicle and injury to Melverton James, who was a passenger in the motor car. James has opted however, to sue only Cable and Wireless.

### Issue

The main issue in the case is whether the defendant had taken reasonable steps in ensuring that the roadway was left in a safe condition after the day's work had ended.

### Findings

I have carefully examined the evidence and have given due consideration to the arguments and submissions put forward by both sides. I have also had the opportunity of assessing the demeanour of the witnesses.

I find that the each plaintiff has not been quite truthful in his account of how the accident occurred. On the other hand, I must say that I was impressed with the witness Winston Senior who was called on behalf of the defendant. I accept his evidence that at the end of the day's work, a number of safety measures were put in place and that they were established whilst a representative of Cable and Wireless was present at the work site.

I find the following facts:

1. A caution tape, orange in colour, was placed around the excavation.
2. Several cones that illuminated in the dark were placed at points leading up to the excavation.
3. Closer to the excavation cones were placed at an angle leading to the right in order for motorists to merge into the right lane and to avoid the excavation at that point.
4. Caution signs with a yellow background and red writing with the words "caution men at work" and "drive slowly" were placed some distance away from and leading up to the excavation.
5. The excavation was between 10-13 ft in length, 7 ft. deep and 5-8 ft. wide.
6. The excavation was uncovered.

7. There was a mound of earth about 4 ft in height around the excavation and it was clearly visible for a distance of at least one and one-half chains as one approaches it in the left lane.
8. There was a bend before one got to the point where the mound became visible.
9. The surface of the roadway was wet as rain had recently fallen.
10. There was a street light above the point where the excavation was dug.
11. The plaintiff Needham was driving on dip lights with the roof light burning in his car as he approached the excavation.
12. When Needham first saw the mound he was traveling at roughly 40 m.p.h. and was some distance away from it.
13. Needham had reduced speed but not sufficiently enough.
14. The application of brakes had caused him to pick up a skid and eventually he ended up into the excavation.
15. There were drag-marks about 10 ft. in length leading directly to the excavation.
16. The caution signs and cones were still in place after the accident. The tape was however, broken by Needham's motor car.
17. As Needham approached the mound no vehicle was proceeding from the opposite direction.
18. There was adequate space for him to have gone either to the right or to his extreme left in order to avoid the obstruction.

I find therefore that on a balance of probabilities, Needham was traveling too fast in the circumstances. He had disobeyed the caution to drive slowly and had also failed to fully appreciate the condition of the road at the material time. He had seen an obstruction ahead so he ought to have reduced speed to such an extent that even if he applied brakes he would not have developed a skid so as to cause him to lose control and to collide in the excavation. I further believe that he had not been keeping a proper look out.

I am of the view however, that the defendant should have taken further precautions in warning the public in general and motorists in particular as one left the bend, that there was an open trench ahead. It is further my considered view, that a sign should have been

erected warning motorists to merge right as one got closer to the obstruction. I do believe that this sign along with the cones could have brought it home more forcefully to motorists that there was danger ahead.

When all matters are taken into consideration I find that the defendant must also be blamed for this accident.

On a preponderance of probabilities, I hold that the accident was substantially contributed to by the negligence of Needham and he ought to be held 60% responsible. The defendant on the other hand, is therefore liable to the plaintiffs to the extent of 40% for its negligence.

#### Damages

I turn now to the award of damages.

#### Re Needham

His claim is one for special damages. There is no dispute where his claim is concerned. The cost of repairs for his vehicle is \$156,681.40 and this is supported by the Assessor's Report, Exhibit 1. I will also allow the sum of \$2,500 being the assessor's fee. This sum has been paid and is evidenced by Exhibit 2. The loss of use, being transportation costs for 3 months and a few days, is allowed in the sum of \$100,000.00. The total arrived at is \$259,181.40.

#### Re James

##### General damages

The injuries disclosed in the Medical Report Exhibit 4 are as follows:

1. Crush injury to the left hand.
2. Skin loss over almost the entire dorsum of the left hand.
3. Amputation of the left middle finger.

His total permanent disability is fixed at 10% of the left hand.

Both sides have referred me to the following cases:

1. Wayne Griffith v Detective. Duncan and The Attorney General at page 283 of Khan's Vol. 3.
2. Keith Rose v Rogers Concrete Block Works Ltd. At page 293 of Harrison's Assessment of Damages.

Mr. McBean further referred me to these other cases:

1. Everald Slater v Adolph Sheriff at page 129 of Khan's Vol. 3.
2. Donovan Cole v Schreecy Enterprises Ltd. At page 293 of Harrison's Assessment of Damages.

The injuries which the plaintiff in the instant case has sustained are not identical to any of those referred to above but I do believe that the Rose case can be of some help. In that case the plaintiff sustained the following injuries:

1. fracture at the base of the terminal phalanx of the right hand;
2. compound fracture of the right hand;
3. amputation of the tip of the right middle finger.

His disabilities amounted to 25% of function of the right hand for two months with a 9% final disability of the function of the right hand. On the 23<sup>rd</sup> July 1992 damages for pain and suffering were assessed in the sum of \$55,000.00. That award when updated with a consumer price index of 1468 for February 2002 amounts to \$202,001.49. I do agree with Miss Smith that the plaintiff in the instant case has sustained more serious injuries. Albeit he has not sustained a fracture of the hand the Doctor has described it as a crush injury to the hand. What makes the difference is the amputation of the middle finger as against an amputation of the tip of the middle finger in Rogers' case. There is also the added 1% disability in this case in respect of the hand. I do believe that an award of \$250,000.00 would be reasonable in all the circumstances, in respect of pain and suffering and loss of amenities.

### Special damages

There was no contest by the defendant in respect of the loss and expenses sustained by James. I would therefore make the following awards:

1. Medical expenses (Exhibit 3)	\$8,200.00
2. Loss of earnings for 14 weeks	
@ \$1,248.65 per week (Exhibit 5)	\$17,481.10
Total:	\$25,681.10

### Judgment

There shall be judgment for the plaintiffs as set out hereunder:

#### Delroy Needham

Special Damages in the sum of \$259,181.40 less 60% = \$103,672.56 with interest thereon at the rate of 6% per annum from the 29<sup>th</sup> day of July 1997, up to today.

There shall be costs to the Plaintiff Needham to be apportioned in accordance with the finding of blameworthiness of 60% on the part of Needham to be taxed if not agreed.

#### Melverton James

##### General damages

Pain and suffering and loss of amenities in the sum of \$250,000.00 less 60% = \$100,000.00. with interest thereon at the rate of 3% per annum from the 26<sup>th</sup> November 1999 up to today.

##### Special damages

A sum of \$25,681.10 less 60% = \$10,272.44 with interest thereon at the rate of 3% per annum from the 29<sup>th</sup> day of July 1997, up to today.

There shall be costs to the Plaintiff James to be apportioned in accordance with the finding of blameworthiness of 60% on the part of Needham to be taxed if not agreed.