IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. 1985/L054

BETWEEN	ALFRED KEITH LEVY		PLAINTIFF
AND	CEDAR CONSTRUCTION COMPANY LIMITED	FIRST	DEFENDANTS
AND	JAMAICA TELEPHONE COMPANY LIMITED	SECOND	DEFENDANTS

Steve Shelton & Paul Dennis instructed by Myers Fletcher & Gordon for Plaintiff.

Charles Piper & Christopher Samuda instructed by Clinton Hart & Company for first defendants.

John Vassel instructed by Dunn Cox & Orrett for second defendants.

6th, 7th, 8th, 9th February,
& 19th July, 1990

PATTERSON, J.

The plaintiff seeks to recover damages against the defendants jointly and severally for personal injuries, damage to property and consequential loss suffered as a result of an accident in the vicinity of the junction of Oxford Road and Half-Way-Tree Road when the plaintiff's motor car collided with a mound of earth placed on the roadway by the first defendants.

The plaintiff's claim is based in negligence and/or nuisance, and he alleges that at about 6:00 p.m. on the 19th October, 1984, the first defendants, acting as the servant and/or agent of the second defendants, negligently caused a mound of dark earth to be left on the said roadway without any warning signs or warning lights, and thus caused a nuisance. It was lighting up time, and the plaintiff, who was lawfully driving his motor car along Half-Way-Tree Road intending to turn unto the slip road leading to Oxford Road, did not see

the mound of earth until he had actually collided with it. His motor car was damaged and he sustained personal injuries to his neck, commonly known as a "whip lash".

The first defendants deny any act of negligence and/or nuisance. While admitting that they had placed the mound of earth on the roadway as a barrier to prevent motorists from driving their vehicles into an open manhole that they were lawfully constructing, they contend that "each evening prior to twilight two flashing signals were erected on top the mound to warn motorists of the construction site ahead", and further, "a warning sign which read in bold print "OPEN TRENCH AHEAD" was erected at the material time 35 feet north of the mound aforesaid". They aver that the collision was caused solely or alternatively contributed to by the negligence of the plaintiff.

The second defendants, in their defence deny that the first defendants were their servant or agent and say that at all material times, the first defendants were incependent contractors engaged to carry out work, the nature of which was not inherently dangerous and in which the first defendants were well known experts. They also deny negligence and say that if the plaintiff suffered injuries and loss, they were occasioned in whole or in part by the negligence of the plaintiff. However, Mr. Vassel admits that if the first defendants are adjudged negligent in the circumstances of this case, the second defendants would be liable primarily, the work being of a hazardous nature. The second defendants therefore claim to be indemnified by the first defendants, should the plaintiff's claim succeed. The first defendants

did not resist the claim.

On the issue of liability, the plaintiff's evidence is that at about 6:00 p.m. on the 19th October, 1984, he was driving his chevrolet motor car in a southerly direction along Half-Way-Tree Road in the parish of St. Andrew. It had rained heavily all afternoon, and it was still drizzling slightly. The road surface was wet and it was very cloudy and overcast and "very dark". His car's headlamps were burning on the low beam and the headlamps of other vehicles using the said road were all burning. He intended to turn in the slip road leading from Half-Way-Tree Road to Oxford Road. Half-Way-Tree Road carries two lanes of traffic going south, and he was travelling at about 15 - 20 m.p.h. in the outer left lane up to a distance of about one chain from the entrance to the slip road, and then he shifted to the inner left lane unimpeded. While in the outer left lane, vehicles were ahead of him, but when he went into the inner left lane, no vehicle was ahead then. As he travelled south on Half-Way-Tree Road, he did not see any sign or lights or anything else to indicate that work was being done on that section of the road. Just as he got to the entrance of the slip road, his car "ran into something" that he did not know what it was then. He was jerked forward and fell to the floor of the car below the steering. On alighting from the car, he realised that it was in a mound of earth, about 4 feet high. This mound of earth had a "slatish colour" about the same colour of the road surface. The car stuck in the earth which was wet from the rainfall. At that time he did not see any workmen in the vicinity of the mound of earth. No fence or flags

or warning signals were on or in the vicinity of the mound then; no detour sign or any distinguishing mark to alert users of the road of the hazard.

A police vehicle came by, and the plaintiff says he stopped it. The police tried unsuccessfully to remove the car from the mound, and it was not until sometime after that another vehicle arrived and successfully removed and towed it away. The mound of earth extended across the entire "mouth" of the slip road, being higher in the middle than at the ends.

The plaintiff says that before he left the scene to seek medical attention he saw a man putting lights on the mound and in other areas where it would show that work was being done. He spoke with that man, but was abused by him. He had used Half-Way-Tree Road going south on the 17th and 18th October, but he could not recall using Oxford Road on those days, nor could he recall seeing any obstruction in the left lane on those days.

The plaintiff denies that the mound of earth was in the left lane on Half-Way-Tree Road and not at the entrance to the slip road. He further denies that the material time was about 5:40 p.m. and that there was no need for light. He says there was street light on a pole in the vicinity of the mound, but the light was very high and bright.

Corporal Gifford Williams says that at about 6:15 p.m. he was driving a police vehicle along Half-Way-Tree Road going towards Cross Roads, when on reaching "the mouth of the intersection" of the slip road leading to

Oxford Road from Half-Way-Tree Road, he observed the plaintiff's car on a mound of sand that was blocking the entrance to the slip road. He says that the road was wet and it was raining and dark. His vehicle and others on the road had headlamps burning. He spoke to the plaintiff and tried without success to pull the plaintiff's car from the mound of sand. He saw that construction work was in progress, and he saw persons putting up lights in front of the mound of sand "towards the New Kingston direction" about 4 - 5 minutes after he was on the scene. He says the mound of sand had the same colour as the road surface. He had been travelling in the extreme left hand lane for about 5 - 6 chains before coming upon the plaintiff's car, and he did not see any signs to warn him of the construction work or of the blockage of the slip road entrance.

The first defendants called two witnesses, the first being its managing director, Barrington DeLano Richards, a civil engineer. His evidence is that at the relevant time construction work was in progress in the extreme left lane of Half-Way-Tree Road in the vicinity of the slip road leading to Oxford Road. The first defendants had entered into a contract with the second defendants to construct a manhole, and the work had commenced on Monday the 15th October, 1984, five days before the accident occurred. That morning a warning sign was put in place 75' to 80' north of the excavation along Half-Way-Tree Road, and a mound of earth was used to form a barrier across the left hand lane about 50' north of the work area. Safety measures were put in

place so that traffic could flow properly. The sign on Half-Way-Tree Road was approximately 18" x 18", placed on a wooden stand, the total height being about 3' 6" from the ground with the words "OPEN TRENCH AHEAD" painted in red letters on a white background,and it was placed 30' - 35' north of the mound. He says he visited the site on a daily basis and he was satisfied that the safety precautions were in place. The sign was always there in the left lane 7' to 8' from the curb wall. He says that "as an engineering matter, proper barriers and warning lights for nights and flagmen by day, provided they are adequately placed, would be sufficient to secure the safety of the public. The establishment of earth barriers and wooden barriers are usual steps taken to secure the safety of the public when work of the nature described is taking place on a road." The sign was a moveable one and it was the only warning before the mound of earth in the left lane from half-Way-Tree. He says he considers a mound of earth across a roadway as hazardous to motorists if not lit at nights, and that it would pose some hazard in daytime when it is raining and overcast. He provided lamps to be put up at nights because of the hazard, but if the lamps were not lit, it would be more hazardous. He admits that any work being done on Half-Way-Tree Road would pose a risk to traffic.

The other witness John Gibbs, says that he was the supervisor employed by the first defendants to carry out the work on the site. He supports the evidence of the other witness for the first defendants, as to the placement of the portable sign and the mound of earth. He says it was his responsibility to see that all safety measures were in place. He was on site daily from 8:00 a.m.

to 5:00 p.m. or later at times, and that was so on the 19th October. On that day, he and the watchman Mr. Lovelace, left Half-Way-Tree Road at about 5:15 p.m. and went to the site shed on Carlton Avenue to prepare and collect the lamps which were to be placed as warning lights. It was not drizzling nor was it raining or overcast then; it was a bright afternoon with the sun going down. It had rained earlier in the day between 12 noon and 1:15 p.m. They returned to the site at about 5:45 p.m., only to see the plaintiff's motor car on the mound of earth. He says he asked the plaintiff what he was doing on the mound of earth and the plaintiff in turn asked who was the contractor and said he was going to sue.
The witness continued:-

"I pointed out to him the sign 35' away from the mound and that the vehicles that were passing did not have park lamps or headlamps. That implied that it was not dark - no further conversation." When cross-examined, he says that he had a heated argument with the plaintiff for about 4 - 5 minutes and then he put the lamps in place and left.

The witness admits that in October, it is getting dark by 6:00 p.m., but says that when he returned with the lamps it was not dark nor was it getting dark. He left the site about 6:15 p.m. and it was getting dark then. He did not see a policeman assisting the plaintiff to get the car off the mound. He says the sign was placed almost in the middle of the left lane and he saw it there after seeing the car on the mound, some 20 feet from the car.

The second defendants called a consulting civil engineer who was actively engaged in the planning and the

implementation of the work on Half-Way-Tree Road. He says that he visited the site from time to time to inspect the work and to ensure that the contractor was conforming to the terms of the contract, including the safety procedures. He says there was a mound of earth some 70' north of the manhole and extending 12' across the road from the eastern curb of Half-Way-Tree Road to block the left hand lane to vehicles which were going south "and may have missed the warning sign 20' - 30' north of the mound". The mound did not block off the slip road from side to side - traffic was able to use the slip road. However, because the width of the excavation took up the inner left lane of Half-Way-Tree Road, which would be the lane that vehicles intending to go along the slip road would use, it meant that in order to get on the slip road, one would have to turn from the outer lane exercising caution and driving slowly. There was no barrier between the sign and the mound of earth. He did not know about the accident when it happened.

A live issue in this case is where the mound actually was. Was it blocking off the slip road as the plaintiff said or was it on the Half-Way-Tree Road blocking the extreme left lane, as the defendants contend? It is fair to say that the plaintiff's case is that the mound blocked the "mouth" of the slip road. By this I understand the plaintiff to be saying that the entrance to the slip road was blocked off to traffic. That was the impression that he got when he ran into the mound, because he had entered the extreme left lane with the intention of using the slip road to get onto Oxford Road. The second defendants have made the picture quite clear to me. Ordinarily, to get to the slip road, motorist travelling south on Half-Way-Tree

Road would use the extreme left lane, and so the mound was placed in that left lane at a point which I consider to be the approach to the slip road. It successfully blocked the path of vehicles travelling in the extreme left lane from entering the slip road. However one could get into the slip road, by using the outer left lane and then turning across a path south of the excavation which had been prepared across the southern island to accommodate traffic. The "entrance" or "mouth" or "approach" to the slip road is not well defined and it is difficult to say where the slip road commences on its northern side along Half-Way-Tree Road. The witness for the second and third defendants says the approach to the slip road commenced north of the manhole. Consequently, I do not find that there is any appreciable difference between the evidence of the plaintiff and that of the defendants on this issue. Mr. Vassel submits that this issue is important to the question of the burden of proof. He says that if the Court finds against the plaintiff on this question of where the earth was and so where the accident happened, then the Court would be in such doubt on the substantive issue as to liability, that it ought to say that the plaintiff has failed to discharge his burden of proof. He referred to the case of Rhesa Shipping Company S.A. v. Edmunds and Another - The Popi M "[1985] 2 ALL ER 712, but I do not find that case helpful having regard to my findings of fact. The plaintiff has discharged the burden of proof placed on him by showing on a balance of probabilities, that the accident occurred as a result of the hazard created by the first defendant in placing

the mound of earth on the public roadway. In my judgment, it is of no great moment whether the mound of earth was totally in the left lane of Half-Way-Tree Road as the second defendants contend or at the "mouth" of the slip road leading off Half-Way-Tree Road into Oxford Road as the plaintiff says. It is not an issue that goes to the root of the plaintiff's case, and in my view, it does not affect the plaintiff's burden of proof on the substantive issue of liability.

The plaintiff is not contending that the defendants are in contravention of any statute or code in carrying out the works on the roadway. What the plaintiff is saying and what I find to be proved is that by placing the mound of earth in the roadway, the defendants created a dangerous obstruction on the public roadway and so they were under a duty to take such steps as would give the users of the roadway reasonable and adequate warning of the obstruction, so long as it remained there. They must take reasonable care to prevent danger to the public from the hazard created by them. The duty to take such reasonable care may be discharged by placing warning signs that are clearly visible at a reasonable distance from the obstruction, and such signs should include danger lights during the hours of darkness which are adequate in the circumstances. The obstruction itself should be clearly identified during the hours of darkness by adequate lights.

I find as a fact that the accident occurred in the manner stated by the plaintiff. In particular, I find that at the material time there was no warning sign placed in the roadway, as the defendants contend. I also

find that it was lighting up time, and that no lights were placed on the mound of earth. I accept the evidence that the colour of the earth was similar to the colour of the roadway, and for that reason, it was difficult for a motorist to see it in the dark. It seems to me that in the particular circumstances of this case, a prudent contractor would have taken steps to place such signs and/or railings with adequate lights, as would have been sufficient to funnel traffic going south along Half-Way-Tree Road from the extreme left lane into the outer left lane, commencing some reasonable distance before coming to the mound of earth and continuing beyond the mound and the excavation. The uncontroverted evidence is that the road was wide enough to accommodate two lanes of traffic going south and another two lanes going north.

The plaintiff's claim is in "negligence and/or nuisance", and perhaps it is best that the differences between cases of negligence and cases of nuisance be identified. In Jacobs v. London County Council [1950] 1 All ER 727, it was pointed out:

> "(1) that negligence is not necessarily an element in nuisance, and
>
> (2) that, where the nuisance in respect of which a private person sues is a 'public nuisance', he has no personal right of action unless he can prove special damage beyond that suffered by other members of the public."

In Winfield's textbook on the Law of Tort, nuisance is defined as "the unlawful interference with a person's use or enjoyment of land, or some right over or in connection

with it." It seems to me that when a person obstructs the highway (e.g. by placing a mound of earth on it) he must be aware or ought to foresee that it is likely to create danger to persons using the highway. What he creates is a public nuisance. Where damage is caused to a private person, as a result of such an obstruction, then, the injured party may maintain an action in nuisance, as distinct from any action that he may have in negligence.

In the instant case, I find as a fact that the first-named defendants created a very dangerous obstruction by placing the mound of earth on the roadway as they did, without maintaining proper warning signs and adequate lighting at a time when it was dark, taking into account the similarity in colour of the mound of earth and the roadway. Such a dangerous obstruction constituted a nuisance on the highway. The defendants were under a duty to ensure that adequate warning of the dangerous obstruction was at all times kept in place, and it was foreseable that if they failed so to do, it was likely to cause serious damage to users of the roadway. Their failure in this regard will render them liable in negligence.

The plaintiff's evidence is that he did not see any warning sign that night, and I accept his evidence. I find that the warning sign which the first defendants say was placed in the roadway at the time the obstruction was created, was not in place at the relevant time. This is borne out by the evidence of the policeman who says he travelled in the extreme left lane for some distance before coming to the mound and he did not see any warning sign. I accept the evidence that the warning sign had been originally placed at the point where the

first defendants say it was. However, in my judgment, the first defendants were under a legal duty to maintain the warning sign in such a position that it could be readily seen by users of the roadway, and that they had failed to do so. Mr. Richards, the first defendants' managing director, says that he saw the warning sign in place when he visited the site on the morning of the 19th October, and that he provided warning lamps for use at nights, but there is no evidence to show that any inspection was done during the course of the day to ensure that the warning sign, which was a moveable one, remained in place. I do not accept John Gibbs as a witness of truth and I reject his evidence that at the time of the accident it was still daylight, and that he pointed out the warning sign to the plaintiff and also that vehicles were travelling along without any kind of light burning.

Mr. Piper referred to the case of Wills v. T.F. Martin (Roof Contractors) Limited [1972] RTR 368. In that case, a builder's skip had been deposited by the defendants close to the kerb on a dimly lit roadway. The plaintiff was riding a moped during the hours of darkness not looking where he was going and he collided with the skip. He brought an action in negligence and in nuisance. Forbes J., sitting in the Queen's Bench Division of the High Court in England concluded that:-

> "put it in negligence or put it in nuisance the sole cause of this accident was the failure by the plaintiff to look where he was going."

and further in his judgment he continued:-

> "So that, if it is put in negligence, I do not think that the placing of the skip with proper lighting

> (and I am not satisfied that it was not properly lit at the time) would be negligent, and thus the plaintiff would fail on that. But even if it had been negligent, the degree of the plaintiff's contributory negligence would be so high as to relieve the defendants from liability. As for nuisance, in my view, though the existence of the skip was a nuisance, it could not be said to be the actual cause of the accident. The actual cause of the accident was the fact that the plaintiff was not looking where he was going."

Although the plaintiff in the instant case says that he did not see the mound of earth before colliding with it, the facts are easily distinguishable from the Wills case cited by Mr. Piper. I find that the accident took place in the hours of darkness, that there was no warning sign displayed, and that the mound of earth was unlit and difficult to be seen against the background of the road surface. I am of the view that those conditions contributed in some way to the plaintiff's failure to see the mound of earth before colliding with it. Nevertheless, having regard to his evidence that there was a street light burning beyond the mound, that other vehicles travelling in both directions had on lights and that his vehicle also had on its light in a dipped position, I would have expected the plaintiff to have seen the mound of earth before colliding with it. He may not have been able to avoid the collision, having regard to the weather conditions, but had he seen it, he could have braked and thus lessened the impact and damage. For this reason I find that he was not keeping a proper lookout. But that in my view, is not fatal to his claim in nuisance or in negligence. It is

trite law that in a claim for damages based on negligence as well as in nuisance, the defendant may set up and rely on a defence of contributory negligence, and in this case the defendants have so pleaded. Taking into account all the existing circumstances that evening as I have already outlined, I find that although the existence of the nuisance and the negligence of the first [illegible] defendants caused the accident, the plaintiff is nevertheless not blameless, in that he failed to keep a proper lookout. I accordingly apportion the blameworthiness of the plaintiff to be 30%, and I consider it just and equitable that any amount of damages awarded him should be reduced accordingly.

I come now to the question of special damages. The plaintiff's motor car, a 1972 model Chevy Nova, suffered damage to its front and back as a result of the collision with the mound of earth and then efforts to remove it therefrom. The estimated costs of repairs, prepared by Burlington Car Body Limited, is $4,181.00. This is proved by the plaintiff, and I will allow it.

The next item of special damages claimed by the plaintiff is for "transportation costs for hireage of car and driver 27th October, 1984 to 30th November, 1984 - five weeks @ $800 per week - $4,000.00".

The plaintiff used his motor car for transportation to and from work and for social purposes. The repairs to the car took about five weeks, and the plaintiff hired a car and a driver for five weeks at a cost of $800.00 per week. This is borne out by the evidence

of Orrett Hart who made the car and driver available for the use of the plaintiff from the 26th October. I accept the evidence and allow the amount claimed, $4,000.00

After the accident and up to the 26th October, the plaintiff says he travelled by taxi to get to the doctor and to work at a cost of $80.00 and I will allow this amount. He says he paid the hospital bill of $125 and a further $76.00 for medication on the night of the accident. Thereafter he visited Dr. Dundas and paid $520 for medical expenses, $75.00 for medical report, $155 for Xray, and $80 for a cervical collar, and I will allow those amounts. So far, the special damages amount to $9,292.00, which amount the defendants have not contested.

The next item of special damages claimed is for "Loss of earnings 3 years 8 months at $130,000.00 per annum - $475,000"; it relates to the period November, 1985 to June, 1989. This claim is contested. It did not form a part of the original pleadings, but was added as item "1X" to the particulars of special damages as an amendment on the 12th June, 1989.

The plaintiff's evidence is that he sustained injuries to his neck which necessitated medication and the fitting of a cervical collar on the 20th October. He wore the cervical collar for 3 months. He was suffering from a compression fracture of the fifth cervical vertebra.

The report of Dr. Dundas which is dated January 24, 1985, reads as follows:-

"I saw this patient initially on the 19th October, 1984. He had been involved in a road traffic accident on the 19th October 1984, and subsequently developed pain in his neck. He had no neurological deficit in terms of symtomatology, and his physical examination revealed spasm in the neck, with restriction of movement but no neurovascular deficit. X-Rays indicated that he had a wedge fracture of his cervical vertebra (5th). He was put in a cervical collar with a chin piece, in order to alleviate his symtoms. Analgestics were also prescribed. After about seven weeks, he was taken out of his collar, and a temporary foam collar was then applied. His symtoms have improved considerably.

This type of fracture is often associated with subsequent degenerative disease in the cervical spine. This may be associated with pain, and neurological problems subsequently."

The latest medical report on the plaintiff is dated 24th April, 1989, and it reads as follow:

"I last reported on this gentleman in 1985, January. He came back to see me in the latter part of 1985, in February of 1987, and again in April of 1989. During this time he has been having recurrent episodes of pain in the neck with restriction of movement and discomfort in the upper limbs.

At my last review on the 24th April, he was complaining of a severe pain in neck with marked restriction of cervical movements. He had difficulty looking behind to reverse his car. He has been continuing the use of home traction.

> Examination revealed a marked restriction of cervical rotation, virtually 0 extension and mild restriction of forward flexion. Lateral flexion was also markedly restricted. In the periphery he had normal reflexes and power and the neurological sensitivity which was detected in 1987 was not evident
>
> X-Rays indicate that he had old disc degeneration between C5/C6 with narrowing of the foramina. Using the American Medical Association Guides for the evaluation of permanent impairment, this amounts to 12 percent of the whole man."

The plaintiff contends that at the time of the accident he suffered superficial bruises to his left knee, and that the pain he suffered in the neck increased with the passage of time. He could not move his arm easily. He went to work on the 20th October, and attempted to work, but he could not and so he returned home. He was then the Managing Director of A. Keith Levy Limited, trading as A.K. appliance, a business he had established and built since 1971. His business involved the sale of all sorts of appliances. There were three other employees, and after the accident, he employed someone in a managerial position. He would nevertheless step in to see what was going on. After the 5 week period, he said he was still unable to go to work full time. He would go for "half day - two hours and then go home". He says he found that when he sat or stayed in one position for too long, his neck would commence aching. He could not lift anything or do anything strenuous.

For sometime before the accident, his business had not been "doing well", and so the plaintiff decided to sell out and migrate to Florida, U.S.A., "in pursuit of a better standard of living." The business was sold in June, 1985 and the plaintiff went to Florida, U.S.A. at the beginning of August that same year. He gained employment as a salesman with Kaufman and Roberts, a chain of stores that retailed appliances. It is interesting to note the duties of the plaintiff whilst he was so employed. He had to sweep the floor, dust off merchandise, unload trailer trucks of goods, pack goods in the warehouse, in addition to selling behind the counter. His working hours were 10:00 a.m. to 6:00 p.m., but occasionally he had to work to 9:30 p.m. He was paid on a "Commission basis", but if in any fortnight period, his commission fell below $280.00, then he would be paid that amount which was the minimum wage for that period. He commenced working with Kaufman & Roberts the very month that he went to Florida, and as a side-line, he made deliveries on behalf of persons who purchased goods at the store he worked. Those deliveries were made out of working hours; in the mornings, at lunch time and after work in the evenings, with the use of a station waggon. The things delivered were usually weighty items that the customers could not transport, e.g., television sets, air conditioners and any other appliance that could fit in a station waggon.

The plaintiff continued in the employment of Kaufman & Roberts up to the 5th November, 1985. He says he could still manage the sales, but not the lifting

of the heavy items. His neck had started "to give problems again", and it affected his hands more so. He was forced to seek medical attention, and after that he was not able to continue working on the job in the U.S.A. The doctor gave him certain advice, which affected him in what he did on the job market thereafter. He was unable to find any suitable employment. He said "at my age, it is difficult to find work in Florida." He is now 64 years old. The plaintiff remained in Florida up to February 1987 and then returned home. He has not sought employment in Jamaica since his return except that he assists "in looking after ex-servicemen from Curphy Place." He is not paid a salary, but he enjoys certain privileges such as meals and the use of a motor car. He says he is not able to work at a full-time job. He cannot continue to work for a full day without resting, his neck gives him problems if he does. The movement of his neck is restricted and it hurts. It affects his driving when he has to reverse and on a long journey he has to use the cervical collar or his neck would hurt terribly. The pain he says worsens with his age. He is still on medication.

The defendants pointed out that the claim for past loss of earnings relates to the period commencing November, 1985, after the plaintiff ceased working in Florida. The writ and statement of claim were filed in February, 1985, and it was not until 12th June, 1989 that the statement of claim was amended to include this particular heading of loss of earnings for 3 years and 8 months, that is from November, 1985 to June, 1989.

It is true to say that the plaintiff did not make a claim for loss of earnings at the time when the statement of claim was filed. However, the evidence establishes that at that time, the plaintiff was still managing his business, although he was not able to be there for each entire day. As already stated his business was on the decline, and it may well be that any loss of earnings suffered over that period could be attributed if not wholly then in part to the decline in business rather than to his injury. When the business eventually folded, the plaintiff migrated to Florida and sought employment of a nature that was much more strenuous than what he had been accustomed to. It may well have been that in his new environs he was unable to obtained employment similar to what he enjoyed in Jamaica, but what is certain is that the injury he suffered had nothing to do with his choice of job in Florida. Having regard to his age, I am of the view that he took the kind of job that was available to him. But the job of a salesman in Florida involves more than it does in Jamaica, and is of a much more strenuous nature. As he said, at his age it is difficult to find work in Florida. That being the case, can it really be said that his injury was the cause of or contributed to his loss of earnings? I do not find that the injury to the neck in any way curtailed the plaintiff's ability to work - the evidence does not support such a finding. The injury did not affect him in his job as a salesman simpliciter. I do not find that the neck injury was the direct or proximate cause why the plaintiff gave up his job in Florida. I find that he

had taken unto himself a job that he was quite unaccustomed to do, and which proved to be more than he could manage at his age, and that is the true reason for his leaving the job at Kaufman & Roberts.

The claim for past loss of earnings runs from the time the plaintiff left his job, and I will examine his physical condition from that time. The plaintiff's evidence is that at that time his neck had started to give problems again and it affected his hands more so. He could not continue working for a complete day without resting, for then his neck hurts and his movements were restricted. The consultant orthopaedic surgeon who examined the plaintiff on the 24th January, 1985 does not support the plaintiff's evidence. He expressed the view that the fracture that the plaintiff suffered "is often associated with subsequent degenerative disease in the cervical spine. This may be associated with pain, and neurological problems subsequently." I did not have the benefit of the surgeon's viva voce evidence to explain the views expressed by him, and there was no evidence of the development of any neurological condition. However, in the report dated 24th April, 1989, the surgeon says that "the neurological sensitivity which was detected in 1987 was not evident." There is no evidence that the injury rendered the plaintiff unable to work. The plaintiff's inability to find work in Florida after leaving Kaufman & Roberts seems to have stemmed from his age and not to his physical condition due to the injury. The plaintiff admitted under cross-

examination that he tried to get employment in Florida right up to the time that he returned to Jamaica in February, 1987, but was unsuccessful. He applied, in most instances, for an appliances salesman job. His hands were swollen at the time he left the job at Kaufman & Roberts , but with treatment, they "went down" in about six weeks. The plaintiff's evidence in this regard clearly establishes that his neck injury would not have prevented him from working, if work was available. On his return to Jamaica, the plaintiff did not seek gainful employment, nor did he resume doing business of any kind. He says he had developed a wide experience of business, having worked with N.A. Taylor Limited as Manager in a haberdashery store, then as salesman for Wills Battery Company, an appliances company, and finally, in his own appliances business since 1971. Nevertheless, all he has done since his return to Jamaica is to assist in looking after ex-servicemen from Curphy Place, a job that does not carry a salary.

The defendants have submitted that the evidence clearly shows that the plaintiff has failed to take mitigating steps which he ought reasonably to have taken in the circumstances. They argue that there is no evidence, medical or otherwise which supports the plaintiff's claim based on his inability to work. The plaintiff has not sought employment that would not involve lifting of weights or frequent movements of his neck. In the event, they ask that no award be made in respect of the plaintiff's claim for loss of earnings

It seems to me that the onus is on the plaintiff to prove that his loss of earnings was a direct or

proximate result of the wrong done to him by the defendants if he is to recover this item of his claim, and that he has failed so to do. I am satisfied on a balance of probabilities, that the injury to his neck has not prevented the plaintiff from obtaining employment or from engaging in some form of employment, be it his own business or otherwise. Consequently, the plaintiff is not entitled to any damages for loss of earnings as claimed, or for future loss.

I come now to the general damages. I have referred to the medical evidence earlier, and I accept the evidence that the plaintiff has suffered pain in the neck over the years as a direct result of the injury. He suffers from a marked restriction of cervical rotation. His permanent impairment amounts to 12 percent of the whole man - complete relief from his pain and suffering seems quite remote and he will probably suffer for the rest of his life. The plaintiff's uncontroverted evidence is that he was the captain of the Jamaica Darts Team at the time of the accident. He said he played darts then, but apparently not now due to his injury. He cannot now drive long distances unless he wears the cervical collar which relieves the pain he would suffer otherwise. This would undoubtedly create some amount of discomfort. He is not able to reverse his car properly, because of the restriction in movement of his neck. Mr. Vassel concedes that with 12% permanent disability, the plaintiff may be handicapped in the labour market, and that he ought to be compensated for such handicap. I have

taken into account the awards made in cases of a similar nature to which I was referred. All things considered, I will award the global sum of $110,000.00 for pain and suffering and loss of amenities.

The second defendants claim to be indemnified by the first defendants against the plaintiff's claim, if same is made out, and the costs of this action, and the first defendants have not resisted that claim. The Court is of the view that both defendants are primarily liable to the plaintiff in the circumstances of this case, and will grant the indemnity claimed by the second defendants.

Accordingly, there will be judgment for the plaintiff against both defendants in the sum of $110,000.00 general damages with interest thereon at 3% per annum (from the date of the service of the writ) until today, and $9,292.00 special damages with interest thereon at 3% per annum from the 19th October, 1984 until today. Such damages awarded to be reduced by 30%. There will be Costs to the plaintiff to be agreed or taxed. Court orders that the first defendants indemnify the second defendants against the damages and costs awarded the plaintiff herein.