JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 26/86

BEFORE: The Hon. Mr. Justice Campbell, J.A.
The Hon. Mr. Justice Forte, J.A.
The Hon. Miss Justice Morgan, J.A.

BETWEEN	ARNOLD WHITE	PLAINTIFF/APPELLANT
AND	MERLE CRAWFORD	DEFENDANT/RESPONDENT

W.B. Frankson, Q.C. & Dr. Bernard Marshall for Appellant

Norman Davis for Respondent

April 4, 5 & June 25, 1990

CAMPBELL, J.A.:

The appellant by writ dated March 21, 1983 claimed damages in negligence arising out of a motor vehicle accident which occurred in the vicinity of Kingsland on the Mandeville Santa Cruz main road on December 11, 1982 between his minibus travelling towards Mandeville and the respondent's motor car travelling in the opposite direction. The main particulars of negligence alleged were:

(a) Driving at too fast a rate of speed having regard to all the circumstances;

(b) driving on or on to the wrong or improper side of road;

(c) driving at or into the plaintiff's said minibus.

He claimed as special damages inter alia the value of the minibus on a total loss basis less salvage amounting to $9,000.00 and loss of use of the minibus for 42 days at $350.00 per day amounting to $14,700.00.

The respondent in her defence denied the negligence and the particulars thereof and pleaded that the accident was caused solely by the negligence of the plaintiff, alternatively that he contributed to the accident. The pertinent particulars of negligence averred by her were -

(a) Attempting to negotiate a corner at too fast a speed in the circumstances;

(b) driving on to the incorrect side of the road while negotiating a corner and at a time when it was unsafe to do so.

She counterclaimed damages for total loss of vehicle amounting to $5,200.00 and for loss of use and loss of earnings totalling $2,400.00.

In this state of the pleadings the appellant to succeed had to adduce credible evidence to satisfy the tribunal of fact on a balance of probabilities that the respondent was driving too fast in the circumstances and that more importantly she was driving on her wrong side of the road and by so doing she drove into the appellant's minibus which was being driven on its correct side of the road.

The matter was heard by Marsh J., on April 14, 1988 on which date he adjudged the appellant two thirds to blame and accordingly gave judgment for him on that basis. The respondent was represented at the trial but was not personally present to pursue her counterclaim which was accordingly dismissed.

The appellant appeals and seeks an order -

(a) That the judgment entered herein for the plaintiff with the liability of contributory negligence be set aside;

(b) that judgment be entered for the plaintiff against the Defendant in such sum as the Honourable Court deems just;

(c) alternatively, that there be a new trial in this cause;

(d) that the costs of this appeal and the costs of the trial to be taxed or agreed, be paid by the Defendant/Respondent.

The grounds of appeal are that -

(1) The learned trial judge in evaluating the evidence in the case, and the facts and inferences to be drawn therefrom, erred in principle and took into consideration extraneous and irrelevant matters, speculation and conjecture in arriving at his conclusion.

(2) There was no evidence or facts and inferences therefrom to enable the learned trial judge to come to the conclusion that the Plaintiff/ Appellant was guilty of contributory negligence and such finding was contrary to law and resulted in a grave injustice to the Plaintiff.

(3) The learned trial judge erred in holding that the loss of use for 6 weeks claimed by the Plaintiff was excessive and erred in deducting 33 1/3 of the Plaintiff's said claim which he did for Income Tax.

The respondent by a respondent's notice seeks an order "that the judgment be varied to substitute a judgment for the defendant on the plaintiff's claim with costs to the defendant to be taxed if not agreed."

The grounds on which this variation is sought are that -

(1) On the basis of the evidence of the Plaintiff the learned trial judge correctly found that the Plaintiff's vehicle intruded into the Defendant's side of the road and driving path and having so found, the learned trial judge ought to have found that this was the sole operative cause of the collision;

(2) There were material discrepancies/ inconsistencies in respect of the testimony of the Plaintiff and his witness, Michael White, and these were such as to render the Plaintiff's case unreliable and to provide a basis for the learned trial judge to reject the testimony of both witnesses.

(3) A material aspect of the Plaintiff's case, namely that the Defendant was overtaking another vehicle, was not pleaded and there was no application to amend the pleadings to insert the allegation, despite the fact that the Plaintiff sought to rely on this at trial.

The appellant's evidence-in-chief before Marsh J., on April 14, 1986 was that he was travelling to Mandeville on December 11, 1982. In the vicinity of Kingsland between mileposts 51 and 52 he negotiated a right hand bend in the road at 25 m.p.h. As he came around the bend he saw two cars namely a Hillman on its correct side of the road and a Capri in his lane. He braked suddenly but notwithstanding, the Capri came and collided in the right side of his bus. The front wheel of the bus was torn off, the axle fell onto the road, the whole right front of the bus was a complete wreck. He said there was excavation on his side of the road "so I was restricted to about 2 feet from white line."

Under cross-examination he admitted that he was a driver for 30 odd years but on minibuses for 14 years (since 1974). He was on his regular route and he was aware that the excavation had been going on for months. He said he never crossed the white line. He always negotiates the corner on his correct side of the road. The bus stopped at the collision point on his side of the white line.

He was asked how wide his bus was. He answered that he could not say but maybe it was about 6 feet.

The undermentioned extract from the record speaks as to what may be inferred as the questions asked and or suggestions made -

> "p. 13 - Don't know how wide was the excavation. How much of road did it take up? I never measured it - I don't know. Yes - There was white line in road. Excavation was going on for months. I never crossed white line - always negotiate corner on my side of road.
>
> Capri was in my lane and ended up on embankment on my right side of road.
> Capri was making to overtake the Hillman.
> It was a wide stretch of road.
> I don't know what happened to the Hillman.
> Not true Capri was not overtaking.
> Bus stopped at collision point on my side of white line.
> My measurements are by assumption.
>
> Trench 4' - 5' wide
>
> Road about 18' wide
>
> At collision Hillman had gone - Capri was not beside it."

The plaintiff called a witness whom the learned trial judge stated explicitly that he was not relying on, hence there is no need to refer to his evidence.

At the close of the appellant's case the following facts given in evidence by him do not on the record appear to have been challenged either by cross-examination or by suggestion to the contrary namely -

(a) that the appellant was at the time travelling at 25 m.p.h.

(b) that there was a Hillman motor car which was travelling on its proper side of the road;

(c) that the Capri when first seen was about 6 feet behind the Hillman but in the appellant's lane;

(d) that the respondent had intruded on to his the appellant's side of the road.

The learned trial judge in adjudging that the appellant was two thirds to blame for the collision based his decision firstly on a finding of fact on which there was no evidence namely that the appellant was driving in excess of 25-30 m.p.h. and was going downhill; secondly on a finding of fact which was not the basis of the appellant's assertion of negligence namely that a second car meaning the Hillman was being overtaken by the respondent's Capri which caused the latter to be in the appellant's lane. The appellant's evidence in chief makes no mention of the Capri overtaking the Hillman. It was in cross-examination that the question of "overtaking" was first raised and the appellant said clearly that "Capri was making to overtake the Hillman." This could mean that the Capri had already moved from its lane into the appellant's lane from which the inference could be drawn that it was about to overtake the Hillman which was still about 6 feet in front of it. The further statement under cross-examination recorded as "not true Capri was not overtaking" is therefore ambiguous, which ambiguity may have arisen from the manner in which the suggestion was made. It ought not therefore to be construed that the appellant was now saying something completely different from his first answer which consequently required him to plead "overtaking" in the particulars of negligence. Thirdly the decision is based on an inference drawn from estimates of measurement of the width of the excavation in the roadway on the appellant's side of the road and of the width of the roadway which the appellant expressly stated were "by assumption" because he did not measure the excavation or the roadway and so in effect what he was saying was really that he was hazarding guesses.

Watt v. Thomas (1947) 1 All E.R. 582 (H.L.) establishes the principle that on questions of fact the greatest weight should be given to the findings of the trial judge because he saw and heard the witnesses and that his judgment should not be disturbed unless it is plainly unsound. However, it is equally established that this principle holds good only where there is no suggestion that the trial judge has misdirected himself in law and since a conclusion based on no evidence is a question of law an appeal court will unhesitatingly interfere in such circumstances.

In this case, the judgment of the learned trial judge rests partly on a conclusion for which there is absolutely no evidence. The conclusion is that the appellant was driving in excess of 25-30 m.p.h. and was going downhill from which it is to be inferred that he was driving at "too fast a speed in the circumstances." This is exactly what the respondent pleaded and would have had to prove of which however there is no proof. This court is therefore entitled to interfere.

On two other grounds this court is entitled to interfere because firstly, the judgment is plainly unsound in so far as it rests on a case which was neither projected by the appellant in his pleading nor in his evidence namely that the accident occurred when the respondent was overtaking another motor vehicle. Secondly, it rests on the acceptance of the appellant as a credible witness in relation to the measurements given by him and apparently inconsistently on not accepting him on the more reliable evidence given by him in relation to which he had knowledge, did not have to resort to guessing, and was not derailed in cross-examination.

The first ground of the Respondent's notice seeking an order that, based on the learned trial judge's findings, judgment be entered for the defendant is predicated on the

learned trial judge's findings, as stated in the ground, being well founded on evidence. The opinion expressed above shows that this is not so. Thus the substratum of the first ground in the notice collapses and the said ground must necessarily fail. The second ground deals with discrepancies/inconsistencies in respect of the testimony of the appellant and his witness Michael White such that the appellant ought to have been considered unreliable and his evidence rejected resulting in judgment for the respondent. The short answer to this is that the learned trial judge having seen and heard both witnesses rejected the appellant's witness as not being a credible witness but accepted the appellant as credible. The fact that the learned trial judge did not accept the testimony of the appellant that the collision took place on his side of the road does not imply that he rejected him as a credible witness. Apparently, this part of his testimony was considered less reliable than the other part dealing with measurements, solely because the learned trial judge made erroneous findings against him as earlier stated, and also erroneously believed that the evidence given by him as to measurements which were guesses explicitly stated by the appellant to be "assumption" were more to be relied on than the other parts of his evidence which were not based on guesses but on knowledge. There is therefore no merit in this ground.

The third ground in the notice is not well founded. As earlier stated the appellant did not rely for the success of his case on negligence constituted by the respondent overtaking another vehicle.

The appellant's first two grounds of appeal are fully justified. The judgment, for the reasons stated above, cannot stand. The only question is whether judgment should be

entered by us for the appellant or a new trial ordered.

In my view the learned trial judge would inevitably have concluded that the appellant had established his case on the evidence led by him once he had found him a credible witness and had not fallen into the errors earlier mentioned.

As regards ground 3, Mr. Frankson submits that the appellant gave evidence on the loss of use suffered by him which not having been challenged under cross-examination ought to be presumed to have been accepted by the respondent. There was thus no justification in law or on the facts for the reduction in the quantum per diem or in the time span of the loss by the learned trial judge. Before us Mr. Davis has not made any submission on this ground.

Mr. Frankson, in my opinion is clearly right. The per diem loss as claimed is not shown to be unreasonably high or at all, the time span for which the loss is claimed is not unreasonably longer than that within which another bus could reasonably be obtained to be put on the road. The loss as claimed ought not therefore to have been reduced. The ground of appeal states that the per diem claim was reduced to give effect to income tax at the rate of $33^{1}/_{3}$%. This is not so stated nor need necessarily be inferred.

I would for the reasons given herein order that the judgment of the court below be varied by substituting therefor judgment without contributory negligence for the sums awarded before deduction for contributory negligence by the learned trial judge other than that for loss of use and for the sum awarded for loss of use there is substituted the sum of $14,700.00 being $350.00 per day for 42 days. In sum I would order judgment for the appellant in the court below in the sum of $28,725.00 with costs to be taxed if not agreed together with the costs of the appeal.

FORTE, J.A.:

This is an appeal from the Judgment of **Marsh J.,** in which he found that the plaintiff/appellant was two-thirds to blame for the accident, arising out of which the appellant had sued for damages. A counterclaim filed by the respondent was not proceeded with, the respondent having failed to attend the trial, and the attorney appearing for her, opting to call no evidence on her behalf. In the end, the learned trial judge was left with the evidence of the plaintiff, and a witness called in his (the plaintiff's) support.

The facts of the case, have been outlined in the judgment of **Morgan, J.A.,** and consequently it is only necessary to mention those aspects which are relevant to my own opinion and conclusions.

In the absence of any evidence for the defendant at the trial, this appeal, through the plaintiff's grounds of appeal, and the grounds in the respondent's notice, and indeed through counsel's arguments before us raised the question of whether having regard to the evidence, the learned trial judge was correct in his conclusions. Unfortunately, the learned trial judge stated his conclusions without having given any reasons for having found as he did, and consequently has placed this court at a disadvantage in determining by what process he arrived at those conclusions. He did, however, reject the evidence of the plaintiff's witness in the following words:

> "That Plaintiff's supporting witness, Michael White, the conductor, failed to impress the Court and kept on insisting that there was no excavation on Plaintiff's side of the road because, in the Court's view, he was aware of the implications thereof. His evidence is rejected ..... ."

In doing so, he left only the evidence of the plaintiff upon which he could make any finding in the case and indeed stated explicitly as a preface to his findings that they were based "solely on the evidence tendered by plaintiff." He found as follows -

1. There was an open trench.

2. Plaintiff crossed line to avoid trench without assuring himself if road around corner of opposite side was clear.

3. Created an obstruction on his opposite side of carriage way.

4. Speed in excess of 25 - 30 m.p.h. going downhill.

5. There was no second car being overtaken by the Defendant - improbable that in a collision of this nature as described by plaintiff that second car, if it existed, would have simply left the scene without a trace. In any event, overtaking not pleaded and no application made to amend.

In the absence of reasons for these findings, this Court has to examine the evidence of the plaintiff as recorded in the Judge's notes to determine whether there were any bases for the learned judge's conclusions.

The fact that the plaintiff's testimony, though challenged by cross-examination was not contradicted by evidence adduced by the defence, does not deprive the learned trial judge of his right as an arbiter of fact to reject his evidence on the basis that he is not a credible witness. In the case of **Industrial Chemical Co (Ja) Ltd v. Owen Ellis** Privy Council No. 25/85 the judgment in which was delivered on the 17th March, 1986, Lord Oliver of Aylmerton in criticizing comments made in the judgment of this Court in respect of unchallenged evidence, had the following to say at page 46 -

> "With respect, their Lordships consider that this was a quite impermissible conclusion and on two grounds. First, it rests upon the fallacy, sometimes propounded from the Bar, that because the sworn testimony of a witness cannot be directly contradicted by that of another witness or by contemporary documents, it must necessarily be accepted as truthful by the judge regardless of his assessment of the credibility of the witness. Secondly, it seems to their Lordships directly to contravene the well-established principles upon which an appellate court has to approach the task of reviewing the trial judge's findings of fact. The question which the Court should have considered was whether there was evidence before the learned trial judge from which he could properly have reached the conclusion that he did or whether, on evidence the reliability of which it was for him to assess, he was plainly wrong."

The approach of a Court of Appeal in determining appeals against the findings of fact of a trial judge was also dealt with in the English Court of Appeal in the case of **Lorraine Patricia Miles v. Kenneth Charles Cain** (unreported) judgment - delivered on the 14th December, 1989 by the Master of the Rolls in which at page 43 the following quote from the speech of **Lord Summer** in **The SS Hontestroom** (1927) A.C. 37 at page 47 was cited -

> "What then is the real effect on the hearing in a Court of Appeal of the fact that the trial judge saw and heard the witnesses? I think it has been somewhat lost sight of. Of course, there is jurisdiction to retry the case on the shorthand note,

> "including in such retrial the appreciation of the relative values of the witnesses, for the appeal is made a rehearing by rules which have the force of statute ..... . It is not, however, a mere matter of discretion to remember and take account of this fact; it is a matter of justice and of judicial obligation. Nonetheless, not to have seen the witnesses put appellate judges in a permanent position of disadvantage as against the trial judge, and, unless it can be shown that he has failed to use or has palpably misused his advantage, the higher Court ought not to take the responsibility of reversing conclusions so arrived at, merely on the result of their own comparisons and criticisms of the witnesses and of their own view of the probablities of the case. The course of the trial and the whole substance of the judgment must be looked at, and the matter does not depend on the question whether a witness has been cross-examined to credit or has been pronounced by the judge in terms to be unworthy of it. If his estimate of the man forms any substantial part of his reasons for his judgment the trial judge's conclusions of fact should, as I understand the decisions, be let alone."

In this case, the learned trial judge, though not explicitly commenting on the credibility of the plaintiff, came to certain findings which impliedly indicates that at least on some aspects of his evidence the plaintiff was disbelieved. He, however did not dismiss the plaintiff as untruthful but apparently, preferred to determine the issues by an analysis of the content of his testimony rather than using the advantage of "seeing and hearing him." In other words, it does not appear that the learned trial judge's estimate (of the plaintiff) forms any substantial part of his reasons for his judgment. As his reasons have to be drawn inferentially from his findings it may be useful to examine them against the evidence.

1. **There was an open trench**

This finding is supported by the evidence of the plaintiff, who in the early part of his examination-in-chief testified to that fact.

2. **Plaintiff crossed line to avoid trench without assuring himself if road around corner of opposite side was clear.**

This finding was arrived at in the face of the following bits of evidence which came from the plaintiff:

(1) "Excavation on my side of the road so I was restricted to about 2 ft from white line;

(2) I never crossed white line - always negotiate corner on my side of road;

(3) Capri was in my lane and ended up on embankment on my right side of road. Capri was making to overtake the Hillman. It was a wide stretch of road. I don't know what happened to the Hillman. Not true Capri was not overtaking.

(4) Bus stopped at collision point on my side of white line."

This evidence revealed that the plaintiff maintained throughout his testimony that he was at all times driving his vehicle on his correct side of the road, and that it was the defendant who was 'trespassing' on his side, thereby causing the collision.

On what basis then did the learned trial judge find that he had 'crossed the line'? The answer appears to be as a result of the following evidence which was adduced in cross-examination of the plaintiff -

"Excavation on my side of the road.
Distance from excavation to centre of road - trench with pipes.

Can't say how wide was bus - maybe about 6 ft.
Don't know how wide was the excavation.
How much of road did it take up?

"I never measured it - I don't know.
.....
I never crossed white line - always negotiate corner on my side of road. Capri was in my lane and ended up on enbankment on my right side of road.
.....
It was a wide stretch of road."

Then follows:

"My measurements are by assumption.
Trench 4' - 5' wide
Road about 18' wide."

It is apparent, then that the learned trial judge came to this finding by a mathematical calculation of the assumed measurements given by the plaintiff e.g. 4 - 5 feet of excavation (assuming excavation commences right up unto plaintiff's left side) added to estimated width of bus - 6 ft - equals 10 - 11 ft. As the plaintiff assumed that the road was 18 ft wide, and assuming that the white line is in the middle of the road, then the bus would of necessity be one to two ft over the white line.

The learned trial judge therefore drew inferences from the 'assumed' measurements offered by the plaintiff, rather than act upon the precise evidence of the plaintiff that he was on his side of the road. This he did in circumstances where the plaintiff had previously declined to give measurements and afterwards, having been apparently pressed, made it clear before doing so that whatever measurements he offered would be by virtue of his assumptions.

In the case of **Whitehouse v.Jordon** (1981) 1 All E.R. 267 at page 286 **Lord Bridge** of **Harwich** had this to say -

> "My Lords, I recognize that this is a question of pure fact and that in the realm of fact, as the authorities repeatedly emphasise, the advantages which the judge derives from seeing and hearing the witnesses must always be respected by an appellate court. At the same time the importance of the part played by those advantages in assisting the judge to any particular conclusion of fact varies through a wide spectrum from, at one end, a straight conflict of primary fact between witnesses, where credibility is crucial and the appellate court can hardly ever interfere, to, at the other end, an inference from undisputed primary facts, where the appellate court is in just as good a position as the trial judge to make the decision."

In keeping with this dicta, it is my opinion that in the circumstances of this case, this Court can interfere with the findings of the learned trial judge.

In my view, the approach by the learned trial judge is wrong. It is obvious from the record, that the plaintiff, was reluctant to give any estimate of distances, because he considered himself not qualified to do so. In the end, being pressed he gave estimates which he clearly stated were distances which he gave by assumption. On the other hand, he had already given evidence in clear and precise terms, in respect to the position of his bus vis a vis the white line, before and at the time of the collision. The mathematical calculations based on these assumptions, and which the learned trial judge obviously used to contradict and reject the plaintiff's testimony re the position of his bus at the time of the collision is in my opinion of no weight being built on a foundation which the plaintiff clearly stated was inaccurate. I would conclude therefore that in regard to this finding there was no evidence upon which the learned trial judge could properly have reached that conclusion, and in the event his conclusion is plainly wrong.

3. Plaintiff created obstruction on his opposite side of carriage way

As the finding was based on finding No. 2 nothing further need be added in that regard.

4. Speed in excess of 25 -30 m.p.h. going downhill

The only evidence of speed, left for the consideration of the learned trial judge after his rejection of the plaintiff's witness was that given by the plaintiff, which was not challenged in cross-examination. Short of dismissing the plaintiff as completely untrustworthy, which he did not do either expressly or impliedly, there was no evidence upon which the learned trial judge could have come to this conclusion.

5. There was no second car being overtaken by the defendant

The reason given by the learned trial judge for this conclusion has no evidential base and therefore cannot be supported.

In those circumstances, in so far as liability is concerned, I would allow the appeal and enter judgment wholly for the plaintiff on the claim.

DAMAGES

I have read the judgments of **Campbell** and **Morgan JJ.A.** and agree with the reasoning and conclusions therein and consequently have nothing further to add in respect of damages.

MORGAN, J.A.:

In this action the plaintiff claimed damages against the defendant for negligently driving her motor car along the road from Mandeville to Santa Cruz thereby causing a collision with and damage to his minibus.

The defendant denied the charges and filed a counter-claim alleging that the accident was caused solely by the plaintiff.

At the date of trial the plaintiff and his witness appeared with plaintiff's counsel. The defendant did not appear but was represented by counsel. The matter proceeded before Marsh, J., who gave judgment as follows:

> "Plaintiff 2/3rds to blame.
> Judgment for Plaintiff on
> the Claim in the sum of
> $1,666 by way of General
> Damages and $4,875 by way
> of Special Damages.
> Counter claim dismissed."

The plaintiff now appeals against this judgment.

The evidence of the plaintiff in chief was short. On this day he was driving his minibus on the road to Mandeville at a speed of about 25 m.p.h. At a right hand bend, because of an excavation which he later described as a trench with pipes - on his left side of the road, he was restricted to a distance near the white line. This distance he described as "about two feet". Coming around the corner he saw a Hillman motor car approaching on its side of the road and the defendant's car, a Capri, in the plaintiff's lane. He braked but the car collided in his right front side, then sped off the road and crashed in an embankment on his right side. He received injuries and medical attention the cost of which was $25. His minibus, from which he makes an average net daily income of $350, was out of use

for six weeks. He was cross-examined - primarily as to distances and to the position of the Capri. As to distance, the notes of evidence, which are terse, say:

> "Distance from excavation to centre of road. Can't say how wide was bus - maybe about 6 ft. Don't know how wide was the excavation. How much of road did it take up? I never measured it - I don't know. Yes. There was white line in road. I never crossed white line. It was a wide stretch of road. My measurements are by assumption. Trench 4' - 5' wide. Road about 18' wide."

As to position of the car, the evidence is:

> "When I first saw Capri it was about 6ft. behind Hillman. Capri was in my lane. Capri was making to overtake the Hillman. I don't know what happened to the Hillman. Not true Capri was not overtaking. At collision Hillman had gone - Capri was not beside it."

The supporting witness gave evidence. This evidence was rejected by the learned trial judge; did not in any way form a part of his findings, and needs no rehearsing.

On this state of the evidence, the learned trial judge made the following findings - pages 16 and 17:

> 1. That Plaintiff's supporting witness, Michael White, the conductor, failed to impress the Court and kept on insisting that there was no excavation on Plaintiff's side of the road because, in the Court's view, he was aware of the implications thereof. His evidence is rejected and Coram finds specifically the following:-
>
> 2. There was an open trench (Plaintiff's actual words "excavation").
>
> 3. Plaintiff crossed line to avoid trench without assuring himself if road around corner of opposite side was clear.

"4. Created an obstruction on his opposite side of carriage-way.

5. Speed in excess of 25 - 30 m.p.h. going downhill.

6. There was no second car being overtaken by the Defendant - improbable that in a collision of this nature as described by Plaintiff that second car, if it existed, would have simply left the scene without a trace. In any event, overtaking not pleaded and no application made to amend.

Contributory Negligence found - Plaintiff 2/3 to blame

- Defendant 1/3 to blame

AWARD

General Damages	=	$5,000
Special Damages		
Medical Expenses		$ 25
Bus		9,000
Loss of use at $1,400 per week for 4 weeks		5,600
		$14,625
General Damages	=	$5,000 less 2/3 = $1,666
Special Damages	=	$14,625 less 2/3 = $4,875."

Before us, Mr. Frankson was allowed to argue together, three grounds of appeal as filed, namely:

"(1) The Learned Trial Judge in evaluating the evidence in the case and the facts and inferences to be drawn therefrom, erred in principle and took into consideration extraneous and irrelevant matters, speculation and conjecture, in arriving at his conclusions.

(2) There was no evidence or facts and inferences therefrom to enable the

" learned Trial Judge to come to the conclusion that the Plaintiff/ Appellant was guilty of contributory negligence and such finding was contrary to law and resulted in a grave injustice to the Plaintiff.

(3) The learned Trial Judge erred in holding that the loss of use for 6 weeks claimed by the Plaintiff was excessive ...."

The defence filed a Respondent's Notice -

"(1) On the basis of the evidence of the Plaintiff, the learned trial Judge correctly found that the Plaintiff's vehicle intruded into the Defendant's side of the road and driving path and having so found, the learned trial Judge ought to have found that this was the sole operative cause of the collision.

(2) There were material discrepancies/inconsistencies in respect of the testimony of the Plaintiff and his witness, Michael White, and these were such as to render the Plaintiff's case unreliable and to provide a basis for the learned trial Judge to reject the testimony of both witnesses.

(3) A material aspect of the Plaintiff's case, namely that the Defendant was overtaking another vehicle, was not pleaded and there was no application to amend the pleadings to insert this allegation, despite the fact that the Plaintiff sought to rely on this at trial."

The learned trial judge, having found the supporting witness unreliable, said that he relied on the evidence of the plaintiff alone. He found there was an excavation as evidenced by the plaintiff.

As to the third and fourth findings, was there evidence before the learned trial judge to come to any of

those conclusions? He did not specifically state that he took into account the estimate of distances which was given by the plaintiff as altogether he gave no reasons for any of his findings of fact. Nevertheless, learned counsel for the defence urged that the learned judge must have taken into account the estimate of distances as it was his assessment of this aspect of the evidence from which he came to these findings.

This evidence of estimates is replete with assertions of the plaintiff's own inability to judge distances and his reluctance to make assumptions. The record is clear that when he succumbed to the urgings of counsel he made what I call, uneducated guesses. Defence counsel aptly called them "opinions" - which I accept they were - and for which he said the plaintiff had neither the necessary skill nor qualification to make. Any positive findings on this, in my view, would be unreasonable, as against the other precise and unqualified evidence from him that he was between the white line and the excavation. The reality that he was unable to tell distances was patent. Had he been asked to point out the distances, and those measurements were agreed by counsel and the Court, then different considerations could arise. The reliability of the distances he gave was extinguished by his assertions of his incompetence to judge and it would be plainly wrong and a misdirection to accept or rely on that evidence as probative against the clear and consistent evidence that he was on his side of the road and that he never crossed the white line.

The plaintiff said that he was travelling at 25 m.p.h. I can find no basis for a finding by the judge (supra) that he was travelling "in excess of 25 - 30 m.p.h.". He was not cross-examined as to speed. Similarly, there is no evidence on which to base a finding that "there was no second car being overtaken".

The evidence from the plaintiff, in chief and in cross-examination, was that he saw the Capri almost six feet behind a Hillman car and in its wrong lane "making to overtake the Hillman", clearly meaning that the driver of the Capri had positioned herself to overtake. In answer to a later question from respondent's counsel, however, he said, "Not true Capri was not overtaking". Defence counsel on this last answer has concluded that the plaintiff's case was that there was an act of overtaking on which plaintiff relied and had neither pleaded, nor sought amendment to plead. This is not so. On the evidence given by the plaintiff, the overtaking had not begun, and, therefore, it was not necessary to be pleaded. In any event, it is my view that his pleading that "he was driving on the wrong or improper side of the road" would, in the circumstances of an overtaking, be adequate. The fact is that no "overtaking" was pleaded or evidenced and that finding is wrong.

This Court is loath to interfere with the findings of fact of a trial judge who is entitled to assess the credibility of a witness, even though the witness is not directly contradicted. In the case of Industrial Chemical Co. (Ja.) vs. Ellis, Privy Council No. 25/25 delivered on 17th March, 1986, Lord Oliver commenting on the principles upon which an Appellate Court must approach the task of reviewing the trial judge's findings in a matter where there was unchallenged evidence, said:

> "The question which the Court should have considered was whether there was evidence before the learned trial judge from which he could properly have reached the conclusion that he did or whether on evidence, the reliability which it was for him to assess, he was plainly wrong."

In my view there was no evidence before the learned judge, in this case, to support the findings to which he came. The totality of the evidence shows that the defendant was wholly to blame and the plaintiff is entitled to a judgment on his claim and the counter-claim.

No item of special damage was challenged, as it could have been, by the defence, a clear inference that the figures were not in dispute, and, in my opinion, there is no reason to deprive the plaintiff of special damages as pleaded.

Finally, it is my view that the decision of the learned trial judge is one to which no reasonable Court could come. Accordingly, I would allow the appeal and enter judgment for plaintiff on the claim and counter-claim as pleaded for $28,725, being as to general damages $5,000 and as to special damages $23,725, with costs of this appeal and of the Court below to be agreed or taxed.

CAMPBELL, J.A.:

The appeal is allowed. Judgment of the Court below is varied by substituting therefor judgment for the appellant without contributory negligence in the sum of $28,725 with costs here and in the Court below to be taxed if not agreed.