[2025] JMSC Civ. 103

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN CIVIL DIVISION

CLAIM NO. SU2020CV04877

BETWEEN	**OWAYNE WEIR**	**CLAIMANT**
AND	**DWAYNE WILLIAMS**	**DEFENDANT**

IN CHAMBERS

Sharon Gordon, Attorney-at-law, instructed by Gordon and Associates for the Claimant

De-Andra F. Butler, Attorney-at-law, instructed by Samuda and Johnson for the Defendant

Heard: July 23, 2025 and October 3, 2025

Civil Procedure - CPR 29.11(2), 26.8 - Application to give viva voce evidence at trial- Whether application to give viva voce evidence can be made at Pre-Trial Review- Whether a witness can be allowed to give viva voce evidence at trial if application for relief from sanction for failure to file witness statement was previously denied- Whether the Claimant's claim can still proceed to trial with just pleadings and expert report

MASTER L. JACKSON

INTRODUCTION

[1] The Claimant filed a claim against the Defendant on December 14, 2020, to recover damages for Negligence relative to a motor vehicle accident that occurred on August 21, 2016. The Claimant in his particulars of claim alleges that:

On or about the 21st day of August, 2016 the Defendant negligently drove Nissan Sunny motor car registered 5843 GS along Ewarton Main Road, in the vicinity of bottom Waterloo entrance, in the parish of Saint Catherine by trying to overtake with Toyota Corolla motor car registered PH 0318 where there was an unbroken white line, while the Toyota Corolla motor car was making a right turn into Waterloo causing a collision with Toyota Corolla motor car which was being driven by the Claimant resulting in the Claimant suffering injuries, loss and damages.

[2] The Defendant filed a defence and counterclaim, wherein he denied that he had been negligent and indicated that it was the Claimant who had pulled off to the extreme left of the roadway whilst it was not safe so to do, re-entered same and collided into the Defendant's vehicle where he sustained injuries and damage to his vehicle. As a result, his counterclaim claims for general and special damages and interest. The Claimant filed a reply and defence to the counterclaim.

[3] The matter progressed to a Case Management Conference, where on November 7, 2022, several orders were made to include that witness statements were to be filed and served on or before May 20, 2024.

[4] Unfortunately, none of the parties complied with this order on time; the Claimant filed a witness statement on October 10, 2024, and the Defendant on November 14, 2024. Both parties made applications for relief from sanctions. The Claimant's application was heard at a Pre-Trial Review on January 13, 2025, by the Honourable Mr. Justice K. Anderson whilst the Defendant's application was considered on paper. Both applications for relief from sanctions for failing to file witness statements were refused.

[5] The Court set the matter for a further Pre-Trial Review hearing with several orders to include, *inter alia*:

> *"A further case management conference for this claim shall take place before a Judge or Master, in Chambers, on May 7, 2025, commencing at 11:00 a.m. for one hour and at that hearing, it shall be for this court to*

decide on whether this claim shall proceed any further and to make the appropriate orders in the circumstances."

[6] The Claimant on February 24, 2025, filed an application seeking the following orders:

a. The Claimant be allowed to give viva voce evidence as his evidence-in-chief at the trial of this matter.
b. That the Claimant be allowed to rely on the documents attached to the Notice of Intention to Tender Hearsay Statement in Documents as they are being tendered under section 31E of the Evidence Act and were served on the Defendant far in excess of the twenty-one (21) days' notice that is required under that Act.
c. That the costs be costs in the claim.
d. Such further and/or other relief as this Honourable Court deems fit.

It is the Claimant's application filed February 24, 2025, which the Court is being asked to determine. Both parties filed written submissions which were amplified orally when they appeared before the Court on July 23, 2025.

SUBMISSIONS BY COUNSEL FOR THE CLAIMANT

[7] Counsel for the Claimant started her submissions by admitting that the Claimant's witness statement was filed out of time. However, she seeks permission to call the Claimant as a witness to give viva voce evidence at the trial of this matter.

[8] In her written submissions, she stated that the considerations set out in rule 26.8 of the Civil Procedure Rules ('CPR') when applied to the case at bar, bear out in favour of the Claimant. The Claimant's non-compliance with the orders of the Court was not contumacious in the circumstances.

[9] She went on to state that the trial will not be delayed by the filing of this application as all the documents required for the trial of this matter, with respect to the

Claimant/Applicant's case, were filed and served months in advance of any proposed trial date, which is scheduled for the Hilary Term of 2026.

[10] Pursuant to rule 29.1 of the CPR, the Court may control the evidence to be given at trial including the nature and form in which that evidence is to be taken. The application for permission for the Claimant's witnesses to give their evidence viva voce should be allowed and does not offend rule 29.11 of the CPR as that rule requires the Court's permission for a witness to be called where the witness statement was filed out of time. That permission is now being sought.

[11] She placed reliance on a number of authorities such as **Wong Sam v Jamaica Redevelopment Foundation Inc** [2018] JMCC Comm 13, **Douglas v The Commissioner of Police** [2017] JMSC Civ 182**, Burger v Martin** [2021] JMCA Civ 35, **Fenella Kennedy Holland & Anor v Joan Williams etal** Claim no. 2008 HCV 01916 heard on the 29th and 30th June 2009 to make the point that the Court should hesitate and think deeply and carefully before turning away the Claimant who has not had his claim heard on its merits. The purpose of the Court is the adjudication of cases on merit, and not to enforce rigid application of procedures and rules relating to the conduct of those cases.

[12] The case law dictates that in the absence of a valid witness statement and case management orders which state a witness statement is to stand as a parties/witness' evidence in chief, the Court is permitted to allow viva voce evidence if it is deemed just to do so.

[13] By way of oral submissions, counsel for the Claimant further argued that, if the Court denies the application for the Claimant to give viva voce evidence, it should still send the matter for trial as there is more than enough evidence for which a trial judge can determine the issue of liability and quantum. This is based on the following:

a. There is no dispute in the pleadings of both the Defendant and Claimant that an accident occurred.

b. The date of the accident is agreed by the parties in their pleadings
c. The parties agreed that there was a collision as seen from their pleadings.
d. The Claimant's application for expert witness was granted and therefore, there is medical evidence to support the nature and extent of the Claimant's injuries.
e. Counsel for the Claimant placed reliance placed on **Igol Coke v Nigel Rhooms and Ors** [2014] JMCA Civ 54 to argue that the court can still determine the matter as the Court of Appeal held that two vehicles don't just simply collide without drivers.
f. If there is an admission, it will suffice in place of the collision and how it occurred.
g. The Court may in the circumstances be able to conclude that the parties are equally liable and apportion liability 50/50 **(See Pamella Thompson & Anors v Devon Burrows Claim number** CL20001/T143 December 22, 2006)

SUBMISSIONS BY COUNSEL FOR THE DEFENDANT IN OPPOSITION TO THE CLAIMANT'S APPLICATION

[14] The Defendant's counsel argued that the rules make it clear that where a witness statement or summary is not served in respect of an intended witness within the time stipulated by the Court, then that witness cannot be called at the trial unless the Court permits. She made the point that in the authority of **Carter & Ors v South & Ors** [2020] JMCA Civ 54, the Court of Appeal made it clear that permission pursuant to rule 29.11(1) of the CPR, is sought by way of an application for relief from sanctions. The rules provide no other avenue for such a witness to give evidence at trial. Unless and until there is a successful application for relief, the sanction imposed for failure to comply with the filing and serving of the witness' statement within time remains in effect.

[15] The effect of the Court of Appeal's interpretation is that until the Claimant is granted relief from sanctions for failing to file his witness statement within the time ordered

by the Court he cannot be called as a witness at trial. In the instant case, an application for relief has already been pursued by the Claimant and refused by the Court. The application for permission to give viva voce evidence is therefore otiose. To grant the orders being sought by the Claimant would render nugatory, the orders of Anderson J refusing the Claimant's application for relief. The Court of Appeal's interpretation of rule 29.11 precludes the orders being sought by the Claimant.

[16] Counsel for the Defendant examined the authorities being relied on by the Claimant's counsel and argued that none of the authorities included a situation in which no witness statement had been filed by a litigant within the time set by the Court and a relief from sanction application subsequently refused. None of the authorities cited are therefore helpful to the Claimant in the instant case.

[17] To allow the orders sought in an application such as the one now before the Court would effectively give the Claimant a second bite of the cherry without the guidance and framework provided by rule 26.8. It is submitted that such an outcome is at odds with both the letter and spirit of the CPR. Such an outcome would also run afoul of the clear and unambiguous judicial pronouncement of the Court of Appeal.

[18] In response to the oral submissions made by counsel for the Claimant, counsel for the Defendant stated that without any witness statement or any other independent evidence, the claim could not be sent to trial. Counsel disagreed that the pleadings could be used by the trial judge to determine the issue of liability and quantum. She stated that pleadings are not evidence and cannot be used by the trial judge to determine the issues of liability and quantum.

[19] She further argued that whilst the parties agree on the date of the collision and where it occurred, and that a collision did occur, from the pleadings, the Defendant has given a different version of how the collision occurred. The Defendant has denied liability and casts all blame on the Claimant, who the Defendant insists is liable and was negligent in how the accident occurred.

[20] She urged the Court to deny the Claimant's application, not to send the matter to trial and perhaps make an order for summary judgment in favour of the Defendant. She conceded that the Defendant's counterclaim would fail, for the same reason she purports that the Claimant's claim would fail.

THE LAW

[21] The following rules of the CPR are relevant in deciding the Claimant's application. Rule 26.8 of the CPR provides for relief from sanction as follows:

> *(1) An application for relief from any sanction imposed for a failure to comply with any rule, order or direction must be –*
>
> *a) made promptly; and*
>
> *b) supported by evidence on affidavit.*
>
> *(2) The court may grant relief only if it is satisfied that –*
>
> *a) the failure to comply was not intentional;*
>
> *b) there is a good explanation for the failure; and*
>
> *c) the party in default has generally complied with all other relevant rules, practice directions and orders and directions.*
>
> *(3) In considering whether to grant relief, the court must have regard to –*
>
> *a) the interests of the administration of justice;*
>
> *b) whether the failure to comply was due to the party or that party's attorney-at-law;*
>
> *c) whether the failure to comply has been or can be remedied within a reasonable time;*
>
> *d) whether the trial date or any likely trial date can be still be met if relief is granted; and*
>
> *e) the effect which the granting of relief or not would have on each party.'*

[22] The CPR also outlines the consequences for failing to serve a witness statement. Rule 29.11 provides:

> *"29.11 (1) Where a witness statement or witness summary is not served in respect of an intended witness within the time specified by the court then the witness may not be called unless the court permits.*
>
> *(2) The court may not give permission at the trial unless the party asking for permission has a good reason for not previously seeking relief under rule 26.8."*

[23] Several authorities have examined the effect of failing to file witness statements as well as when it is that the Court may grant permission for a witness to give viva voce evidence at a trial. I have summarized the principles that can be gleaned from the key authorities below:

(a) Carter & Ors v South & Ors [2020] JMCA Civ 54. The Court of Appeal examined the issue as to whether rule 29.11 of the CPR was contingent on the satisfaction of rule 26.8. The Court held that "…the sub-rules comprised in rule 29.11 should be read together as one rule. The phrases, "unless the court permits" in sub-rule 1, and "the court may not give permission" in sub-rule 2, relate to the seeking of relief under rule 26.8. Furthermore, the words, "at the trial" in rule 29.11(2) are contextual, since a court may grant permission in different contexts and at different stages.

The sanction for failing to file in the time allotted takes effect unless the court permits. The permission of the court can be achieved in an application for relief from sanctions under rule 26.8. So, rule 29.11 pre-supposes relief will be sought under rule 26.8 before trial. If it is not sought before trial, permission may be sought at trial, but it will not be granted unless the additional hurdle is crossed, which is to show good reason why it was not sought before under rule 26.8."

(b) Jamaica Public Service v Charles Vernin Francis and Columbus Communications Limited [2017] JMCA Civ 2**.** Under rule 29.11, the appellant's failure to file and exchange witness

statements as ordered rendered it unable to call any witnesses unless it was granted relief from sanctions.

(c) Dorrett Wong Sam v Jamaica Redevelopment Foundation Inc [2018] JMCC Comm13**.** Prior to the Claimant being sworn, the Court observed that the document filed as the Claimant's witness statement commenced with the words "Dorrett Wong Sam will state that..." Anticipating that if the Claimant identified and confirmed the truth of the witness statement it would stand as her evidence in chief, the Court suggested that "states" would be preferable to "will state". Counsel agreed. The Court allowed that amendment, since it was minor and purely as to form, without any objection. That might be considered to have been an omen based on what transpired thereafter. After the Claimant was sworn and gave the usual preliminary information, she was shown the document which was filed and served purportedly as her witness statement. To the apparent shock and consternation of her counsel Mr. Gammon, she testified that she did not recognize the document and that it was not her signature which was affixed to it. Counsel then made an application for her to give viva voce evidence in chief, in lieu of her witness statement.

"This issue appeared to be a novel one and the Court was not provided with, nor did the Court identify any case law authority which could be of assistance. However, applying general principles, in the Court's opinion, since there had been no case management orders for the witnesses' statements to stand as the witnesses' evidence in chief at trial, it was open to the Court to permit viva voce evidence if the justice of the situation allowed for it". The Court concluded that preventing the Claimant from giving viva voce evidence would have

been an unduly strict and harsh position to adopt in the circumstances.

(d) Fenella Kennedy Holland & Anor v Joan Williams etal Claim No. 2008HCV 01916 heard on the 29th and 30th June 2009. In that matter, the Court examined how a trial would proceed in a situation where the witness statement was rendered inadmissible and in turn a party's non-compliance with case management conference orders. A Court may order that a witness give evidence viva voce. This may mean that the trial takes longer. However, given the Constitution and the right to have one's civil rights and obligations determined, it would seem very rare that a litigant be barred from establishing his case if his witness statement is not permitted to stand as evidence in chief and there is other evidence that can be used to establish his case.

(e) Trillion Douglas v The Commissioner of Police [2017] JMSC Civ 182. The Court stated that careful thought must be given before turning away a litigant who has not had their claim heard on the merits. Striking out a claim is a draconian measure which must only be done in clear cases.

(f) DSP John Morris & Anors v Desmond Blair&Anor [2023] JMCA Civ 45. The sanction stipulated by the rule for failure to comply with the timeline for service of the witness statement is that the witness may not be called unless the court permits, and this sanction takes effect immediately on the breach. To my mind, seeking to strike out a witness statement filed after the specified time is not a sanction recognised by the rules.

Rule 29.11 presumes that no application for relief from sanction had been made before the hearing. The fact is that the Respondents once alerted that the Appellants were making the unusual application

to have their witness statement struck out, made the necessary application seeking relief from sanction before the date set for the hearing.

There was no good reason for the failure to file the witness statements within the time specified. Thus, the Court was precluded from granting the relief sought. The Respondents, without more, will not be able to call a witness at the assessment of damages. This result is similar to one that was arrived at by this court in JPS v Francis, where Edwards JA (Ag) (as she then was) made an observation that is appropriate to this matter at para. 70. She stated the following: "The result is that the appellant will not be able to call a witness at the trial. Though this result may appear to be draconian, it is the rule and litigants will best give regard to it or suffer the consequences. It is no use to say that the appellant will be prejudiced if it is not able to call witnesses at the trial. Inherent in the existence of rule 29.11 of the CPR is an acceptance that there will be prejudicial effect; nonetheless the rule still exists and attorneys and their clients must be mindful of it and the effect of non-compliance. As the Board stated in the case of The Attorney General v Universal Projects Limited [[2011] UKPC 37], it serves the useful purpose of improving the efficiency of litigation." (Emphasis supplied)

ISSUES

1. Whether the Claimant's application can be made at any stage of the proceedings or it should be made at the trial.
2. Whether the Claimant can be given permission to give viva voce evidence at the trial.
3. Whether the Claimant's claim can still proceed to trial on mere pleadings.

ANALYSIS

Whether the Claimant's application can be made at any stage of the proceedings or it should be made at the trial.

[24] Neither of the parties addressed the issue as to whether the Claimant's application could be made at the adjourned Pre-Trial Review hearing given the wording of rule 29.11(2) which states that, "The court may not give permission ***at the trial*** unless the party asking for permission has a good reason for not previously seeking relief under rule 26.8." *(emphasis mine)*

[25] Albeit that rule 29.11(2) uses the word trial, in **Carter & Ors v South & Ors** [2020] JMCA Civ 54, the Court of Appeal stated that the words "at the trial", in rule 29.11(2) are contextual, since a court may grant permission in different contexts and at different stages. It, therefore, means that the Court can give permission at different stages of the proceedings, to include before the trial, at the trial or even at an assessment hearing. As it relates to the latter, the Court of Appeal in **DSP John Morris & Anors v Desmond Blair& Anor** [2023] JMCA Civ 45 confirmed that rule 29.11(2) also applies to an assessment hearing.

[26] Therefore, the Court can consider the Claimant's application under rule 29.11(2) of the CPR at a Pre-Trial Review. However, such an application being made before the trial should be considered under rule 26.8 of the CPR. **(See DSP John Morris Anors v Desmond Blair and Anor** [2023] JMCA Civ 45 **and Beverley Byfield v Malcolm McDonald & Anors** [2025] JMCC Comm 02**).**

Whether the Claimant can be given permission to give viva voce evidence at the trial.

[27] Counsel for the Claimant's arguments are simply that the considerations set down in rule 26.8 when applied to the case at bar bear out in favour of the Claimant. The Claimant's non-compliance with the orders of the Court was not contumacious in the circumstances. She further argued that the trial will not be delayed by the filing of this application as all documents required for the trial of this matter were previously disclosed to the Defendant's counsel.

[28] The case law dictates that in the absence of a valid witness statement and case management orders which state that a witness statement is to stand as a witness' evidence in chief, the Court is permitted to allow viva voce evidence if it deems it just to do so.

[29] Counsel for the Defendant argues that the strict application of rule 26.8 of the CPR often results in draconian consequences. In the instant case, both parties were denied an opportunity to lead evidence at the trial since both applications for relief from sanctions under rule 26.8 were previously denied. While the trial could properly continue in the absence of evidence from the Defendant, it cannot realistically proceed in the absence of evidence from the Claimant.

[30] She also argued that the rules do not allow a litigant to circumvent the requirements of rule 26.8 by simply applying to give viva voce evidence. If relief is refused, the litigant's only recourse is an appeal.

[31] Albeit counsel for the Claimant has cited several authorities where the Court granted permission to the Applicant to give viva voce evidence at trial, none of the authorities cited assists the Claimant. In all the authorities cited, the witness statements were filed within the time permitted by the Court.

[32] In **Dorrett Wong Sam v Jamaica Redevelopment Foundation Inc** [2018] JMCC Comm 13 the witness statement was filed within time, but the witness testified that she did not recognize the document and that it was not her signature which was affixed to it. Counsel then made an application for her to give viva voce evidence in chief, in lieu of her witness statement. In allowing the witness to give viva voce evidence in applying general principles, the Court stated that since there had been no case management orders for the witnesses' statements to stand as the witnesses' evidence in chief at trial, it was open to the Court to permit viva voce evidence if the justice of the situation allowed for it. The Court concluded that preventing the Claimant from giving viva voce evidence would have been an unduly strict and harsh position to adopt in the circumstances.

[33] In **Fenella Kennedy Holland & Anor v Joan Williams etal Claim** No.2008HCV01916 heard on the 29th and 30th June 2009**,** an objection was taken to the witness statement filed in that it contained a mixture of opinion and allegations of fact. The Court examined the purpose of witness statements in a trial, and how a trial would proceed in a situation where the witness statement was rendered inadmissible and in turn creates a party's non-compliance with case management conference orders. The short answer by the Court was that a Court may order that a witness gives evidence viva voce. This may mean that the trial takes longer.

[34] The starting point in determining the Claimant's application under rule 29.11(2) of the CPR, can be gleaned from the Court of Appeal authority of **Guy's Trucking and Anor v Rupert Barnes Supreme Court Civil** Appeal No 130 of 2005**.** The Court of Appeal stated that the Court in determining an application under rule 29.11(2) is to consider whether the Applicant "*has a good reason for not previously seeking relief under Rule 26.8 applications." If the trial judge answered the question pertinent to the first stage in the negative, then the application must fail. If the trial judge considers that there was good reason for not previously utilizing a Rule 26.8 application, it does not follow that permission to call the proposed witness will automatically be given. There is a compelling reluctance on my part to attempt to prescribe criteria which trial judges should employ in exercising their discretion in the second stage, for I am not so prescient as to contemplate the manifold circumstances which may, and no doubt will arise. Undoubtedly, the discretion at the second stage must be exercised with a view to the contending parties having a fair trial. The overriding objective of our Civil Procedure Rules 2002 is that of "enabling the Court to deal with cases justly".*

[35] Counsel for the Claimant, in her submissions referred to rule 26.8 of the CPR and that the Claimant has found favour with that rule and as such, the application being sought should be granted. However, the application filed makes no reference to rule 26.8 and the affidavit in support is devoid in that regard as it relates to the requirements under rule 26.8 of the CPR in relation to relief from sanctions.

Moreover, the Claimant having previously utilized and made an application for relief from sanctions pursuant to rule 26.8, which was refused, I agree with counsel for the Defendant, that the Claimant cannot now seek to make an application under rule 29.11(2).

[36] An application under rule 29.11(2) presumes that no previous application was made for relief from sanctions (see **See DSP John Morris Anors v Desmond Blair and Anor** [2023] JMCA Civ 45). One is also reminded of what Edwards JA stated in **Jamaica Public Service v Charles Vernon Francis and Colombus Communications Limited,** that the judge having been precluded from granting the relief from sanctions, the result is that the Appellant will not be able to call a witness at the trial. The result may seem draconian, but it is the rule and litigants, and their counsel should be mindful of the consequences of non-compliance. As a result, the Claimant in the instant case, having failed to satisfy the first limb of rule 29.11(2) and having previously filed an application for relief from sanctions that was refused, the application to give viva voce evidence will have to fail.

[37] I find the situation in the instant case akin to **Kenisha Taylor v Jermaine Holding, Jamaica Urban Transit Company Limited and Bernard Blue et al.** [2023] JMSC Civ 114 where the Claimant made a similar application as the Claimant herein, seeking permission to allow evidence from two witnesses whose witness statements were not filed and served within time. An application for relief from sanctions was previously made in relation to these witness statements and was refused. The submission by the Claimant's counsel was that the Claimants' respective applications for relief from sanctions having been refused, it was open to the Court to allow for the witness statements to stand and for the witnesses to be called pursuant to rule 29.11(1) and (2) of the CPR. The argument by counsel for JUTC in opposition is similar to that of the Defendants in the case at bar and reliance was placed on the Court of Appeal (COA) decision in **Oneil Carter and Ors v Trevor South and Ors** [2020] JMCA Civ 54**.** Palmer-Hamilton J found the COA decision instructive and applied it accordingly. Palmer-Hamilton J had this to say:

> *"The position in Oneil Carter is essentially that where a party fails to file a witness statement, it is not sufficient for a Court, exercising its case management powers, to simply extend time for filing the witness statement or allow it to stand as filed without relief from sanctions having been obtained. However, even if relief is not obtained, a party relying on such a witness statement has a small window of opportunity to rely on this witness if they can show good reason for not previously seeking relief from sanctions under Rule 26.8 of the CPR. The Claimants did apply and were refused relief. The Court's discretion to permit a litigant who has failed to file and serve a witness statement is only to the extent that it is satisfied that there is good reason for failing to apply for relief from sanctions. A party who fails to file a witness statement must make an application for relief from sanctions in order to rely on the statement or the evidence of that witness. If there is good reason for failing to apply for relief the Court may permit the statement to be relied upon. If relief is sought and refused, I found that the Court had no further discretion to permit the witnesses to be called and accordingly was constrained to rule against the Claimants in their application."*

[38] For completeness I wish to add that the Claimant's application also seeks permission to rely on hearsay documents filed with a notice of intention to rely on hearsay documents on October 10, 2024. There is no need for the Court to address this aspect of the application as the law is clear on the procedure to be adopted by a party that seeks to rely on hearsay documents in civil proceedings under the Evidence (Amendment) Act. The party intending to use hearsay evidence must serve a written notice within the time frame specified in section 31E of the Evidence (Amendment) Act. The opposing party may choose to serve a notice objecting to the admission of the hearsay evidence and require the maker to attend the trial to give viva voce evidence.

Whether the Claimant's claim can still proceed to trial on mere pleadings

[39] Counsel for the Claimant, in her oral submissions, argued that if the Court was minded to refuse the application, it should still consider sending the Claimant's claim to trial. The basis of her oral submissions is grounded in the need for the Claimant's claim to be heard and that the trial judge can determine the claim on the pleadings as well as the expert report tendered previously which substantiates the Claimant's claim as to the injuries sustained because of the Defendant's purported negligence.

[40] Counsel for the Defendant urged the Court not to send the matter to trial. She argued that pleadings are not evidence and that the Claimant has no other evidence to establish and prove the issue of liability and negligence which was a live issue to be determined by the trial judge.

[41] The Court invited both parties to examine two authorities wherein both parties application for relief was denied and the court made orders including, inter alia, that, "*A pre-trial review shall be held before a Judge or Master, in Chambers, on a date to be scheduled by the Registrar in consultation with the parties, and at that pre-trial review hearing, the court shall then, among other things, consider whether the trial can proceed, or instead if summary judgment should be granted in favour of the defendant."* (**See Errol Tracey v AG** [2025] JMSC Civ. 55) and **Johnathan Davis v Dennis Tulloch & Anors** [2024] JMSC Civ. 108 "there shall be heard on paper and presided over by Anderson J., the following: *'Should an order now be made, awarding summary judgment in favour of the 2nd ancillary defendant against the defendant/ancillary claimant, bearing in mind that the defendant/ancillary claimant will not be able to rely on any document at trial in proof of his ancillary claim?' This court's ruling on the hearing of same, is reserved*.

[42] Counsel for the Claimant maintained her argument that the Court is to send the matter to trial based on the pleadings and not to adopt the course of action in the abovementioned authorities. Conversely, the Defendant contended that the pleadings did not constitute evidence admissible at trial and urged the court to grant summary judgment in the Defendant's favour.

[43] Counsel for the Claimant's oral submissions are novel but flawed. Pleadings/statement of case are not evidence; the purpose of pleadings is to set out a party's case which support the cause of action being pursued in the case of the Claimant and in the case of the Defendant, the defence he seeks to rely on. Pleadings are an outline of the issues that the parties are asking the Court to resolve. The nature and import of pleadings were aptly discussed by Nembhard J

in **Rasheed Wilks v Donovan Williams** [2020] JMSC Civ 234 and bears repeating in full:

> *"[12] The system of pleadings operates to define and delimit with clarity and precision the real matters in controversy between the parties. Pleadings serve the two-fold purpose of informing each party of the case of the opposing party and, at the same time, informing the court of the issues between the parties that will govern the interlocutory proceedings between them and which the court will have to determine at the trial.*
>
> *[13] Pleadings are therefore required to demarcate the parameters of the case that is being advanced by each party to an action and are critical to identify not only the issues joined between the parties but the extent of the dispute between them.*
>
> *[14] Lord Woolf MR, in McPhilemy v Times Newspapers Ltd and others,3 provided a comprehensive analysis of the nature and importance of pleadings. He stated as follows: - "The need for extensive pleadings including particulars should be reduced by the requirement that witness statements are now exchanged. In the majority of proceedings identification of the documents upon which a party relies, together with copies of that party's witness statements, will make the detail of the nature of the case the other side has to meet obvious. This reduces the need for particulars in order to avoid being taken by surprise. This does not mean that pleadings are now superfluous. Pleadings are still required to mark out the parameters of the case that is being advanced by each party. In particular, they are still critical to identify the issues and the extent of the dispute between the parties. What is important is that the pleadings should make clear the general nature of the case of the pleader."*

[44] Therefore, how are pleadings treated by the trial judge. An appropriate authority in this regard to demonstrate same is **Dwight Tyndale v Kenneth Edgar & Anors** [2018] JMSC CIV. 39 where the Defendants contended that the Claimant's pleadings have not disclosed sufficient factors to establish the tort of negligence and the evidence presented has not buttressed any deficiency in the pleadings. The Court in determining this contention stated: -

> *"the statement of case does not have to include the evidence on which the party relies, but must provide enough detail to allow the case to be properly set out and so allow the defendant to know the case he is to meet. The evidence should support the pleadings to assist the court's determination."*

[45] From the foregoing, it is evident that the purpose of pleadings is to alert the other party and the Court, as to the issues in contention between the parties and the

allegations of facts they intend to rely on at trial. While pleadings contain factual allegations, they are not proof of those facts. It is evidence from witnesses, relevant expert witnesses and documents that are required to prove the allegations of facts as outlined in the pleadings/statement of case of the parties.

[46] Therefore, counsel for the Claimant's argument that the trial judge can determine the issue of liability by examining the pleadings i.e. the statements of case of both parties (particulars of claim and the defence/counterclaim) are misguided. The Claimant's version of the collision varies as night, and day compared to the Defendant's version. On what basis would the trial judge be able to determine that the Claimant's version of the events as pleaded in the statement of case is to be accepted over the Defendant's or vice versa?

[47] Moreover, it is the Claimant who is to prove his case on a balance of probabilities. The general state of the law as to the proof of negligence was examined by Lord Griffiths in ***Ng Chun Pui and Ng Wang King v Lee Chuen Tat and Another Privy Council Appeal*** No 1/1988 delivered on 24 May 1988**,** when he said at pages 3 and 4:

> *'The burden of proving negligence rests throughout the case on the plaintiff. Where the plaintiff has suffered injuries as a result of an accident which ought not to have happened if the defendant had taken due care, it will often be possible for the plaintiff to discharge the burden of proof by inviting the court to draw the inference that on the balance of probabilities the defendant must have failed to exercise due care, even though the plaintiff does not know in what particular respects the failure occurred… it is the duty of the judge to examine all the evidence at the end of the case and decide whether on the facts he finds to have been proved and on the inferences he is prepared to draw he is satisfied that negligence has been established.' (emphasis mine)*

[48] It stands to reason therefore, that the burden being placed on the Claimant to prove his version of the allegations of facts as pleaded, cannot use that which he alleges (mere pleadings), to discharge that burden of proof. Additionally, the trial judge cannot use mere pleadings to determine whether the Claimant has discharged that burden or to determine which version of events as pleaded ought to be accepted over the other.

[49] At this juncture I also wish to add that the medical practitioner, albeit deemed an expert and his report also admitted as an expert report previously, will not assist the Claimant in proving the issue of liability and negligence which is in dispute, and which must be proven by the Claimant before the issue of quantum can be determined by the Court. It is to be remembered also that although, the medical practitioner has been deemed an expert and his report accepted as an expert report, the Claimant must formally tender this document into evidence. This is done when the Claimant mentions that he was treated by the medical practitioner and has obtained the report. The report is then tendered and admitted into evidence through the Claimant. In the absence of a witness statement or the witness giving oral evidence, to lay the foundation, the medical report cannot be tendered and admitted into evidence. Therefore, the Claimant's oral submissions that the matter should proceed to trial would fail based on the foregoing.

[50] The Claimant's application seeks to circumvent the order of Anderson J as the Claimant having failed to obtain relief from sanctions, currently has no witness statement before the Court and as such will be unable to call a witness for the trial to prove his claim. Although the CPR provides that a witness may give evidence orally, the Court at case management, is to determine the way in which evidence is received. In this case, the Court indicated it was to be by witness statement. The Claimant couldn't in these circumstances now seek to give evidence orally. What the Claimant could have done before the sanction took effect, was to apply to vary the case management orders. It may seem draconian yes that the Claimant has no recourse to present his claim at trial based on the authorities examined. However, the Claimant had the option of filing and serving a witness summary within the time frame stipulated by the Court to file and serve witness statements, where he was unable to file and serve a witness statement within time.

[51] Considering the foregoing, the application pursuant to rule 29.11(2) for the Claimant to give viva voce evidence is refused. Likewise, the Ancillary Claimant would not be able to give viva voce evidence if a similar application was made by him to do so.

[52] Rule 26.2 of the CPR allows the Court to make orders of its own initiative. The Court however, must give the affected party at least 7 days' notice of this and give the affected party an opportunity to make submissions and to be heard. Considering the predicament faced by both parties and the fact that the matter cannot proceed to trial, the Court will make several orders.

ORDERS ON THE CLAIMANT'S APPLICATION

[53] Based on the foregoing, the Court orders:

1. The Claimant's application filed February 24, 2025, for the Claimant to give viva voce evidence at trial is refused.
2. Trial period fixed for one day in the Hilary Term 2026 is vacated.
3. Cost awarded to the Defendant to be agreed or taxed if not agreed.
4. Counsel for the Claimant is to prepare file and serve orders.

ORDERS ON PRE-TRIAL REVIEW

[54] In consequence of my findings on the Claimant's application and authorities, and pursuant to rule 26.2 of the CPR, the court will make an order that the parties are to show cause why an order should not be made by the court to strike out the claim and counterclaim. This is because the Claimant will not be able to give evidence at the trial of the claim nor the Defendant/Ancillary Claimant on the counterclaim, and neither party has any independent evidence to prove their respective claims. The Court therefore orders,

1. The Claimant and the Defendant/Ancillary Claimant should show cause as to why their statement of case should not be struck out in light of the fact that neither party will be able to give evidence at the trial and neither has any independent evidence to prove their respective claims, by filing and serving written submissions and emailing same to latoya.samms@jamaicajudiciary.gov.jm, within 14 days of this order,

2. Unless the Claimant and the Defendant/Ancillary Claimant show cause as to why their statement of case should not be struck out by filing and serving written submissions and emailing same to latoya.samms@jamaicajudiciary.gov.jm, within 14 days of this order, then, their statement of case stands struck out with each party bearing its own cost.