

NEW TECHNIQUES IN PLEADING UNDER THE CIVIL PROCEDURE RULES, 2002

LLOYD BARNETT

BACKGROUND

Old Rules

Evasion Possible

The old common law rules of pleading required the legal result of the facts relied on but not the facts to be stated. The position in the Chancery Court was completely different and facts were stated in great detail. By the end of the 19th century, the rules were drastically altered to provide that material facts and material facts only should be pleaded. In Jamaica up to December 31, 2002 it was possible to plead in such a way that the other party would not have a clear view of the evidential material that would be marshalled against him and had to prepare, subject only to such disclosures as could be obtained by request for particulars and discovery, by intelligent anticipation or guess work.

New Rules

Clarity required

The overriding objective of the new Rules being the enabling of the Court to deal with cases justly, involves, *inter alia*, that the parties are on an equal footing, that no one is taken by surprise or allowed to be embarrassed by non-disclosure or late or inadequate disclosure. In order to achieve this objective the rules of pleadings had to be substantially altered. Counsel must now adopt a new technique in response to the changes which are highlighted below:

INITIATING PROCEEDINGS

Old Rules

Proceedings in Supreme Court are initiated by Writ of Summons, Petition, Originating Notice of Motion or Originating Summons. In the case of a writ; it has to be accompanied by or followed by a Statement of Claim. In the case of the other initiating processes they were accompanied by affidavits.

New Rules

Excepting for civil proceedings relating to insolvency, bankruptcy, winding up of companies and matrimonial matters, the claimant must initiate his or her action by filing a **claim form** which must usually be accompanied by particulars of the claim and reliefs sought or an affidavit giving details of the nature of the claim. Thus, under the new rules in all cases the approach is closer to the former Originating Summons procedure.

Old Rules

Imprecision

Pleader could keep several options open putting forward alternative propositions of fact for which there was no evidential material in support. Inconsistent allegations of fact, “confession and avoidance”, speculative assertions and vague possibilities could be used.

New Rules

Clarity and Consistency

Each party must set out his or her definitive case from the outset, rather than prevaricate first and amend later. Since there must be a verification of allegations of fact, there is a potential sanction for contempt of court as well as the destruction of the Claimant’s credibility. Evasive, obscure and inconsistent pleadings will no longer be accommodated.

- *Old Rule: Material facts*
- *New Rules: All the facts*
- *Old Rule, CPC168: Pleadings had to state allegations of material facts, but not evidence by which proved.*
- *New Rule, CPR 8.7(1), 10.5(1): Pleadings must state all the facts on which the party relies.*
- *Old Rule, CPC166: Statements must be as brief as the nature of the case will admit.*
- *New Rule, CPR 8.9(2): Statements must be as short as practicable.*

- *Old Rule: Evidence should not be stated.*

- *New Rule: Evidence must be stated.*

- *Old Rule: Pleadings not to contain evidence by which the allegations of fact are to be proved.*

- *New Rule: Pleadings must contain evidence by which allegations of fact are to be proved.*

- *Old Rule, CPC 184, 189: Precise words of document or conversation had not to be stated only effect or purport, unless words themselves are material.*

- *New Rule, CPR8.9(3), 10.5(6): Documents necessary to case must be identified or be annexed.*

- *Old Rule: Facts not law.*
- *New Rule: Allegations of fact and propositions of law.*
- *Old Rule: Omit law.*
- *New Rule: Law may be required.*
- *Old Rule, CPC 188: Party need not allege any fact which the law presumes in his favour unless denied.*
- *New Rule, CPR 8.9(1): Claimant must set out all facts on which he or she relies.*
- *Old Rule, CPC 178: Pleading must state facts not law, though this was often impossible, e.g. notice to quit invalid because does not conform with Rent Restriction Act. Accordingly, there were many exceptions. CPR 178*
- *New Rule, CPR 8.7: Claimant must state nature of his or her case. (The Defendant is not expressly required to comply with any similar provision.) A Party may therefore find it necessary to identify the point of law on which his claim or defence is based. Barclays Bank v. Boulter [1999] 1 W.L.R. 1919 (1923); [1999] 4 All E.R. 513(517).*

- *Old Rule: Particulars of special damages.*

- *New Rule: Evidence of personal injuries.*

- *Old Rule: A claim for aggravated or exemplary damages must be pleaded or Particulars must be given of special but not general damages. RSC Order 18/12/9*

- *New Rule, CPR 8.7(2): A claim for aggravated or exemplary damages must be pleaded but no express provision is made with respect to special damages other than with respect to personal injury claims, but it is submitted that the old practice must be followed.*

- *Old Rule: There was no specific provision for personal injury claims.*

- *New Rule, CPR 8.11: In personal injury claims the claimant must state (a) age, (b) attach copy of medical report intended to be relied on, and (c) a schedule of any special damage claimed.*

DEFENCE

- *Old Rule: State all grounds.* □ *New Rule: State all facts.*

- *Old Rule: Facts generally not necessary.*

- *New rule: Facts necessary.*

- *Old Rule, CPC 178: Pleading must raise all grounds of defence.*

- *New Rule, CPR 10.5(1): The Defence must set out all the facts on which the Defendant relies to dispute the claim.*

- *Old Rule, CPC 180: Defence must not be general but must deal with each allegation of fact which is not admitted.*

- *New Rule, CPR10(5)2: Defendant must say:*
 - (i) *Which, if any, allegation in claim are admitted;*
 - (ii) *Which, if any, are denied;*
 - (iii) *Which, if any, are neither admitted or denied, because the Defendant does not know whether they are true but wish the Claimant to prove.*

- *Old Rule: Defendant need not give details.*
- *New Rule: Defendant must give details.*
- *Old Rule: Old Rule permitted a “general” denial if it were made clear that it was a denial of each allegation of fact, e.g. save as is hereinbefore etc ... denies each and every allegation contained in the statement of claim as if seriatim”. RSC 18/13/5.*
- *New Rule, CPR 10(4)(5): If Defendant denies any allegation in the claim he or she must state the reasons for doing so, if it is intended to prove a different version or the reasons for resisting the allegation.*
- *Old Rule: Once the defence traversed the allegations in the claim and was not evasive, it could not be attacked although further and better particulars could be sought.*
- *New Rule, CPR 10.7: The consequences of not setting out one’s case in the Defence is that it will not be permissible to rely on any allegation or factual argument which is not set out in the defence, unless the Court permits, normally only at a case management conference.*

REPLY

- *Old Rule: Optional* □ *New Rule: Excluded*

- *Old Rule: Plaintiff, since 1960 was normally free to file a reply, if he or she desired. By adoption of the English practice if there was no reply to a defence all matters not admitted placed in issue. R.S. 0.18, r .14. If however the Plaintiff wished to raise specifically any matter such as performance, release, limitation, fraud or illegality which he or she wished to contend makes the defence unsustainable or which if not pleaded would take the other party by surprise, a reply was necessary. R.S. 0.18, r. 8(1)*

- *New Rule: A claimant may not file or serve a reply without the permission of the court.*

VERIFICATION OF PLEADING

- *Old Rule, CPC 168(2): Signature of counsel who settled pleadings required or of instructing attorney on the record, but this was not a verification of the truth of the allegations. Counsel's only duty was to act on instructions and in the case of fraud to have reasonably clear basis for including the allegation.*

- *New Rule, CPR3.12, 10.5(8): The parties must verify their statement of case or defence by a certificate of truth unless it is impracticable for the lay party personally to do so in which case the attorney may do so on behalf of the client stating the reason why this is necessary. Since legal documents settled by an attorney should be signed by him or her, there should normally be at least two signatures on the pleading.*

IMPACT OF THE CHANGES ON PRACTICE

1. Explaining the similar reforms in England, Lord Wolf, M.R. said:

“The word ‘pleadings’ is given a timely demise. It is banished from the new Rules. In its place will be the statement of case. The change of name is important because it marks a break with the past, a break which is underlined by the requirement of the new statement of truth. That is a requirement for the litigant to certify that he believes the facts set out in his statement of case to be true. Parties will not be able to make allegations, ignoring whether or not they are justified.”

2. Lord Wolf identified five main problems with the old pleadings:

- “(a) they often fail to set out the facts clearly and so impede identification of the issues;
- (b) they concentrate too much on causes of action and defences, rather than on facts, which in turn contributes to over-use of alternative positions; defences in particular are deliberately framed to keep all options open as long as possible;
- (c) affirmative defences are not pleaded;
- (d) longwindedness; and
- (e) the original pleadings get out of date as they are superseded by amendments and further and better particulars; after the exchange of witness statements, they become less relevant for the purpose of the trial agenda.

3. The essential function of pleadings under the old rules as well as the new rules is to provide the Court and the other parties with a brief statement of the facts relied on. It is suggested that nevertheless the language of the new rules will not prevent pleadings in detail out of an abundance of caution. Possibly, the greatest inducements for the avoidance of prolixity are:

- (1) the need for extensive pleadings will be reduced by the exchange of witnesses statements, affidavits as to the facts and disclosure of documents; and
- (2) the elimination of tactical arguments over the contents of statements of case since “unless there was some obvious purpose to be served by fighting over the precise terms of the pleadings, contests over their terms will be discouraged” per Lord Wolf, M.R. in *McPhilmey v Times Newspaper Ltd.* [1999] 3 All E.R. 775(793).

Nevertheless, pleadings are still required to mark out the parameters of the case that is being advanced by each party. *Ibid.*

4. The verification provisions demonstrate the dramatic change in the rules and practice which now demand more thorough collection of evidence, detailed written statements, analysis of the relevant law and careful briefing before the filing of a statement of case or defence.

Where a limitation period is about to expire, even the extended time granted by CPR8.(4) may prove onerous, and the extended time for filing a defence provided by CPR10.3 will nevertheless compel expeditious responses from attorney and client.

SANCTIONS

The CPR gives the judge wide powers to specify the consequences of non-compliance with the Rules or an Order. A judge may therefore strike out a statement of case which fails to disclose reasonable grounds for bringing or defending a claim, or is an abuse of process. In view of the case management provisions and the numerous alternatives, including summary costs order an striking out is not usually an appropriate measure. *Biguzzi v. Rank Leisure plc* [1999] 1 W.L.R. 1926; [1994] 4 All E.R. 934.

ANTICIPATED RESULTS

- *Early preparation*
- *Expedition in taking instructions and collecting evidence.*
- *Greater care in pleading.*
- *Greater potential for settlements.*
- *More disclosure and fairer trials.*
- *Less scope for late amendments.*
- *Greater exposure to punitive costs for non-compliance.*

PARTICULARS OF CLAIM

CLAIM NO. 100 OF 2003

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

[Adopted from Bullen & Leake (14th ed.) Vol. 1, 27E-1]

BETWEEN MIDDLESEX COMMERCIAL BANK LTD. CLAIMANT
A N D MODERN COMPUTER TECHNOLOGY LTD. DEFENDANTS

1. In June 1999 negotiations took place between representatives of the Claimant and the Defendant concerning the supply by the Defendant of computer hardware and software for use by the Claimant in its banking business.

2. In the course of such negotiations, a meeting took place at the Claimant's offices on June 14, 1999 at which Mr Albert Hall on behalf of the Claimant described to Mr John Doe on behalf of the Defendant the Claimant's requirements and the particular purposes for which the Claimant required a new computer system. These requirements included:

- (1) the supply of a new computer system to be used in the Claimant's business as a commercial banker and to replace the Claimant's existing computer system which was not Year 2002 compliant;
- (2) the supply of a new computer system to automate functions which were currently being carried out manually, and thereby to enable the Claimant to

reduce its staffing levels, achieve costs savings, and increase profit margins;

- (3) full integration between the deposits, withdrawals, bank charges, savings and credit accounts, interest rates and the operations of the branches, ABM machines, wire transfers and electronically conducted transactions.
- (4) full integration, including a fast and reliable network link, between the Claimant's Head Office and its 20 branches throughout the Island.

3. At the meeting on June 14, 1999, in order to induce the Claimant to enter into the agreement referred to in paragraph 4 below Mr John Doe orally represented to Mr Albert Hall as follows:

- (1) The Defendant was experienced in the design and supply of computer systems for commercial bank
- (2) The Defendant's "Compunet" system was suitable to meet the Claimant's requirements as described by Mr Hall.

By an agreement in writing between the Claimant and the Defendant dated July 1, 1999 ("the Agreement") the Defendant agreed to supply the Claimant with computer hardware and software for use by the Claimant in its banking business ("the System"), for a total price of \$5,000,000 including GCT. A copy of the Agreement is served herewith marked Annex 1.

5. The Defendant made the Agreement in the course of its business as a designer and supplier of computer systems.

6. There were express terms of the Agreement as follows:
- (1) The System would provide the facilities described in the Claimant's Statement of Requirements dated May 1, 1999, including:
 - (a) full integration between the quotations, bill of materials and stock control modules; and
 - (b) full integration, including a fast and reliable network link, between the Claimant's branches throughout the Island.
 - (2) The system would be fully Year 2000 compliant, as defined in section 7 of the Defendant's Specification entitled "Facilities of the Compunet software".
7. There were implied terms of the Agreement as follows:
- (1) the system would be reasonably fit for the particular purposes made known by the Claimant to the Defendant, as set out in paragraph 2 above;
 - (2) the system would be of satisfactory quality;
 - (3) the Defendant would exercise reasonable skill and care in the performance of its obligations under the Agreement.
8. The Claimant relied on the skill and judgment of the Defendant and on the representations referred to in paragraph 3 above in entering into the Agreement.
9. Having regard to the matters made known by the Claimant to the Defendant as pleaded in paragraph 2 above, it was in the reasonable contemplation of the parties that if the System was defective or the Defendant was otherwise in breach

of contract the Claimant would suffer loss in:

- (1) failing to achieve anticipated savings;
- (2) failing to increase profit margins and thereby profits;
- (3) incurring increased costs; and
- (3) obtaining and installing a replacement computer system.

10. In purported performance of the Agreement the Defendant delivered equipment to the Claimant and installed certain software in September 1999.

11. The Defendant was in breach of the Agreement in the following respects:

- (1) Transactions on the current accounts of customers did not accurately update the claimant's records or the customers' accounts.
- (2) The network link between the Claimant's offices was slow and frequently broke down.
- (3) The contract programming module was not Year 2000 compliant.
- (4) The system was in the respects set out above not reasonably fit for its purpose or of satisfactory quality.
- (5) The Defendant failed to exercise reasonable skill and care in the design and testing of the System.

Particulars of these breaches are set out in the report of Mr G. Washington a copy of which is served herewith marked Annex 2.

12. The representations referred to in paragraph 3 above were false.

Particulars

- (1) The Defendant had sold only one computer system for use by a small commercial bank, Jameson Bank, which had only one small branch, and was not experienced in the design and supply of such systems.
- (2) The Defendant's "Compunet" system was not suitable for use by the Claimant as it was defective in the respects set out in paragraph 11 above.

13. Further, at the time the Agreement was made the Defendant did not have reasonable grounds for believing the representations referred to in paragraph 3 above to be true, and those representations were made by the Defendant negligently.

Particulars

- (1) A consultant to the Defendant, Mr. Howard Expert had in February 1999 provided an assessment of the Defendant's Compunet System which threw doubt on its suitability for the type of operational system required by the claimant;
- (2) A preliminary trial run had indicated that the system was not Year 2000 compliant;
- (3) No further or any adequate other tests were conducted by the Defendant.

14. By reason of the facts and matters pleaded above, the Claimant was entitled to and did reject the system, by letter to the Defendant dated February 1, 2000.

15. As a result of the Defendant's breaches of contract the Claimant has suffered loss and damage, as particularized more fully in the report of Mr. A. Lincoln, a copy of which is served herewith marked Annex 3.

Particulars

- (1) The Claimant has incurred additional costs of \$100,000 as set out in Section 1 of Annex 3.
- (2) The Claimant has suffered a loss of profits and contribution to overheads of \$500,000, as set out in Section 2 of Annex 3.
- (3) The Claimant has incurred costs of \$300,000 in obtaining a replacement computer system, as set out in Section 3 of Annex 3.

16. Alternatively, the Claimant has suffered loss of \$1,000,000 as a result of wasted expenditure, being the price paid to the Defendant for the supply of the System together with the loss pleaded in paragraph 15(1) above, less the second-hand value of the computer hardware (estimated to be \$20,000). The Defendant is liable for such loss as damages for breach of contract and/or under section 15 of the Sales of Goods Act.

17. Further or alternatively, the Claimant is entitled to recover the price of the system, namely \$5,000,000, on the ground of total failure of consideration.

18. The parties entered into the Agreement on terms incorporating the Defendant's written standard terms of business. The Claimant will contend that the terms thereof

which purport to exclude or limit the Defendant's liability are unfair and unreasonable and inapplicable for the following reasons:

- (1) The terms purport to exclude all liability on the part of the Defendant.
- (2) The Claimant's bargaining position was very weak as the Claimant urgently needed to replace its previous system which was not Year 2000 compliant.
- (3) The Defendant refused to discuss any change to its standard written terms of business.
- (4) The Defendant could have obtained insurance cover against potential liability to its customers.
- (5) The terms do not expressly exclude liability in cases where the Defendant is negligent.

19. The Claimant is entitled to interest at such rate and for such period as the Court thinks fit pursuant to Law Reform (Miscellaneous Provisions) Act.

AND the Claimant claims damages, alternatively \$1,000,000, and interest thereon at such rate and for such period the Court thinks fit pursuant to the Law Reform (Miscellaneous Provisions) Act.

SETTLED

(
 (
In consultation (
 (

CICERO HOPETON, Q.C.

ELAINE DRURY

I certify that all the facts set out in these Particulars are true to the best of my knowledge,
information and belief.

.....
JOSEPHINE HOWARD
Chairman and Managing Director
of the Claimant Company

CLAIM FORM

CLAIM NO. 100 OF 2003

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

BETWEEN MIDDLESEX COMMERCIAL BANK LTD. CLAIMANT
A N D MODERN COMPUTER TECHNOLOGY LTD. DEFENDANTS

The Claimant, Middlesex Commercial Bank Ltd., is a company incorporated in Jamaica, with registered office at 2000 Knutsford Boulevard, Kingston 5, St. Andrew and carries on the business of commercial banking under a licence issued pursuant to the Banking Act.

The Claimant claims damages for breach of a contract for the supply of a computer system, for recovery of the price paid and for interest on the amounts recoverable.

The Registry is at King Street, Kingston, telephone numbers (876) 922-8300-9, fax (876) 967-0669. The office is open between 9:00 a.m. and 4:00 p.m. Mondays to Thursdays and 9:00 a.m. to 3:00 p.m. on Fridays except on Public Holidays.

DATED THE DAY OF JANUARY, 2003

SETTLED

(
(.....
CICERO HOPETON, Q.C.
In consultation (.....
(.....
ELAINE DRURY

The Claimant's address for service is that of its Attorney-at-Law,
..... of, telephone numbers,
fax number

FILED by of, Attorney-at-Law herein
for and on behalf of Claimants whose address for service is that of its said attorney.

DEFENCE

CLAIM NO. 100 OF 2003

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

[Adopted from Bullen & Leake (14th ed.)]

BETWEEN MIDDLESEX COMMERCIAL BANK LTD. CLAIMANT

A N D MODERN COMPUTER TECHNOLOGY LTD. DEFENDANTS

1. Paragraphs 1 and 2 of the Particulars of Claim are admitted.
2. Paragraph 3 of the Particulars of Claim is denied. Mr Doe told Mr Hall that the System was newly developed, had not yet been fully tested in a live environment, and was available to the Claimant at a discounted price on the basis that the Claimant would provide user-feedback as to the functionality and ease of use of the System. Mr Hall stated that he was attracted by the discounted price and accepted this.
3. Paragraphs 4, 5 and 6 of the Particulars of Claim are admitted.
4. Paragraph 7 of the Particulars of Claim is denied. The alleged implied terms were excluded by clauses 12 and 13 of the Defendant's standard terms of business, which were incorporated in the Agreement.
5. It is admitted that the Claimant relied on the skill and judgment of the Defendant in entering into the Agreement. Save as aforesaid, paragraph 8 of the Particulars of Claim is denied.
6. (1) Further or alternatively, the Defendant's obligations were as set out

in the Agreement. Clause 20 thereof provided that the Agreement was the complete and exclusive statement of the agreement between the parties relating to the subject-matter of the Agreement and superseded all previous communications, representations and other arrangements, written or oral, and that the Claimant acknowledged that no reliance had been placed on any representation made but not embodied in the Agreement.

- (2) The Defendant relied on the representation contained in Clause 20 of the Agreement in entering into the Agreement, and the Claimant is estopped from alleging that it relied on representations made by the Defendant.

7. Paragraphs 9 and 10 of the Particulars of Claim are admitted.

8. It is denied that the Defendant was in breach of contract as alleged in paragraph 11 of the Particulars of Claim or at all. The Defendant's response to the allegations of breach of contract is set out in Schedule 1 served herewith

9. (1) Paragraph 12 of the Particulars of Claim is denied.

(2) The Defendant employed personnel with wide experience of computer systems for bankers, which they had acquired in their previous employment.

Particulars

[Set out details.]

- (6) It is admitted that the System contained minor defects which the Defendant was obliged to rectify under the Maintenance Agreement entered into between the Claimant and the Defendant, but it is denied that the System contained defects which rendered it unsuitable for use by the Claimant.
10. Paragraph 13 of the Particulars of Claim is denied. The Defendant refers to paragraphs 2 and 9 above.
11. Paragraph 14 of the Particulars of Claim is denied. The Claimant lost the right to reject the System by continuing to use it after the Claimant had had a reasonable opportunity to examine it, and by failing to notify the Defendant of its intention to reject the System prior to February 1, 2000.
12. (1) It is denied that the Claimant has suffered the loss or damage alleged in paragraph 15 of the Particulars of Claim or any loss or damage.
- (2) The System did not contain defects which could have materially affected the Claimant in the operation of its business, and there was no justification for obtaining a replacement system.
- (3) The Claimant failed to take reasonable steps to mitigate its alleged loss in that:
- (a) it failed to devote reasonable time and patience to learning how to operate the System and to training its staff in the use of the System;

- (b) it failed to work together with the Defendant to identify problems with the System and find appropriate solutions to such problems; and
 - (c) it obtained a replacement computer system which was not required.
- (4) Further or alternatively, if (which is denied) there were reasonable grounds for the Claimant to obtain a replacement system, the alleged replacement system contains enhanced facilities when compared with the Defendant's "Compunet" system, and the Claimant failed to mitigate its loss by obtaining an equivalent system.
- (5) If (which is denied) the Claimant has suffered loss as alleged, the Claimant must give credit for the benefit of the use of the System since September 15, 1999.

13. Paragraphs 16 and 17 of the Particulars of Claim are denied. The Claimant has had the benefit of the use of the System in its business since September 15.

14. (1) If (contrary to the Defendant's case), the Claimant has suffered loss as a result of the matters pleaded in the Particulars of Claim, the Claimant is precluded from recovering such loss by clauses 12, 13 and 20 of the Defendant's standard terms of business, which provided as follows:

- (a) [Set out exclusion and limitation clauses.]
- (2) Clauses 12, 13 and 20 were fair and reasonable for the following reasons:
 - (a) they were clearly set out in an agreement signed on behalf of each

- party;
- (b) they were reviewed by the Claimant's solicitor before the Claimant entered into the agreement.
 - (c) the parties were not of unequal bargaining power: the Claimant is a very much larger company than the Defendant, and could have purchased a similar system from other suppliers;
 - (d) the Defendant could not obtain insurance cover against failure to provide Year 2000 compliance;
 - (e) the Defendant was obliged to rectify defects promptly under its Maintenance Agreement with the Claimant.
- (3) It is admitted that the Defendant was not prepared to accept amendments to its standard terms of business.
 - (7) Save as aforesaid, paragraph 16 of the Particulars of Claim is denied.
15. It is admitted that the Court has power to award the Claimant interest on

SETTLED

.....
COLIN INVERNESS

I certify that all the facts set out in this Defence are true to the best of my knowledge, information and belief.

.....
THOMAS ARCHIBOLD
 Director/Secretary of
 the Defendant Company

CLAIM FORM

CLAIM NO. F.C. 120 OF 2003

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

BETWEEN OLIVE BEATRICE CALLENDER CLAIMANT**A N D MIDDLESEX TRANSPORT CO. LTD. DEFENDANT**

1. The Claimant, Olive Beatrice Callender, is a cashier employed to Retail Stores Ltd. and reside at Banana Lane, Old Harbour in the parish of St. Catherine.
2. The Claimant is the widow and executrix of the estate of C who died on December 1, 2003. The Claimant was granted probate on December 15, 2002 out of the Supreme Court. The Claimant is a dependant of the deceased within the meaning of the Fatal Accidents Act and brings this action for the benefit of the dependants of the deceased, pursuant to the Fatal Accidents Act, and for the benefit of the estate of the deceased pursuant to the Law Reform (Miscellaneous Provisions) Act.
3. At about 3 p.m. on October 1, 2002 the deceased was riding his bicycle on the nearside of Cumberland Road, Spanish Town in the parish of St. Catherine when Mr B, while driving the Defendant's Lorry Registration Number C153Y in the course of his employment to the Defendant attempted to overtake the deceased but left insufficient room and struck the deceased with the nearside front of the vehicle pushing the deceased under the wheels of the truck, causing him severe injuries from which he later died.

4. The Claimant believes that the death was caused as result of the negligence of the driver of the Defendant's lorry:

Particulars

- (a) driving at an excessive speed having regard to the conditions of the road, it having rained earlier that afternoon;
 - (b) overtook when it was unsafe to do so;
 - (c) failed to give way to oncoming traffic, but instead kept too close to his nearside kerb giving the deceased insufficient space in which to cycle;
 - (d) failed to see the deceased;
 - (e) failed to heed the presence of the bicycle;
 - (f) failed so to brake, steer, swerve, or manoeuvre his lorry as to avoid the collision that occurred;
 - (g) failed to blow his horn, or otherwise alert the deceased to his presence so that the deceased might take avoiding action;
 - (h) drove when he had been drinking as evidenced by his slurred speech and unsteady gait.
5. As a result the deceased who was born on May 1, 1948 sustained severe injuries from which he died some 3 weeks later, and thereby his estate and dependants have suffered loss and damage;

Particulars of Injury

Crushing injuries. The deceased suffered seven broken ribs, and a flail left chest leading to pneumothorax. His pelvis was broken in four places. He had fractures of both femurs, and his left lateral malleolus was shattered. He had severe depressed fractures of both cheekbones, and a right parietal fracture. He suffered extensive brain damage. Fuller particulars of these fatal injuries, and the attempted treatment, are contained in the report of Dr. P. Athology attached hereto as Annex 1.

Particulars of Loss to the Estate

- (1) The deceased was in employment as a mechanic to Island Motor Distributors Ltd. at the time of his death, earning \$7,000 per week net. His estate claims for nine weeks' loss of earnings: \$63,000.
- (2) Cost of care provided by visits from friends and relatives during his stay in hospital: 50 hours at \$100 per hour: \$5,000
- (3) Hospital fees \$50,000.00}
- } (See bills and receipt attached)
- (4) Medication \$10,500.00}

Particulars pursuant to the Fatal Accidents Act

- (a) The action is bought for the benefit of:
 - (i) the Claimant, widow of the deceased who was born on April 1, 1970, and who married the deceased on July 19, 1990;

- (ii) John C, son of the deceased, who was born on July 2, 1991
(now aged 11).
 - (iii) Mary C, daughter of the deceased, who was born on February
20, 1993 (now aged 9).
- (b) The dependants were dependent on the deceased for their maintenance, income and support. The deceased was in regular employment as aforesaid and in addition from time to time did private jobs repairing motor vehicles in his spare time from which he earned approximately \$120,000 per annum. He pooled his income with that of the Claimant (who earned some \$300,000 gross per annum). He was a family man, who did not smoke and drank little, and devoted his spare time to his home, wife and children. The claimant claims 80 per cent of the net pooled income less her net earnings as the loss of dependency, due to the fact that the pooled earnings were low and they did nearly everything together so that a greater than normal amount would be spent for their joint benefit and that of their children.
- (c) The Claimant was dependent also on the work and services the deceased provided for her and her son around the home. She shared a 3-bedroom house with the deceased:
- (i) He did the gardening of about two hours per week during 30 weeks of the year. The annual loss is about \$1,000 per year.

- (ii) He painted the interior of the house every 2-3 years; labour cost estimated at \$20,000 per annum.
- (iii) He performed day-to-day maintenance which is estimated at about 10 hours per annum. The annual loss is about \$1,000 per year.

Full details are contained in the schedule of damages attached at Annex 1.

- 5. Further the Claimant claims funeral expenses in the sum of \$250,000.
- 6. Further the Claimant claims interest to be assessed upon such damages as may be awarded under the Law Reform (Miscellaneous Provisions) Act.

AND the Claimant claims:

- (1) Damages under the Fatal Accidents Act.
- (2) On behalf of the estate of the deceased, under the Law Reform (Miscellaneous Provisions) Act, damages.
- (3) Interest pursuant to Law Reform (Miscellaneous Provisions) Act.

SETTLED

.....

I certify that all facts set out in this Claim Form are true to the best of my knowledge and belief.

DATED THE 24TH DAY OF JANUARY, 2003

.....
O. B. CALLENDAR
Claimant's Signature

NOTICE TO THE DEFENDANT

If you do not complete the form of Acknowledgement of Service served on you with this Claim Form and deliver or send it to the registry (address below) so that it is received within FOURTEEN days of service of the Claim Form on you, the Claimant will be entitled to apply to have judgment entered against you. See Rules 9.2(5) and 9.3(1).

The form of Acknowledgement of Service may be completed by you or an Attorney-at-Law acting for you.

The Registry is at King Street, Kingston, telephone numbers (876) 922-8300-9, fax (876) 967-0669. The office is open between 9:00 a.m. and 4:00 p.m. Mondays to Thursdays and 9:00 a.m. to 3:00 p.m. on Fridays except on Public Holidays.

DATED THE DAY OF JANUARY, 2003

The Claimant's address for service is that of his Attorneys-at-Law, MACPHERSON, MAXWELL & CO. of 22 Churchill Road, Kingston 10, St. Andrew, telephone number (876) 906 7773; fax (876) 906 7374

FILED by MACPHERSON, MAXWELL & CO., of 22 Churchill Road, Kingston 10, Attorneys-at-Law for and on behalf of the Claimant.