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IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN CIVIL DIVISION

CLAIM NO. 2006 HCV 00816

BETWEEN	MARCIA JARRETT (Administratrix of the Estate of Dale Jarrett, deceased)	CLAIMANT
AND	SOUTH EAST REGIONAL HEALTH AUTHORITY	1ST DEFENDANT
AND	ROBERT WAN	2nd DEFENDANT
AND	THE ATTORNEY–GENERAL	3RD DEFENDANT

IN CHAMBERS

Miss Catherine Minto instructed by Nunes, Scholefield, Deleon & Co. for the Claimant

Miss Annaliesa Lindsay instructed by the Director of State Proceedings for the Defendants

Heard: October 17 & 19, 2006 and November 3, 2006

Default judgment - Application to set aside default judgment - test to be applied for setting aside default judgment- Whether application for default judgment should have been served on Crown- Whether leave of Court required to enter default judgment against the Crown- Judicature (Rules of Court) Act, s. 4(8)- Crown Proceedings Act, s. 29 - Civil Procedure (Amendment) Rules, (2006), r. 13. 3.

McDONALD-BISHOP, J (Ag.)

1. By this application, the defendants are seeking an order that judgment in default entered against them on the 8th day of June, 2006 be set aside and that they be permitted to file their defence out of time.

2. The defendants have cited twelve grounds on which the application to set aside the default judgment is based. The kernel of the grounds are distilled for these purposes and condensed and outlined in the terms following.

(i) The default judgment against the defendants was entered on 8th June, 2006. However, none of the defendants was served with an application by the claimant to enter the judgment.

(ii) The application to set aside the default judgment is made promptly and the claimant will, therefore, not be prejudiced as her claim is for an unspecified sum of money that is yet to be submitted or quantified.

(iii) The defendants were not able to file an appropriate defence within the prescribed time of 42 days allowed by the Civil Procedure Rules (2002) (CPR) because the defendants require adequate instructions and also further information from the claimant in order to do so.

(iv) There is a defence on the merits to include the fact that the claimant's claim pursuant to the Fatal Accidents Act is statute barred.

(v) All the grounds considered in light of the overriding objective of the CPR deem it just and equitable in the circumstances to set aside the judgment and for permission to be granted to the defendants to file their defence.

3. The evidential support advanced in respect of these grounds is contained in the affidavit of Miss Annaliesa Lindsay to which a draft defence is exhibited. To this application, the claimant stands in strong opposition. The evidence in

response and in opposition to this application is contained in the affidavit of Miss Taneisha Brown to which a draft affidavit of the claimant is exhibited. Before proceeding to a contemplation of the instant application, I deem it useful to provide a synopsis of the facts of the case and a brief chronology of the proceedings.

FACTUAL BACKGROUND

4. In or about March, 1999, the claimant's husband, Dale Jarrett, deceased, was admitted to the Kingston Public Hospital (KPH) to undergo a surgical procedure for removal of a tumour that had been diagnosed in his left kidney. The KPH falls under the management and control of the 1st defendant. The 2nd defendant was the doctor entrusted with the responsibility of the care, management and treatment of the deceased from 1998 when the deceased was referred to him in his private practice. The surgery at the KPH was performed on March 12, 1999 by the 2nd defendant. The deceased's left kidney was removed during the surgery for testing.

5. A biopsy was to be performed on the tumour removed from the deceased's kidney to determine and to guide the future care, management and treatment of the deceased as well as to ensure that the proper diagnosis was made. The kidney with the tumour went missing after the operation. It was, therefore, not subject to the testing intended. The deceased continued to suffer pain in the same region of his body as before the operation. The pain increased in intensity.

6. By July, 1999, another diagnosis was made of a tumour in his T12 vertebrae. The deceased was advised to do further treatment in light of the presence of this tumour and the loss of the kidney specimen. The deceased did

not do so as recommended. On March 8, 2000, he died. The immediate cause of death remains undisclosed in the statement of case.

7. The claimant, by claim form dated March 7, 2006, brought an action against the defendants pursuant to the Law Reform (Miscellaneous Provisions) Act and the Fatal Accidents Act in her capacity as administratrix of the estate of her late husband. She has alleged in her statement of case that her husband died on 8th March, 2000 *"as a result of the negligent attention, treatment, care and/or diagnosis which the deceased received from the 1st and/or 2nd Defendant/ and or other servants and/or agents of the 1st Defendant who are unknown"* to her. It is her claim that this negligence caused the deceased's normal expectation of life to be shortened thereby resulting in his estate and near relations suffering loss and damage and incurring expenses.

CHRONOLOGY

8. The records and the undisputed evidence have revealed the following facts relative to these proceedings:

(i) The claimant filed her claim form with accompanying particulars of claim on 7th March, 2006.

(ii) On 20th March, 2006, the claim form with particulars of claim was served on the 3rd defendant.

(iii) On the 7th April, 2006, the 3rd defendant filed an acknowledgment of service on behalf of all the defendants.

(iv) This acknowledgment of service was served on the claimant's attorneys- at- law on 7th April, 2006.

(v) On 8th June, 2006, judgment in default of defence was entered for the claimant against the defendants.

(vi) On 20th June, 2006, the 3rd defendant was served with an attested copy of a judgment against the three defendants in default of defence.

(vii) On 23rd June, 2006, the defendants applied by a notice of application for court orders to set aside this judgment.

(viii) On 6th July, 2006, the defendants were served with a notice of hearing of assessment of damages from the Supreme Court Registry dated the 27th June, 2006 for hearing of assessment on 9th November, 2006.

(ix) On 13th July, 2006, the defendants were served with an amended particulars of claim that included items of special damages not included in the original particulars of claim. The claimant has indicated in that amended particulars of claim that she intends to make further amendments to the particulars of claim as she is in the process of collating further details in relation to special damages. This would see an increase in the sum claimed for special damages.

THE LAW

9. The right of the defendants to make this application in the circumstances of this case and the power of the court to entertain it inhere in the provisions of the Civil Procedure (Amendment) Rules, 2006, r. 13.3 (1) that came into effect

on September 18, 2006. It provides that the CPR (2002) has been amended to read:

> *"The court may set aside or vary a judgment entered under Part 12 if the defendant has a real prospect of successfully defending the claim"*

Further, the said amended CPR (2006) at rule 13.3 (2) provides:

> *"In considering whether to set aside or vary a judgment under this rule, the court must consider whether the defendant has:*
>
> *(a) applied to the court as soon as is reasonably practicable after finding out that judgment has been entered;*
> *(b) given a good explanation for the failure to file an acknowledgment of service or a defence, as the case may be."*

10. It is thus the principle that the primary test for setting aside a default judgment regularly obtained is whether the defendant has a real prospect of successfully defending the claim. The defence must be more than arguable to be such as to show a real prospect of success. This is a restatement of the principle in case law under the leading case of **Alpine Bulk Transport Co. Inc v. Saudi Eagle Shipping Co. *Inc.*** [1986] 2 Lloyd's Rep 22. It was also stated in that case that by this test, the court, in order to arrive at a reasoned assessment of the justice of the case, must form a provisional view of the likely outcome of the case if the judgment were set aside and the defence developed.

11. Since the test for summary judgment is in the same terms, I would adopt too the meaning ascribed to the words 'real prospect of success' in the context of summary judgment proceedings and say that the defence must have a 'real' as opposed to a 'fanciful' prospect of success and that 'real' is to be taken in its natural and ordinary meaning and so does not warrant any clarification or amplification: **Swain v Hillman and another** [2001] 1 All ER 91 applied. In fact, my adoption of this principle is by no means original as In **E.D. and F. Man**

Liquid Products Ltd v Patel [2003] EWCA Civ. 472, the *Times* 18 April, 2003, the U.K. Court of Appeal confirmed that the tests for setting aside a default judgment is the same as the test for summary judgment.

12. From the provisions of the CPR and the relevant case law, I think it would be safe to argue that the considerations for the court, before setting aside a judgment regularly obtained, should involve an assessment of the nature and quality of the defence; the period of delay between the judgment and the application made to set it aside; the reasons for the defendants' failure to comply with the provisions of the rules as to filing of a defence and the overriding objective which would necessitate a consideration as to any prejudice the claimant is likely to suffer if the default judgment is set aside. Before proceeding to examine these issues, however, I will first seek to dispense with the first ground raised by the defence in asking me to exercise my discretion to set aside the default judgment.

Whether the Application for the Default Judgment Should Have Been Served on the Defendants

13. It is the contention of defence that none of the defendants was served with an application for default judgment and that this should be taken as a ground for setting aside the judgment. The legal basis for this argument is to be found in the Judicature (Rules of Court) Act, s. 4(8) and the Crown Proceedings Act, ss. 29 (1) and 29 (2). For ease of clarity, the relevant portions of these provisions are set out below.

The Judicature (Rules of Court Act), s. 4(8) provides:

> *"The power conferred by this section to make rules of court shall be a power to which subsection (1) of section 29 of the Crown Proceedings Act, applies and in relation to civil proceedings by or against the Crown shall be exercised subject to that section."*

The Crown Proceedings Act, s. 29 (1), in turn, provides:

> *"Any power to make rules of court or Resident Magistrate's Court rules shall include power to make rules for the purpose of giving effect to the provisions of this Act, and any such rules may contain provisions to have effect in relation to proceedings by or against the Crown in substitution for or by way of addition to any of the provisions of the rules applying to proceedings between subjects."*

S. 29 (2) then provides:

> *"Provision shall be made by rules of court and Resident Magistrate's Court rules with respect to the following matters-*
>
> > *(c)...for providing that in the case of proceedings against the Crown the plaintiff shall not enter judgment against the Crown in default of appearance or pleading without the leave of the Court to be obtained on application of which notice has been given to the Crown." (Emphasis added)"*

The definition of "Rules of Court', according to the interpretation section of the Act, includes the Civil Procedure Rules, 2002.

14. There is no provision in the CPR giving effect to the provisions of the Crown Proceedings Act despite the mandatory wording of the section, particularly s. 29 (2) (c), that there should be rules in relation to entering judgment against the Crown in default of defence. The former Judicature (Civil Procedure Code) Law (CPC) had given effect to this provision in s. 258B. It provided:

> *"In any proceedings against the Crown no judgment for the plaintiff shall be entered in default of pleading without the leave of the Court or a Judge, and any application for such a leave shall be made by notice of motion or summons served not less than seven days before the return day."*

15. This requirement was given due consideration by Harrison, J.A. (as he then was) in ***D & L H Services Limited & others v The Attorney –General and another*** SCCA No. 53/98 delivered March 26,1999. He identified the purpose and rationale of the provision and stated as follows:

"The requirement of leave by 'the court or a judge' prior to entry of judgment in proceedings against the Crown is not peculiar to section 258B. The restriction also exists under section 78A (judgment in default of appearance) and under section 79 (summary judgment). The purpose and rationale are that the Crown consists of so many various arms and agencies that the Court takes the precaution to make it certain that knowledge of and service of the correct government agency has been effected"

16. Campbell, J also gave due consideration to this provision under the Crown Proceedings Act within the context of the CPR in **Rutair Limited v Jamaica Civil Aviation Authority** CL2005 HCV01748, delivered September 18, 2006. He also stated in his conclusion on this issue (with which I concur) that although the CPR is silent on the issue, the provisions of the Crown Proceedings Act in respect of default judgment would still apply. He maintained that the reason for leave to be granted recognizes that various departments, agencies and emanations comprise a modern state and so the rule makes due allowance for the Attorney General (in whose name all civil proceedings for and against the Crown should be brought) to have knowledge of and service of matters.

17. I would therefore venture to say that the purpose and rationale for such a rule remain the same today as it was under the former rules. So, the fact that there is an omission to make such provisions in the CPR cannot override the mandatory provisions of the statute which stand in effect until repealed. The rules cannot either impliedly or expressly repeal the statute. It follows then that the rules applicable to the entering of default judgments should be construed as being subject to the Crown Proceedings Act where the default judgment is to be against the Crown. To hold otherwise would be to ignore the mandatory provisions of the legislation and to go against the clear intention of Parliament. In the absence of a written rule in the CPR, I am still prepared to hold that the power to enter default judgment under the CPR is subject to the relevant provisions of the Crown Proceedings Act particularly s. 29 (2) (c). Accordingly, leave of court is required for the entry of such a judgment against the Crown

and the notice of such application is to be served on the Crown before such a judgment may be entered.

18. The claimant's counsel argued, however, that the claimant was under no duty to serve the application/ request for default judgment as none of the defendants named falls within the definition of 'Crown' in the Crown Proceedings Act or the 'State' in Part 12 of the CPR. Further, that the 2nd defendant is sued in his personal capacity and, therefore, could not be included as 'State' within the definition of the CPR. The fallacy in this argument is readily apparent. The claimant has joined the 3rd defendant as a defendant and has stated in her particulars of claim that the 3rd defendant *"is sued by virtue of the provisions of the Crown Proceedings Act for that the acts complained of were committed by servants and/ or agents of the Crown".*

19. Within this context, the claimant further avers that the 2nd defendant was at all material times the servant and/or agent of the 1st defendant and/or the Crown and, in the alternative, that he was contracted by the deceased and treated the deceased as part of his private practice. In relation to the 1st defendant, she avers that it is sued as a corporate statutory body whose responsibility entails the management, control and administration of the Kingston Public Hospital where the deceased was treated.

20. The Crown Proceedings Act, s. 3(1) reads in part:

> *"Subject to the provisions of this Act, the Crown shall be subject to all those liabilities in tort to which, if it were a private person of full age and capacity, it would be subject-*
>
> *(a) in respect of torts committed by its servants or agents."*

An 'Agent', when used in relation to the Crown, is defined under the Act as including 'an independent contractor' and s.13 (2) states that *"civil proceedings against the Crown shall be instituted against the Attorney –General."* Clearly, the Crown is joined as a party to the proceedings due to acts allegedly done by its servants and/or agents.

21. Given the claimant's pleadings and the nature of the proceedings, it is clear that these are proceedings against the Crown even, at minimum, on the principle of vicarious liability. Accordingly, I find it hard to fathom the source of and legal basis for counsel's submission that none of the defendants named falls within the definition of 'Crown' in the Crown Proceedings Act. I will, therefore, dismiss this contention as one without an iota of merit.

22. It follows then that the provisions of the Crown Proceedings Act was not complied with for the default judgment to be entered against the defendants. On this basis, it could well be argued that the judgment is irregular and should be automatically set aside as such, albeit, that it does not fall within any of the conditions set out in r. 13.2 of the CPR concerning the setting aside of default judgments irregularly obtained.

23. The defendants, however, did not seek to develop their application along this line in relation to a judgment irregularly obtained. They, evidently, view the non-compliance with the Crown Proceedings Act as a ground to set aside the judgment that they accept as one regularly obtained. I will, therefore, proceed to consider the application within the context of a judgment regularly obtained.

Is There an Affidavit of Merit?

24. The judgment may be set aside if this court is satisfied that the defendants have a real prospect of successfully defending the claim. There must

be shown, therefore, a defence on the merits. It is well established that this defence must be shown to exist in an affidavit sworn to by someone who can swear to the facts and to which a draft defence is exhibited.

25. ***Furnival v Brooke*** (1883) 49 L.T. 134 is still good authority on the point that where the judgment is regular, the court has a discretion in the matter and the defendant must, as a rule, show by an affidavit that he has a defence to the action on the merits. It has been established as far back then that before a judgment which is regularly obtained could be set aside, an affidavit of merit was required and when an application to set aside a judgment is not so supported, it ought not to be granted except for some very sufficient cause (see also ***Evans v Bartlam*** [1937] A.C. 473). This principle has resounded with settled acceptance by the courts within our jurisdiction. Consequently, an affidavit of merit is a fundamental requirement in all applications of this sort.

26. Within this context, it is worthy to note Lord Atkin's dictum in ***Evans v Bartlam*** (supra):

> *"But in any case, in my opinion, the Court does not, and I doubt whether it can, lay down rigid rules which deprive it of jurisdiction. Even the first rule as to affidavit of merit could, in no doubt, in rare but appropriate cases be departed from."*

This is clearly suggestive that the courts, while requiring as a rule that there must be an affidavit of merit may, nevertheless, in rare but appropriate cases, depart from its own rule in order not to deprive itself of jurisdiction to "revoke the expression of its coercive powers". It follows then that the absence of an affidavit of merit, in rare and exceptional circumstances, may not be fatal to an application to set aside.

27. For these purposes, it can be said that an affidavit of merit should show that the defendants have a defence that has a real prospect of successfully

defeating the claim and would also disclose any excuse for their failure to comply with the rules of procedure for the filing of a defence. The defendants, in seeking to fulfill the requirement of providing an affidavit of merit have relied on the sole affidavit of Annaleisa Lindsay filed in support of this application. Miss Minto, however, vehemently opposed this affidavit. Her attack on the affidavit was launched on roughly three fronts. Firstly, she argued that the affidavit is not a proper affidavit of merit in that it comes from counsel having conduct of the matter who speaks to facts that are not within her personal knowledge and with the source and grounds not disclosed. Secondly, that counsel in the matter, having sworn to the affidavit, ought not to have conducted the hearing of the application. Thirdly, that the affidavit does not disclose a defence on the merits to satisfy the test for setting aside the judgment.

28. Miss Minto contended that it has long been established and reiterated in the Court of Appeal that an affidavit of merit must be attested to by one who can speak positively to the facts. In support of her argument, she relied on **Ramkissoon v. Olds Discount** (1961) 4 W.I.R, 72 and the dictum of Downer, J.A. in ***Book Traders Caribbean Limited et al v. Jeffrey Young*** SCCA No. 59/1997 delivered November 10, 1997.

29. It must be noted, however, that under the CPR there is an exception to the general rule that an affidavit may contain only facts within the personal knowledge of the deponent. Rule 30.3 (2) (like its predecessor- s.408 of the CPC) allows for an affidavit containing information and belief to be utilized in interlocutory proceedings of this nature, of course, subject to specified conditions (see r.30.3 (2) (b). This reflects and serves to confirm the principle enunciated as far back as 1972 in the Trinidad and Tobago case of **Water & Sewage Authority v Waithe** (1972) 21 W.I.R. 498 that since proceedings to set aside a default judgment were interlocutory, the affidavit of merit could contain statements of information and belief with the sources and grounds thereof.

30. Our own Court of Appeal has also given effect to this principle in proceedings of this nature in more recent decisions since **Book Traders.** In **D & L H Services Limited et al v The Attorney- General et al** (supra), a similar challenge was posed to an affidavit of counsel from the 3rd defendant's (in this case) chambers. The claimant's counsel in that case contended that there was no affidavit of merit before the court. After exploring the issue within the context of the relevant law- the CPC (s.408) and case law- Harrison, J.A. (as he then was) concluded that hearsay evidence was admissible in applications to set aside a default judgment which are, in fact, interlocutory proceedings. He decided that the affidavit of counsel in that case, although in part based on evidence of information and belief, was admissible. The same conclusion was arrived at in respect of the provisions of the current r. 30.3 (2) in **Trevor McMillan et al v Richard Khouri** SCCA No. 111/2002 delivered July 29, 2003.

31. In light of this, the argument of Miss Minto that an affidavit of merit must be attested to by one who can speak positively to the facts is too restrictive within the context of the CPR. It also runs counter to strong authority that an affidavit of merit in interlocutory proceedings may contain matters that are not within the personal knowledge of the deponent provided certain conditions are satisfied.

32. Against this background, the question that now arises is: can Miss Lindsay's affidavit be accepted as one of merits? Of course, this necessitated an examination of the terms of her affidavit. Having done such an examination, I found that a substantial part of her 11- paragraphed affidavit consists of facts that are purportedly within her personal knowledge. There are three paragraphs that comprise hearsay statements and statements of belief (5, 6 &8). Of these three paragraphs, paragraph 8 has set out the source of the information and the grounds for belief. A part of paragraph 6 also does so.

33. The issue taken by the claimant's counsel relates primarily to paragraph 5 and a part of paragraph 6. In paragraph 5, the deponent speaks to instructions she has received from her clients that would put her in a position to file a defence. The instructions her clients reportedly gave were set out in the paragraph. The information given is stated to be from the defendants. This is contained in the draft defence of the defendants exhibited to her affidavit. The source is thus identified.

34. In any event, the information set out there are things that are set out also in the claimant's statement of case and to which Miss Lindsay would have had access from the time the claim form was served on the defence. The information contained therein is, essentially, not referred to for the truth of the contents but for the fact that she has now received instructions to put her in a position to file a defence. This would, therefore, not constitute hearsay to render it inadmissible. Even if it were though, it would be of no prejudice to the claimant because these are the same facts on which the claimant is relying as set out in her particulars of claim. They are undisputed. The complaint in relation to that paragraph is, therefore, unwarranted.

35. On an examination of paragraph 6, I do accept that the deponent has stated what appear to be facts or information but which could not have been in her personal knowledge. If she had made this statement from information and belief, she has failed to indicate the source and the grounds thereof. This is thus inadmissible as a matter of law. This observation, however, extends only to the portion that reads:

> *"The fact that no tests were carried out would not have affected the extent, if critical, of Mr. Jarrett's suspected cancer, thus resulting in his untimely death."*

Of the entire affidavit, this is the only part that I would treat as inadmissible. This portion is disregarded for my purposes and is treated as severed for all intents and purposes. The remaining portion of the affidavit, which is the substantial portion, is thus left for my scrutiny to see if it would qualify as an affidavit of merit.

36. To this issue, the claimant's counsel also added some other contentions which I would have to dispose of before proceeding to see if there is a defence on the merits. She contended that the fact that Miss Lindsay works for the 3rd defendant does not render her an appropriate deponent in this respect as the 3rd defendant is a "nominal defendant" who can lead no direct evidence at the trial in relation to what transpired. She continued:

> *"Further, any argument to the effect that she swore to the Affidavit in her capacity as a representative of the Third Defendant, is belied by the fact that she has now appeared before the court to argue the application, and is using her own Affidavit. This is in direct breach of established practice and procedure that Counsel cannot depone to and argue on an Affidavit in matters involving disputed facts. By doing so, she has eroded any possibility off the Claimant exercising her right under Part 30 of the CPR to call on her to be cross-examined on its (sic) Affidavit."*

I will just state that I have given this submission all the seriousness I think it deserves and I find it difficult in the context of the nature of the instant proceedings to accord any merit to it. Suffice it to say, I see nothing as a matter of law and no authority was brought to my attention to convince me to hold that Miss Lindsay is not a proper deponent in this case. I will also add that the Attorney- General, in my estimation, is not only a proper defendant but more than a "nominal defendant." The claimant is alleging liability of the Crown for the acts of its servants and/ or agents and so it will have to bear the burden of the incidences of liability if the claimant succeeds on her claim. As such, it cannot be taken as a mere "nominal defendant."

37. In relation to the objection of Miss Minto that Miss Lindsay has argued her own application and relied on her own affidavit, again, I can see nothing as a matter of law to dictate that this is impermissible within the circumstances of this case. I see nothing that could preclude the claimant from cross- examining Miss Lindsay if she had so desired. There may, indeed, be situations in which it would be undesirable for counsel to act in that way. However, I see nothing improper in the circumstances of this particular case to ignore the affidavit of Miss Lindsay on this ground.

38. I am, therefore, unable to find favour with Miss Minto's objections on these grounds. Accordingly, I accept Miss Lindsay as a proper deponent in the case and someone whose affidavit I may consider to see if it discloses a defence on the merits.

Does the Defence Show a Real Prospect of Success?

39. A defence on the merits would simply be a defence that, when examined in relation to the claim, would show that the defendants have a real prospect of successfully defending the claim. It must be a defence having a 'real' prospect as opposed to a 'fanciful' prospect of success. In **Blackstone's Civil Procedure, 2004** at paragraph 34.13 it is stated that on an application for summary judgment by a claimant, the defendant may seek to show a defence with a real prospect of success by setting up one of the following:

"a) *a substantive defence e.g., volenti non fit injuria, frustration or illegality.*

b) a point of law destroying the claimant's cause of action;

c) denial of facts supporting the claimant's cause of action;

d) further facts answering the claimant's cause of action, e.g. an exclusion clause, or that the defendant was an agent rather than a principal."

Given the similarity in the tests in both proceedings, it seems useful to adopt the foregoing as the formulation of a sound principle as to the forms a defence with a real prospect of success may take on an application for setting aside a default judgment. It is logical to conclude that a defence with a real prospect of success may be one grounded in fact; one grounded in law or one grounded in both fact and law.

40. The nature of the burden on the defendant to be discharged in applications of this sort is persuasively formulated by Craig Osborne, in his work, **Civil Litigation, Legal Practice Course Guides 2005-2006** (Oxford University Press*) at page* 364, which I now adopt in undiluted terms:

> *"Accordingly, a defendant who seeks to set aside a judgment which was properly obtained will himself have to file evidence to persuade the court that there are serious issues which provide a real prospect of him successfully defending the claim by putting forward arguments based on law or facts. The evidence filed must be verified by a statement of truth explaining the background (for example, why time passed without him responding properly to the claim form) and setting out his case in sufficient detail to satisfy the test. On receipt of that evidence it will be open to the claimant to amplify his own statement of case by further written evidence (for example to demonstrate that the defendant's evidence lacks any credibility, or to produce material which undermines it, such as contemporary documents)."*

It is against this background of the relevant legal principles that I have sought to examine the instant application.

41. The claim is said to be for damages under the Law Reform (Miscellaneous Provisions) Act and the Fatal Accidents Act in respect of the deceased who died as a result of the negligent attention, treatment care and/or diagnosis he

received from the 1st and/ or 2nd defendants and /or other servants or agents of the Crown who are unknown to the claimant. The claimant also avers that she will, in so far as is relevant, rely on the doctrine of *res ipsa loquitor.*

42. The defendants have accepted that the deceased died and that the kidney was removed for testing. Their defence has managed to give rise to the serious issue of causation. In the end, the defendants are denying that the misplacement of the kidney specimen could be the cause of death of the deceased and they put the claimant to strict proof of this. Further, it is their contention that the claimant has not stated the cause of death and therefore no nexus has been established between the defendants' alleged acts or omissions and the cause of death. They maintained that, with the cause of death not indicated, the necessary nexus between the treatment or lack of treatment by the defendants and the deceased's death has not been established. In their view, the doctrine of *res ipsa loquitur* is not applicable to assist the claimant on the issue of liability.

43. The cause of action that has allegedly been vested in the claimant upon the death of the deceased is one grounded in the tort of negligence. It is trite law that the burden of proof in an action for negligence falls on the claimant who, in order to maintain the action, must show certain things. He must show that he was injured by an act or omission for which the defendant is in law responsible. This involves the proof of some duty owed by the defendant to the claimant; some breach of that duty and an injury to the claimant between which and the breach of duty a causal connection must be established. It is therefore insufficient for a claimant to prove a breach of duty without proving injury or to prove injury which may or may not be due to a breach of duty: **Halsbury's Laws of England**, 3rd edn. vol. 28, p. 74. Further, any action for negligence is also subject to the limiting principles of remoteness (in which reasonable foreseeability is central), intervening causes and the duty to mitigate. All these

are issues likely to be considered in the context of this case given the defence disclosed in the affidavit.

44. In response to the challenge of the defendant concerning the absence of a nexus been shown between the act or omission of the defendants and the death of the deceased, Miss Minto contended that the cause of death is a matter of evidence and not pleading and so the claimant does not have to disclose that in her pleadings. I do appreciate that the connection between the death of the deceased and the acts or omissions of the defendants is, ultimately, one to be established by evidence. It must be noted, however, that a pleading must state such facts as would, if proved or admitted, establish the claimant's case. Material facts are what are to be pleaded and that is those facts essential to the claimant's cause of action or to the defendant's defence.

45. It is recognized that sometimes it is difficult to determine what is a matter of pleading and what is a matter of evidence. As the learned authors of **Odgers on High Court Pleading and Practice** 23rd edn., 135 pointed out, "*it is not always easy to decide what are the facts to be proved and what is only evidence of those facts. The question is one of degree and there are many cases in which facts and evidence are so mixed up as to almost be indistinguishable.*" According to them, the question as to whether a particular fact is or is not material depends on the special circumstances of a particular case and is a question which is not always easy to answer and one in which no general rule can be laid down.

46. Given the difficulty of sometimes distinguishing material facts from the means of proving those facts, Miss Minto's argument is not totally devoid of merit because the establishment of the nexus between the death and the defendants is, ultimately, a matter of evidence. The nexus, however, must be based on material facts. It must be noted that, as a rule, evidence will not be permitted on

facts that were not pleaded and so it is advisable that where there is a blurring in the distinction between what is a fact to be pleaded and what is evidence of it, it is best to plead the fact. In cases where negligence is pleaded, some definitiveness and particularity of facts are needed.

47. What is required of the claimant in this case would be, I think, an allegation based on material facts that the defendants caused the death of the deceased. While the means by which the proof of this is to be accomplished need not be pleaded, I am of the view that the proximate cause of death of the deceased is a material fact that should be pleaded. It is a fact necessary for the purpose of formulating a complete cause of action and at the same time indicating to the defendants the case they will have to meet and the material facts they would have to answer at trial. This is so in the particular circumstances of this case with death occurring a year or so after the alleged act or omission of the defendants. The interest of justice would be best served by such a pleading.

48. Indeed, the fact as to the proximate cause of death assumes even greater significance in light of allegations from the defence of, arguably, intervening factors such as the tumour in another region of the deceased body, his failure to remove the tumour and the alleged treatment of the deceased by other persons unrelated to the defendants. These, by themselves, have managed to give rise to serious issues of facts (including questions of medicine) and questions of law which, I believe, warrant special consideration.

49. The claimant, in the face of the challenge by the defence as to causation and having been put to strict proof of her allegation, has not disclosed the material fact as to the cause of death on which such crucial allegation against the defendants is based. Paragraph 16 of her affidavit tendered into evidence as exhibit "TB4" in answer to the defendants' affidavit states:

"That Dale died on March 7, 2000. At the date of his death, the hospital had still not located the specimen (removed kidney) and there was no proper report confirming whether Dale had even had a cancerous tumor of the kidney. He was in intense pain up to the time of his death."

At paragraph 17, she continues:

"That I am truly hurt by the Defendants allegations and submissions that I have not been prejudiced by their delays in this matter. During seven years of waiting, I lost my husband, my husband who was 32 lost his life, and we still do not know whether he had received a proper initial diagnosis, as the specimen was displaced."

These assertions do not amount to a definitive statement of any fact as to the cause of death. In this regard, I will pause to reiterate the words of Craig Osborne (supra) concerning what the claimant could do upon receipt of the defendant's affidavit:

"On receipt of that evidence, it will be open to the claimant to amplify his own statement of case by further written evidence (for example, to demonstrate that the defendant's evidence lacks any credibility, or to produce material which undermines it, such as contemporary documents)."(Emphasis mine)

50. Given the nature of the issues between the parties, with the question of causation being the pivotal one, nothing is indicated at this stage on the claimant's case to point to a causal nexus between the alleged negligent acts or omissions of the defendants and the death of the deceased. The claimant, in the face of the challenge by the defence, has not shown anything to demonstrate that the defence being advanced lacks credibility. Neither is there from the claimant, at the end of this hearing, any evidence, documentary or otherwise, to undermine the defence on the issue of causation raised by them in their affidavit of merit. The affidavit of merit, as presented, has revealed serious questions on this issue of causation as a matter of fact and of law that warrant investigation at a trial.

51. In the circumstances as presented in this case, it is difficult to find that the defence raised by the defendants on the critical question of causation is without a real prospect of success. This, I might add, would have been the position even if the cause of death had been disclosed because evidence would still be necessary to prove that such cause of death was a direct and foreseeable result of the defendants' removal of and failure to test the deceased's kidney. In light of the foregoing, I am persuaded to the view that the defence, when viewed against the backdrop of the claim as it stands at this time, is such that there is a real as opposed to a fanciful prospect of the defendants successfully defending the claim.

52. On top of this, the defendants have also demonstrated too that there is a defence in their favour in relation to the technical defence of the limitation of the action. It is their contention that the claim under the Fatal Accidents Act is statute barred. This is clear. The Act, however, provides that the court may allow the action notwithstanding that it is brought outside the limitation period. The fact that the court could grant the claimant relief in this regard does not, however, take away the right of the defendants to rely on such defence. It is available to them to be pleaded and could well be accepted by the court thereby defeating the claim under that statute. There is thus a real prospect that the defendants could successfully defeat the claim under this head.

53. Miss Minto has raised several thought provoking and interesting points in advancing her argument that there is no defence on the merit. I must commend her industry. I have, however, given due regard to all that she has urged on me but I am unable to find a proper basis, in law or in fact, on which I could agree that there is no merit in the defence and that any prospect of success is a fanciful one. In the circumstances, I find that the defendants have a real prospect of successfully defending the claim.

Did the Defendants Act Promptly to Set Aside the Judgment?

54. In considering whether to set aside the judgment, I am also mindful that I have to consider whether the defendants have applied to set aside the judgment as soon as is reasonably practicable after finding out that the judgment had been entered against them: r. 13.3 (2)(a) (amended CPR, 2006).

55. The default judgment was entered on the 8th June, 2006 and served on the defendants on the 20th June, 2006. By the 23rd June, 2006, the application to set aside was made. There is, evidently, no problem in finding that the defendants have acted promptly in applying to set aside the judgment. There has been no inordinate or inexcusable delay. This was conceded by Miss Minto.

Is There a Good Explanation For Failing to File a Defence?

56. Although there is a defence on the merits and the defendants had acted promptly to set aside the judgment, I must enquire into the reasons advanced for the failure of the defendants to comply with the procedural rules for filing a defence within the prescribed time: r.13.3 (2) (b) (amended CPR)

57. According to Miss Lindsay, the due date for the defence to be filed would have been the 1st or 2nd May, 2006, 42 days after receiving the claim form. She deposed that during that time when the defence was due, *"they were not in a position to file and serve a proper and appropriate defence as a result of insufficient instructions and what they have now realized is the need for further information from the claimant."*

58. Again, Miss Minto took the defendants to task. She stated that the defendants have failed to provide the court with a good explanation. Through the affidavit of Taneisha Brown, she demonstrated that the defendants were provided, as far back as 1999, with the same information which Miss Lindsay

alleged that they are now in receipt of. Further, she argued, that although the defendants claim that they needed information from the claimant, no request was made of the claimant's counsel for such information and, finally, that the defendants have raised defence in law that *"could not possibly require instructions."*

59. I have considered the argument of both counsel and I do accept, given the nature of the action and the magnitude of the allegation encompassing persons known and unknown, that instructions in contemplation of responding to the claim would have to be obtained. I accept that this might, in the normal course of business, take some time for an appropriate and proper defence to be filed particularly in light of the fact that that two of the three defendants are, in effect, "institutional defendants". This, without more, could have been a sufficiently acceptable reason. However, there is more.

60. I must say that I have looked at the issues raised by way of the defence on the instructions obtained and I do agree with Miss Minto that there are areas of the defence that would warrant no instructions for a "proper" defence to be filed. It is clear at first glance of the claimant's statement of case that there is no cause of death given and that no nexus is shown between the death and the alleged negligence of the defendants which, in itself, would give rise to the critical question of causation. That is patently clear from the claimant's pleading and would have provided some sufficiently cogent material for a defence to be prepared in response. Also, the defence as to the fatal accident claim being statute barred needed no instructions. I find that there was sufficiently good material on which a "holding" defence (still one showing some real prospect of success to protect against a summary judgment or a default judgment) could be filed with the right reserved to file an amended and more ample defence at a later time, with or without leave.

61. Also, the reason advanced by the defendants that they have come to realize that more information was needed from the claimant to file a defence is not accepted as a good explanation. Additional information from the claimant could not preclude a defence being filed in the particular circumstances of this case. Information from the claimant could be properly addressed by a simple letter or by a formal request for further information. Up to the hearing of this application, the defendants have not shown any attempt made to obtain this 'much needed' information from the claimant within the 70 days between the service of the claim form and the entering of the default judgment, or at any time thereafter. Yet, by the time of this application, they have still managed to prepare a draft defence without any further information from the claimant.

62. While I can appreciate that the claim might not have completely set out the case that the defendants are required to meet, it did not take away from the ability of the defendants to file a proper "holding" defence based on the information in their possession. This conclusion has come against the background that the claimant has shown, through several documentary exhibits, that there had been prior discussions between, at least, the 1st and 3rd defendants and the claimant. These have indicated that, as far back as 1999, the defendants were aware of the complaint of the deceased and the claimant about the kidney. They, themselves, had indicated to the claimant that investigations were being conducted into the circumstances. In fact, up to 2003, the 3rd defendant had indicated in one such correspondence that he was awaiting instructions from the Ministry of Health and requested that the estate should bear with them a little more.

63. The circumstances of the case would, therefore, not be new to the defendants since there is clear and undisputed evidence that they have been investigating the case for the past seven years. It is hard to imagine that for seven years some sufficiently useful information was not garnered to furnish the

basis for, at least, a preliminary defence with some real prospect of success to be filed within the prescribed time.

64. I conclude on a totality of the circumstances and in light of what is now raised as a defence that the defendants' explanation cannot be taken as a wholly acceptable one. They had the option to either file a defence on what was available to them and seek to amend at a later date upon obtaining more ample instructions or to seek an extension of time within which to comply with the rules for the filing of a defence. I cannot accept the explanation advanced as a sufficiently good one.

65. The absence of a good explanation, however, does not, in and of itself, dispose of the matter. In ***Thorn plc v McDonald [1999] CPLR 660,*** the U.K. Court of Appeal stated that any failure by the defendant to provide a good explanation for the delay is a factor to be taken into account but is not always a reason to refuse to set aside (*See **Blackstone's** (supra), p. 246).*

Should the Judgment be Set Aside?

66. The ultimate question therefore remains: should the judgment be set aside in all the circumstances as considered and in light of the overriding objective of enabling the court to deal with cases justly? A good starting point is to be reminded of that stated by Moore-Bick, J in ***International Finance Corporation v Utexara*** [2001] CLC, 1361, that:

> *"A person who holds a regular judgment, even a default judgment, has something of value and in order to avoid injustice he should not be deprived of it without good reason. Something more than a merely arguable case is needed to tip the balance of justice to set the judgment aside."*

67. On the other side of the scale, it is accepted as an established principle of our law that the court will not generally allow judgment by default to stand where the defendant has merely failed to follow the rules of procedure and there has not been a hearing on the merits. This is authoritatively laid down in the oft-quoted dictum of Lord Atkins in ***Evans v Bartlam*** (supra) at page 650:

> *"The principle obviously is that unless and until the court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has been obtained only by failure to follow any of the rules of procedure."*

68. I embrace this pronouncement as a sound and instructive one even in the context of this case coming so many decades after. The defendants have failed to comply with the rules for filing a defence within the time prescribed and have no acceptable excuse for not so doing but should this conclusively deprive them of the right to be heard on the merits? I am, indeed, mindful that in deciding whether or not to set aside this default judgment, the prime and paramount test has to be whether the defendants have shown a defence on the merits, that is, a defence with a real prospect of successfully defending the claim.

69. Despite the absence of what I consider as a good explanation for the failure to file a defence within the time prescribed, I nevertheless find that this is outweighed by the existence of, *prima facie,* a defence on the merits and the fact that the defendants have acted promptly to set aside the judgment which is indicative of a genuine desire to defend the claim. Miss Lindsay has urged on me to heed the words of Rattray, P in ***C. Braxton Moncure v Doris Delisser*** (1997) 34 J.L.R., 423 where he stated at page 425:

> *"The Court will not allow a default judgment to stand if there is a genuine desire of the defendant to contest the claim supported by the existence of some material upon which that defence can be founded."*

70. In considering the overall justice of the case and in giving effect to the overriding objective, I have taken into account too the fact that no leave was obtained for the default judgment to be entered and notice of the application was not served on the defendants in accordance with the provisions of the Crown Proceedings Act. This, at minimum, would have deprived the defendants of even a slight window of opportunity for an application to be made to extend time for the filing of the defence.

71. I have also considered any possibility or likelihood of prejudice to the claimant if the default judgment is set aside. I have noted in this regard that damages have not yet been assessed and that at the time default judgment was requested and notice of hearing of assessment was given, the claimant was still not ready to prove special damages. Consequently, an amended particulars of claim was served on the defence indicating an increase in the amount claimed for special damages. In that amended particulars, there is an indication that further amendment will be sought as soon as the claimant is finished collating all material data relative to proof of special damages. It is clear that the claimant is still not ready to assess damages in its entirety. Any prejudice, therefore, there might be to the claimant at this stage, if judgment was to be set aside, is outweighed by the prejudice to the defendant if judgment was not set aside in all the circumstances.

72. I am indeed persuaded by the words of the learned authors of **Blackstone's** (supra) at paragraph 1.26, that:

> *"The main concept in the overriding objective is that the primary concern of the court is to do justice. Shutting a litigant out through some technical breach of the rules will not often be consistent with this, because the primary purpose of the civil courts is to decide cases on their merits not reject them for procedural default."*

73. In fine, I am not prepared to shut the defendants out through a technical breach of the rules in this situation where there is, as I see it, a defence on the merits and a genuine desire to defend the claim. I am, indeed, propelled to the view that the default judgment entered against the defendants on June 8, 2006 ought to be set aside.

ORDER

74. Accordingly, I make the following orders:

1. Default judgment of June 8, 2006 entered in favour of the claimant against the defendants in binder: 738 Folio: 304 is hereby set aside on condition that the defendants do file and serve a defence within twenty-one (21) days of the date hereof.

2. The date fixed for hearing of assessment of damages on November 9, 2006 is hereby vacated.

3. Matter to proceed to Case Management Conference on April 26, 2007 at 12:00 p.m. for one (1) hour after consultation with the Registrar.

4. Costs to the claimant to be agreed or taxed.