[2026] JMSC Civ 142

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2014HCV04206

BETWEEN	**HEART INSTITUTE OF THE CARIBBEAN LIMITED**	**CLAIMANT**
AND	**DENRY CUMMINGS**	**DEFENDANT**

IN CHAMBERS

Ms Keisha Spence and Mr Vasheney Headlam, instructed by Henlin Gibson and Henlin, Attorneys-at-Law for the Claimant

Mr Leroy K. Equiano, Attorney-at-Law appearing on behalf of the Defendant

Heard: May 29, 2025 and February 27, 2026

ORAL RULING

Civil Procedure: Rules 29.5(1)(d) and 29.5(2) - Inadmissible Hearsay Evidence-Striking Out Application-Evidence Act – Sections 31F, 31G and 31G.

JACKSON J

Introduction

[1] On 29 May 2025, during the trial of this matter, counsel for the defendant, Mr Leroy Equiano, objected to paragraphs 5–15 of the witness statement of the

claimant's sole and primary witness, Mr Agyeman Manu, on the ground that they constituted inadmissible hearsay and requested that they be struck out.

[2] On 27 February 2026, I upheld the objection and made the following orders:

1. The objection to paragraphs 4–15 of Mr Agyeman Manu's witness statement is upheld to the extent that paragraphs 5–15, together with the accompanying Notices of Intention to Tender Documents, are struck out as inadmissible hearsay.

2. The claimant is granted leave to appeal.

3. The matter is adjourned to 30 September 2026 at 12:00 noon for half an hour by video conference, pending the appeal.

4. Costs are costs in the claim.

5. The claimant's attorneys-at-law shall prepare, file and serve this order.

[3] The foregoing are reasons for doing so.

The Background that gave rise to the Objection

[4] The trial commenced on 29 May 2025. Manu took the stand. After he was sworn in and answered the usual introductory questions about his name, address and occupation, counsel for the claimant, Mr Vasheney Headlam, sought permission of this court for his witness statement to stand as his evidence-in-chief.

[5] Both counsel addressed the court. Mr Headlam further requested time to file his oral submissions and authorities, noting the likely impact on the witness's evidence in light of the objection. I directed both counsel to file and serve their submissions and lists of authorities by 13 June 2025, and part-heard the matter, adjourning it to 20 June 2025 for continuation.

The Genesis of the Claim

[6] To put the objection in context, it is necessary to provide a brief background to the circumstances that led to the claim.

[7] The claim, filed on 2 September 2014, sought the return of US$37,746.00 for an alleged breach of an agreement to implant an implantable cardioverter defibrillator (ICD) in the defendant.

[8] The nine-paragraph Particulars of Claim alleged that, on or about 22 July 2014, the defendant consulted Dr Joel Brooks at the Heart Institute of the Caribbean ("HIC"). Dr Brooks diagnosed a genetic cardiovascular disease with a high risk of sudden death and recommended urgent ICD implantation. According to the claimant, the parties then reached an oral agreement for the procedure. The defendant was informed that the device had to be brought into Jamaica and carried by a specialist, and that he would also have to bear the cost. The claimant further alleged that the defendant agreed to those arrangements.

[9] The claimant further pleaded that the defendant was admitted to Medical Associates Hospital, where Dr Brooks examined him, and that he accepted a price for the procedure and the device.

[10] Ms Shelly-Ann Stevenson, an administrator at HIC, discussed the payment arrangements with the defendant. The defendant paid a $2 million deposit, using Sagicor Insurance and a credit card. The defendant further alleged that the balance was to be paid in two instalments.

[11] On 24 July 2014, the defendant allegedly told Ms Stevenson that he would arrange for another doctor to perform the procedure. Ms Doreen Darien, another HIC administrator, then contacted him to explain that HIC had already incurred expenditure. She offered a reduced total price of J$2 million, free pacemaker interrogation after the procedure, one year's free HIC membership, and a free ECG. The defendant, the claimant, still refused to proceed with the procedure.

[12] The Particulars of Claim referred to three documents and three incident reports, attached and designated “A” to “F”. Although they were identified and attached to the Particulars of Claim, the usual notice that they would be relied upon or adduced at trial under section 31E or 31F of the **Evidence Act,** without calling their makers, was omitted.

[13] The documents and reports were:

- Dr Brooks’ incident report, dated 24 July 2014, marked **“A”**;
- Ms Stevenson’s incident report, dated 24 July 2014, marked **“B”**;
- Copy cheque no. 100055, marked **“C”**;
- Ms Darien’s incident report, marked **“D”**;
- Invoices: sum outstanding, marked **“E”**;
- Demand letters, marked **“F”**.

The Witness Statement of Agyeman Manu

[14] For ease of reference, paragraphs 3–15 of Mr Manu’s witness statement are reproduced verbatim below.

> *“ ….*
>
> *3. The facts and matters in this statement are within my personal knowledge insofar as I was a party to the event, matter or issue in the course of my employment with the Claimant.*
>
> *4. The Claimant is the premier centre of excellence for cardiovascular care in the English-Speaking Caribbean. The core business of the Claimant is to provide comprehensive and sophisticated diagnosis and management of all forms of heart diseases.*
>
> *5. In or about 22nd July 2014. I became aware that the Defendant had a consultation at the Claimant's office, which resulted in the Claimant's Dr Joel Brooks diagnosing the Defendant with genetic cardiovascular disease associated with a high risk of sudden death. An urgent Implantable Cardioverter Defibrillator (ICD) procedure (hereinafter referred to as the ICD implantation") and treatment*

were recommended to the Defendant by Dr Brooks. Dr Brooks brought the Defendant to the billing department and indicating that the procedure needed to be done.

6. The cost of the procedure at the time was Four Million Four Hundred and Seventy-Nine Thousand Seven Hundred and Forty-Four Dollars (J$4,479,744.00). The ICD would have had to be purchased overseas, and a special technician would take the device to Jamaica from the United States of America. The above-mentioned information was communicated to the Defendant.

7. The Company Administrator, Ms Dorren Darien, was instructed to make the necessary arrangements for the technician and the ICD to be flown from the United States of America. The technician's airfare and hotel accommodation were an expense to the Claimant.

8. The Defendant agreed to have the procedure done with the Claimant, and as a result, he was admitted to the Medical Associates Hospital on the 22nd of July 2014.

9. Prior to the Defendant's transfer and admission to the Medical Associates Hospital, the Defendant provided his Sagicor Insurance information to the Claimant so that it could be submitted for pre-approval.

*10. Several calls were made to Sagicor Insurance for the pre-approval letter requested by *the Defendant. During that process, the Defendant was aware that the sum to be paid could, by him, amount to over Three Million Dollars. The Claimant also enquired about how the Defendant intended to pay his portion in an effort to accelerate the pre-approval process with Sagicor.*

11. On or around the 23rd of July 2014, a Sagicor agent did an eligibility check on the Defendant's policy and found that the Defendant had major medical coverage for no more than Five Hundred Thousand Dollars (J$500,000.00). The Defendant was immediately advised of this information. The Defendant's portion would have been Three Million Nine Hundred and Seventy-Nine Thousand Seven Hundred and Forty-Four (J$3,979,744.00).

12. The Defendant then advised that he would make a Five Hundred Thousand Dollar (J$500,000.00) deposit on 23rd July 2014. Thereafter, he would give the Claimant a cheque for One Million One Hundred Thousand Dollars (J$1,100,000.00) from Sagicor Investment. A further payment of Four Hundred Thousand Dollars (J$400,000.00) from his credit card. This would have totalled Two Million Dollars (J$2,000,000.00), representing a deposit on the ICD implantation. The Defendant also requested a payment plan for the balance to be paid in two (2) instalments, with the first being at the end of August 2014, and the latter at the end of September 2014.

13. In accordance with the said agreement, on the 23rd July 2014, the Defendant made a payment of Five Hundred Thousand Dollars (J$500.000.00) for which receipt was issued. The Claimant was advised that a further payment of would be made by 9:00 a.m. on the 24t8 July 2014.

14. At about 8:40 a.m. on the 24th July, 2014, the Defendant was contacted to follow- up about the scheduled payment. The Defendant explained that he was no longer interested in having the procedure done with the Claimant as he was unable to afford it. Further, that he would be finding another Doctor to assist him. The Defendant was reminded that the Claimant had made preparation and expended resources in preparation for the procedure. The technician and the device were already on the island at that point.

15. The Defendant simply stated that he would do the procedure with another Doctor and then abruptly ended the telephone call.

……"

The Notices of Intention to Adduce Hearsay Evidence

[15] Two Notices of Intention to Adduce Hearsay Evidence were served on the defendants just days before the trial, and both were served outside the required 21-day timeline provided by the **Evidence Act**.

[16] The first Notice was filed on 21 May 2025, and the second, a Supplemental Notice, was filed on the day of the trial, 29 May 2025. Both Notices stated that the makers of the documents were unavailable to attend court.

[17] The first notice, filed on 21 May 2025, attached the following documents:

I. Three incident reports: Shelly-Ann Stevenson, Dr Joel Brooks and Doreen Darien, each dated 24 July 2014;
II. An email from Ms Stevenson to Kyhian Keene dated 23 July 2014;
III. A National Commercial Bank cheque dated 23 July 2014; and
IV. an invoice dated 25 July 2014.

[18] These documents were also included in a Bundle of Not Agreed Documents, and both were filed on 21 May 2025.

[19] The supplemental notice, filed on 29 May 2025, included nine clinical and administrative records. The claimant contended that the records had been overlooked and discovered late; hence, they were filed late. These records were:

I. a Quality Audit Sheet dated 22 July 2014;
II. a Patient Information Sheet;
III. a Patient Medication Log;
IV. an HIC Medware Diagnostic Coding record;
V. a Registration Form dated 22 July 2014;
VI. results from Apex Health Care Centre addressed to Dr Debra O'Connor;
VII. a 2-D, M-Mode and Doppler Echocardiogram report dated 22 July 2014;
VIII. an Echocardiogram/Doppler record dated 22 July 2014; and
IX. an initial Cardiology and Vascular Clinic visit record dated 22 July 2014.

[20] The claimant sought to adduce the documents in the Notice filed on 21 May 2025, pursuant to sections 31E and 31G of the **Evidence Act**, and in the

Supplemental Notice, pursuant to sections 31E, 31F and 31G of the **Evidence Act.** The defendant objected to both Notices and asked the court to require the makers to attend trial for cross-examination.

A Brief Look at the Incident Reports

[21] These reports were written in the first person, and each person provided a first-hand account of each of the witnesses' interactions with the defendant and others.

Dr Brooks' Incident Report, 24 July 2014

[22] Dr Brooks is the consultant who examined the defendant. The report recounts his direct dealings with the defendant, his examination, his conversation with the referring physician, the defendant's admission to Medical Associates Hospital, and his subsequent hospital visit. In the report, Dr Brooks also noted that the billing clerk discussed the procedure costs with the defendant and that the defendant knew the implant device had to be brought to Jamaica. The report concludes with an account of a telephone call on 23 July 2014 from an unidentified nurse, during which Dr Brooks was informed that the defendant had transferred his care to another physician.

Ms Stevenson's Incident Report, 24 July 2014

[23] Ms Stevenson described her direct dealings with the defendant, including a conversation in Dr Brooks' presence. Her report also recounts her handling of the defendant's health insurance with a Sagicor agent, her discussions with that agent regarding the proposed payment plan and related arrangements, and the defendant's cancellation.

Ms Darien's Incident Report

[24] Ms Darien described her direct dealings with the defendant after he cancelled the procedure. Her report recounts their conversation, her proposal for a reduced price, and the defendant's refusal to accept it.

The Submissions

[25] Mr Equiano addressed the law of hearsay and its common-law and statutory exceptions.

[26] Relying on Morrison P (as he then was) in **National Water Commission v VRL Operator Limited and others** [2016] JMCA Civ. 19, he sets out what he described as a simple and comprehensive definition of hearsay, citing the Learned President as follows:

> *[9] "As is well known, evidence of a statement made by someone not called as a witness may or may not be admissible. If what it is intended to prove by the evidence is the fact that the statement was made, then it will, generally speaking, subject to considerations of relevance and any other exclusionary factors, be admissible for that purpose. However, if the evidence is tendered to establish the truth of what is contained in the statement, it is hearsay evidence and, as such, generally inadmissible."*

[27] He submitted that the rule against hearsay in trials protects the integrity of the justice system because hearsay is often unreliable and its accuracy cannot be tested. He further submitted that exceptions have developed over time, permitting certain forms of hearsay, including the common-law exceptions for dying declarations and statements made against one's own interest.

[28] He further submitted that, in recent times, legislation has broadened the scope of exemptions to the admissibility of first-hand hearsay statements and documents, with specific reference to **the Evidence (Amendment) Act 2023.** He further submitted that the **Evidence Act** paved the way for the admissibility of statements, including those from persons who are deceased or incapacitated by

illness and cannot be located, as well as certain business and computer-generated documents.

[29] He argued that these exceptions do not alter the definition of hearsay and that hearsay remains inadmissible unless a common-law or statutory exception applies. He underscored this submission by contending that the witness statement under review failed to satisfy any of the requirements.

[30] Further, counsel relied on rule 29.5 of the Civil Procedure Rules (CPR). He submitted that the witness statement regime is now firmly established in civil trials and that rules 29.5(1)(d) and 29.5(2) require witness statements to be free of inadmissible material.

[31] Rule 29.5(1)(d), which he regarded as unambiguous, provides that "a witness statement must not include any matters of information or belief which are not admissible and, where admissible, state the source of any matters of information or belief". Under rule 29.5(2), the court may strike out any inadmissible, scandalous, irrelevant or otherwise oppressive matter from a witness statement.

[32] Counsel then highlighted key paragraphs of the statement. He noted that paragraph 5 of the witness statement disclosed no interaction between Mr Manu, the defendant, and Dr Brooks. He said paragraph 6 appeared to lay the basis for an agreement. He asserted that information was communicated to the defendant, but Mr Manu has not identified who communicated it, when it was communicated, nor its source.

[33] He emphasised that the defendant disputed the alleged contract and that this fundamental issue required evidence to be tested on cross-examination.

[34] He also stated that paragraphs 14 and 15 were clear examples of the claimant's attempt to circumvent the rules of evidence by introducing inadmissible hearsay.

[35] In summary, counsel submitted that paragraphs 5–15 contained no direct evidence but appeared to recount other people's accounts of events and conversations involving the defendant. He argued that, from the statement's tone and tenor, it was clear that Mr Manu had neither participated in those events or conversations nor acquired first-hand knowledge of any contractual arrangements.

[36] These gaps, he submitted, concerned the identity of the person who communicated the proposed cost and arrangements to the defendant—matters central to the alleged contract and vehemently disputed.

[37] Turning to the notice of intention to adduce incident reports and other documents, including receipts, counsel submitted that the claimant must establish that the documents fall within the statutory exceptions set out in sections 31(E), 31(F) and 31(G) of the **Evidence Act**.

[38] He further submitted that merely citing those provisions in the notices to adduce was insufficient. He asked the court to note that the witness statement mentioned neither the notices nor any documents attached to them, and that it also failed to establish the conditions precedent required to satisfy the court under the Evidence Act.

[39] Mr Headlam responded with equal force and emphasis. Without explicitly denying that paragraphs 4–15 contained hearsay, he argued that the CPR introduced procedures to streamline litigation and save trial time.

[40] He submitted that the objection should have been raised at the pre-trial review, after the statement had been filed and served pursuant to case management orders and well before trial. He characterised the late objection as trial by ambush, which the court should discourage.

[41] He relied on Batts J's decision in **Lowell Morgan v Sentry Services Company Limited and SGB Maintenance Limited** [2015] JMSC Civil 12, where a similar objection arose:

> *"[24] Ezekiel Knight was then called to give evidence on behalf of the First Defendant. He is a security officer and at the material time was area manager. His witness statements dated 23rd April 2013 and 6th November 2014 stood as his evidence in chief. The Claimant's counsel then rose to object on the basis that the witness' statements were hearsay. I enquired of her why, if the statement was given in 2013, these objections were not made at pre-trial review. Counsel responded that there was judicial authority to the effect that such applications are to be made at the trial.*
>
> *[25] I refused to allow the application at this late stage. Different situations may call for a different exercise of discretion. It seems to this court that the general rule, if the efficiency of the court is to be maintained, must be that objections to the contents of witness statements take place in pre-trial hearings. A party who has duly filed and exchanged witness statements to which no objection is taken is entitled to plan his case on the basis that this will be the evidence in chief of his witness. If, at trial, due to a successful objection, a great hole is punched in matters he needs to prove, an application to adjourn can be expected. The whole tenor of the Civil Procedure Rules supports a view that litigation by ambush is to be avoided. I will not allow the First Defendant to be ambushed at this stage by objections to the content of a witness statement served over a year ago. Cross-examination as well as submissions on the probative value of the content of witness statements are adequate safeguards available to the Claimant. My position may of course have been otherwise had the witness statement been served out of time or after the pre-trial review."*

[42] Applying that reasoning, Mr Headlam pointed out that the statement was filed and served on 1 November 2024, and that no objection was raised at the pre-trial review on 31 March 2025. He submitted that the claimant would therefore have planned its case on the basis that the statement, as it stood, would constitute its evidence-in-chief. He urged the court to reject the objection as belated, an ambush, and a delaying tactic.

[43] In response, Mr Equiano said that no rule of law prescribed when an objection must be taken, and that failure to object at pre-trial review could not render

inadmissible evidence admissible unless a statute or the common law provided otherwise. He submitted that the party preparing a witness statement remained responsible for ensuring compliance with the hearsay rule and other rules of evidence.

[44] He further argued that Batts J's decision conflicted with rules 29.5(1)(d) and 29.5(2) and with hearsay law, and that it should not bind this court.

[45] Responding to the alleged lack of personal involvement and the identified sources under rules 29.5(1) and 29.5(2), Mr Headlam submitted that Mr Manu acquired knowledge during his employment as Finance Manager, a role that implied access to company records and files. He relied on paragraph 3 of the witness statement:

> *"3 The facts and matters in this statement are within my personal knowledge insofar as I was a party to the event, matter or issue in the course of my employment with the Claimant."*

[46] Also relying on Edwards JA's decision in **Jamaica Public Service Company Limited v Charles Vernon Francis and Columbus Communications Jamaica Limited** [2017] JMCA Civ. 2, Mr Headlam argued that Mr Manu, as an employee and senior officer, could give evidence based on knowledge derived from company records. He submitted that such knowledge could be treated as the company's knowledge for the purpose of proving the claim.

[47] He maintained that paragraph 3, read alongside Mr Manu's position as Finance Manager, implied that the information came from within the company rather than from external sources.

[48] Under section 31F of the Evidence Act, Mr Headlam contended that the incident reports were generated or received in the course of business and therefore met the conditions for admission. He relied on section 31F(6)(d), submitting that

reasonable efforts to locate or identify the former employees responsible for the documents had been unsuccessful.

[49] Finally, he submitted that, in its discretion and on application, the court could permit amplification of the statement to introduce documents already referred to or relevant to the substance of the witness's evidence.

[50] Mr Equiano distinguished **Jamaica Public Service Company Limited v Charles Vernon Francis and Columbus Communications Jamaica Limited** as involving an affidavit explaining a company's procedural default based on its records, rather than trial evidence proving disputed dealings with an external party, such as the defendant.

The Ruling of the Court

[51] The claimant failed to establish either a common-law exception to the hearsay rule or the conditions precedent for admission under the statutory exceptions in the **Evidence Act.** The **Evidence Act** sets out clear requirements for statements and documents to fall within the hearsay exception.

[52] Before proceeding, this ruling concerns Mr Manu's witness statement filed on 1 November 2024 and the attempt to adduce two notices. The supplemental witness statement, the application for relief from sanctions, and the supporting affidavits filed on 13 June 2025 fall outside its scope. The application was not heard.

[53] Starting with the rules of this court, Rule 29.5(1)(d) of the CPR prohibits the admission of inadmissible information or belief and requires sources to be stated where admissible. Rule 29.5(2) permits the court to strike out inadmissible material.

[54] By the court's own observation of the relevant paragraphs, I note the following: paragraphs 5–15 recount disputed events without establishing Mr Manu's first-

hand knowledge or identifying his sources. The general assertion of personal knowledge in paragraph 3 does not cure these omissions—paragraph 5 reports Dr Brooks' diagnosis and recommendation without explaining how Mr Manu learned of them. Paragraph 6 identifies neither the person who communicated the price and overseas arrangements nor Mr Manu's basis for reporting that communication.

[55] Paragraphs 7–8 provide no basis for Mr Manu's knowledge of the instructions to Ms Darien, expenditure, or the alleged agreement. Paragraphs 9–12 report insurance enquiries, findings, advice, and payment promises without establishing Mr Manu's participation or identifying his sources.

[56] Paragraph 13 identifies neither Mr Manu's role in receiving payment nor the admitted supporting record, nor the source of the further payment promise. Paragraphs 14–15 provide no basis for Mr Manu's account of the cancellation call or his assertions about the technician and device.

[57] A clear evidence deficiency is that the statement neither identifies nor adopts the documents in the notices, nor does it explain their creation or sources, or show how he obtained them. It therefore provides no foundation for their admission under the **Evidence Act.** Further, the statement does not establish the makers' unavailability to the court's satisfaction. This is a specific requirement of the statute.

[58] Assertions in counsel's submission that reasonable efforts to locate or identify the former employees had failed are not evidence of the conditions relied upon under section 31E of the **Evidence Act.**

[59] The notices of intention sought admission of fifteen disputed exhibits. They were served close to the trial date. Such filing did not dispense with proof of the statutory conditions. The incident reports also contained hearsay evidence upon hearsay evidence. These include Dr Brooks' report of an unidentified nurse's

statement and Ms Stevenson's dealings with a Sagicor agent. Each of those statements adds another layer of hearsay that requires its own foundation.

[60] **Jamaica Public Service Company Limited v Charles Vernon Francis and Columbus Communications Jamaica Limited** concerned an interlocutory explanation of procedural default based on internal records, not proof of disputed dealings with an external party. It does not establish the missing foundation here. Mr Manu's office as Finance Manager does not, by itself, prove knowledge of the events or the truth of the recorded conversations. He must show how the documents were generated in the course of his business and how he came into contact with them. His statement does not refer to the assertions. The assertion in paragraph 3 of the witness statement is not enough to establish that the documents were obtained in the course of the business.

[61] Amplification of the statement upon application, by virtue of Rule 29.9 (1), may assist in some circumstances but cannot assist in the case at bar. The statement is far from disclosing the substance of the evidence which the witness seeks to amplify.

[62] Equally, the failure to object at pre-trial review does not render hearsay admissible or make the trial objection an ambush. Introducing unexchanged and unserved evidence by amplification would risk a trial by ambush and be highly prejudicial to the defendant.

[63] For these reasons, I recognise the clear failure to comply with the law on hearsay evidence. There was no basis for not upholding the objection. As ordered in paragraph 2, I strike out paragraphs 5–15 of the statement and the attempt to tender the documents under the **Evidence Act.**