[2026] JMCA Civ 5

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MISS JUSTICE P WILLIAMS JA
THE HON MR JUSTICE LAING JA
THE HON MRS JUSTICE SHELLY WILLIAMS JA (AG)

SUPREME COURT CIVIL APPEAL NO COA2025CV00024

BETWEEN	**NICHOLAS ALLEN**	**APPELLANT**
AND	**AZAR MITCHELL**	**1ST RESPONDENT**
AND	**GARFIELD LOVE**	**2ND RESPONDENT**

Written submissions filed by Lennox A Gayle & Co for the appellant

Written submissions filed by Archer Cummings & Co for 1st respondent

13 March 2026

Civil Practice and procedure – Amendment of statement of case after the expiration of the limitation period – Civil Procedure Rules 2002, Parts 19 and 20 – Limitation of Actions Act, section 46 – Whether learned judge erred in application of the principles

PROCEDURAL APPEAL

(Considered on paper pursuant to rule 2.4(3) of the Court of Appeal Rules 2002)

P WILLIAMS JA

[1] I have read the draft judgment of my brother Laing JA and I agree with his reasoning and conclusion.

LAING JA

Introduction

[2] This is a procedural appeal arising from the decision of an acting judge of the Supreme Court ('the learned judge') granting Mr Azar Mitchell ('the 1st respondent') leave to amend its statement of case nine years after the claim was initially filed, on the dates set for trial. The learned judge further ordered that the amended claim form, amended particulars of claim, and the amended witness statement be permitted to stand as having been properly filed.

Background

[3] Mr Nicholas Allen ('the appellant'), is the 1st defendant in a negligence claim. The 2nd respondent, Garfield Love ('Mr Love'), although named, has not taken part in the proceedings. Proceedings were commenced in the Supreme Court against the appellant and Mr Love, by the 1st respondent, seeking damages as a result of a motor vehicle accident which he alleged occurred in the Mandeville Bus Park in the parish of Manchester on or about 13 November 2013.

[4] On 11 May 2015, the 1st respondent filed a claim form and particulars of claim ('the original statement of case'), in which he alleged that on the relevant day, he was standing in the Mandeville Bus Park when Mr Love "so negligently drove and/or operated and/or managed the said motor vehicle registered PF 9283, owned by [the appellant], that he caused and/or permitted the same to come violently in collision with the [1st respondent]. The accident was wholly caused by the Negligence of [Mr Love]". The 1st respondent also set out the particulars of negligence attributed to Mr Love.

[5] In response to the claim, the appellant filed a defence on 15 July 2016, in which he positively asserted that, at all material times, Mr Love was neither his servant nor his agent, and that his designated driver was one Mr Richard Allen. He further stated that, at no time, did he authorise or give permission to Mr Love to drive his Toyota Hiace mini bus registered PF 9283 ('the motor vehicle'). Mr Love did not file a defence, and a default judgment was entered against him.

[6] The appellant's witness statement was filed and served on 9 January 2024. A witness statement from Mr Saint Sirane Stedrick Allen o/c Richard Allen was filed and served on 16 February 2024 and 19 February 2024 respectively. In substance, the statements averred that Mr Love was a "back up man /loaderman" who had entered and driven the motor vehicle without permission and the motor vehicle subsequently came into contact with the 1st respondent.

[7] On 20 February 2024, the 1st respondent filed an amended claim form and an amended particulars of claim. The significant amendment to the claim form for purposes of this appeal was the assertion that Mr Love was the appellant's "and/or Richard Allen's servant, agent, authorised driver, and or permitted" driver of the motor vehicle.

[8] The amended particulars of claim now include particulars of negligence of the appellant and/or Mr Richard Allen as follows:

> "(a) Authorising, permitting, and/or suffering [Mr Love] to drive, operate and/or manage the motor vehicle registered PF 9283;
>
> (b) Further, or in the alternative, authorising, permitting, and/or suffering Mr Richard Allen to authorise, permit and/or suffer [Mr Love] to drive, operate and/or manage the motor vehicle registered PF 9283;
>
> (c) Further, or in the alternative, leaving the motor vehicle registered PF 9283 unattended without having stopped the engine and/or without taking due precautions against its being moved or moving in their absence.
>
> (m) [sic] Further, or in the alternative, failing to have any sufficient regard for pedestrians, and or particularly [the 1st respondent], that were or might reasonably be expected to be in the said Bus Park by leaving the motor vehicle registered PF 9283 unattended without having stopped the engine and/or without taking due precautions against its being moved or moving in their absence.

(d) The [1st respondent] intends to rely on the doctrine of *res ipsa loquitur"*

[9] On 21 February 2024, the 1st respondent filed a notice of application for court orders, for permission to amend the statement of case, requesting that it be heard at the trial scheduled for 21 and 22 February 2024, or on such other date as the court deems fit. By this application, he sought orders permitting his amended claim form and particulars of claim filed on 20 February 2024, as well as his amended witness statement filed on 29 January 2024, to stand. The application also sought additional relief that is not material to this appeal.

[10] The primary grounds advanced for the amendments of the statement of case are that:

> "1. CPR 20.4 provides that an application for permission to amend a statement of case may be made at the Case Management Conference. Statements of case may only be amended after a Case Management Conference with the permission of the Court…
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> …
>
> 3. On or about the 9th of January 2024 and the 16th February 2024, [the appellant] filed the Witness Statements of Nicholas Allen and Saint Sirane Stedric Allen o/c Richard Allen respectively. These Witness Statements make allegations that are not included in [the appellant's] Defence.
>
> …
>
> 8. If the orders sought is not granted, then the [1st respondent] will be seriously and irredeemably prejudiced. The granting of the orders will not unduly prejudice [the appellant], who only began to raise certain issues with particularity in his Witness Statements will also need to amend his Defence if permissible."

[11] The application was supported by an affidavit of urgency sworn to by Clifton D Campbell, the attorney-at-law having conduct of the matter, and filed on 21 February

2024. In the affidavit, Mr Campbell referred to his earlier affidavit filed on 5 January 2024 in support of a notice of application for relief from sanctions. The affidavit addressed primarily matters concerning the medical evidence. However, at para. 13, it made a brief reference to the amended claim form and amended particulars of claim in the following terms:

> "On the 20th of February 2024, an Amended Claim Form and an Amended Particulars of Claim were filed and served on the [appellant's] Attorneys-at-Law. These documents sought to correct procedural issues, as well as to further particularise [the 1st respondent's] cause of action, the relationship and information of the parties, and the damages. This will allow the issues between the parties to be determined with finality and justly.
>
> …"

[12] On 25 October 2024, the matter came up for hearing before the learned judge. After hearing submissions from counsel for the appellant and the 1st respondent, she made the following orders:

> "1. The [1st respondent's] Amended Claim Form and Amended Particulars of Claim both filed on 20th February 2024 are permitted to stand.
>
> 2. The [1st respondent's] Amended Witness Statement filed on 29th January 2024 is permitted to stand.
>
> 3. The [appellant] is permitted to file and serve an Amended Defence on or before December 6, 2024.
>
> 4. The [1st respondent] is permitted to file and serve a reply, if necessary, on or before January 7, 2025.
>
> 5. The Trial dates of November 6 and 7, 2024, are hereby vacated.
>
> 6. Trial is now fixed for two days on September 22 and 23, 2025 at 10:00 a.m. before a judge alone in open Court.

7. A further Pre-Trial Review date is scheduled for April 29, 2025 at 2:00 p.m. for one hour.

8. Leave to appeal is refused.

9. Costs to be costs in the claim.

10. The [1st respondent's] Attorneys-at-Law are to prepare, file and serve the Formal Order herein."

The appeal

[13] Being dissatisfied with the orders of the learned judge, and the learned judge having refused leave to appeal, the appellant applied for, and was granted, leave to appeal by a panel of this court on 7 April 2025. The notice and grounds of appeal were to be filed by 5 May 2025, but were filed on 17 April 2025. The grounds of appeal are as follows:

"i. The [learned judge] erred in law in granting the application to amend the claim when its effect was to permit the bringing of a new cause of action, or at the very least an amendment of the existing cause of action on the basis of new facts/allegations made after the expiration of the limitation period.

ii. The [learned judge] erred in the exercise of her discretion to grant an amendment in that she;

(a) wrongly granted the amendment at a very late stage of the action – the action was more than nine years old, an adjournment had been sought on the very date of trial to facilitate the application to amend, and the order made by the [learned judge] resulted in the substantial trial dates of November 6 and 7, 2024 being vacated

(b) Wrongly failed to recognise that there was no new cause of action on the amended claim

(c) Wrongly failed to recognise that in the circumstances of this case the [1st respondent] could not properly obtain, maintain and proceed with a judgment on the footing that [Mr Love] was the servant and/or agent

of the [appellant] and then be granted an amendment of the claim in the same action against the [appellant] permitting him to proceed against the [appellant] on a different basis at the same time as damages against [Mr Love] are being assessed

(d) wrongfully failed to recognize that an amendment in the terms granted would prejudice the [appellant] because the limitation period in a claim of negligence had expired in relation to the [appellant] who had not previously been sued for any negligent act alleged to have been committed by him in respect of the accident/incident subject of the action.

(e) the learned judge erred in any event in granting the amendment to permit the [1st respondent] to sue on the basis that the [appellant's] driver (Allen) authorised [Mr Love] to drive the bus when no particulars of the negligence of Allen were furnished

(f) the learned Judge erred in granting amendments that were lacking in 'truth and substantiality'

(g) the learned Judge erred in granting amendments which were essentially frivolous or amounted to an abuse of the process of the Court.

iii. the [learned judge] wrongly ordered that costs be [costs] in the claim instead of awarding costs in favour of the [appellant]."

[14] The appellant's grounds of appeal may conveniently be grouped into the following three issues:

1. Whether the amendments constitute a new cause of action, and if the new cause of action is founded on the same or similar facts (ground i);

2. Whether, in all the circumstances, including the timing of the application, the learned judge wrongly exercised her discretion to

grant the amendments notwithstanding the absence of a legal bar to her doing so (ground ii); and

3. Whether the learned judge erred in awarding costs to be costs in the claim instead of awarding costs to the appellant (ground iii).

However, despite the framing of these issues, ultimately, I concluded that the failure of the 1st respondent to have joined Mr Richard Allen as a defendant to the claim has significant implications for how this appeal should be resolved.

Appellant's submissions in summary

[15] The essence of the appellant's submissions in respect of ground i is that the court will not generally allow an amendment of a statement of case after the expiration of the limitation period to enable a new cause of action, except where the cause of action is based wholly or substantially on the facts already pleaded. Reliance was placed on **The Attorney General of Jamaica v Abigaile Brown (By Next Friend Affia Scott)** [2021] JMCA Civ 50 ('**The AG v Abigaile Brown**'). Counsel for the appellant, Mr Lennox Gayle ('Mr Gayle'), contended that there are fundamental differences between the facts as originally pleaded and the amended statement of case.

[16] Mr Gayle submitted that if Mr Love was, as originally alleged, the servant or agent of the appellant, then any claim against him ought properly to have been advanced on the basis of vicarious liability. However, the amendments granted by the learned judge introduced an entirely new claim, namely that:

a) The appellant authorised Mr Richard Allen to allow Mr Love to drive the motor vehicle; or

b) Mr Richard Allen negligently left the motor vehicle unattended with the "engine running" thereby making it possible for Mr Love to enter the vehicle and drive it.

[17] Counsel acknowledged that if the appellant did not authorise Mr Richard Allen to permit Mr Love to drive the vehicle, and Mr Richard Allen nonetheless did so, vicarious liability could properly be attributed to the appellant. Counsel drew the court's attention to the decision in **Ilkiw v Samuels and others** [1963] 1 WLR 991, as discussed in Winfield & Jolowicz on Tort, 17th Edition, at para. 20-11. In that case, the 3rd defendants were held vicariously liable after their driver, the 2nd defendant, while acting in the course of his employment, allowed Samuels to drive the lorry. Samuels was not authorised by the owner of the lorry to do so, and Samuels' negligent driving caused an accident and injury to the plaintiff.

[18] Counsel observed that, in his amended witness statement, the 1st respondent contends that he heard the driver instruct the conductor to move the motor vehicle. However, this allegation was never pleaded in the amended particulars of claim, and as such, it is in breach of rule 8.9 of the Civil Procedure Rules ('CPR'), which requires a claimant to set out in the claim form or particulars of claim all the facts on which he intends to rely. It was further emphasised that, pursuant to rule 8.9, a claimant may not rely on any factual contention that is not properly pleaded.

[19] Counsel also submitted that, in any event, there was no legal basis to permit the amendments since they are not based on the same or substantially the same facts and relied on the approach to assessing this issue outlined by the court in **Attorney General of Jamaica & Anor v Cleveland Vassell** [2015] JMCA Civ 47.

[20] In respect of ground ii, it was contended that the learned judge erred in the exercise of her discretion by allowing the amendments and not properly assessing several considerations. These include the advanced stage at which the application to amend was made, as well as the prejudice alleged to the appellant arising from the expiration of the limitation period, which has now deprived the appellant of the opportunity to rely on a limitation defence to the negligence claim.

[21] Regarding ground iii, the position advanced is that although costs are discretionary, the learned judge failed to properly consider a number of relevant factors, including the lateness of the application and the resulting consequences, such as the adjournment of the trial date.

The 1st respondent's submissions in summary

[22] On behalf of the 1st respondent, Archer Cummings contended that the amendments did not introduce an unknown person or a distinct cause of action. The amendments arose directly from the original particulars of claim and the appellants' defence that Mr Richard Allen was his only designated driver.

[23] It was submitted that, even if the amendments introduced a new claim, the decision in **The AG v Abigaile Brown** makes it clear that there is no inflexible prohibition barring a new cause of action after the expiration of the limitation period, provided it arises from the same or substantially similar factual matrix. Mr Palmer contended that this requirement that the claim arose from substantially the same facts was satisfied, as the amendments stemmed from the very circumstances underpinning the original claim, namely the negligent operation of the appellant's motor vehicle. It is also contended that even if the amendments introduced a distinct allegation, the decision in **The AG v Abigaile Brown** demonstrates that the learned judge was required to consider whether the factual issues raised by the amendments were likely to be contested at trial. If so, the amendments ought properly to have been permitted.

[24] It was advanced that, even if Mr Love is not an unauthorised driver of the appellant and took the vehicle without the permission of Mr Richard Allen, the appellant may nevertheless be liable if it was foreseeable that the vehicle could have been stolen. Counsel advanced that a critical issue to be determined at trial is the manner in which Mr Love came to be driving the appellant's vehicle, specifically:

a. whether he was allowed to do so by the appellant or by Mr Richard Allen in the course of his employment;

b. whether he was allowed to do so by Mr Richard Allen outside the course of his employment; or

c. did he take the vehicle without consent, and if so, the circumstances that led to this happening?

[25] It was submitted that even if Mr Richard Allen permitted Mr Love to drive the motor vehicle without the appellant having authorised him to permit this, Mr Richard Allen would merely have been doing his work in an unauthorised manner. The appellant, as his employer, could still be found to be vicariously liable for a wrongful and unauthorised mode of doing some act authorised by the master. Reliance was placed on **Carole Reid v Anwar Mark Anthony Wright and Damion Markland** [2017] JMSC Civ 88.

[26] In relation to ground ii, Mr Palmer submitted that although the amendments were sought long after the commencement of the claim, the delay did not, of itself, prohibit them. He contended that the learned judge expressly considered the issue of potential prejudice to the appellant. Counsel relied on the case of **Caricom Investments Limited and Others v National Commercial Bank Jamaica Ltd and Others** [2020] JMCA Civ 15, in which this court overturned a refusal to grant permission to amend a statement of case on the retrial of a claim.

Exercise of the court's discretion

[27] By this appeal, the appellant challenges the learned judge's exercise of her discretion in granting an amendment after the relevant limitation period had expired. The general principles governing this court's review of a judge's discretion are well established. They are set out in the judgment of Lord Diplock in **Hadmor Productions Limited and Others v Hamilton and Others** [1982] 1 All ER 1042, 1046. These principles were subsequently adopted by Morrison JA (as he then was) in the oft-cited authority of **Attorney General v John MacKay** [2012] JMCA App 1 at para. [19], where he stated that:

" ...

> '[The appellate court] must defer to the judge's exercise of his discretion and must not interfere with it merely on the ground that the members of the appellate court would have exercised the discretion differently.'
>
> [20] This court will therefore only set aside the exercise of a discretion by a judge on an interlocutory application on the ground that it was based on a misunderstanding by the judge of the law or of the evidence before him, or on an inference - that particular facts existed or did not exist - which can be shown to be demonstrably wrong, or where the judge's decision 'is so aberrant that it must be set aside on the ground that no judge regardful of his duty to act judicially could have reached it'."

Therefore, for this court to disturb the learned judge's decision, it must be shown that the learned judge's exercise of her discretion was based on a misunderstanding of the law or the evidence that was before her, or that her decision was palpably wrong. This court has not had the benefit of the learned judge's reasons for the orders made and is, therefore, not aware of the considerations that informed her decision. Accordingly, our analysis must proceed by reference to the applicable general principles and the particular facts and circumstances of this case.

Whether the amendments constitute a new cause of action, and if the new cause of action is founded on the same or similar facts (ground i)

[28] The central issue before this court is whether the learned judge erred in permitting the amendments to the 1st respondent's statement of case, in particular the claim form and particulars of claim, after the expiration of the limitation period.

[29] Rule 20.6(1) of the CPR, which is applicable, reads as follows:

> "20.6 (1) This rule applies to an amendment in a statement of case after the end of a relevant limitation period.

> (2) The court may allow an amendment to correct a mistake as to the name of a party but only where the mistake was –
>
> (a) genuine; and
>
> (b) not one which would in all the circumstances cause reasonable doubt as to the identity of the party in question."

The rule addresses amendments to correct a mistake regarding the name of a party but offers no further guidance on the circumstances in which a new cause of action may be introduced after the expiration of the limitation period. This court recognised and acknowledged this in **The Jamaica Railway Corporation v Mark Azan** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 225/2005, judgment delivered on 16 February 2006 ('**Mark Azan**').

[30] In **Tikal Limited and Wayne Chen v Everley Walker** [2020] JMCA Civ 33, this court considered and accepted the position articulated in **Lance Melbourne v Christina Wan** (1985) 22 JLR 131, page 135, that the limitation period for actions in tort is six years. There is no dispute between the parties before us that the amendments were granted after the expiration of the limitation period applicable to the tort of negligence.

[31] The parties also agree on the relevant legal principles governing amendments after the expiration of the limitation period, as articulated in several authorities, including **The AG v Abigaile Brown, Mark Azan**, **The Attorney General of Jamaica and Another v Cleveland Vassell** and **Sandal Resorts International Limited v Neville L Daley and Company Limited** [2018] JMCA App 24 ('**Sandals Resorts**'). As Harrison JA explained in **Mark Azan**, an amendment that seeks to add or substitute a new cause of action is deemed to be a separate claim. Where such an amendment is permitted after the limitation period has expired, the defendant will be deprived of the limitation defence. This outcome will generally result in injustice, which cannot ordinarily be cured by an award of costs.

[32] The principles governing applications to introduce a new cause of action after the expiry of the limitation period were also articulated in **Mark Azan**, where the court identified several relevant considerations and emphasised that the list was by no means exhaustive.

> "29…
>
> (i) If the new plea introduces an essentially distinct allegation, it will be a new cause of action. In **Lloyds Bank plc v Rogers** (1996) The Times, 24 March 1997, Hobhouse LJ said inter alia:
>
> > '…if factual issues are in any event going to be litigated between the parties, the parties should be able to rely upon any cause of action which substantially arises from those facts.'
>
> (ii) Where the only difference between the original case and the case set out in the proposed amendments is a further instance of breach, or the addition of a new remedy, there is no addition of a new cause of action. See **Savings and Investment Bank Ltd v Fincken** [2001] EWCA Civ 1639, The Times, 15 November 2001.
>
> (ii) A new cause of action may be added or substituted if it arises out of the same facts, or substantially the same facts, as give rise to a cause of action already pleaded.
>
> (iv) In the case of **Brickfield Properties Ltd. v Newton** (1971) 1 WLR 862 a general endorsement on the writ claimed damages against an architect for negligent supervision of certain building works. The particulars of claim were served after the expiry of the limitation period and contained claims both for negligent supervision and negligent design. It was held by the Court of Appeal that the negligent design claim arose substantially out of the same facts as the negligent supervision claim and in its discretion the court allowed the amendment."

[33] The court's power to permit an amendment, whether it is an amendment that does not introduce a new cause of action or an amendment that introduces a new cause of action arising out of the same or substantially the same facts, must be constrained by principles of fairness. As Harrison JA observed at para. 5 of **Mark Azan**, the governing principle has always been that an amendment should be allowed if it can be done without prejudice to the opposing party. This principle has been repeatedly endorsed in subsequent authorities, including **Sandals Resorts**.

[34] The cause of action underpinning the original claim is the tort of negligence. The ingredients of this tort are well established and are identified by the authors of Winfield and Jolowicz on Tort, 13th Edition, Chapter 5 as:

(a) A legal duty on the part of A towards B to exercise care in such conduct of A as falls within the scope of the duty;

(b) Breach of that duty;

(c) Consequential damage to B.

[35] Closely related to these elements is the concept of foreseeability. In the context of the operation of motor vehicles, there is a duty on the driver of motor vehicle to operate it with the skill and care of the reasonably competent driver and utilise ordinary care or skill towards persons using the roadway whom he could reasonably foresee as being likely to be affected or injured by his conduct in accordance with the neighbour principle as espoused by Lord Atkin in **Donoghue v Stephenson** [1932] AC 562, 580.

[36] In addition to being liable for wrongful acts which cause damage, a person can also incur liability for the damage caused by the negligence of another person under the principle of vicarious liability. Many cases involving vicarious liability arising from the driving of motor vehicles turn on the issue of agency. The issue of agency is often complex, and the learned authors of Halsbury's Laws of England, 5th Edition, Volume 1, paras. 29 and 30 state:

> "The terms 'agency' and 'agent', in popular use, have a number of different meanings, but in law the word 'agency' is

> used to connote the relation which exists where one person has an authority or capacity to create legal relations between a person occupying the position of principal and third parties. The relation of agency arises whenever one person, called the 'agent', has authority to act on behalf of another, called the 'principal', and consents so to act.
>
> The authority of the agent may be derived expressly from an instrument, either a deed or simply in writing, or may be conferred orally. Authority may also be implied from the conduct of the parties or from the nature of the employment. It may in certain cases be due to the necessity of circumstances, and in others be conferred by a valid ratification subsequent to the actual performance. In addition, a person may appear to have given authority to another, and acts within such apparent authority may effectively bind him to the third party."

[37] The complexity of the interplay between the concepts of negligence and agency is aptly demonstrated in the Privy Council appeal from Guyana, in **Harry Rambarran v Gurrucharran** [1970] 1 All ER 749. To adequately illustrate the difficulties that may arise, it is necessary to review the facts.

[38] The appellant, Mr Rambarran, was the owner of a motor car. On the day of the accident, he was not using the vehicle; it was at his home while he was at his farm located elsewhere. His son, Leslie, who resided with him, had a general standing permission to use the car. Leslie took the vehicle, and, due to his negligence, it was involved in an accident that caused injury to the respondent, Mr Gurrucharran. The respondent sued the appellant, as owner, for damages. Notably, Leslie was not made a party to the proceedings and did not give evidence. The trial judge accepted the appellant's evidence that Leslie was permitted and authorised by his father to drive the car at the time of the accident. However, his father did not know that Leslie was using the vehicle that day. Accordingly, the trial judge found that Leslie was not driving as his father's servant or agent, and the respondent had failed to discharge the burden of proving that Leslie was acting on the appellant's behalf. Accordingly, the judge dismissed the claim.

[39] On appeal to the Court of Appeal of Guyana, the court, by a majority, allowed the appeal and found the appellant liable. Reliance was placed on the principle from **Barnard v Sully** (1931) 47 TLR 557, that ownership of a vehicle raises a *prima facie* case that the owner's servant or agent was driving it. The Court of Appeal held that this presumption was not rebutted because the appellant, who "alone knows the facts", had failed to lead evidence as to the specific purpose of Leslie's journey at the time of the accident "although from his own lips" the appellant must have had that evidence available. Therefore, since Leslie was driving on that day with the appellant's permission, a strong *prima facie* case had been established, which the appellant did not answer.

[40] On Mr Rambarran's appeal to the Privy Council, Lord Donovan, delivering the judgment of the Board, allowed the appeal and found that the trial judge was correct in concluding that the owner was not liable. Having reviewed several authorities, the Board distilled what may properly be regarded as the core principles governing such cases. Firstly, the ultimate question is one of fact, and the central issue of whether the driver was acting as the owner's servant or agent is also a question of fact to be decided on the totality of the evidence. Where no more is known of the facts than that at the time of the accident, the car was being driven by someone other than the owner, this affords "some" evidence that it was being driven by his servant or agent.

[41] Secondly, the evidence that it was being driven by his servant or agent, based on the fact of ownership, is rebuttable. The owner can rebut any inference from ownership in one of two ways:

1. By leading positive evidence of the driver's purpose and establishing that it was for the driver's own benefit and not the owner's; or

2. By giving sufficient credible and cogent evidence to prove that the car was not being driven for any purpose of the owner. If this evidence is accepted, the actual purpose of the driver's journey becomes irrelevant, and this position is not to be overthrown

> because the owner chooses to deploy this approach to rebutting the inference rather than the former.

[42] Accordingly, the Board explicitly rejected the view of the Court of Appeal that the owner was obliged to lead evidence of the driver's specific errand. The Board held that it is sufficient for the owner to prove, on a balance of probabilities, that the driver was not on the owner's business. The plaintiff, who has the burden of proof and means of compulsion (eg, joining the driver as a defendant or calling him as a witness), cannot complain of a lack of evidence about the journey which it was within his power to adduce by making Leslie a co-defendant and by administering interrogatories to elicit responses as part of the litigation process. The respondent, having failed to adduce any evidence to counter the appellant's testimony, did not discharge the legal burden of proving agency.

[43] Therefore, **Harry Rambarran v Gurrucharran** stands as a critical authority for the proposition that ownership alone creates only an evidential inference of agency, which may be displaced by credible evidence from the owner that the driver was on a "frolic of his own". It firmly places the legal and evidential burden of proving agency on the plaintiff. The principles outlined in this case have been adopted in several cases from this jurisdiction, including **Lena Hamilton v Ryan Miller and Others** [2016] JMCA Civ 59.

[44] In analysing the original claim in the context of the guidance offered by **Harry Rambarran v Gurrucharran**, the critical factual allegation by the respondent in the original claim is that Mr Love was the servant and/or agent of the appellant. This is not expressly stated in the original claim form, but in the original particulars of claim at para. 2, it is so stated.

[45] The 1st respondent is, therefore, free to pursue his claim as originally filed.

[46] In the amended claim form, it is expressly pleaded by the 1st respondent that Mr Love, "[the appellant's] and/or Richard Allen's servant, agent, authorised driver, and/or

permitted driver", caused his injury. In the amended particulars of claim, it is expressly pleaded at para. 3 that Mr Love was:

> "… the servant, agent, authorized driver, and/or permitted driver of [the appellant] and/or Mr Richard Allen."

[47] As amended, the 1st respondent case continues to be founded on the concept of vicarious liability, based on an agency relationship between Mr Love and the appellant. However, there is a significant factual distinction. The amended pleadings rely on the conduct of Mr Richard Allen to ground vicarious liability in the appellant. In his amended witness statement, the 1st respondent states the following at para. 5:

> "5. At the time of the accident the driver of the minibus, Mr. Richard Allen had asked his conductor, Mr. Garfield Love, to reverse the coaster minibus for him. The minibus was owned by [the appellant]."

[48] Vicarious liability is not an independent, freestanding tort. It is a legal principle by which one party may be held liable for the tort committed by another. The necessity of a tort triggering the operation of the principle is evidenced by the fact that vicarious liability is not properly pleaded in isolation without identifying the underlying tort relied on.

[49] However, as both counsel have appreciated, in addition to the original pleading which sought to make the appellant liable on the basis of his ownership of the vehicle and the doctrine of agency, the amended pleadings provide the 1st respondent with an additional and alternative basis in vicarious liability.

[50] The claim as amended based on vicarious liability is grounded on the 1st respondent's pleaded assertion that Mr Richard Allen permitted Mr Love to drive the motor vehicle, or alternatively that he negligently left the vehicle unattended, thereby allowing Mr Love access. These allegations, if properly pleaded and proved, may ground vicarious liability. In **Ilkiw v Samuels**, Waines, the driver of a lorry, was given strict instructions by his employer not to allow the lorry to be driven by anyone else. In disobedience of those instructions, he permitted Samuels to drive the lorry and an accident occurred in

which the plaintiff was injured. The English Court of Appeal held that the employers were liable since Waines' negligence arose in the course of his employment. However, it warrants emphasis that, in **Ilkiw v Samuels**, the injured claimant brought the claim against Samuels, the unauthorised driver, Waines, the authorised driver and Waines' employer.

[51] In order for the claim to succeed against the appellant on the basis of vicarious liability, the 1st respondent must prove that Mr Ricard Allen is liable in negligence. However, the 1st respondent has not sought to join Mr Ricard Allen as a defendant, and the 1st respondent is, therefore, incapable of establishing Mr Richard Allen's liability, which is a prerequisite for a finding of vicarious liability on the part of the appellant.

[52] It should be acknowledged, as Harrison JA stated in para. 30 of **Mark Azan**, that the learned judge in exercising his discretion "whether or not to grant the amendment ought to consider the respondent's prospects of success at the trial". In the circumstances of this case, the learned judge erred in permitting the amendments since they could serve no useful purpose if Mr Richard Allen is not a defendant.

Conclusion on the appeal against the grant of the application to amend (Grounds i and ii)

[53] The core of the appeal, as contained in the grounds of appeal, raise the issue of whether the amendments constitute a new cause of action and should not have been permitted after the limitation period had expired. If there was a new cause of action, this raised the secondary issue of whether it is founded on the same or similar facts. However, I have not found it necessary to resolve these issues because, in my opinion, resolving them would be academic having regard to my conclusion that the learned judge was demonstrably wrong to have permitted the amendment.

[54] My conclusion that the learned judge erred in granting the amendments to claim vicarious liability based on the negligence of Richard Allen does not fall squarely within any of the grounds of appeal. However, the issue of whether the amendments were

permissible when Mr Richard Allen was not made a defendant was raised, at least tangentially, by ground ii(e):

> "(e) the learned judge erred in any event in granting the amendment to permit the [1st respondent] to sue on the basis that the [appellant's] driver (Allen) authorised [Mr Love] to drive the bus when no particulars of the negligence of Allen were furnished.

[55] An important distinction is that I have concluded that the learned judge's error was not because no particulars of negligence of Mr Allen were furnished, because they were, but that he was not made a defendant. The court is nevertheless empowered to find that the error as found disposes of the appeal. Accordingly, I conclude that the appeal against the learned judge's permission to amend the statement of case succeeds.

Whether the learned judge erred in awarding costs to be costs in the claim instead of awarding costs to the appellant (ground iii)

[56] The appellant also takes issue with the learned judge's order as to costs, contending that costs ought to be awarded to him rather than awarded in the claim. In my opinion, there is merit in this ground of appeal. As Neuberger J indicated in **Charlesworth v Relay Roads Ltd and Others** [2000] 1 WLR 230, a consideration in granting orders for amendment is whether the other party can be compensated in costs for any damage suffered because of a late application being granted. The trial had to be adjourned, which must have caused the appellant inconvenience. The need for an amendment ought to have been evident from the appellant's defence, even before the witness statements of the appellant and Mr Richard Allen were filed. The filing of these witness statements cannot, therefore, excuse the late filing of the application by the 1st respondent in a claim in which he bears the burden of proof and had the "means of compulsion (e.g., joining the driver as a defendant or calling him as a witness)" (see also **Harry Rambarran v Gurrucharran**).

[57] In these circumstances, I am of the view that the learned judge erred in ordering that costs be costs in the claim and not making a costs order in favour of the appellant.

Rule 65.8 (3)(c) of the CPR provides that where the application is to amend a statement of case, the court must order the applicant to pay the costs of the respondent unless there are special circumstances.

[58] There are no special circumstances in this case and therefore the rule applies. The learned judge should have ordered the respondent to pay the costs of the appellant. Having regard to my opinion on the substantive appeal, I am of the view that the costs order should be revisited.

Conclusion

[59] For the reasons stated herein, I find that the learned judge erred in permitting the amendments. I am also of the view that she erred in making the order for costs, and I would propose the following orders:

(1) The appeal is allowed.

(2) The orders of the learned judge, made on 25 October 2024, are set aside and substituted therefor are the following orders:

a. The respondent's notice of application for permission to amend his statement of case is refused.
b. Costs of the application are awarded to the appellant in any event to be taxed if not agreed.

(3) The claim is to be fixed for further pre-trial review by the Registrar of the Supreme Court at the earliest possible date.

(4) Costs of this appeal are awarded to the appellant to be taxed if not agreed.

SHELLY WILIAMS JA (AG)

[60] I too have read the draft judgment of my brother Laing JA and agree with his reasoning and conclusion.

P WILLIAMS JA

ORDER

1. The appeal is allowed.

2. The orders of the learned judge, made on 25 October 2024, are set aside and substituted therefor are the following orders:
    a. The respondent's notice of application for permission to amend his statement of case is refused.
    b. Costs of the application are awarded to the appellant in any event to be taxed if not agreed.

3. The claim is to be fixed for further pre-trial review by the Registrar of the Supreme Court at the earliest possible date.

4. Costs of this appeal are awarded to the appellant to be taxed if not agreed.