[2022] JMCA Civ 15

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE BROOKS P
THE HON MISS JUSTICE EDWARDS JA
THE HON MRS JUSTICE DUNBAR-GREEN JA

SUPREME COURT CIVIL APPEAL NO COA2020CV0092

BETWEEN	**RASHEED WILKS**	**APPELLANT**
AND	**DONOVAN WILLIAMS**	**RESPONDENT**

Written submissions filed by Shelards attorneys-at-Law for the appellant

Written submissions filed by Georgia Hamilton and Co attorneys-at-Law for the respondent

24 March 2023

PROCEDURAL APPEAL

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

BROOKS P

[1] I have read, in draft, the comprehensive judgment of my learned sister, Edwards JA. I agree with her reasoning and conclusion.

EDWARDS JA

Background

[2] This is a procedural appeal filed by Mr Rasheed Wilks ('the appellant'), challenging an adverse ruling made against him by the learned judge who heard his application in the court below. That ruling is contained in a written judgment delivered on 3 December

2020 and reported at [2020] JMSC Civ 234. The learned judge ruled against the appellant on the preliminary objections he raised on 16 November 2020, before the start of the trial of his claim, in the court below.

[3] The appellant's claim, in the court below, surrounds a motor vehicle accident which took place on 3 January 2011, at about 5:30 pm, along Old Hope Road, Kingston 6, in the parish of Saint Andrew. At that date and time, the appellant, who had been standing at a bus stop along with other persons, was hit by a white Toyota Avalon sedan motor car, with registration number 9690 EQ, owned by Mr Donovan Williams ('the respondent'), and driven by Mrs Ann Marie Kirlew-Williams (hereinafter referred to as 'Mrs Williams'), who is his wife. As a result of the accident, two persons were fatally injured, whilst the appellant and five other persons sustained serious injuries.

[4] The claim was filed by the appellant against the respondent on 30 September 2014, in which he averred that the respondent was vicariously liable for the negligent actions of Mrs Williams, who at the time of the accident, was driving the respondent's car as his servant and/or agent. The appellant's claim, as pleaded at para. 4 of both the particulars of claim, filed 30 September 2014, and the amended particulars of claim, filed 29 May 2019, is that the accident was caused by the negligence of Mrs Williams, acting as the servant and/or agent of the respondent. A notice of proceedings was also filed and served on the respondent's insurers on the same date the claim was filed, which also alleged that Mrs Williams was driving as the servant and/or agent and/or employee of the respondent.

[5] The respondent's defence was filed on 12 December 2014. In his defence, the respondent admitted that he was the owner of the vehicle involved in the accident and that the driver of the vehicle was his wife. However, in response to the allegations made by the appellant in the particulars of claim, at para. 2 of the defence, the respondent said that "paragraphs 2, 3 and 4 of the Particulars of Claim and the Particulars of Negligence alleged herein are all denied". Also, in para. 2, and continuing into paragraphs 3 to 4 of the defence, the respondent asserted that Mrs Williams had had a "syncopal attack" which

had been diagnosed by a doctor and for which she had spent two weeks in hospital. He further alleged that Mrs Williams had been competent to drive at the time of the accident, having never suffered a syncopal attack previously.

[6] In effect, the respondent was relying on the defence of automatism, and in support of that defence, he attached a medical report of Dr Carl Bruce, dated 16 April 2012.

[7] A case management conference ('CMC') was held and formal orders for CMC were made on 30 October 2017. Along with the usual orders for disclosure and inspection, an order was made for witness statements to be filed and exchanged on or before 10 December 2018. A pre-trial review date was set for 4 November 2019, and the trial dates of 16, 17 and 18 November 2020 were set.

[8] The appellant filed a pre-trial memorandum on 7 December 2018, outlining the nature of the proceedings, as well as the factual and legal contentions of the parties under the headings "*By the Claimant"*, and "*By the Defendant".* Under the latter, it was erroneously expressed that the respondent, in his defence had alleged that, "Mrs. Ann Marie Roseline Kirlew-Williams, acting as the servant and/or agent of the Defendant, was suddenly and without any warning, overcome by a syncopal attack". The issues identified in the pre-trial memorandum were whether the accident was caused by the negligence of Mrs Williams acting as the respondent's servant and/or agent, and whether the respondent was liable. This pre-trial memorandum was served on the respondent's attorneys. No amended defence was filed in the light of the appellant's obvious erroneous view of the defence.

[9] On the 27 May 2019, permission was granted by a Master of the Supreme Court for the appellant to amend his particulars of claim and schedule of special damages, and for the amended document to be filed and served on or before 7 June 2019. Permission was also granted for an amended defence to be filed, if necessary, and served on or before 21 June 2019. The amended particulars of damages and schedule of special damages was duly filed and served, with significant amendments having been made only

to the particulars of injuries and particulars of special damages. Again, no amended defence was filed.

[10] Despite the CMC order for witness statements to be filed and exchanged on or before 10 December 2018, the respondent did not file a witness statement and a witness summary until 20 February 2020, six months before the trial date, and more than a year after the order had been made. On 20 February 2020, an order was made by a Master of the Supreme Court permitting the respondent's witness statement, as well as the witness summary for Mrs Williams, which were filed out of time, to stand as if filed in time. Permission was also granted for a witness statement of Mrs Williams to be filed and served on or before 28 February 2020.

[11] In his witness statement, filed 20 February 2020, the respondent, at paras. 4 and 5, asserted that, although he was the owner of the motor car, his wife had sole and complete possession of the vehicle and was going about matters of her own personal benefit, unbeknownst to him, on the day of the accident. He also claimed that, about a year and a half before the accident, he had given his wife "total possession of the said motor vehicle" because it had become 'strenuous' for both of them to operate the same vehicle, given their busy and separate schedules, and also because he wanted her to have her own vehicle. He asserted that he had acquired a vehicle for his own use, and that, after that acquisition, he never used the one involved in the accident again. In her witness statement, filed 28 February 2020, at paras. 3 and 9, Mrs Williams made the same assertions as the respondent, that the vehicle involved in the accident had been given to her by the respondent for her sole use and benefit from 2009, and that she had not been driving at his "request, instructions, or directives" or for his "benefit or purpose" on the day of the accident.

[12] None of these assertions appear in the defence filed 12 December 2014.

The preliminary objection

[13] The appellant filed notice of preliminary objection on 13 November 2020 as follows:

> "Take Notice that at the trial of this matter on the 16th, 17th and 18th days of November, 2020 and on such other or further dates as this matter shall come on for hearing, the Claimant intends to make the following objection:-
>
> 1. That the defence of automatism being relied on by the Defendant in his Defence filed on December 12, 2014 is res judicata and the Defendant is estopped from relying on this defence based on the ruling of the Court of Appeal in **Ann-Marie Williams v R [2020] JMCA Crim 40** delivered on November 06, 2020.
>
> 2. The Defence filed by the Defendant is in breach of **CPR r. 10.5** in that the Defendant has failed to clearly and unequivocally say in his Defence that the driver of the vehicle involved in the subject accident was not his servant or agent and state the reasons for resisting the Claimant's allegations that she was his servant or agent. Accordingly, a detailed witness statement or a list of documents cannot be used as a substitute for a short statement of all the facts relied on by the Defendant in accordance with **CPR r.10.5** and as such paragraphs 4 – from "it was my" to paragraph 7 of the Witness Statement of the defendant filed on February 20, 2020 should be struck out. Similarly, paragraph 3 from "although the Sedan" to the end and the entire paragraph 9 of the witness statement of the driver, Ann-Marie Kirlew-Williams filed on February 28, 2020 should be struck out."

[14] This preliminary objection was raised in response to the respondent's attempts to rely on the defence of automatism at the trial, as well as his attempt to deny that Mrs Williams was driving as his servant and/or agent in his witness statements. Before the learned judge in the court below, the appellant maintained that, to permit the respondent to rely on the defence of automatism, would be to allow him to re-litigate an issue that had already been decided by this court and that the factual assertions in denial of agency were in breach of the rule 10.5 of the Civil Procedure Rules ('CPR'). The appellant,

therefore, asked the learned judge to strike out those portions of the respondent's witness statement filed 20 February 2020, and that of Mrs Williams' witness statement filed on 28 February 2020, in respect of those assertions as outlined in the notice above, on the basis of res judicata and issue estoppel, as well as for breach of rule 10.5 of the CPR.

[15] The learned judge, in her written ruling, ruled in favour of the respondent, and, as said previously, it is that ruling which is the basis of this procedural appeal.

The appeal

[16] The appellant filed several grounds of appeal and written submissions were made with respect to them. The respondent filed written submissions in response. No oral arguments were heard in this procedural appeal, and it was heard wholly on paper. Grounds 1 (a) to (m), 2, and 3 deal with the issue of whether the learned judge erred in law in ruling against the objection made on behalf of the appellant in relation to the breach of rule 10.5 of the CPR. The appellant contends that, because the respondent is in breach of that rule, he ought not to be permitted to give any evidence to resist the allegation that, at the material time of the accident, the subject vehicle was being driven by Mrs Williams whilst acting as the respondent's servant or agent.

[17] Grounds 4a to 4e challenge the ruling of the learned judge, in favour of the respondent, on the question of whether he can rely on the defence of automatism. The gravamen of the challenge is that the issue is res judicata, the defence having already been rejected by this court in its decision in the appeal filed by Mrs Williams against her conviction in the criminal case against her, in respect of the same accident.

[18] Ground 5 challenges the judge's award of costs to the respondent.

[19] The overarching issue in this appeal, therefore, is whether the learned judge erred in ruling on the preliminary objection in favour of the respondent. This raises two sub-issues which are: whether the issue of automatism is *res judicata* and subject to issue estoppel, and whether the respondent is bound by his pleadings in the defence.

[20] In keeping with generally accepted principles, this court cannot disturb the ruling of the learned judge, unless it is shown that, in the exercise of her discretion, she erred on a point of law or in her interpretation of the facts, or that she took account of irrelevant matters and failed to take account of relevant factors so as to come to a decision which was plainly wrong or one which was "so aberrant" that "no reasonable judge regardful of [her] duty to act judicially could have reached it". If any such occurrence can be shown, the impugned decision must be set aside (see **Hadmor Productions v Hamilton** [1982] 1 All ER 1042 at 1046 and **The Attorney General of Jamaica v John Mackay** [2012] JMCA App 1 at paras. [19] and [20]).

Analysis

Did the learned judge err by applying the wrong principles of law in refusing the preliminary objection made on behalf of the appellant in relation to the breach of rule 10.5 of the Civil Procedure Rules, 2002 - grounds 1 (a) to (m), 2, and 3

[21] The appellant's preliminary objection was heard on 16 November 2020, the first date set for the trial of the claim. The learned judge, in her ruling on this point, considered whether the defence filed 12 December 2014 was in breach of rule 10.5 of the CPR. Having considered the nature and import of pleadings, the duty of a defendant to set out his case and the purpose of the rule, and having considered that the rule was mandatory, the learned judge found that the defence did contain a denial of a relationship of principal and agent between the respondent and his wife. She, however, found that it was a bare denial and did not meet the requirements of rule 10.5. For that reason, she ruled that the defence was in breach of the requirements of rule 10.5 of the CPR.

[22] Having so found, however, the learned judge refused to strike out the portions of the witness statement which alleged facts in support of the defence that Mrs Williams was not an agent or servant. Her main reason for doing so, as expressed by her, was that striking out the impugned sections would have amounted to a striking out of the respondent's case and a denial of his right to be heard. On that basis, and having regard to the late stage at which the objection was made (at the trial and nine months after the

witness statements were filed), the learned judge determined that it was not in the interests of justice to accede to the objection. The appellant, she found, would have been apprised, from the service of the witness statements, of the parameters of the defence being advanced by the respondent, and it could not be said that he was taken by surprise or that he would not have had ample time to properly prepare to meet the case, or, that any prejudice would be caused to him.

[23] The learned judge also considered that the respondent could have applied to amend his statement of case, to cure the defect, even at this late stage. In justification of this approach, she relied on the case of **Topaz Jewellers and Raju Khemlani v National Commercial Bank Jamaica Limited** [2011] JMCA Civ 20. In that case, the respondent had applied to amend its defence at the commencement of trial of the claim, to include a defence that the claim was statute barred. The application was granted by the trial judge. The subsequent appeal against that order was dismissed by this court. This court found, *inter alia*, that the appellants had a good answer to the limitation point and were, therefore, not prejudiced by the late amendment which they would have had the opportunity to contest.

[24] In the instant case, despite the learned judge's observation that the respondent could have amended his defence, even at that late stage, he at no time did so. As I observed earlier, even when faced with the appellant's pre-trial memorandum that indicated that the defence was that the driver had been driving as a servant or agent of the respondent, and even after the filing of the notice of application to strike out portions of the witness statements, the respondent at no time applied to amend his defence.

[25] I will now consider the rule which has been invoked by the appellant.

[26] Rule 10.5 of the CPR states:

> "10.5 (1) The defence must set out all the facts on which the defendant relies to dispute the claim.
>
> (2) Such statement must be as short as practicable.

(3) In the defence the defendant must say-

(a) which (if any) of the allegations in the claim form or particulars of claim are admitted;

(b) which (if any) are denied; and

(c) which (if any) are neither admitted nor denied, because the defendant does not know whether they are true, but which the defendant wishes the claimant to prove.

(4) Where the defendant denies any of the allegations in the claim form or particulars of claim -

(a) the defendant must state the reasons for doing so; and

(b) if the defendant intends to prove a different version of events from that by the claimant,

the defendant's own version must be set out in the defence

(5) Where, in relation to any allegation in the claim form or particulars of claim, the defendant does not -

(a) admit it; or

(b) deny it and put forward a different version of events,

the defendant must state the reasons for resisting the allegation.

(6)…

(7)…

(8)…"

[27] Rule 10.7 is also of importance and states, in full, that:

"10.7 The defendant may not rely on any allegation or factual argument which is not set out in the defence, but which could have been set out there, unless the court gives permission."

[28] Rule 20.1 allows a party to amend its statement of case at any time before the CMC. After that, any amendment may only properly be made with the permission of the court. The rules do not suggest the factors that the court ought to take account of in considering whether to grant permission. However, the authorities, including **Topaz Jewellers and Raju Khemlani v National Commercial Bank Limited**, do suggest that the issues of prejudice and injustice loom large in any such decision.

[29] The appellant's claim against the respondent is in vicarious liability. He alleges that the respondent is vicariously liable for the injury and loss he suffered as a result of the negligent driving of Mrs Williams, which resulted in the car she was driving crashing into pedestrians, including himself. The appellant's claim is as a result of his injuries from the accident.

[30] Rule 10.5 makes it clear that the defence must set out all the facts on which a defendant relies to dispute the claim. If he denies any of the allegations in the claim or particulars of claim, a defendant must state his reason for doing so. If he has a different version of events from the claimant, he must state his version in the defence.

[31] In this case, the appellant maintains that the respondent failed to comply with rule 10.5 and failed to state that the driver was not his servant or agent and the brief facts on which he relied. Accordingly, says the appellant, he cannot raise it for the first time in his witness statement, nor can he rely on evidence in his witness statement to support such a defence. The appellant points to the fact that there is no mention of vicarious liability in the defence and no information stated from which the court can infer a rebuttal to the assertion that the driver was the servant or agent of the owner of the vehicle. The appellant also contends that, as a result, the respondent could not now raise any evidence or rely on any fact that was not specifically pleaded, to rebut the inference of vicarious liability. He relies on the case of **Medine Forrest v Kevin Anthony Walker and Jhanelle Sabrina Pitt** [2019] JMSC Civ 25. In that case, Rattray J agreed with the claimant that the defendant's defence contained bare denials, was in breach of rule 10.5, and was, therefore, subject to being struck out under rule 26.3.

[32] The appellant also complains that the defence is a bare denial of agency and nothing more, and relies on the case of **Curvey Campbell v Ferdinand Flash and Winston Young** (unreported), Supreme Court, Jamaica, Suit No CL C 471 of 1997, judgment delivered 12 July 2004, a decision of Sykes J (Ag), as he then was. In that case, it was decided, at page 6, that where there is "proof that a vehicle was negligently driven by a person other than the owner, the fact of ownership, in the absence of any other fact, is prima facie evidence that the driver was the servant or agent of the owner. A denial in the pleadings that the driver was not the servant or agent of the owner is not sufficient". This, the court said, having already stated, at pages 4 and 5, that once a claimant has established ownership, a bald denial of agency without evidence will not be sufficient to 'derail' a finding of vicarious liability. That court also found that a mere denial of agency, unless accepted by the other party, does not establish that as a fact.

[33] In my view, those observations make perfectly good sense, otherwise there would be no need for allegations of facts to support a denial.

[34] The appellant also relies on **Charmaine Bernard (Legal Representative of the Estate of Reagan Nicky Bernard) v Ramesh Seebalack** [2010] UKPC 15, an appeal to the Privy Council from the Court of Appeal of Trinidad and Tobago, regarding the interpretation to be placed on provisions in the Civil Proceedings Rules of Trinidad and Tobago. That case held, speaking generally, that the claimant's duty in setting out his or her case to include a short statement of all facts relied on, meant that each head of loss the claimant was seeking to recover should be identified in the statement of case. Where that was not done, an amendment is required. That was a case of negligence against the driver and owner of a motor truck which was involved in an accident in which the deceased was struck and killed. The claimant was the deceased's legal representative. The claimant, having filed a claim in negligence for damages, later sought and was granted permission to claim for vicarious liability against the owner of the truck, but failed to give any details of the damages claimed. She, however, filed a list of documents and a witness statement including receipts showing funeral expenses and wages, although

there was no pleading in the claim form and statement of case with respect to those items. She later applied to amend the statement of case to include particulars of general and special damages including for "lost years". Permission was granted at first instance despite the objections of the defendant. The ruling of the judge, at first instance, was largely based on his determination that the amendment was not a "change" within the meaning of rule 20.1(3) of the CPR. That rule requires a claimant seeking to "change" a statement of case after the first CMC, to satisfy the court that the change was necessary because of a change in circumstance which became known after the CMC, before permission to make that change can be granted. I pause here to note that this requirement does not exist in our CPR.

[35] The defendant successfully appealed to the Court of Appeal, which found that the amendment was a "fundamental change" since it introduced a claim for "lost years" and for special damages, for the very first time. It also found that the amendment ought not to have been allowed as the claimant's case was not properly "brought forward", having regard to "contemporary principles and practice" (see paras. 12 and 13). There was also no change of circumstances after the first CMC, as required by rule 20.1(3).

[36] The claimant appealed to the Privy Council, where it was argued that she did not need an amendment, in any event, as the claim had included a claim for damages and the particulars of which could have been otherwise supplied, including in a witness statement. The Privy Council, referring to the claimant's duty in rule 8.6 of the CPR to set out, in her statement of case, a statement of facts on which she relied (which is similar to rule 8.9(1) of our CPR), and the duty in rule 8.10(4) to attach a schedule of any special damages claimed, held that the claimant having omitted to do so, an amendment of the statement of case was necessary. The Board considered, at para. 15, **McPhilemy v Times Newspapers Ltd and others** [1999] 3 All ER 775, and Lord Woolf's pronouncement in that case on the continued requirement for pleadings to "mark out the parameters of the case" and to "make clear the general nature of the case of the pleader".

The Board also held that a detailed witness statement or a list of documents could not be used as a substitute for a short statement of all the facts relied on by the claimant.

[37] In determining whether the amendment ought to have been allowed, since it was submitted it could be made without causing any prejudice to the defendant, the Board took the view that this was not the proper approach in the post CPR era. Furthermore, it found that the overriding objective did not assist the claimant. The Board considered the 'plain' language in Part 20 of the CPR (somewhat different from our Part 20) which circumscribes when changes to the statement of case may be made with and without permission, and took the view that, if a statement of case contained allegations which were sufficiently made, it need not be amended. In such a case, further particulars could be provided in a witness statement. It, however, held fast to the view that, in the case before it, the omission from the statement of case of a short statement of the heads of loss that were being claimed meant that an amendment was required which amounted to a "change" in the statement of case within the meaning of rule 20.1(3), and there had been no change of circumstances since the first case management conference, as the rule required, for permission to be granted. The Board further took account of the 'litigation culture' in Trinidad and Tobago and the purpose for which the rules had been drafted, which was to "introduce more discipline into the conduct of civil litigation and defeat the endemic *laissez-faire* interpretation to the rules" (see para. 31). The appeal was, therefore, dismissed.

[38] The case of **McPhilemy v Times Newspapers Limited** was also cited by the appellant. This case held that pleadings were not made superfluous because of the requirement for witness statements, but that pleadings were still necessary "to mark out the parameters of the case being advanced by each party and to identify the issues and extent of the dispute between the parties". In that regard, it said, no more than a concise statement is required. At page 793 of that case, it was said that:

> "What is important is that the pleadings should make clear the general nature of the case of the pleader."

[39] It is clear, therefore, that although only a short statement of facts is required, a witness statement cannot be issued as a substitute for it. Although the authorities mostly deal with the inadequacies in a claimant's statement of case, the principles would, obviously hold true for a defendant's statement of case.

[40] I, therefore, agree with the appellant that the respondent having failed to plead facts or information in his defence to dispute that Mrs Williams was driving his car as his servant and/or agent at the relevant time, he cannot now seek to do so in a witness statement. The case of **Dennis P Chong v The Jamaica Observer Limited** (unreported), Supreme Court, Jamaica, Claim No CLC 578 of 1995, judgment delivered 14 February 2007, on which he relies, does not assist the respondent.

[41] It follows that I reject the respondent's counter argument that because agency was clearly denied, if he had said more he would have been giving evidence, which he was not allowed to do. He posits that, implicit in the denial of the paragraphs, is a denial that his wife was not his agent and that she was not going about his business at the time of the accident, without him having to say so. He also submits that, pursuant to the case of **Desmond Kinlock v Denny McFarlane and others** [2019] JMSC Civ 20, anything more said in the pleadings would have amounted to admitting evidence or law into the pleadings. He maintains, as a result, that the denial of agency was sufficient. This is clearly an unacceptable argument, and the learned judge was clearly correct to find that he was in breach of rule 10.5. In any event, he has not counter-appealed that finding.

[42] The respondent, however, goes further, and contends that there is no automatic sanction for failing to comply with rule 10.5 and that the appellant would have to apply under rule 26.3 to strike out the statement of case in the event of such a failure. He also maintains that the appellant has no basis on which to apply to strike out portions of the witness statements once it does not fall under rule 29.5. In any event, he says, this collateral attack has come six years after the pleadings were filed and served. The respondent argues that the appellant sat on his laurels relying on a so called "tactical advantage" and failed to take advantage of the measures afforded by the rules. He gave

examples such as rule 34.1 which gives the right to request information, and rule 26, which allows an application to strike out the statement of case to be made. The respondent maintains that this application, and subsequent appeal, is an abuse of the process of the court. He submits, finally, that there is no basis to set aside the learned trial judge's discretion not to strike out portions of the witness statement.

[43] Unfortunately, I cannot agree with these submissions made by the respondent. Dealing first with the claim that the appellant waited too late to complain in order to gain some "tactical advantage", I would immediately dismiss this as being unworthy of serious consideration. Para. 4 of the appellant's particulars of claim, to which the respondent filed a defence, asserted two things. Firstly, that the accident was caused by the negligence of Mrs Williams, and secondly, that she was acting as the servant and/or agent of the respondent. The respondent, in his defence, averred that, save for the fact that Mrs Williams was involved in an accident whilst driving his motor car on the date and time alleged, paras. 2, 3 and 4 of the particulars of claim and particulars of negligence alleged in those paragraphs were all denied. In "further response to the matters alleged therein" he gave a concise statement of facts outlining that his wife was "driving his motor vehicle" when she had a sudden syncopal attack, and that she was seen and evaluated by a doctor. He also made a statement as to the fact that she had never had such an attack previously, and was competent to drive at the time. Clearly, in this regard, he had no reservation about giving evidence with regard to the defence of automatism. However, no statement was made regarding any fact that Mrs Williams was not driving his motor vehicle as his agent or servant at the time or that she had the car for her own use or purpose.

[44] Not surprisingly, therefore, the appellant seemed to have (erroneously as it turned out) taken it as agreed that the wife was driving the respondent's motor vehicle as his servant or agent at the time of the accident. Certainly, it seemed not to have been clear to the appellant that this was distinctly denied in the defence as opposed to just the denial of negligence. I say this because, as pointed out previously, in the pre-trial

memorandum which was filed and served on the respondent as far back as December 2018, the appellant made the statement as to his understanding of the defence, which was that Mrs Williams, whilst driving the respondent's motor vehicle as his servant and or agent, had a sudden syncopal attack. Since this was the clearly stated understanding of the defence filed, which at no point was corrected by the respondent, even though it was served on him, it is obvious that the defence only became clear to the appellant when the witness statements were filed some nine months before the trial. I am not sure what 'tactical advantage' the appellant would have achieved by waiting to object on the first day of trial rather than within those nine months after the witness statements were filed, as it was open to the appellant to apply for permission to amend even at the trial stage. However, there is no burden on a claimant to alert a defendant to do what he is required to do to advance his case.

[45] It would also be erroneous to say that the mere denial by the respondent was sufficient and could be expanded in the witness statement (see **Seebalack**). As was noted by the learned judge, at para. 36 of her ruling, the main reason for the duty imposed in rule 10.5 is to alert a claimant to the parameters of the defence and to identify the issues joined and areas of dispute. The learned judge sought to distinguish the case of **Seebalack**, but it remains unclear what her basis for doing so was. As she pointed out, the claimant, in that case, sought to introduce, by way of a witness statement and a bundle of documents, claims for special damages and general damages for "lost years", in a context where no formal application to re-amend the statement of case had been made at the interlocutory stage. The distinction the learned judge made was that, in the instant case, there was a denial of agency in the defence, witness statements have been filed and exchanged and the complaint was being made for the first time at the trial. However, as has already been shown, the defence was a bare denial in breach of rule 10.5, which meant that rule 10.7 was invoked. Moreover, in **Seebalack**, the claimant had claimed damages without pleading the particulars thereof, in breach of her duty under Part 8 of the CPR, which invoked rule 20. In the end, the failures in both cases would bring about the same result. I am, therefore, unclear as to the distinguishing

feature located by the learned trial judge as I can see none here. Furthermore, there is, effectively, not much difference between making a claim for damages but not pleading particulars of a head of damages in support of that claim, in breach of the rules, and making a bare denial of a claim, without pleading any brief statement of facts in support of that denial, also in breach of the rules. In my view, the effect is the same. Viewed in any other way, rule 10.5 of the CPR would be made redundant.

[46] The respondent also argued that the appellant ought to have applied to strike out the defence under rule 26, since there was no sanction for failing to comply with rule 10.5, and that the appellant could not apply to strike out portions of the witness statement since rule 29 was not applicable. In response to this argument, I say two things. Firstly, the learned judge made no decision on this point. She seemed to have accepted that she had the power to strike out the portions of the witness statements under rule 26. Her adverse ruling against the appellant, was based partly on the timing of the application, which she claims ought to have been made earlier, so as to give the respondent an opportunity to cure or remedy the defects in his pleadings. Her second reason was that the witness statements, filed approximately nine months before the trial, gave the appellant ample time to know the case he was to meet and, therefore, he would not be taken by surprise at the trial. She found that there would be no prejudice to the appellant. She also found that the respondent could have elected to apply to amend his statement of case.

[47] Respectfully, I am not sure that having found that the respondent was in breach of rule 10.5, that it was open to the learned judge to permit him to rely on statements of fact in his witness statements which expanded on that bare denial without an amendment being made to the statement of case. In my view, an amendment was required. As stated in **McPhilemy** and in **Seebalack**, following on a bare denial, the witness statement would be insufficient to cure a defect in the pleadings.

[48] Furthermore, even if the respondent had applied to amend the statement of case, the learned judge would have had to consider the basis for permitting him to do so,

before exercising her discretion in his favour. Not only would she have had to consider the provisions of Part 20 of the CPR, dealing with the amendment of a statement of case, but she would also have had to consider the overriding objective of dealing with cases justly, and in particular, any potential prejudice to the appellant. The learned judge made the bold statement that the appellant would not be prejudiced by allowing the portions of the witness statement to stand because they provided additional information in relation to the defence, as well as an understanding of the respondent's case. Further, she found that the appellant was not taken by surprise. However, the learned judge in considering the issue of prejudice, failed to take account of the fact that Mrs Williams was not made a party to the claim, that the limitation period had long past for a claim to be brought against her in her own right, and that, if the respondent succeeded on the point of agency, at this late stage, the appellant would have had no recourse. Furthermore, so much time having passed, it would have been impossible for the appellant to verify or dispute the assertions of fact being made by the respondent in 2020 to deny agency, which had been alleged from 2014. If the respondent had filed his witness statements on time, it would have been done within the limitation period and the appellant would have been able to take appropriate steps in light of what was contained therein.

[49] In rule 20.6, there is also a stated limitation placed on an amendment to a statement of case after the limitation period has passed. The reason for that is beyond obvious. None of this was considered by the learned judge. Instead her main focus was on the fact that the appellant had not objected earlier so as to alert the respondent to do that which the rules say he must do.

[50] In that regard, it should be noted that, since the effect of being in breach of rule 10.5 is that, pursuant to rule 10.7, no allegation or factual argument which is not set out in the defence, but which could have been, may not be relied on, unless so permitted by the court, that in and of itself is a sanction. It, therefore, follows that if the court does not give permission for a respondent to rely on those allegations or factual assertions, then he cannot rely on them in a witness statement. Since witness statements are

generally allowed to stand as a witness' evidence-in-chief, the offending parts would have to be excised before the witness statement is admitted into evidence. The only way to excise the offending parts is to strike them out or otherwise exclude them.

[51] Under rule 29.1, the court has the power to control evidence given at the trial, which includes the power to exclude evidence that would otherwise be admissible. Rule 29.5(2) allows the court to strike out inadmissible scandalous, irrelevant or otherwise oppressive matters. In my view, there would, therefore, be no need to apply to strike out the offending parts of the witness statement, pursuant to rule 26, for if no permission is granted to rely on the defence, the factual assertions in support of it would be irrelevant and subject to striking out under rule 29.5(2). However, as found by the learned judge, there is power, in rule 26.3(1), to strike out for a failure to comply with the rules.

[52] The respondent says that striking out is a draconian measure and should be resorted to only in plain and obvious cases. For that he relies on the case of **Medine Forrest**. I am not entirely sure that there can be a plainer or more obvious case than this one.

[53] In the final analysis, based on her finding that the respondent was in breach of rule 10.5, the learned judge ought to have considered whether to permit him to rely on allegations and factual assertions not contained in the defence, but which could have been. She ought to properly have taken account of the factors germane to the exercise of her discretion. The learned judge failed to consider relevant factors which would have assisted her in coming to a decision as to the proper exercise of her discretion and instead took account of irrelevant matters. This caused her to wrongly place the burden on the appellant to alert the respondent that he was in breach of the rules. In doing so, she failed to consider that, in any event, pursuant to rule 10.7, the respondent could not rely on the factual assertions and allegations in the witness statements without an amendment to his statement of case, which required an application and her permission to do so, which had not been sought by the respondent. If she had properly considered the matter she would have seen that the prejudice in allowing the respondent to rely on

these factual assertions in his witness statements, denying agency, which were not contained in the defence, but which could have been, was too great. She would also have noted that they came long after the limitation period had expired and were clearly prejudicial to the appellant's case. On the other hand, and in any event, the respondent is still able to rely on his denial of negligence, which had been the main focus of his defence.

[54] The decision of the learned judge was plainly wrong. In the circumstances of this case, she ought to have struck out those portions of the witness statements which alleged facts in support of the bare denial of agency, that were not made in the respondent's statement of case, but which could have been. As a result, the appellant would, in my view, succeed on these grounds.

Grounds 4a, 4b, 4c, 4d, and 4e - whether the judge was wrong to rule that the respondent can rely on the defence of automatism as it is not res judicata

[55] The appellant maintains that the defence of automatism being relied on by the respondent, is subject to the principles which underline *res judicata*, issue estoppel and the re-litigation of cases. This, counsel says, is because of the ruling by this court in the criminal case of **Ann-Marie Williams v R** [2020] JMCA Crim 40 in which this court rejected the defence of automatism raised by Mrs Williams in her criminal trial for causing death by dangerous driving. Counsel submitted that since the respondent intends to call Mrs Williams as a witness to establish the defence, he should not be permitted to do so, especially since he intends to use the same medical report of Dr Carl Bruce, which had been examined and rejected by this court. Counsel submits further that the defence having already been litigated and adjudicated upon by a court of superior jurisdiction, the respondent should not be allowed to re-litigate it. Counsel is of the view, that even though the respondent was not a defendant in the criminal case, the defence of automatism, is not his defence but that of Mrs Williams, who had been the defendant in the criminal case, and it is she who has to prove it. She should not be allowed to attempt to do so, counsel maintains, as the medical on which she relies to do so was already rejected as being insufficient for the defence to succeed.

[56] The appellant relies on four cases in support of his argument on *res judicata*, issue estoppel and re-litigation. These are: **Fletcher & Company Limited v Billy Craig Investments Limited and Scotia Investments Limited** [2012] JMSC Civil 128, **Bartholomew Brown and Bridgette Brown v Jamaica National Building Society** [2016] JMCA App 7, **Arthur J S Hall and Company (a Firm) v Simons et al** [2000] 3 All E R 673, and **Hunter v Chief Constable of West Midlands and another** [1981] 3 All E R 727.

[57] The cases of **Bartholomew Brown** and **Fletcher & Company Limited** are of assistance only in so far they provide a definition of *res judicata* and issue estoppel. In the case of **Bartholomew Brown**, it is stated that "[t]he doctrine of *res judicata* is applicable to issues, defences, applications and/or causes of actions which have been heard and determined on the merits" (see para. 42). Counsel also relies on this court's statement, in that case, that "it is a fundamental doctrine of all courts that there must be an end to litigation". In **Fletcher & Company Limited**, at para. [65] of the judgment**,** the court relied on the definition in Halsbury Laws of England, 4th edition, Vol. 16, para. 1530, in which it notes that the pertinent question in determining whether a matter is *res judicata* and a party is to be estopped from proceeding on the issue, is whether the party to be estopped is seeking to re-litigate the precise point which had distinctly been in issue in the earlier proceedings and had been determined against him with certainty. For that purpose, it hardly matters whether one of the parties to the second proceedings was not a party to the earlier proceedings.

[58] The definitions provided in these cases cannot be disputed. However, whereas in the present case, we are dealing with a previous trial in a criminal case and the present one in a civil case, with a different defendant but arising out of the same facts, in **Bartholomew Brown**, for instance, multiple repetitious applications and appeals were filed before the courts in the same civil proceedings by the same parties on the same issues. Similarly, **Fletcher & Company Limited** involved civil matters with no criminal antecedents, although the parties were not the same as those in the previous case.

[59] **Arthur J S Hall and Company (a Firm)** dealt with the issue of whether advocates were still entitled to immunity from suit in respect of their conduct of proceedings, and discussed the rules surrounding the prevention of re-litigation of the same issues (see pages 701 to 704). Counsel relies on the statement of the law made by Lord Hoffman, at page 701, not only as to the policy which generated the rules where the parties in the litigation are the same, but also as to when policy would justify extending the rules to cases where the parties to the second litigation are not the same. This would occur where the "circumstances are such as to bring the case within the spirit of the rules". Counsel, in the instant case, argues that the circumstances of this case would bring it within this second policy and submits that it would be against public interest for the Supreme Court to re-litigate the same defence of automatism which had already been ruled on by the Court of Appeal.

[60] Counsel also submits that the respondent's sole purpose in re-litigating the defence of automatism is to exonerate Mrs Williams from liability for the accident. If the respondent was allowed to re-litigate the issue, counsel says, then it would amount to a collateral attack on the judgment of the Court of Appeal in the criminal case. In support of this theory counsel relies on the case of **Hunter v Chief Constable of West Midlands and another**.

[61] I also found that the case of **Ord v Ord** [1923] 2 KB 432, discusses the meaning of *res judicata* in simple terms. At page 439, Lord Lush defines it as meaning instances where "the res – the thing actually and directly in dispute – has been already adjudicated upon…by a competent court, it cannot be litigated again". Once again, this simple definition cannot be validly disputed, although it must be borne in mind that that case involved a husband and wife who were the same parties to the earlier proceedings as well as to the later proceedings.

[62] The respondent, in answer to the appellant's preliminary challenge, relies on the case of **Hollington v F Hewthorn and Company Limited and Another** [1943] 1 KB 587, which he says establishes that evidence of a criminal conviction is inadmissible in

subsequent civil proceedings to prove the facts on which the conviction is founded, where those facts are in issue in the civil proceedings. He also relies on the case of **Mansfield and Another v Weetabix Ltd and Another** [1997] EWCA Civ 1352, which confirmed that the burden of proof is different and the standard of proof is a much lower one in a civil case than in a criminal one. That court said that a driver, in a criminal trial, had to show that he was in a state of automatism when the accident occurred, if that was his defence. That is not the standard in a civil case where the standard of care is that of a reasonably competent driver who is unaware that he was or might have been suffering from a condition.

[63] At paragraph 52 of her written ruling, the learned judge made the point that where the defence of automatism is raised in criminal proceedings, the burden of proof "starts and remains upon the defence." This, of course, is not exactly correct, as the defendant only bears the burden of proof where the plea of not guilty by reason of insanity is raised. What, perhaps, the learned judge meant to say, (since she cited **Hill v Baxter** [1958] 1QB 277 at page 284, which correctly states the law, as authority) was that, the defendant has the evidential burden to show facts upon which he relies for the defence of non-insane automatism to succeed. In such a case, the burden of proof remains on the prosecution. Where the defence amounts to one of not guilty by reason of insanity, the burden of proof lies on the defence.

[64] In her written ruling, the learned judge did take account of the fact that the nature of the defence of automatism in the civil and criminal arena is different. She relied on the case of **Mansfield and Another v Weetabix Ltd and Another**. She pointed to the fact that in a civil case, he who asserts must prove, therefore, she said, the burden of proof rested on the respondent, to prove on a balance of probabilities, that Mrs Williams was unaware that she was or may have been afflicted by a sudden condition which impaired her ability to drive. Relying on the above case, she found that the standard of care, which is expected when automatism is raised as a defence to a civil claim, is that of a reasonably competent driver, unaware that he is or may be suffering from a condition

that impairs his ability to drive. The objective of the respondent in relying on the defence, she found, would be entirely different from Mrs Williams'. The learned judge found, therefore, that the decision of this court in the criminal case of **Ann-Marie Williams v R**, was not applicable to these civil proceedings and consequently, the doctrine of *res judicata* and issue estoppel was also not applicable. The learned judge did not refer to the case of **Hollington v F Hewthorn and Co Ltd**, and it is not clear whether the case was cited to her by the respondent.

[65] The case of **Hollington v F Hewthorn and Co Ltd** involved a motor vehicle accident, as a result of which, the plaintiff, who later died, brought an action for damages for injuries sustained in the accident involving a motor car owned by his father against one of the defendants who had been convicted of careless driving in relation to the accident. After the death of the plaintiff, his father, who continued the suit on behalf of the deceased's estate, could adduce no direct evidence of how the accident had occurred, and, therefore, sought to introduce a certificate of conviction as evidence of the defendant driver's conviction for careless driving, along with the signed statement the deceased driver made to the police shortly after the accident. The evidence sought to be adduced was rejected as inadmissible, but the court found that negligence was, nevertheless, established. The defendants appealed.

[66] The plaintiff maintained on appeal that the judgment should be upheld on the basis given by the lower court, but submitted that, if the court found otherwise, a new trial should be ordered at which the evidence of conviction and the statement that had been wrongly excluded should be considered. The Court of Appeal found that the evidence admitted by the judge at first instance was not sufficient to establish negligence, but had to go on to consider whether the longstanding practice of not admitting evidence of a previous criminal conviction in a civil case was based on a wrong premise.

[67] The court first considered the issue on the ground of relevance. It found that a conviction for careless driving would only be relevant as proof that another court had found the defendant guilty of careless driving. Secondly, it considered the differences

between criminal proceedings and civil proceedings and found that the issues in criminal proceedings were not identical to the civil proceedings. Thirdly, it took the view that the civil court would not know anything about the evidence in the criminal court and what arguments had influenced the criminal court in coming to that decision. It, therefore, found that the opinion of a criminal court as to guilt for careless driving was irrelevant to the issue of whether the defendant was guilty of negligence. It also considered the issue as it pertains to the parties involved, on the basis that a judgment is not conclusive against anyone who was not a party to it. This was noted, with the recognised exception that "[a] judgment, however, is conclusive as against all persons of the existence of a state of things which it actually affects, when the existence of that state is a fact in issue" (see pages 596 and 597).

[68] Having examined several authorities on the issue, the court decided that the evidence of the conviction for careless driving had been correctly rejected.

[69] The decision in that case was never a popular one and has been criticized in several cases, for instance by Lord Diplock in **Hunter v Chief Constable of West Midlands and another**, and by Lord Hoffman in **Arthur J S Hall and Company (a Firm)**.

[70] The principles were reconsidered in the House of Lords decision in **Hunter v Chief Constable of West Midlands and another**, on which this appellant relies. The facts of the case are briefly that Hunter was one of several persons who had been convicted of setting off a bomb in an English pub which killed 21 people. All the defendants had allegedly confessed to the crime, but whilst there was other evidence against the other defendants, the case against Hunter had depended upon his alleged confession. During the trial, the defendants, including Hunter, challenged the admissibility of their confessions on the basis that they had been threatened and beaten by the police to confess. Whilst there had been no indication that they had been beaten in pictures taken before they left the last police station and on their first appearance in court, by their second appearance in court, after the confessions had allegedly been given, it was clear that they had been badly beaten. Their allegations were rejected on a *voir dire* and their

confessions were admitted at trial. They were convicted of murder. Subsequently, 14 prison officers were charged with assaulting the accused men but were acquitted at trial. The appellant then brought a civil action against the Chief Constable and the Home Office, claiming damages for assault by the police and prison officers. The Chief Constable in charge of the police applied to have the action struck out on the ground that it raised issues identical to those that had been raised, determined, and rejected at the murder trial against the police officers. At the hearing of the application to strike out the claim, based on fresh evidence adduced by Hunter, the court refused to strike out the action. The Chief Constable appealed, and the Court of Appeal held that the action ought to be struck out on the ground that it was an abuse of process to allow Hunter to re-litigate the identical issue that had been decided against him at the criminal trial, and that he was barred by issue estoppel from raising the issue of whether he had been assaulted by the police. Hunter appealed to the House of Lords. The head note of the decision, which accurately reflects the findings of the House of Lords, reads, in part, as follows:

> "The initiation of proceedings in a court of justice for the purpose of mounting a collateral attack on a final decision adverse to the intending plaintiff reached by a court of competent jurisdiction in previous proceedings in which the plaintiff had a full opportunity of contesting the matter was, as a matter of policy, an abuse of the process of the court. The fact that the collateral attack was by means of a civil action raising an identical issue decided against the plaintiff in a competent court of criminal jurisdiction was immaterial, since if the issue had been proved against the plaintiff beyond all reasonable doubt in the criminal court it would be wholly inconsistent if it were not decided against him on the balance of probabilities in the civil action…
>
> Since it was clear that the purpose of the plaintiff's civil proceedings was not to obtain damages from the police but to prove that the confession on which he was convicted had been obtained by force, those proceedings were a collateral attack on the ruling of the trial judge and the verdict of the jury at the murder trial that the plaintiff's confession had not been obtained by the police by force."

[71] As to the latter finding, it is important to note that, in relation to Hunter's suit against the Home Office for assault by the prison officers, even though 14 prison officers

were tried and acquitted of the assault charges, the Home Office had admitted, in the civil suit, that some violence had been inflicted on the appellant by prison officers but put him to strict proof as to the extent and severity of his injuries. He was, therefore, entitled to some damages in that regard. However, Hunter did not seek to obtain judgment on liability and for an assessment of damages, but instead persisted in the claim against the Chief Constable with regard to the police officers who it had already been decided at the criminal trial had not assaulted him.

[72] It is also important to note, that to a large degree, the case of **Hunter v Chief Constable of West Midlands and another** was decided against the background of legislative provisions which do not exist in this jurisdiction. These provisions are in the English Civil Evidence Act of 1968, which makes criminal convictions admissible in evidence at a civil trial, within the meaning and scope of sections 11 and 13 of that Act. Those sections were designed to overrule the effect **Hollington v F Hewthorn & Co Ltd** (in so far as the admissibility of a criminal conviction in a subsequent civil action was concerned). In that regard, the House of Lords in **Hunter v Chief Constable of West Midlands and another**, considered **Hollington v F Hewthorn & Co Ltd** to have been wrongly decided.

[73] A close examination of the case of **Hunter v Chief Constable of West Midlands and another** will reveal that it is a case decided on two premises. The first is that Hunter's conviction was admissible under section 11 of the Civil Evidence Act of 1968 as proof of guilt, unless the contrary could be shown. The second is that the civil case brought by Hunter was a collateral attack on the findings of the court in the criminal trial against him, and was, therefore, an abuse of the process of the court. The House of Lords declined to decide the case on the basis of any "issue estoppel", which it said should be restricted to "that species of estoppel per rem judicatam that may arise in civil actions between the same parties or their privies" (see page 733). The House of Lords cited the cases of **Mills v Cooper** [1967] 2 All ER 100 and **Director of Public Prosecutions v**

Humphrys [1976] 2 All ER 497, which, it was said, decided that issue estoppel had no place in English criminal law (see page 733).

[74] The House of Lords also pointed out that the case of **Hollington v F Hewthorn & Co Ltd** did not decide any issue regarding the raising, in a civil trial, of the identical question that had already been decided in a criminal court of competent jurisdiction and that the decision did not purport to be an authority on such an issue (see page 735 of **Hunter v Chief Constable of West Midlands and another**). However, as pointed out by the House of Lords, the case was used as a rationale for the decision in a case which the House of Lords described as a "notorious libel case". That case, I can say with some confidence, was **Goody v Odhams Press Ltd** [1966] 3 All ER 369. In that case, Goody was convicted for his part in what came to be known in England as "the great train robbery" and was sentenced to 30 years' imprisonment. The defendant newspaper published an article which mentioned Goody's role in the robbery and the fact that he was in prison for his part in it. Goody sued the newspaper for libel. The newspaper pleaded justification of the libel, but to succeed it would have had to prove that Goody was in fact one of the train robbers. Based on the rule in **Hollington v F Hewthorn & Co Ltd**, it could not rely on Goody's conviction as it was not admissible in the civil libel suit. To get around the rule, the newspaper sought, and was granted, permission to amend its defence to plead partial justification, and sought to mitigate damages by evidence that Goody was already a man of bad character at the time the alleged libel took place. The Court of Appeal held that the plea of partial justification was admissible, and that Goody's previous bad character was also admissible in mitigation of damages since damages for libel are given for injury to character and reputation, and that there was no better guide to character and reputation than previous convictions.

[75] The rule in **Hollington v F Hewthorn & Co Ltd** was heavily criticised by Lord Denning in this case as a "strange rule of law", and by Lord Salmon, who agreed with him. However, it was held that the Court of Appeal was bound by the decision. Lord Salmon hoped that it might be reconsidered as part of the law reform.

[76] The Law Reform Committee subsequently considered the rule and made recommendations in its Fifteenth Report (1967, Cmnd 3391). Section 13 of the Civil Evidence Act of 1968 was enacted to cure that 'mischief' that was caused by the 'rule' in **Hollington v F Hewthorn & Co Ltd**, in the "notorious" case of **Goody**, by making, in a civil action for libel and slander, pursuant to section 13, proof of a conviction conclusive proof of guilt against an intending plaintiff. Section 13, on the one hand, was said to be "consistent with and give statutory recognition to the public policy of prohibiting the use of civil actions to initiate a collateral attack on a final decision *against the intending plaintiff* which has been made by a criminal court of competent jurisdiction" (see page 735 of **Hunter v Chief Constable of West Midlands and another**).

[77] Section 11 of the Civil Evidence Act of 1968, on the other hand, directly reversed the effect of the decision in **Hollington v F Hewthorn & Co Ltd** and allows *prima facie* proof of conviction against a defendant to be admissible as rebuttable but not conclusive evidence of guilt, so that a defendant could rebut that evidence, if he can, by proof, on a balance of probabilities, to the contrary.

[78] None of these cases provide authority for this court to say that a defendant is precluded from relying on a defence in a civil action which failed in a criminal action against a different defendant, where the civil action had its genesis in the criminal charge. Based on the common law as it now stands, the fact that the defence was rejected by a jury in a criminal trial, and then by this court, does not preclude it from being relied on in a separate civil trial against a different defendant. In such circumstances, no question of re-litigation would arise. Of course, the cases do recognise, especially **Hunter v Chief Constable of West Midlands and another**, that to launch a collateral attack against the criminal conviction may amount to an abuse of process, and so far, that only seems to apply where the convict is the intending plaintiff.

[79] The common law principle regarding evidence in a civil action arising out of a criminal trial and conviction is fairly settled in this jurisdiction due to the courts having treated the English Court of Appeal's decision in **Hollington v F Hewthorn and Co Ltd**

as persuasive and decisive on the issue. In **Julius Roy v Audrey Jolly** [2012] JMCA Civ 53, Harris JA, in delivering the judgment of this court, held that **Hollington v F Hewthorn and Co Ltd** was still good law in this jurisdiction and that this court is bound by it until a change in the law is "sanctioned" by the legislature (see para. [14]). Earlier in **Danny McNamee v Shields Enterprises Ltd** [2010] JMCA Civ 37 and later in **Patrick Thompson and Ors v Dean Thompson & Ors** [2013] JMCA Civ 42, Morrison JA (as he then was) also discussed the applicability of the rule to this jurisdiction and concluded that it remained good law in our jurisdiction.

[80] The rule, of course, does not apply, as recognised by Lord Goddard in **Hollington v F Hewthorn and Co Ltd**, at page 599 to 600 of the judgment, where there has been an admission or a guilty plea, as "an admission can always be given in evidence against the party who made it". This was the position taken by this court in the case of **Carlson Jones (By Next Friend Joseph Jones) v Bevin Montague** [2012] JMCA Civ 28, where the court held that the principle in **Hollington v F Hewthorn and Co Ltd** was not applicable to the case before it because of the evidence of the guilty plea in the criminal trial. This court pointed to the fact that this position was expressly accepted in the **Hollington v F Hewthorn and Co Ltd** case, itself.

[81] The case of **Hollington v F Hewthorn & Co Ltd** was again considered by the Privy Council in the case of **Calyon (a company incorporated under the laws of the Republic of France) v Michailaidis and others** [2009] UKPC 34, even though that case only involved civil proceedings. The Board had to consider the effect of a civil judgment in personam obtained in one jurisdiction, on civil proceedings in another jurisdiction, where one of the parties was not a party to the previous judgment. For the answer to that question, the Board turned to the approach of the law as stated in the case of **Hollington v F Hewthorn & Co Ltd**. The Board acknowledged that the decision had been heavily criticised and that it had been reversed by the Civil Evidence Act 1968, section 11.

[82] However, the Board underscored, at para. 28, the fact that the case continues to "embody the common law as to the effect of previous decisions" which it said was that "[i]n principle the judgment, verdict or award of another tribunal is not admissible evidence to prove a fact in issue or a fact relevant to the issue in other proceedings between different parties" (quoting from **Land Securities v Westminster City Council** [1993] 4 All ER 124). The Board also pointed to the fact that no changes to the law as regards civil proceedings between different parties on the same issues, had been suggested by the Law Reform Committee (1967, Cmnd 3391) and that the English and Scottish Parliament had made no such change. The Board also, in reliance on **Hunter v Chief Constable of West Midlands and another**, recognised that re-litigating an issue, even between different parties from those in the earlier proceedings, can amount to an abuse of process of the court. However, it noted that, in such a case, the onus would be on the party alleging that there was such an abuse of process, to establish that further litigation would be an abuse of process. The test in such a case, the Board said, is for the claimant to show that it would be manifestly unfair to them that the same issues should be re-litigated, or that to allow those issues to be re-litigated would bring the administration of justice into disrepute.

[83] In the instant case, the action is being brought by the respondent who was not a party to the criminal trial. The first finding made in the case of **Hunter v Chief Constable of West Midlands and another** was not similarly open to the learned judge due to the case of **Hollington v F Hewthorn & Co Ltd**, which has been followed consistently in this jurisdiction, and as said by the Board in **Calyon**, still continues to embody the common law, until our Parliament has the occasion to consider the matter as regards whether it is in the public interest for the same issue rejected in a criminal trial to be re-litigated in a civil trial.

[84] Despite the approach taken in **Hunter v Chief Constable of West Midlands and another**, the law in this jurisdiction is as enunciated in **Hollington v F Hewthorn & Co Ltd**, and, therefore, if the conviction of Mrs Williams in the criminal trial is not

admissible in the civil trial, then the issue of automatism remains open for argument in the civil trial and is not *res judicata*. I also accept that issue estoppel has no place in the criminal arena and is inapplicable here.

[85] I agree with the respondent that there was no basis on which the learned trial judge could have found that the issue of automatism was *res judicata*. She was, therefore, correct on this point. No issue of abuse of process was raised for consideration by this court, and furthermore, Mrs Williams, for some indiscernible reason, was not made a defendant to the appellant's claim, so it is not she who seeks to rely on the defence.

[86] These grounds would necessarily fail.

Conclusion

[87] It is my considered view that the learned trial judge fell into error when she refused to strike out those aspects of the respondent's witness statement, and the witness statement of Mrs Williams, in which the respondent sought to rely on allegations and factual assertions which were not set out in his defence but which could have been. The respondent made no attempt to amend his defence from a bare denial in breach of rule 10.5, and no application for permission to do so was ever made as required by rule 10.7. The respondent could not, therefore, rely on any such assertions in a witness statement to bolster his defence. The judge was plainly wrong to find that she could permit him to do so without an amendment to his statement of case. The learned judge was also wrong to find that the appellant was not prejudiced by the assertions in the witness statement, without considering that it left the appellant without a possible remedy, since at the time these factual assertions were made, the limitation period had passed and the appellant could no longer pursue a remedy directly against the driver. Neither did she consider that amendments to the statement of case were restricted after the limitation period had passed, within the meaning of rule 20.6.

[88] The learned judge was not wrong in concluding that *res judicata* and issue estoppel was not applicable to this case. Furthermore, the principles in **Hollington v F Hewthorn**

& Co Ltd remains the law in this jurisdiction. As a result, I would suggest that the appeal be allowed in part, and orders (1), (2) and (4) of the learned judge's orders be set aside. I would order that portions of para. 3 from the words "although the Sedan" to the end of that paragraph, and all of para. 9 of the witness statement of Annmarie Kirlew-Williams filed on 28 February 2020 be struck out. I would also order that portions of para. 4 from the words "it was my" to the end of the paragraph, para. 5 from the words "ever since" to the word "benefit" and all of para. 7 of the witness statement of Mr Donovan Williams, be struck out. I would further grant the appellant half his costs here and in the court below, he having only been partially successful in this appeal.

DUNBAR-GREEN JA

[89] I too have read the draft judgment of Edwards JA and I agree with her reasoning and conclusion. I have nothing further to add.

BROOKS JA

ORDER

a. The appeal is allowed.

b. Orders (1), (2) and (3) of the decision and orders of the learned judge made on 3 December 2020 are set aside.

c. That portion of paragraph 3 from the words beginning with "although the Sedan" to the end of that paragraph, and all of paragraph 9 of the witness statement of Annmarie Kirlew-Williams, filed on 28 February 2020, are struck out.

d. That portion of paragraph 4 from the words beginning with "it was my" to the end of the paragraph, paragraph 5 from the words "ever since" to the word "benefit", and all of paragraph 7 of the witness statement of Mr Donavan Williams are struck out.

e. The appellant is to have half his costs here, and in the court below, to be agreed or taxed.