**COMMONWEALTH OF THE BAHAMAS** **2016**

**IN THE SUPREME COURT** **CLE/gen/01707**

**Common Law & Equity Division**

**BETWEEN**

**JEFFREY CHARLES SMITH**

**Plaintiff**

**AND**

**DONNAMAE INERA MILLER**

**First Defendant**

**AND**

**M&M VIRGO LIMITED**
**(d.b.a. VIRGO CAR RENTAL)**

**Second Defendant**

**AND**

**SHAVAD ROLLE**

**Third Party**

**Before:** The Honourable Sir Brian M. Moree Kt.

**Appearances:** Mr. E. Raphael Moxey for the Plaintiff
Ms. Glenda Roker for the Second Defendant
No appearance by First Defendant and Third Party

# JUDGMENT

1. On 2 August, 2022 I handed down my decision in this case. At that time I dismissed the action against the Second Defendant with reasons to follow. I also ordered the Plaintiff to pay the costs of the Second Defendant to be taxed if not agreed. As the action was dismissed against the Second Defendant I did not make any Orders against the Third Party under the Third Party

Notice filed by the Second Defendant. I now set out in this Judgment the reasons for my decision.

***Procedural Background***

2. The Plaintiff, Jeffrey Charles Smith (***"the Plaintiff"*** or ***"Mr. Smith"***), commenced this action against the First Defendant, Donnamae Inera Miller (***"Ms. Miller"***) and the Second Defendant, M & M Virgo Limited (***"M&M"***) by a specially endorsed Writ of Summons filed on 29 December, 2016 claiming Damages, Interest and Costs. According to the Statement of Claim endorsed on the Writ, Mr. Smith was riding his bicycle on Market Street on 31 October, 2014 (later amended with leave to 1 November, 2014) when he was hit by a Honda Fit Model car with License Number SD1952 (***"the Honda"***) being driven by Ms. Miller causing him serious personal injuries. He alleged that the collision was caused by the negligence of Ms. Miller and the Particulars are set out in the Statement of Claim.

3. M&M owns Virgo Car Rental (which hereafter in this Judgment is included in the definition of M&M) which, as its name suggests, is a car rental business in New Providence. The only reference to M&M in the Statement of Claim is in paragraph 3 which reads:

> *"The 2nd defendant is the owner of the "Said Car"* [i.e. the Honda]*; and at the time of the accident the Said car was rented/leased by the 2nd defendant to the 1st defendant."*

4. For some reason the Writ was not served on Ms. Miller for several years. Then, on 24 June, 2020 the Plaintiff obtained an Order from Thompson J (as he then was) extending the validity of the Writ to 31 July, 2020 and allowing the Writ to be served on Ms. Miller by substituted service through advertising it for one day in one of the daily newspapers (***"the June Order"***). According to the Affidavit of Service of Donell Johnson filed on 29 June, 2020 the advertisement giving '*Notice of the Writ of Summons*' was published in the Tribune on 26 June, 2020. I noted an earlier Affidavit of Service of Donell Johnson filed on 29 May, 2020 stating that the advertisement giving '*Notice of the Writ of Summons*' was published in the Tribune on 29 May, 2020 which was before the date of the June Order. In that Affidavit Ms. Johnson recited the date of the Order for substituted service as 27 May, 2020 although I was unable to find an Order with that date on the Court file. I was not sure of the circumstances surrounding that earlier Affidavit of Ms. Johnson but it seemed that the Plaintiff proceeded on the basis that Ms. Miller was deemed to have been served with the Writ of Summons on 26 June, 2020 based on the June Order. Ms. Miller did not file an Appearance and consequently an Interlocutory Default Judgment was filed against her on 12 May, 2021 with damages to be assessed (***"the Default Judgment"***). As of the date of the trial, the assessment had not taken place.

5. M&M filed its Defence on 18 September, 2018. The gist of its Defence was that it owned the Honda but did not rent or lease that vehicle to Ms. Miller. M&M did not admit that Ms. Miller was driving the Honda at the time of the accident. There were a series of short

paragraphs in the Defence neither admitting nor denying the averments in the Statement of Claim relating to the accident itself, the alleged negligence of Ms. Miller and the injuries and special damages claimed by Mr. Smith.

6. Later, after obtaining the requisite leave, M&M filed a Third Party Notice on 20 August, 2019 against Shavad Rolle ("***Mr. Rolle***") on the basis that it had rented the Honda to him and not to Ms. Miller. After the Notice was served on Mr. Rolle he did not respond and therefore, going forward, he was bound by the provisions of Order 16 rule 5 of the Rules of the Supreme Court. The case moved to trial.

***Evidence at trial***

7. Mr. Smith gave evidence at the trial. His Witness Statement dated 20 April, 2021stood as his evidence in chief. He recounted that on 1 November, 2014 while riding his bicycle on Market Street along the side walk he was struck by a car being driven by a female. He stated that the car was travelling at a high rate of speed and while trying to maneuver around a Jitney bus the driver lost control of the vehicle and went onto the side walk hitting him off his bicycle. He stated in his evidence that after the incident he later learned that the driver was Ms. Miller and that the car was rented from M&M which was the owner. According to Mr. Smith, two police officers on motorcycles arrived at the scene and he saw them talking with the driver of the car. The officers drove away and the driver of the car moved the vehicle to the other side of the road. Mr. Smith did not see any other police officers at the scene before he was taken away to the hospital by an ambulance.

8. After waiting in the hospital for many hours without receiving any medical treatment Mr. Smith left to try to obtain medication from outside the hospital to relieve his pain. He stated that he was in tremendous pain which lasted throughout the following three days and so he returned to the hospital. He was admitted at that time and it was discovered that he had suffered injuries to his shoulder, neck, back and spinal cord and also had soft tissue bruising. Sometime later in February, 2015, while still in hospital, a police officer visited Mr. Smith and asked him questions about the accident. Subsequently Mr. Smith saw a Police Report, which was admitted into evidence by consent, indicating that he was to be charged with driving without due care and attention in connection with the accident. However, according to his evidence, he was never served with a Summons and he stated that he thought that the charge was trumped up to prejudice his civil action. Mr. Smith's bicycle was damaged beyond repair.

9. Mr. Smith was hospitalized for 23 weeks and he stated that when he was discharged he could not afford therapy so he managed on his own. He stated that he now walks with a limp and is permanently disabled. He can no longer ride a bicycle to deliver newspapers as he did before the accident and he stated that his mobility is greatly diminished. He is receiving $310.00 per month from National Insurance. Prior to the accident, Mr. Smith stated he earned approximately $250.00 per week.

10. During his cross examination Mr. Smith was asked how he knew that the driver of the car which struck him was a female. His answer was that he saw a female get out of the Honda

with another women and they spoke to him while he was in the ambulance. He said that he was not riding his bicycle recklessly when he was hit by the car. The Plaintiff did not call any additional witnesses and closed his case upon the completion of his evidence.

11. Ms. Shannon Minus Horton was the sole witness for M&M at the trial. She relied on her Witness Statement dated 14 April, 2021 for her examination in chief.

12. Ms. Horton worked for M&M for 17 years and had been a Manager for the past 14 years. Her evidence was that M&M owns the Honda and it was rented by M&M to Mr. Rolle on 17 October, 2014. Prior to that date on 14 October, 2014 Mr. Rolle had rented another car from M&M with License Number SD 2702 but after experiencing problems with that vehicle he exchanged it for the Honda on 17 October, 2014 with the return date of 28 October, 2014. Ms. Horton explained that the Rental Agreement with Mr. Rolle, which was admitted into evidence (***"the Agreement"***), governed both the first rental of SD 2702 and the exchange of that vehicle for the Honda. When renting the Honda Mr. Rolle had elected to purchase the Collision Damage Waiver and according to Ms. Horton he was the only named driver in the Agreement. When pressed on this point by Mr. Moxey during the cross examination she agreed that the words 'named driver' do not appear on the Agreement but stated that the person named as the Renter on the Agreement, in this case Mr. Rolle, was the only person authorized to drive the Honda under the Agreement. Ms. Horton said that if another person intended to drive the Honda it would have been necessary to insert the name of that person under the heading 'Additional Renter' on the Agreement. That was not done in this case. During her re-examination Ms. Horton stated that under M&M's standard Rental Agreement the person who rents a vehicle and signs the Rental Agreement is the only authorized driver unless there are additional renters included in the Rental Agreement. As Mr. Moxey stated, to the extent that this issue is relevant, the position in law on authorized drivers under the Agreement is a matter for the court.

13. According to Ms. Horton's evidence, Mr. Rolle physically went into the M&M office on 28 October, 2014. At that time he reported that another vehicle had hit the Honda from behind a few days earlier on 21 October, 2014 causing damage to the back of the car. In that regard, Mr. Rolle completed a Third Party Statement Form in connection with that accident which was provided by M&M (***"the TP Statement"***) and, as the damage was not severe, he was allowed to extend the rental of the Honda for an additional day to 29 October, 2014. Ms. Horton's evidence was that Mr. Rolle was late in returning the Honda to M&M and did not do so until 3:37 p.m. on 1 November, 2014. At that time there was damage to the front and back of the Honda. During his cross examination Mr. Moxey challenged Ms. Horton on the return date and suggested that the Honda was, in fact, returned on 28 October, 2014. He referred Ms. Horton to her earlier Affidavit filed in this action on 18 September, 2018 where she had stated in paragraph 3 that Mr. Rolle returned the Honda on that date. She explained that the date of 28 October, 2014 was when Mr. Rolle had gone into the M&M office to report the accident which had occurred on 21 October, 2014 and was given an extension of the rental of the Honda to 29 October, 2014. She said that the return date in paragraph 3 was an error as it had not taken into consideration the extension. I noted that in paragraph 5 of the same Affidavit Ms. Horton

stated that the Honda was returned on 1 November, 2014. Ms. Horton was resolute in her evidence on this point at the trial and stated that she personally had checked in the Honda at 3:37 p.m. on 1 November, 2014. She referred to the Agreement showing that the date and check in time was 1 November, 2014.

14. Ms. Horton stated in her evidence that when there is not enough space on the Rental Agreement to record all of the information pertaining to the rental of a vehicle an extension sheet is used which is usually attached to the Agreement. She stated that there was an extension sheet used in the rental to Mr. Rolle which recorded the payment for the extra day (i.e. 29 October, 2014) but it was not attached to the Agreement which was in evidence.

15. Ms. Horton was cross examined by Mr. Moxey on the payments made by Mr. Rolle. He referred to the handwritten notes on the Agreement which, he said, showed that the payment was for 14 days covering the period 14 October – 28 October, 2014. Ms. Horton responded by reiterating that the payment made Mr. Rolle for the extra day, 29 October, 2014, was recorded on the extension sheet. She stated that as of 28 October, 2014 when Mr. Rolle left the M&M office, he had paid for the period 14 October, to 29 October, 2014. Therefore, according to Ms. Horton's evidence, when Mr. Rolle returned the Honda on 1 November, 2014 he had to pay for an additional 3 days covering 30 October to 1 November, 2014 which was taken out of the deposit.

16. In her evidence, Ms. Horton stated that M&M did not have a Rental Agreement with Ms. Miller and her name was not on the Agreement. She said that "*...we're unaware of Ms. Donnamae Miller.*" Additionally, Ms, Horton stated that when the Honda was returned by Mr. Rolle on 1 November, 2014, M&M had no knowledge of the accident which allegedly occurred on that day. In his cross examination, Mr. Moxey firmly suggested to Ms. Horton that M&M gave permission to Ms. Miller to drive the Honda on 1 November, 2014 and that she "*...could have been a former employee or a renter or customer of Virgo and that Virgo is withholding information.*" She responded in the following way as recorded in the Transcript for 27 May, 2021 on pages 32 -33 starting at line 30:

> *"I disagree with that statement. I've been here* [that is at M&M] *for 17 years....I'm unaware of her* [Ms. Miller] *as an employee. I could check my customer base, but during this particular period, there's no Donnamae Miller. We would never withhold information from the Court and if she had rented from us, we would gladly produce a rental agreement. We are lawfully insured. It wouldn't have been a problem"*

17. In her Re-examination Ms. Horton stated that after the Honda was returned by Mr. Rolle on 1 November, 2014 it was sent to be repaired. She stated that she personally checked in the Honda on 1 November, 2014 and it had not been rented to anyone else on that day. On the subject of authorized drivers, Ms. Horton stated that in her 17 years of experience the renter of a vehicle is the only authorized driver unless other persons are included in the rental agreement as 'Additional Renters'.

18. There was no evidence adduced at the trial showing how Ms. Miller came to be the driver of the Honda at the time of the accident.

***Submissions***

19. Mr. Moxey submitted that the Plaintiff had established by his evidence that he was hit by the Honda on 1 November, 2014, that Ms. Miller was driving the Honda at the time, that M&M owned the Honda and that Ms. Miller's negligent driving caused the accident. He further contended that on the documentary evidence before the Court, the Honda had been returned to M&M on 28 October, 2014 (although in his closing submissions he said no later than 31 October, 2014). In support of that contention Mr. Moxey relied (i) on the statement by Ms. Horton in her earlier Affidavit filed on 18 September, 2018 that the Honda was returned on 28 October, 2018; and (ii) on the fact that the date of the TP Statement was 28 October, 2014 indicating that was when the Honda was returned to M&M. He also observed that the evidence did not show that any enquiries were made by M&M on 1 November, 2014, when they say that the Honda was returned, about the damage to the front of the Honda. There was no evidence showing that Mr. Rolle had explained how that damage occurred. This, he submitted, was further evidence that the Honda was returned on 28 October, 2014 before the front of the Honda was damaged.

20. Mr. Moxey also contended that the payments recorded on the Agreement in hand writing showed that Mr. Rolle had paid up to 28 October, 2014.

21. He submitted that the evidence showed that the Agreement had ended on or before 31 October, 2014 and therefore M&M had possession of the Honda on 1 November 2014, and it knew

> that *"....or is deemed to know, the identity of [Ms. Miller]; and, in fact most likely rented the* [Honda] *or gave* [Ms. Miller] *permission to drive the* [Honda]. *As such,* [Ms. Miller] *was a client, or employee, or agent of* [M&M] *when she was involved in the accident with* [Mr. Smith]. *On these facts, if accepted by the Court,* [M&M] *is vicariously liable."*

22. Alternatively, Mr. Moxey contended that if Mr. Rolle was still the renter on 1 November, 2014 under an extension of the Agreement, then Mr. Rolle "*...must have intentionally given permission to* [Ms. Miller] *to drive the car. In this scenario, the act of driving of the rental car conforms with the mode of conduct which a rental car company would expect to happen with respect to the use of its rented vehicle, and this, without more, makes them vicariously liable once liability had been found."*

23. Counsel submitted that there were only two possible scenarios in this case; one was that Ms. Miller rented or borrowed the Honda with the knowledge of M&M. The second one was that Mr. Rolle gave permission to Ms. Miller to drive the Honda and Mr. Moxey contended that the Agreement did not explicitly prohibit other persons from driving the Honda. Accordingly, Counsel submitted that in both scenarios M&M would be vicariously liable for the negligence of Ms. Miller.

24. Mr. Moxey cited a number of cases in support of his submissions. In referring to **Lister and Others v Hesley Hall Limited [2001] UKHL 22; Ricketts v Thomas Tilling (1) KB [1915] 1 K.B.644; Ilkiw v Samuela and Others [1963] 2 All ER 879 and Engelhart v Farrant & Co. and T. J. Lipton [1897] 1 QB 240** he submitted that M&M would be liable for the negligence of Ms. Miller if it had rented the Honda to Mr. Rolle and he in turn allowed or authorized Ms. Miller to drive the car. In my view that submission was entirely hypothetical in this case. First it was contrary to the pleaded case in paragraph 3 of the Statement of Claim that M&M rented the Honda to Ms. Miller. There was no alternative plea that at the time of the accident the Honda was rented to Mr. Rolle and either he had given Ms. Miller permission to drive the vehicle or that such permission or authorization should be inferred from the circumstances. Secondly, there was no evidence at the trial that Mr. Rolle had allowed Ms. Miller to drive the Honda at the time of the accident.

25. Ms. Roker submitted that the Statement of Claim in this case failed to disclose a cause of action against M&M. She contended that the Plaintiff had not adduced any evidence to show that either M&M or Mr. Rolle had authorized Ms. Miller to drive the Honda on 1 November, 2014. Even on the assumption that Ms. Miller was driving the Honda on 1 November, 2014 at the time of the accident (which she did not accept) Ms. Roker contended that there was no evidence that she was driving in the course of any service, employment or agency of M&M. Counsel submitted that vicarious liability is not presumed by mere possession. Further, she submitted that the Plaintiff had not even shown on a balance of probabilities that Ms. Miller was driving the Honda at the time of the alleged accident. She contended that the action should be dismissed against M&M.

26. She relied on the case of **Sandy Port Homeowners Association Limited v R. Nathaniel Bain SCCivApp & CAIS No. 289 of 2014** to support her attack on the inadequacy of the Plaintiff's pleading.

***Findings of Facts***

27. In the Statement of Claim indorsed on the Writ it is alleged in paragraphs 2,4 and 5 that:

> "*2. The first defendant was the driver* of [the Honda].
> .....
> *4. On the 31st October, 2014* [later amended to 1 November, 2014], *while* [Mr. Smith] *was riding his bicycle along Market Street he was struck by* [the Honda] *being driven, at the relevant time, by* [Ms. Miller].....
> *5. The said accident was caused by the negligence of* [Ms. Miller]."

28. As a result of her default in filing an Appearance and the subsequent Default Judgment against her, Ms. Miller is deemed to have admitted all the allegations in the Statement of Claim. Consequently, it was not necessary for Mr. Smith to prove at the trial any of those allegations in connection with his claim against Ms. Smith. However, in so far as there were any pleaded claims in the Statement of Claim against M&M which were not admitted, it would be necessary to consider the evidence in connection with those matters.

29. Mr. Smith's evidence related to the accident itself, what happened to him at that time and afterwards in the hospital and his injuries and earnings. On the other hand, Ms. Horton's evidence was primarily about the rental arrangements involving the Honda between Mr. Rolle and M&M and the absence of any relationship or contact between M&M and Ms. Miller in connection with the Honda.

30. I observed the two witnesses when they gave their evidence at the trial and considered all the evidence including the admitted documents which were adduced at the trial. It was apparent that Mr. Smith was deeply affected by the accident and its impact on his life. It was my view that he related what he remembered about the accident and his subsequent hospitalization to the best of his recollection. His evidence on his earnings prior to the accident was not documented but bearing in mind my decision to dismiss the action against M&M it was not necessary to consider the issue of damages.

31. I was of the view that Ms. Horton was a credible witness. I accepted her evidence on the details relating to the rental of the Honda to Mr. Rolle which was not contradicted by any other direct oral evidence. I considered Ms. Horton's evidence on the one day extension to 29 October, 2014 and that the extension sheet which she stated had been completed was not produced at the trial. I found her oral evidence on this point, after a probing cross examination by Mr. Moxey, to be straight forward and believable. I did not find that evidence to be inconsistent with the TP Statement or any of the other documents tendered in evidence. The fact that the TP Statement was dated 28 October, 2014 did not, in my view, cast doubt on Ms. Horton's evidence that the rental of the Honda was extended on that date for an additional day and that, albeit late, it was eventually returned by Mr. Rolle on 1 November, 2014.

32. Specifically, I accepted Ms. Horton's explanation about the difference between paragraphs 3 and 5 in her Affidavit filed on 18 September, 2018 with regard to the return date of the Honda. When those paragraphs are considered in light of the evidence of Ms. Horton given at the trial, the position is clarified in that Mr. Rolle did take the Honda to the M&M business premises on 28 October, 2014 (which was the original return date for the Honda) when he reported the accident which had occurred on 21 October, 2014 and completed the TP Statement. That Statement was admitted at the trial and it is clearly dated 28 October, 2014. Also, a copy of the Agreement was attached to the September 2018 Affidavit showing that the Honda was checked in at 3:37 p.m. on 1 November, 2014 which is consistent with paragraph 5 of that Affidavit. What is missing in the September 2018 Affidavit is the more detailed account of the dealings between M&M and Mr. Rolle during the period 28 October, 2014 and 1 November, 2014 which was given in the evidence at the trial. I did not regard that omission in the Affidavit as adversely affecting the credibility of Ms. Horton. The fact is that a copy of the Agreement was attached to the Affidavit and that clearly showed when the Honda was returned to M&M. Any conflict on this point between paragraphs 3 and 5 of that Affidavit was easily resolved by reference to the exhibited Agreement.

33. There was no evidence showing that M&M rented or leased the Honda to Ms. Miller on or around 1 November, 2014 or had any other dealings with Ms. Miller at that time in connection with the Honda. Similarly, there was no evidence that Ms. Miller was at any time an employee, client or agent of M&M or that Mr. Rolle had given permission to Ms. Miller to drive the Honda on 1 November, 2014.

34. Bearing in mind the evidence adduced at the trial and the Default Judgment against Ms. Miller I found that:

    (i) Mr. Smith was hit off his bicycle by the Honda on 1 November, 2014 when it was being driven by Ms. Miller;
    (ii) The collision between the Honda and Mr. Smith's bicycle was caused by the negligent driving of Ms. Miller;
    (iii) M&M was the registered owner of the Honda on 1 November, 2014 but under the definition of 'owner" in section 2(1) of the Road Traffic Act Mr. Rolle would have become an owner in possession in his own right during the time when he was renting the Honda under the Agreement;
    (iv) There was no rental/lease agreement, agency or other arrangement between Ms. Miller and M&M on 1 November, 2014 relating to the Honda authorizing Ms. Miller to drive that vehicle on behalf of M&M or for any purpose in connection with the business of M&M; and
    (v) The Honda was rented by M&M to Mr. Rolle initially for the period 17 October to 28 October, 2014 and then extended by one day to 29 October, 2014. Mr. Rolle kept the Honda for an additional 3 days and returned it to M&M at 3:37 p.m. on 1 November, 2014.

***Vicarious liability***

35. The only claim sought to be advanced by the Plaintiff against M&M was that it was vicariously liable for the negligence of Ms. Miller in causing the accident on 1 November, 2014 which injured the Plaintiff. Vicarious liability is a form of strict liability and arises when one person is held liable for the wrongful act or omission of another, even if the specific act or omission was unknown to that person at the time it occurred. In **Barclays Bank plc v Various Claimants [2020] UKSC 13** Lady Hale stated:

> *"Two elements have to be shown before one person can be made vicariously liable for the torts committed by another. The first is a relationship between the two persons which makes it proper for the law to make the one pay for the fault of the other. Historically, and leaving aside relationships such as agency and partnership, that was limited to the relationship between employer and employee, but that has now been somewhat broadened.....The second is the connection between that relationship and the tortfeasor's wrongdoing. Historically, the tort had to be committed in the course or*

*within the scope of the tortfeasor's employment, but that too has now been somewhat broadened."*

36. It was my view that the claim of vicarious liability in this case was unsustainable for four reasons: (i) it was not pleaded; (ii) in this case there was no proper basis to infer an agency relationship between Ms. Miller and M&M; (iii) as a matter of law, it did not arise merely from the averment, without more, that M&M rented/leased the Honda to Ms. Miller; and (iv) there was no evidence to support it.

***(i) Point 1 – Vicarious liability was not pleaded***

37. The Statement of Claim in this case has only one short reference to M&M. I set it out above but I will repeat it here for convenience:

> *"The 2nd defendant is the owner of the "Said Car"* [i.e. the Honda]*; and at the time of the accident the Said car was rented/leased by the 2nd defendant to the 1st defendant."*

38. That laconic averment in the Statement of Claim raised only two points with regard to M&M. The first one is that M&M owned the Honda. That was admitted. The second point is that at the time of the accident – 1 November, 2014 - M&M had rented or leased the Honda to Ms. Miller. That was denied and therefore had to be proved by the Plaintiff according to the requisite standard of proof. There were no other matters pleaded relating to Ms. Miller and M&M.

39. In his submissions Mr. Moxey referred to M&M giving Ms. Miller permission to drive the Honda and to Ms. Miller being a client, or employee, or agent of M&M when she was involved in the accident with Mr. Smith. However, there are no averments in the Statement of Claim that M&M gave Ms. Miller permission to drive the Honda on 1 November, 2014 and it is not pleaded that Ms. Miller was driving the Honda at the time of the accident as a servant and/or agent of M&M or that at the time of the accident M&M had an interest in the purpose for which the Honda was being used by Ms. Miller. Nothing is pleaded in the Statement of Claim with regard to the circumstances surrounding the use of the Honda by Ms. Miller at the time of the accident.

40. Mr. Moxey also contended, in the alternative, that if Mr. Rolle was the renter of the Honda on 1 November, 2014 he "*...must have intentionally given permission to* Ms. Miller *to drive the car.....*" However, again, the underlying fact of that contention was not pleaded in the Statement of Claim.

41. Mr. Smith was not at liberty to advance a case against M&M at the trial which he had not pleaded in the Statement of Claim and Mr. Moxey's submissions had to be considered in that context.

42. The Rules of the Supreme Court are clear that parties in litigation are bound by their pleadings and cannot advance a case which is not raised in the pleadings. There can be no

'creeping missions' coming out at the trial which incrementally disclose, add or change the case of one party or the other unless leave of the court is obtained to amend the relevant pleading. Apart from the application during the trial to amend the Writ to change the date of the accident from 31 October, 2014 to 1 November, 2014 (which was granted without opposition from Ms. Roker) no application was made on behalf of Mr. Smith to amend the Writ to include additional details or information which may have come to the knowledge of Mr. Smith after the Writ was filed. Ms. Horton's Witness Statement was filed on 22 April, 2022 and presumably Mr. Smith or his Counsel would have received it shortly thereafter so he would have seen the evidence which M&M was intending to lead at the trial.

43. In **Bahamas Ferries Limited v Charlene Rahming SCCivApp & CAIS No. 122 of 2018,** the Court of Appeal addressed the importance of pleadings in a civil case. In his Judgment Sir Michael Barnett JA (as he then was) stated:

> *"29. The real difficulty in the judgement of the court below is that the finding of negligence was not one that was pleaded by the respondent.....*
>
> *30. The trial judge rejected the particulars of negligence pleaded and founded liability on a ground not pleaded in the statement of claim.*
>
> *31. In our judgment this is not proper and manifestly unfair to the appellant.*
>
> *32. Negligence was clearly pleaded and particularised as set out in paragraph 6 above.*
>
> *33. That was the case the appellant had to meet. There was no assertion that it was negligent in failing to delay boarding because of the rain.....*
>
> .....
>
> *37. This is not an arid pleading point.*
>
> *38. In Nada Fadil Al Medenni vs. Mars UK Limited [2005] EWCA Civ 1041 Dyson LJ giving the decision of the English Court of Appeal said:*
>
> > *"It is fundamental to our adversarial system of justice that the parties should clearly identify the issues that arise in the litigation, so that each has the opportunity of responding to the points made by each other. The function of the judge is to adjudicate on those issues alone. The parties may have their own reasons for limiting the issues or presenting then in a certain way. The judge can invite, and even encourage, the parties to recast or modify the issues. But if they refuse to do so, the judge must respect that*

*decision. One consequence of this may be that the judge is compelled to reject a claim on the basis on which it is advanced, although he or she is of the opinion that it would have succeeded if it had been advanced on a different basis. Such an outcome may be unattractive, but any other approach leads to uncertainty and potentially real unfairness."*

39. *The starting point must always be the pleadings. In Loveridge and Loveridge v Healey [2004] EWCA Civ. 173, Lord Phillips MR said at paragraph 23:*

> *"In Mcphilemy vs Times Newspapers Ltd. [1999] 3 ALL ER 775 Lord Woolf MR observed at 792-793:*
>
> > *'Pleadings are still required to mark out the parameters of the case that is being advanced by each party. In particular they are still critical to identify the issues and the extent of the dispute between the parties. What is important is that the pleadings should make clear the general nature of the case of the pleader."*

44. Mr. Smith was bound by his pleadings. He had not pleaded an agency relationship between M&M and Ms. Miller or any other circumstances giving rise to an obligation on M&M to pay for the negligence of Ms. Miller. The alleged rental of the Honda by M&M to Ms. Miller was the only point pleaded.

***(ii) Point 2 - no proper basis to infer an agency relationship between Ms. Miller and M&M***

45. There are times when, in the absence of evidence to the contrary, there is a presumption that the driver of a vehicle (who does not own the vehicle) is the agent of the owner – see **Barnard v. Sully (1931) 47 T.L.R. 557 and Hopkinson v Lall [1959 1 WIR 382.** However, that presumption did not arise in this case. Ms. Horton's evidence, which I accepted, clearly rebutted such a presumption as she stated that Ms. Miller did not rent the Honda from M&M and that she was unknown to M&M and had no dealings with M&M in connection with the Honda.

46. In view of that evidence, which clearly rebuts a presumption of agency, there was no basis to infer an agency relationship between Ms. Miller and M&M based on M&M's ownership of the Honda. The Plaintiff would have had to plead the agency relationship and prove it by evidence at the trial. He did neither. This is apart from the point on ownership under section 2(1) of the Road Traffic Act.

***(iii) Point 3 - vicarious liability did not arise merely from the averment, without more, that M&M rented/leased the Honda to Ms. Miller***

47. The mere fact that a car rental company rents a vehicle to a hirer does not, of and by itself, make the hirer the agent of the car company when driving the vehicle for his own purposes and/or on his own business.

48. In **Avis Rent-a-Car v Maitland (1980) 32 WLR 294** the appellant, a car-hire company, hired a motor car to the second defendant for weekly payments and required the car to be returned each week for servicing. The car was being driven by the second defendant in the course of his business as a private investigator when he crashed killing his passenger. The executrix of the deceased sued the appellant (i.e. the car rental company) and the second defendant. Judgment was entered against the second defendant in Default of Defence. At the trial, the appellant was held jointly liable with the second defendant for damages for the death of the deceased as the driving of the car had been to the benefit of the appellant. The appellant appealed the decision of the trial judge. The issue raised on appeal was whether the driver of the car was the agent of the appellant at the time of the crash. In allowing the appeal it was held by the Court of Appeal of Jamaica that there was no agency relationship between the appellant and the second defendant and consequently the appellant was not vicariously liable for the negligence of the second defendant. The Court held that there was no joint interest between the appellant and the second defendant in the business in which the second defendant was engaged in at the time of the crash.

49. Zacca, Acting P gave the Judgment for the Court. He stated:

> *"Morgans v Launchbury [1973] AC 127 is the leading case on this question. The law is accepted as being well settled. Lord Wilberforce stated (at page 135):*
>
> > *'For I regard it as clear that in order to fix vicarious liability upon the owner of a car in such a case as the present, it must be shown that the driver was using it for the owner's purposes, under delegation of a task or duty. The substitution for this clear conception of a vague test based on 'interest' or 'concern' has nothing in reason or authority to commend it. Every man who gives permission for the use of his chattel may be said to have an interest or concern in its being carefully used, and, in most cases if it is a car, to have an interest or concern in the safety of the driver, but it has never been held that mere permission is enough to establish vicarious liability ... I accept entirely that 'agency' in contexts such as these is merely a concept, the meaning and purpose of which is to say 'is vicariously liable', and that either expression reflects a judgment of value- respondeat superior is the law saying that the owner ought to pay. It is this imperative which the common law has endeavoured to work out through the cases. The owner ought to pay, it says, because he has authorised the act, or*

*requested it, or because the actor is carrying out a task or duty delegated, or because he is in control of the actor's conduct. He ought not to pay (on accepted rules) if he has no control over the actor, has not authorised or requested the act, or if the actor is acting wholly for his own purposes. These rules have stood the test of time remarkably well.'*

*When a company or an individual in the course of its business hires a motor vehicle to a person on terms that during the period of hire the vehicle should be driven by the servant or agent of the owner, responsibility for the negligent driving of that motor vehicle will in ordinary circumstances devolve upon the owner: Mersey Docks and Harbour Board v Coggins & Griffith (Liverpool) Ltd [1947] AC 1. An entirely different situation arises in law when such a company or individual hires the motor vehicle on condition that the motor vehicle can be driven by the hirer for purposes exclusively determined by the hirer, in which the benefits of the venture accrue wholly to the hirer. In this second case there is no joint interest between owner and hirer in the outcome of the venture and the hire is not dependent upon or affected by the profitability or otherwise of the venture...."*

50. The Supreme Court of Jamaica addressed the issue of vicarious liability in the context of a car rental company in the case of **Rupert Henry v Bargain Rent-A-Car and Andrea Allison [2017] JMSC Civ 1.** In that case the court gave summary judgment to Bargain Rent-A-Car and dismissed the case against it on the basis that there was no evidence of an agency relationship between the two defendants. In the course of his Judgment the judge stated:

*"The issue was whether there was on the evidence an agency relationship between both defendants. It has not been shown that the second defendant was connected to or had an interest in the first defendant's enterprise in respect of the hiring of the vehicle or that she was driving for the first defendant's purposes. There was no proof that he was their servant and or agent or in any way connected to the business of the first defendant"*

51. In reviewing the authorities the judge stated in paragraph 16 of his Judgment that:

*"In **Island Car Rentals Ltd. v. Headley Lindo 2015 JMCA App 2**, Brooks, JA opens his judgment with these words:*

*"Avis Rent-a-Car Ltd v Maitland (1980) 32 WIR 294 has long been accepted as the authority for the principle that a person who lets a motor vehicle on hire, is not by virtue of that transaction, vicariously liable for the negligent driving of the person to whom he hires the vehicle."*

52. In **Alain Beckford v Milton O'Connor and Island Car Rentals Limited [2020] JMSC Civ.252** the Supreme Court of Jamaica once again had to consider a claim of vicarious liability against a car rental company. The Claimant, Alain Beckford, brought an action to recover damages for negligence as a result of a motor vehicle accident which occurred on the 24th of September 2012. Mr. Beckford was driving his motor vehicle along a road in the parish of St. Mary when the 1st Defendant, Milton O'Connor, collided with his vehicle. In his Claim Form Mr. Beckford stated that the 1st Defendant was either acting in his own capacity or as an agent and or servant of the 2nd Defendant, Island Car Rentals Limited. The 2nd Defendant applied for, *inter alia,* summary judgment based on **Avis Rent-a-Car v Maitland.** In granting summary judgment the judge stated;

> *"[27] The pleadings of the Claimant have attributed liability on the part of the 2nd Defendant based on the principle of vicarious liability. The 2nd Defendant has shown by the evidence contained in the affidavit in support of the notice of application that there was no relationship between itself and the 1st Defendant upon which a court could hold that they are liable for the actions of the 1st Defendant. The Respondent/Claimant having put forward no evidence in rebuttal, has placed nothing before this court to say otherwise.*
> *[28] In the circumstances therefore I cannot find that the Respondent/Claimant has a real prospect of succeeding on the claim against the Applicant/2nd Defendant."*

53. In the case of **Sands Sr. (father of the deceased Lance H. Sands Jr.) and others v. Evelyn and another [2019] 1 BHS J. No. 19; 2010/CLE/gen/01289** a motorcyclist died as a result of injuries sustained in a collision with a vehicle driven by the first defendant who was employed by the second defendant. The father of the deceased commenced the action against the two defendants. The first defendant was not served with the Writ and Statement of Claim and was not in the jurisdiction. He played no part in the trial. The claim against the second defendant was that it was vicariously liable for the negligence of the first defendant. In its Defence the second defendant admitted that it owned the vehicle but denied that the first defendant was driving as its servant or agent at the time of the collision. The sole issue before the court was whether the second defendant was vicariously liable for the negligence of the first defendant.

54. In his Judgment Winder J (as he then was) after referencing **Maitland** stated:

> *"4. The singular issue for the resolution of this dispute is the question of vicarious liability. It is not in dispute that* [the first defendant] *was employed by* [the second defendant] *and that the vehicle he drove that night was owned by* [the second defendant]. *As a general rule, a person will be vicariously liable only where the tortfeasor is his agent acting in the course of the employment. Likewise, the vehicle owner is liable only where the driver was driving for some purpose of the owner.*
> .....

> *6. .....Vicarious liability is not presumed by the mere fact of employment and ownership. At trial the Court did hear evidence from Sherry Brown..... At paragraph 2 of her Witness Statement Ms. Brown stated.*
>
> > "[The first defendant] *was permitted to drive a 2008 Ford Explorer motor vehicle which was owned by* [the second defendant]. [The first defendant] *completed a J.S. Johnson Motor Accident Report Form dated October 26, 2009, in which* [he] *stated that at the time of the motor vehicle accident involving Mr. Lance Sands, Jr., (deceased) the 2008 Ford Explorer motor vehicle was being used for his personal use/leisure....."*
>
> *7. In all the circumstances, having considered the evidence before me, I find that there was no evidence that at the time of the accident, whilst in the company of his wife,* [the first defendant] *was engaged in any undertaking for the purposes of Commonwealth."*

55. Parenthetically, I note that the Statement of Claim in the **Sands** case included the following paragraph:

> *"[6] The said collision and resultant death was caused by the negligence of the First Defendant, the Servant or Agent of the Second Defendant as hereinafter set out, who is vicariously liable for the same, of which his estate and dependants suffered loss and damage."*[My emphasis]

That pleading is markedly different to paragraph 3 in Mr. Smith's Statement of Claim in this case which did not plead that Ms. Miller was the servant or agent of M&M or that Ms. Miller was driving for M&M's purposes at the time of the accident

56. Putting aside the issue of evidence for the moment, it is apparent from the above authorities that a car rental company is not, merely by renting a vehicle to a person, vicariously liable for the negligent driving of that person. There would have to be pleaded and proved that, in addition to the rental, there was at the material time a relationship between the car rental company and the hirer/driver upon which a court could properly hold that the company was liable for the actions of the hirer/driver. This is usually an employee or agency relationship and/or that the hirer/driver was driving for a purpose connected to the business of the company. It was my view that the pleading in paragraph 3 of the Statement of Claim that M&M rented the Honda to Ms. Miller on 1 November, 2014, without more, was not enough to ground a claim of vicarious liability against M&M.

***(iv) Point 4 - No evidence to support claim of vicarious liability***

57. Independent of the above three points, and even if I was wrong in my conclusions on those points, there was no evidence at the trial that Ms. Miller rented the Honda from M&M. The pleaded case of Mr. Smith against M&M in the Statement of Claim indorsed on the

Writ was predicated on that issue. There was no evidence adduced at the trial to support that position. Indeed, as stated in paragraph 34 above, I found that, on the oral and documentary evidence at the trial, there was no rental/lease agreement or other arrangement between Ms. Miller and M&M on 1 November, 2014 relating to the Honda. On that basis, the pleaded case against M&M, such as it was, could not succeed and I dismissed the case against it.

58. As stated above, the underlying factual matrix to support the alternative submissions by Mr. Moxey that either M&M or Mr. Rolle had given (or must be deemed to have given) Ms. Miller permission to drive the Honda at the time of the accident or that she was driving the Honda at the time of the accident as the agent of M&M or Mr. Rolle was not pleaded and therefore could not be relied on by Mr. Smith at the trial.

***Conclusion***

59. In the result, the case against M&M was dismissed and the Plaintiff was ordered to pay the costs of M&M to be taxed if not agreed.

Dated 20th day of December, 2022

Sir Brian M. Moree Kt.

**COMMONWEALTH OF THE BAHAMAS** **2016**

**IN THE SUPREME COURT** **CLE/gen/01707**

**Common Law & Equity Division**

**BETWEEN**

**JEFFREY CHARLES SMITH**

**Plaintiff**

**AND**

**DONNAMAE INERA MILLER**

**First Defendant**

**AND**

**M&M VIRGO LIMITED**
**(d.b.a. VIRGO CAR RENTAL)**

**Second Defendant**

**AND**

**SHAVAD ROLLE**

**Third Party**

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# JUDGMENT

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