[2012] JMCA Civ 20

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 126/2009

BEFORE: THE HON MR JUSTICE PANTON P
THE HON MR JUSTICE MORRISON JA
THE HON MISS JUSTICE PHILLIPS JA

BETWEEN	**ADELE SHTERN**	**APPELLANT**
AND	**VILLA MORA COTTAGES LTD**	**1ST RESPONDENT**
AND	**MONICA CUMMINGS**	**2ND RESPONDENT**

Miss Carol Davis for the appellant

David Batts and Mrs Terri-Ann Gibbs instructed by Livingston, Alexander & Levy for the respondents

29, 30 November, 1 December 2010 and 16 April 2012

PANTON P

[1] I have read the reasons for judgment written by my learned brother Morrison, JA. I agree with him fully and have nothing to add.

MORRISON JA

Background

[2] This is an appeal from a judgment of Lawrence-Beswick J, given on 23 June 2009, in which she gave judgment for the respondents in an action brought against them by the appellant for damages for negligence and breach of the common duty of care under the Occupiers' Liability Act ('the Act'). The principal issue that arises on the appeal is whether the learned judge was correct in her conclusion that the appellant had failed to prove on a balance of probabilities that the respondents were in breach of a duty of care to her, whether under the general law or under the Act. A subsidiary issue, which the judge did not find it necessary to address in the light of her conclusion on the principal issue, is whether the 2nd respondent was an 'occupier' for the purposes of liability under the Act.

[3] The appellant is a citizen of the United States of America, who was, on 15 February 1996, a paying guest at the Villa Mora Hotel and Cottages ('the hotel') situated at Norman Manley Boulevard, Negril, in the parish of Westmoreland. The hotel was at the material time owned and operated by the 1st respondent on land owned by the 2nd respondent.

The appellant's case

[4] The appellant's case at trial was that, during her stay at the hotel, she was permitted by Mr Keith Black, the then manager of the hotel, to use a refrigerator located in the office of the hotel for the purpose of storing her own personal items,

there being no refrigerator in her room. On 15 February 1996, as she attempted to open the door of the refrigerator, she received a severe electrical shock, as a result of which, she further alleged, she sustained severe injuries, suffered loss and damage and incurred substantial expenses.

[5] The appellant claimed that this accident and as a consequence, her injuries, loss and damage, were caused by the negligence of the 1st respondent, as the operator of the hotel, and/or the 2nd respondent, as the owner of the premises upon which it was situated. The appellant also placed reliance on the common duty of care owed by an occupier of premises to visitors under the provisions of the Act.

[6] The pleaded particulars of negligence were as follows:

> "(a) Failing to take any or any reasonable care to see that the Plaintiff would be reasonably safe in using the said hotel and in particular in using the said refrigerator.
>
> (b) Failing to take any or any reasonable care to prevent injury or damage to the Plaintiff from unusual dangers in the said hotel of which they knew or ought reasonably to have known.
>
> (c) Causing or permitting the said refrigerator to be and/or to become and/or to remain in a defective and dangerous condition and to be a danger and a trap to persons lawfully staying at the said hotel and using the same.
>
> (d) Failing to replace or to repair the said refrigerator or to take any or any reasonable measures to render the said refrigerator safe to use when they knew or ought reasonably to have known that it was in a defective and dangerous condition and was likely to expose the Plaintiff to injury and damage from electrocution.
>
> (e) Failing to take any or any adequate measures whether by way of periodic or other examination, inspection, test or

otherwise to ensure that the refrigerator was in a reasonably safe condition and was not defective or dangerous and in a condition in which it was likely to expose the Plaintiff to injury and damage from electrocution.

(f) Failing to give the Plaintiff any or any adequate warning of the dangerous condition of the refrigerator.

(g) Exposing the Plaintiff to a risk of damage or injury of which they knew or ought reasonably to have known.

(h) Causing or permitting the Plaintiff to use the said refrigerator when they knew or ought reasonably to have known that it was in a defective state and was unsafe.

(i) In the circumstances failing to discharge the common duty of care to the Plaintiff in breach of the Occupiers' Liability Act. The Plaintiff will rely so far as is necessary on the doctrine of Res Ipsa Locquitur [sic]."

[7] The appellant, who was a resident of Long Island, New York City, in the United States of America, gave evidence that early in the month of February 1996, she travelled on vacation to Negril in the parish of Westmoreland. She described herself as an American Professor of Arts, a multi-disciplinary artist, a graphic designer and a consultant, in addition to which she was a published poet and author, and a performance artist of novels and movement. On 15 February 1996, about one week after having checked in at the hotel as a paying guest, the appellant attempted to open the door of a refrigerator located in the hotel's office, in which she had been storing her food items during her stay. She was intending to go to the beach later that morning, so she was barefooted, but she was not wet. This is what, by her account (from the judge's acceptance of which there is no appeal), then ensued:

"I attempted to open the refrigerator using the handle which was on it. However, on touching the refrigerator with my left hand I became stuck to it, and I was unable to detach my hand. I could not breathe and I could not speak. I was aware of the sound and rhythm of the refrigerator, but I was electrified. I absolutely deny that my use of the refrigerator was unauthorized. As far as I am aware, a fridge is supposed to be a safe appliance. I was entirely unaware that there was any risk involved in using a fridge without shoes. Prior to this incident, I did not consider a refrigerator dangerous equipment [sic]. I have throughout my life used a refrigerator while I was barefooted, and never hither to this incident been shocked doing so. I take the safe use of a refrigerator for granted, and everyone I know does too.

After what seemed like an eternity and a very close call with death, but what was probably less than a minute I was able to let go of the handle. My hand just came loose from it. I was in shock. I was shaking visibly. Mr. Black who was in the office told me to calm down. I was out of breath and gasping for air. I had to make a great effort to take conscious breaths. I was eventually able to sit down on a chair opposite to Mr. Black. I stayed on the chair for about 20 minutes, and eventually I was able to get up and walk.

I slowly got up, feeling traumatized, and I made my way to the beach to seek help from some acquaintances Phil and Andre who were expecting me on the beach. They helped me back to my room. I got no help from the hotel management. Hours later my friend Angelena Craig came to see me. I was still feeling very weak. I decided to see a doctor. Dr. Clarke was recommended, and I called him. He made a house call and came to see me in my room at the hotel. He diagnosed that I was suffering from electric shock, recommend bed rest and massage and gave me a tranquilizer. He said that it was too early to tell how it would affect me, but I might have nerve or heart damage. I requested a written report from him. Initially he agreed, but subsequently when I told him that I was making a complaint against Villa Mora to the Tourist Board, he refused to see me or to answer my calls to his office. I paid his bill during his visit."

[8] The appellant sought and received medical treatment in Negril and, after remaining in Jamaica for another two weeks, during which she attempted to continue her vacation, although, she said, she "was not feeling at all well", she returned to New York on 29 February 1996. Thereafter, she became increasingly ill and found herself spending a lot of time confined to bed, suffering from chronic fatigue and barely able to function. In her own graphic language, "my life was forever changed." Up to the date of her written statement (6 December 2005), nearly 10 years after the incident, the appellant continued to consult physicians and to receive treatment, frequently experiencing migraine headaches, vertigo, muscle spasms on both side of her body and a number of other disabling *sequelae.* Medical reports on her condition and treatment from more than 15 doctors were produced in evidence by her and the appellant claimed special damages attributable to her injuries totalling US$1,378,809.00.

The appellant's expert's evidence

[9] Mr Eric Hudson, a registered professional engineer and a member of the Jamaica Institute of Engineers, was instructed on behalf of the appellant to visit the hotel and "to examine the Refrigerator and its electrical installation particularly...Special attention should be paid to the integrity of the electrical installation and to establish if there was any defect that would have lead [sic] to the electric shock that [the appellant] experienced". On the day of his visit to the hotel (11 December 2008), Mr Hudson was shown a white, double door refrigerator (of the Kenmore brand), which was "showing signs of its age by its worn paintwork, touches of corrosion, and an external water bottle condensate collector etc., is plugged into the receptacle at the right side of the

room". The refrigerator was in operation and was "quite cool inside, signifying that it was working fairly well". At the back of the refrigerator, the protective guard which usually covers the bottom compartment to restrict access to the operating mechanisms underneath the refrigerator was missing, "thus exposing all of these working components".

[10] Close examination of the insulated flat three-wire electrical supply cable leading from the refrigerator to the electrical outlet on the wall of the building "revealed two points of damage to the insulation at the end closest to the metal frame of the refrigerator". Describing these points of damage more closely, Mr Hudson said this in his report (at page 8):

> "The upper damaged point appeared to have been a cut into the insulation for about 10mm and the piece of insulation which is still attached, when raised up exposes the inner copper conductor. Just below this point is another area of damage where it appeared that either an attempt was made to strip bits of the insulation from the conductor with a dull knife or that rodents have been nibbling at the insulation, thus exposing the conductor which is clearly visible."

[11] In Mr Hudson's view, the metal frame and the components underneath the refrigerator had been poorly maintained and he drew attention to the accumulation of moist dust and rust together clinging to the metallic parts and also to the electrical cables. The electrical supply cable terminated "just inside the frame to which it is attached, and is separated into its three wires". A green earth wire terminated on the frame of the fridge, "while the line and the neutral wires are extended loosely across

the back of the fridge over to the compressor on the other side". Although these latter two wires appeared to be intact, the point of connection of the earth wire to the frame "appeared to be corroded and covered in dirt".

[12] Mr Hudson prefaced his analysis of the condition and situation in which he found the refrigerator on his visit to the hotel, with a general discourse on 'Electrical Circuitry and Short Circuits', which I cannot avoid setting out in full:

> "All materials, bodies, persons which are connected to the general mass of earth but are insulated from that path of electrical current are safe from the effects of that current.
>
> These electrical paths, however, are sometimes breached and what is termed a "fault" occurs. A fault may be described as an unintentional and undesirable creation of a conducting path for electrical power. These faults can occur at various levels of current flow, from one which is minute involving milliamperes to one which is severe and involving millions of amperes of current and either happens almost instantaneously when it occurs.
>
> A minute short circuit current exists usually where there is only a leakage of current between a conductor (usually across a gap, air gap or low insulating capacity material) and another item of material or a body which will conduct the electrical current to earth, and is referred to as an "earth leakage fault".
>
> Most electrical short circuits that affect humans and which are in a lot of cases lethal, fall into this category. Protective devices of various types have been designed to provide protection to humans against short circuits. Circuit breakers are the most commonly used devices which are generally provided to protect against the 'larger' faults. When the phenomena of the earth leakage fault problems were detected and researched a protective device called 'Ground Fault Interrupter' was developed and has now been adopted

> to be installed in situations where the susceptibility to this fault is prevalent and lethal.
>
> The above preamble is relevant to this investigation as the findings directly relate to the probability of an earth leakage fault which could have existed undetected at the refrigerator in question at the time of the electrocution of the Claimant.
>
> A person coming into contact with a source of electrical current and the person by virtue of the conditions existing at the time, becoming a low resistance path to earth for this electrical current, would be shocked and the circumstance could be as bad as resulting in the individual's death."

[13] Commenting generally on the "existing conditions" at the hotel, Mr Hudson found that, with one exception, they were generally in order and in conformity with established standards. The exception related to the earthing apparatus which, in his view, "did not conform and the method of connecting the earth wires to this substitute type of earth rod (a piece of galvanized pipe) is not acceptable". Mr Hudson considered that "the acceptable earthing installation is a copper earth rod with a cable clamp which provides a proper connection to the earth wire". Despite this deficit in the earthing apparatus, he nevertheless thought that "the resistance to earth of the installation could meet the prescribed level and could be regarded as an effective earth installation but which cannot be guaranteed on a continuous basis".

[14] In the result, Mr Hudson concluded his review of the existing conditions by saying this (at page 12):

> "It is highly probable that leakage of current could have been occurring through the body of the refrigerator back to the earthing system because of the cut in the wire, but

> undetected and too low to be cleared by the circuit breaker protecting the plug circuit to which the refrigerator was connected.
>
> Damage to the insulation that protects current-carrying conductors is dangerous, as the current in the exposed conductor can short circuit if it comes in contact with another conducting path. The electrical tape that was seen hanging from the conductor tubing was apparently used to repair the damaged insulation, and it eventually peeled off because of the dampness in the area, thus exposing the bare conductor. It is therefore evident that at some time, someone was aware that the damaged insulation existed, and that it needed to be corrected, but it was not properly or effectively done."

[15] Mr Hudson went on to make the point that, although Jamaican electrical standards do not call for 'Ground Fault Interrupters' to be installed in domestic or commercial buildings in general, the standards did specify that "every circuit shall be protected against the persistence of leakage to earth of currents liable to cause danger". The requirement was, therefore, for "proper and adequate insulation and earthing of the circuits". Mr Hudson considered that the 'fault' which he had identified in the grounding apparatus could have existed for some time without causing any problems. However, the refrigerator was being used "mainly by persons who were suitably insulated from the ground" (although it was not expected that persons should wear shoes on approaching like appliances). In the case of the appellant, who was barefooted on a damp floor at the material time, "a low resistance path to earth [was] created, so in her attempt to open the door of the refrigerator, contact was made with the metal casing of the refrigerator through the back of her hand and she became an unintentional path to earth (short circuit path)".

[16] Mr Hudson's conclusion was as follows (at page 15):

> "It is my firm opinion that at the time of the electrocution of Professor Adele Shtern, the section of the damaged electrical cable came into close proximity to or in contact with the metal body of the refrigerator causing current to flow from the live or neutral conductor to earth through the body of the refrigerator.
>
> Professor Adele Shtern, upon coming into contact with the body of the refrigerator, and being grounded herself through her bare feet on a damp floor, also became an electric path to earth (unintentional electric path) which caused her to be electrocuted.
>
> The standard type of electrical circuit protection (circuit breaker) that existed at this installation was ineffective in detecting and reacting to this type of fault. The situation can recur even at this time, as the condition of the damaged cable remains the same. This probable fault situation existed in 2004 when a previous inspection was done by Levi Sommerville, a colleague under the auspices of our firm, and a report prepared and submitted to the Court. It is therefore apparent that proprietors of Villa Mora are insensitive to the danger to which themselves, their staff and the public are exposed."

[17] Mr Hudson ended his report by venturing an opinion on the phenomenon described by the appellant in her evidence, that is, her sudden release without assistance, from the refrigerator after receiving the electrical shock. Mr Hudson found this to be "puzzling" (describing it as the "uncanny sudden release"), but thought that it could be explained by the fact "that she did not actually grasp the handle of the fridge door but, by trying to put her hand between the body of the fridge and the handle, the back of the hand made contact with the body of the fridge". He amplified this explanation as follows (at page 14):

> "A trial by the writer showed that it is virtually impossible to try to grasp the handle with your left hand without touching the body of the refrigerator. [The appellant] would then have been held for a sustained period of time. Electric current passing through a human body has a significant effect upon the nervous system, to the extent that it prevents reflex action which in this case would tend to react for one to pull away. Instead it causes involuntary contraction of muscles beyond the victim's control. In this case because the path is through the back of the hand the contraction would cause her fingers to close around the handle which is non-conducting, thus releasing her from the metal body and the electrocution. Her body weight would then cause her to fall away as she went limp, thus causing her release."

[18] When he was cross examined, Mr Hudson was shown Jamaica Standards Specification, standard 10.11.1. He accepted that the standard approved the use of galvanized pipes, and that what he had observed at the hotel "could function effectively". Mr Hudson also agreed that, in Jamaica, a new domestic refrigerator would normally be "plugged in and put to use and ordinarily/usually/normally is only maintained when a problem demonstrates itself with the functioning". He also accepted that the plug which connected the refrigerator to the wall outlet was a three-pronged plug, which incorporated a third prong, which is a ground wire, as a safety feature. Further, he accepted that one of the "small cuts" that he observed on the conductor might have been deliberately made by the respondents' expert, Mr Leroy Tyson, who had visited the hotel and inspected the refrigerator before he did, for testing purposes. He did observe, however, that he could see no need for this to have been done and said that "if done, one ought to repair it". He further observed that during his inspection of the refrigerator, both Mr Tyson and the 2nd respondent's brother had been

present and had responded with "utterings of astonishment" when the damaged conductor was revealed. In particular, he vividly recalled Mr Tyson commenting that "I just can't imagine how I did not see that". He considered that, in the absence of some external force, contact between the exposed conductor and the frame of the fridge "would be unlikely" and he agreed with the suggestion that what happened in the instant case, "whereby someone has been electrocuted while opening [a] fridge door, is [a] rare occurrence".

The respondents' case

[19] In their amended defence, the respondents made a number of points:-

(i) that the appellant had a refrigerator, which was in good working order, in her allotted room;

(ii) that the appellant did not have permission to use the refrigerator in the hotel office, this being the 2nd respondent's private refrigerator;

(iii) that the appellant's complaint of receiving an electric shock was "faked and staged so as to extort money from either the [1st respondent] or the Jamaica Tourist Board"; but

(iv) if it was genuine, it was not as severe as alleged, and would in any event have been caused "by her going to the refrigerator on her way from the beach, barefooted and wet, without permission from the [respondent]", with full knowledge of the risk of being shocked;

(v) that if the appellant did sustain electrical shock and consequential injury, she was the author of her own misfortune.

[20] The defence was accordingly a combination of a denial that the appellant had received an electrical shock as alleged by her or that she had sustained the injuries and

suffered the losses complained of, a denial of negligence and some legal defences, including *volenti non fit injuria* and contributory negligence.

The 2nd respondent's evidence

[21] The 2nd respondent was a director and shareholder of the 1st respondent. In the early 1990s, at a time when she was resident in the state of Florida in the United States of America, she purchased the refrigerator at a retail outlet in that state and used it for approximately three years, before shipping it to Jamaica in or about 1995. Since that time, the refrigerator, which was placed in the hotel's office and plugged in, in the usual way, had been in constant use and had not, to the best of the 2nd respondent's knowledge, information or belief, been moved, tampered with, manipulated or modified in any way. Neither had the refrigerator malfunctioned in any way. Since the 15 February 1996 incident, the refrigerator had remained in constant use in the same location and no one had ever, as far as the 2nd respondent was aware, complained of receiving an electrical shock while using it.

[22] From time to time, the 2nd respondent would travel to Jamaica for both vacation and business purposes. Her family home was located on the property, but not in the hotel itself. The refrigerator was used by the staff at the hotel and by the 2nd respondent herself, members of her family and her close friends who occasionally came onto the property. Guests at the hotel were not allowed to use the refrigerator, as the guest rooms were equipped with refrigerators, but in February 1996 not all guest rooms were so equipped and as a result guests who required the use of a refrigerator were

allowed to access the refrigerator by handing their items for refrigeration to a member of the hotel's staff.

[23] Also giving evidence on behalf of the 2nd respondent were her nephew, Mr Conrad Cummings, and Mr Keith Reid, a tour operator who was very familiar with the hotel. Mr Cummings had lived in the family home on the property from childhood and, despite the fact that he was not employed to the hotel, would from time to time assist in its operations by taking guests' luggage to their rooms, washing plates, effecting repairs and operating as a handyman whenever he was able to do so. Mr Reid's evidence did not add much to the case, but he also confirmed that he knew the 2nd respondent and "used to see her on occasions when she was at the property, as she is sometimes away for extended periods".

The respondents' expert's evidence

[24] Mr Leroy Tyson, who was an electrical engineer and a licensed electrician, received instructions on behalf of the 1st respondent to "ascertain whether the refrigerator in question is capable of causing the injuries alleged or at all". He visited the hotel for the purposes of preparing his report in March 2007, that is, nearly two years earlier than Mr Hudson had done. He considered that the "nature and form" of the appellant's complaint of having received an electrical shock pointed "to a possible grounding (earthing) fault, which could cause any such behavior of the refrigerator". However, his visit to the hotel revealed no evidence or signs of any forms of repairs ever having been effected to the refrigerator, which appeared to have all its engine

electrical parts intact. These parts, which showed no visible signs of defect, were fully functional and the refrigerator was in use at the time of his visit. Various tests carried out on the hotel's electrical system and the interconnecting of the refrigerator proved to be satisfactory and in keeping with established Jamaican electrical standards.

[25] Specifically, from his physical inspection and various tests carried out by him on both the electrical system supplying the office and the refrigerator itself, Mr Tyson found as follows:

> "**Power supply**
>
> 1. The power supply to the office and the refrigerator is 120 volts.
>
> 2. The circuit providing power to the plug that feed [sic] the refrigerator is protected by a 20A single pole breaker.
>
> 3. The main earthing system on the incoming supply to the property is properly connected.
>
> 4. All terminations for the power supply are terminated and connected correctly.
>
> **Insulation Resistance**
>
> 5. The phase, neutral and earth conductors within the office installation have a value [greater] than the required insulation resistance...among them.
>
> 6. The phase, neutral and earth conductors within the service cord of the refrigerator have a value [which is] more than the required installation resistance...among them.

7. The insulation resistance between the earth and the metal parts of the refrigerator is...[equal to] the required standard.

8. There is no physical damage on entire installation [sic], including that of the refrigerator.

9. The refrigerator was sitting on a dry wooden pallet.

Polarity

10. The polarity of all conductors (live, neutral and earth) for the office (plugs and breakers) and refrigerator are secured in the correct place.

11. The mail [sic] plug end of the refrigerator service cord is a non-reversible type."

[26] The conclusion of Mr Tyson's detailed 17 page report was that the "electrical installation and refrigerator circuits at the office of [the hotel] are in good condition with satisfactory test values and has [sic] no electrical defects". Further, "if the system was in the same condition on 15 February 1996, as I found it in March 2007, there would be no possibility for any human being to be electrically shocked from the refrigerator [and] Professor Adele Shtern could not have been shocked under these perfect electrical conditions as the alleged".

[27] Mr Tyson was also instructed on behalf of the respondents to review Mr Hudson's report and the findings of this review were recorded in a document prepared by Mr Tyson, entitled "A Review of Expert's Report presented by Eric Hudson, P.E.", dated June 2009.

[28] As regards the "two small cuts" reported by Mr Hudson in the insulation on the conductors, Mr Tyson revealed that one of these cuts was clearly in existence at the time he did his inspection of the refrigerator in April 2007. However, the other cut had actually been placed there by Mr Tyson himself, "to aid in the tests processes that I had planned". Both cuts were, Mr Tyson continued, on the "up side of the cable" and, given its limited flexibility, he saw "no possibility for it to be twisted without someone forcing it to turn". Even if someone turned the cable, "the moment it is released it will return to the natural position, which is the cuts will turn to the upward position away from the body of the refrigerator and remain there until an external force is applied in a specific direction". The position of the plastic bottle which Mr Hudson had observed was such as to create a gap between the refrigerator and the back wall, hence there was "no chance of the cable or the damaged sections being forced on the body of the refrigerator".

[29] Mr Tyson was equally dismissive of Mr Hudson's observations in respect of corrosion and dirt, having found on testing that this had "proven not to affect the electrical and mechanical connectivity of the conductors". As regards the earthing apparatus, Mr Tyson pointed out that the measured resistance provided by the piece of galvanized pipe "satisfied the prescribed level" and was also in conformity with clause 10.11.1 of the Jamaica Standards Specification for Electrical Installations 21 (JS21:1992) (page 136(a)). As regards the insulator resistance of the refrigerator doors, "particularly the areas at and around the handle where [the appellant] hold on

to", Mr Tyson reported that on testing he had "obtained some significantly high values of insulator resistance".

[30] In concluding his review, Mr Tyson stated the following (at page 7):

> "My conclusions therefore runs [sic] counter to that of Mr. Eric Hudson, P.E. for the reasons listed below;
>
> 1. The small exposed area of the conductor on the cable at the back of the refrigerator cannot make contact to the body of the refrigerator without the aid of someone deliberately twisting it and forcing it to do so.
>
> Secondly, these damaged areas cannot make contact with the floor because they are at the section of the cable that can only be suspended in the air based on the point of termination and the height from the floor.
>
> 2. The space between the refrigerator and the wall is limited by the plastic bottle which is in place to collect the condensate from the freezer.
>
> Therefore, the refrigerator cannot make physical contact with the wall once the plastic bottle is in place. Hence, there is no possibility of the refrigerator being forced on to the wall and allowing the cable to be forced into contact with the body of the refrigerator.
>
> 3. The doors of the refrigerator are insulated by the non-conductive painting on them. If electricity flowing through the refrigerator [sic] it cannot be felt or have any effect on anyone touching the doors. Hence, all persons using this refrigerator are isolated from the metal frame of the refrigerator by this coated paint."

[31] When Mr Tyson was cross examined, he maintained his position that the tests which he had conducted on the electrical conductors leading from the refrigerator to the wall socket "had proved that they were perfect conductors which indicated that

current would not have travelled to [the] body of the refrigerator". Shown photographs of the cuts in the conductors, Mr Tyson agreed that he had only inflicted one of them and that the other was already there when he did his inspection in 2007. He did not "molest" the pre-existing cut, because he did not know where it came from and, because of its positioning, he "did not think it critical at the time". He also disagreed with the suggestion that the two cuts were in close proximity to the body and frame of the refrigerator.

[32] In the following exchanges with counsel for the appellant, Mr Tyson was further pressed in cross examination on whether there was any inference that could be drawn from the fact that a person received an electrical shock.

> "Ques. Is it the case that where safety requirements for maintenance are breached there is a risk of shock?
>
> Ans. Yes.
>
> Ques. If one does get shock [sic] would it be that there could be breach of maintenance?
>
> Ans. Could be breach of installation regulation.
>
> Ques. Where fridge is installed but wires from another electrical apparatus come into contact with fridge so that body of fridge becomes live, would that not be breach of safety procedure?
>
> Ans. Yes. That would be illegal installation.
>
> Ques. If there were not proper earthing of the wires and someone has [sic] shock [sic], you say safety requirement had been breached?
>
> Ans. Yes.

Ques. Where body of refrigerator has become live, safety regulations breached?

Ans. Installation breached."

Lawrence-Beswick J's judgment

[33] After a nine day trial, Lawrence-Beswick J found, "on a balance of probabilities, that [the appellant] sustained an electric shock from a refrigerator at Villa Mora on February 15, 1996". However, after a detailed review of the expert evidence deployed on both sides, the judge considered that the relevant evidence as to what occurred at the precise time of the incident was "minimal" and was therefore insufficient to allow her to determine the cause of the shock suffered by the appellant. She was accordingly unable to make a finding of negligence on the part of either of the respondents. That conclusion also sufficed to dispose of the claim under the Act and the appellant had therefore failed to prove her case on a balance of probabilities. Judgment was accordingly entered for the respondents, with costs to be agreed or taxed.

The appeal

[34] The appellant challenged the decision of the learned trial judge on several grounds. Starting with a general complaint that "the learned Trial Judge erred in finding that the Appellant had failed to prove her case on a balance of probabilities", the grounds of appeal proceeded to make the following specific complaints:

"d. Having found as a fact that the Appellant did sustain a shock at the 1st Respondent's Hotel and/or the 2nd Respondent's premises, the Learned Trial Judge erred in that she ought

properly to have considered and applied the legal principles of res ipsa loquitur and/or the Respondent's evidence as to the measures taken by them to satisfy the common duty of care to the Appellant.

e. The Learned Trial Judge erred in concluding that there was no evidence and/or insufficient evidence of the cause of the shock.

f. The learned Trial Judge erred in that she failed to properly assess on a balance of probability evidence as to the cause of the shock, and in particular the evidence of the Appellant's expert that the electrocution was caused by the damaged cable coming into close proximity with the metal body of the refrigerator, causing current to flow from the live or neutral conductor to earth through the body of the refrigerator, and that the Appellant was electrocuted on coming into contact with the body of the refrigerator, such that she became an electric path to earth.

g. The Learned Trial Judge erred in finding that the Respondents were not negligent, having found that the Appellant did sustain a shock and having accepted the evidence of the Respondent's expert Mr Tyson to the effect that if one gets an electric shock from the handle or any part of a refrigerator, it means that standard safety requirements for the installation of such equipment had been breached either directly or indirectly.

h. The Learned Trial Judge erred in that she failed to consider the evidence that the Respondents were negligent in that the cord of the refrigerator was not properly insulated.

i. The Learned Trial Judge erred in that she failed to consider the evidence that the Respondents were negligent in that they failed to properly install the refrigerator, and/or to carry out the necessary tests required to be carried out by a qualified person on installation of the refrigerator."

[35] By a counter-notice of appeal filed with the leave of the court on 21 October 2010, the respondents, for their part, sought to support the judgment in the court below on a number of grounds, which may be summarised as follows:

(a) The appellant failed to lead any or any worthwhile evidence that the respondent failed to take reasonable care to make the hotel premises reasonably safe.

(b) The appellant failed to prove that the alleged incident occurred in the manner theorised by its expert, Mr Hudson.

(c) As regards the claim based on occupier's liability, the appellant failed to prove the existence of a relationship giving rise to a duty of care between herself and the 2nd respondent.

(d) The evidence established that the alleged defect in the refrigerator was latent and could not have been detected by a layman, but there was no evidence that either of the respondents or their servants or agents knew, or ought reasonably to have known, of any alleged defect in the refrigerator.

(e) There was no evidence of breach of duty and the respondents were under no duty to ensure against "mere possibilities or remote even if foreseeable possibilities".

(f) The appellant failed to prove that any injury complained of by her was caused by the alleged electrical shock, her medical evidence having suggested the existence of a prior "medical condition".

(g) Having regard to the appellant's "composure, level of concentration and participation in the trial", it was open to the judge to reject the allegations of injury, as alleged or at all.

The submissions

[36] In her submissions, Miss Davis for the appellant concentrated her attack on Lawrence-Beswick J's judgment on grounds (d), (g) and (i).

[37] On ground (g), she submitted that the judge had erred in finding that negligence had not been established against either of the respondents, as a result of what the judge described as "this dearth of evidence". In considering whether there was negligence, it was submitted, the judge ought first to have determined whether the appellant, as an invitee within the meaning of the Act, had encountered an unusual occurrence when she sustained an electrical shock from the refrigerator, since hotel guests would not normally expect to be shocked by a refrigerator. At common law, the occupier of premises owes a duty to exercise reasonable care to prevent damage from an unusual danger, that is, "one which is not usually found in carrying out the task or fulfilling the function which the invitee has at hand" (***London Graving Dock v Horton*** [1951] AC 737, 745). Once a claimant has shown an occurrence that is prima facie evidence of lack of care, it is for the defendant to provide an explanation to show that the accident did not occur from want of care on his part (***Ward v Tesco Stores Ltd*** [1976] 1 All ER 219 and ***Hall v Holker Estate Co. Ltd*** [2008] EWCA Civ 1422).

[38] As regards, ground (d), Miss Davis pointed out that the appellant had pleaded the doctrine of *res ipsa loquitur*, which, it was submitted, applied where (a) the occurrence was such that it would not have happened without negligence, and (b) the thing that inflicted the damage was under the sole management and control of the

defendant. Once these factors are proved, Miss Davis submitted, the doctrine of *res ipsa loquitur* operates to raise an inference of negligence, whereupon it is then for the defendant to provide a reasonable explanation of how the accident occurred (Clerk & Lindsell on Torts, 17th edn, paras 7-176 to 7-180). In this case, the judge had omitted altogether to deal with the doctrine, as she was obliged to do, it having been pleaded and the appellant's case having been put forward on this basis as an alternative to the pleaded particulars of negligence.

[39] And finally, on ground (i), Miss Davis submitted that the judge had erred in her conclusion that the appellant had failed to prove her case on a balance of probabilities, there having been "ample evidence" before the judge as to the cause of the shock from the experts on both sides. In particular, Miss Davis submitted that the judge erred in failing to consider the evidence that showed that the respondents were negligent in that the cord of the refrigerator was not properly insulated.

[40] In addition to those authorities that I have already indicated, Miss Davis relied on ***Stone v Taffe et al*** [1974] 1 WLR 1575, ***Fisher v C.H.T. Ltd and others (No. 2)*** [1966] 2 QB 475 and ***Indermaur v Dames*** [1866] LR 1 C.P. 274 and I will come in due course to a consideration of some of these authorities.

[41] The respondents did not challenge Lawrence-Beswick J's finding of fact that the appellant did receive an electrical shock on 15 February 1996. However, Mr Batts submitted at the outset that the learned judge's conclusion that she had been provided with insufficient evidence to enable her to determine the cause of the shock was in fact

another way of saying that the appellant had failed to prove on a balance of probabilities that it had been caused by the negligence of the respondents, either under the general law or under the Act. This was, it was submitted, a correct decision in law and on the facts in the light of the evidence which was led at the trial.

[42] Basing himself on Clerk and Lindsell on Torts (19th edn, paras 8-04, 8-15 and 8-16), Mr Batts identified the four elements of the tort of negligence, viz., (i) a duty; (ii) breach of that duty; (iii) damage caused by the breach of that duty; and (iv) damage that is not so unforeseeable as to be too remote. He submitted that the question whether a duty of care in negligence has arisen and, if so, whether that duty has been breached, is a question of mixed law and fact, in respect of which the burden of proof is on the appellant. The issue was then whether the eventuality which occurred was reasonably foreseeable and whether it is in the view of the court fair and reasonable to impose a duty of care.

[43] As regards occupier's liability, Mr Batts directed our attention to the common duty of care imposed by section 3 (2) of the Act and to the common law definition of 'occupier', as "a person who has a sufficient degree of control over premises to put him under a duty of care towards those who come lawfully onto the premises" (Clerk and Lindsell, 16th edn, para. 13-06).

[44] Against this legal background, Mr Batts submitted that the judge was correct in her finding that sufficient evidence had not been put before her to permit her to find either of the respondents liable. In relation to the 1st respondent, there was no

evidence as to the state of the refrigerator in 1996 or, specifically, whether there was a cut in the conductor wire leading from the refrigerator to the electrical outlet in the wall. Further, even if such a cut was there in 1996, there was no evidence that the 1st respondent's manager, Mr Black, knew or ought reasonably to have known of it at that time. In any event, the evidence was that the cut may have been inflicted by rats and that its location and size made it difficult to see. There was no required maintenance schedule for refrigerators of this type, which was still functioning well by the time of the experts' inspection in 2007 and 2008 respectively, and the shock experienced by the appellant "would have been the result of a rare combination of circumstances all taking place at the same time". The 1st respondent's duty was to take reasonable care and not to guard against mere possibilities or eventualities which were not reasonably foreseeable.

[45] With respect to *res ipsa loquitur*, Mr Batts submitted that there was no scope for the operation of the doctrine in this case, as the conditions for its application did not exist, particularly as there were more than one possible ways in which the accident could have happened without negligence and, in any event, the appellant had put forward a theory of what caused the accident.

[46] As regards the 2nd respondent, Mr Batts submitted that she could not be held liable, as although she was the registered owner of the property on which the hotel was located, the hotel was owned and operated by 1st respondent, which was the entity with which the appellant had entered into a contract. The 2nd respondent was at all

material times resident in the United States of America, up until 2002, when she returned to Jamaica to live in her family home, which was separate from, albeit on the same premises as, the hotel. There was therefore no evidence that the 2nd respondent was at any material time the occupier of the hotel, within the meaning of the Act. Although the refrigerator was arguably the property of the 2nd respondent, Mr Batts submitted further, it was at all material times in the possession of the 1st respondent and under its control, located as it was in the 1st respondent's office. There was no evidence that the 2nd respondent knew or ought to have known of any defect in the refrigerator and the 2nd respondent accordingly owed no duty to the appellant, either as occupier or under the general law of negligence.

[47] In her reply to these submissions, Miss Davis pointed out that it had been admitted on the pleadings that the 2nd respondent was an occupier of the hotel and that in the light of this the appellant was not obliged to adduce additional evidence on the issue.

Discussion and analysis

[48] I now turn to the issues which arise on this appeal (including the authorities) under the following sub-headings: (i) proof of negligence (including *res ipsa loquitur*); (ii) the duty to take reasonable care and unforeseen occurrences; and (iii) occupiers' liability. But I must preface the discussion with a comment about the repeated references by counsel on both sides, as well as the learned judge, to the appellant's 'electrocution' on 15 February 1996. Although the Concise Oxford English Dictionary

(10th edn) does define the verb 'to electrocute' as meaning to "injure or kill by electric shock", the more common usage is that given in Chambers' 21st Century English Dictionary, which is "(1) to kill someone or something by electric shock; (2) to carry out a death sentence on someone by means of electricity". For the remainder of this judgment, I will therefore refer to the appellant as having sustained an electric shock.

Issue (i) - proof of negligence

[49] The requirements of the tort of negligence are, as Mr Batts submitted, fourfold, that is, the existence of a duty of care, a breach of the duty, a causal connection between the breach and the damage and foreseeability of the particular type of damage caused (see Clerk & Lindsell on Torts, 19th edn, para. 8-04). The test of whether a duty of care exists in a particular case is, as it is formulated by Lord Bridge of Harwich, after a full review of the authorities, in the leading modern case of ***Caparo Industries plc v Dickman*** [1990] 1 All ER 568, 573-574:

> "What emerges is that, in addition to the foreseeability of damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterised by the law as one of 'proximity' or 'neighbourhood' and that the situation should be one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope upon the one party for the benefit of the other."

[50] As regards the question of proof of a breach of the duty of care, there is equally no question that the onus of proof, on a balance of probabilities, that the defendant has been careless falls upon the claimant throughout the case (see Clerk & Lindsell, op. cit.,

para. 8-149; see also, ***Ng Chun Pui v Lee Chuen Tat*** [1988] RTR 298, per Lord Griffiths at page 300). But the actual proof of carelessness may often be problematic and the question in every case must be "what is a reasonable inference from the known facts?" (Clerk & Lindsell, op. cit., para. 8-150).

[51] The court may also infer carelessness in cases covered by the so-called "doctrine" of *res ipsa loquitur.* In the seminal case of ***Scott v The London and St Katherine Docks Co***. (1865) 3 H & C 596, 601, in which bags of sugar being lowered by a crane from a warehouse by the defendants' servants fell and struck the plaintiff, Erle CJ said this:

> "But where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants that the accident arose from want of care."

[52] In ***Ng Chun Pui v Lee Chuen Tat***, Lord Griffiths considered (at page 300) that the phrase *res ipsa loquitur* was "no more than the use of a latin maxim to describe a state of the evidence from which it is proper to draw an inference of negligence". While the operation of the rule does not displace or lessen the claimant's burden of proving negligence in any way, its effect is that –

> "...in an appropriate case the plaintiff establishes a prima facie case by relying upon the fact of the accident. If the defendant adduces no evidence there is nothing to rebut the inference of negligence and the plaintiff will have proved his case. But if the defendant does adduce evidence that evidence must be evaluated to see if it is still reasonable to

> draw the inference of negligence from the mere fact of the accident."

[53] Lord Bridge then went on to adopt dicta from two earlier cases as to the true meaning and effect of the maxim. The first is ***Henderson v Henry E Jenkins & Sons*** [1970] RTR 70, 81 – 82, in which Lord Pearson observed that "...if in the course of the trial there is proved a set of facts which raises a prima facie inference that the accident was caused by negligence on the part of the defendants, the issue will be decided in the plaintiff's favour unless the defendants by their evidence provide some answer which is adequate to displace the prima facie inference". The second is ***Lloyde v West Midlands Gas Board*** [1971] 1 WLR 749, 755, in which Megaw LJ said that the maxim does no more than describe a "common sense approach, not limited by technical rules, to the assessment of the effect of evidence in certain circumstances...a plaintiff prima facie establishes negligence where (i) it is not possible for him to prove precisely what was the relevant act or omission which set in train the events leading to the accident; but (ii) on the evidence as it stands at the relevant time it is more likely than not that the effective cause of the accident was some act or omission of the defendant or of someone for whom the defendant is responsible, which act or omission constitutes a failure to take proper care for the plaintiff's safety".

[54] The principle was applied in ***Ward v Tesco Stores Ltd***. While shopping in the defendant's supermarket, the plaintiff slipped on some yoghurt, which had been spilt on the floor, and was injured. In the plaintiff's action for negligence against the defendant, evidence was given that spillages occurred about 10 times per week and

that the staff of the supermarket had been instructed that, if they saw any spillages on the floor, they were to stay where the spill had taken place and call someone to clean it up. In addition, the floor of the supermarket was given a "general clean-up" daily, it was polished twice per week and it was brushed five or six times per day. However, the defendant called no evidence as to when the store floor had last been brushed before the plaintiff's accident and there was therefore no evidence before the court as to whether the floor had been brushed a few moments before the accident, or an hour, or possibly an hour and a half.

[55] The trial judge found the defendant liable and it was contended on its behalf on appeal that he had erred, because it had been for the plaintiff to prove that the spillage had been on the floor for an unduly long time and that there had been opportunities for the management to clean it up, which they had not taken. In a judgment with which Megaw LJ agreed, Lawton LJ referred (at page 222) to the relevant principles as enunciated in what he described as "the classical judgment" of Erle CJ in ***Scott v The London and St Katherine Docks Co.***, and then went on to apply it to the case before him in this way:

> "In this case the floor of this supermarket was under the management of the defendants and their servants. The accident was such as in the ordinary course of things does not happen if floors are kept clean and spillages are dealt with as soon as they occur. If an accident does happen because the floors are covered with spillage, then in my judgment some explanation should be forthcoming from the defendants to show that the accident did not arise from any want of care on their part; and in the absence of any explanation the judge may give judgment for the plaintiff.

> Such burden of proof as there is on defendants in such circumstances is evidential, not probative. The trial judge thought that prima facie this accident would not have happened had the defendants taken reasonable care. In my judgment he was justified in taking that view because the probabilities were that the spillage had been on the floor long enough for it to have been cleaned up by a member of the staff."

[56] However, in ***Hall v Holker Estate Co Ltd***, Sir Mark Potter P (with whom Arden and Hughes LJJ agreed) issued the following cautionary note (at para. [33]):

> "The judgments in *Ward v Tesco* do not of course relieve the claimant of the overall burden of proof. He must show that the occurrence of the accident is prima facie evidence of a lack of care on the part of the defendant in failing to provide or implement a system designed to protect the claimant from risk of accident or injury."

[57] *Res ipsa loquitur* therefore applies where (i) the occurrence is such that it would not normally have happened without negligence (the editors of Clerk & Lindsell, op. cit., para. 8-152 provide an illustrative short-list from the decided cases: "bales of sugar do not usually fall from hoists, barrels do not fall from warehouse windows, cranes do not collapse, trains do not collide and stones are not found in buns"); (ii) the thing that inflicted the damage was under the sole management and control of the defendant; and (iii) there must be no evidence as to why or how the accident took place. As regards this last criterion, the editors of Clerk & Lindsell (op. cit. para. 8-154) make the important point, based on ***Henderson v Jenkins & Sons***, that "Where the defendant does give evidence relating to the possible cause of the damage and level of precaution

taken, the court may still conclude that the evidence provides an insufficient explanation to displace the doctrine".

[58] In the instant case, it has not been contended that the 1st respondent, as the owner and operator of the hotel, did not owe a duty of care to the appellant, who was a paying guest at the hotel. The further question whether Lawrence Beswick J was correct in her conclusion that the appellant had not sufficiently proved negligence on the part of the 1st respondent turns entirely on an assessment of the expert evidence on both sides. It must be said at once that a plain weakness in that evidence was that neither expert was in a position to speak to the condition of the refrigerator and the hotel premises on or around 15 February 1996, Mr Tyson and Mr Hudson having first visited the property in March 2007 and December 2008 respectively. Notwithstanding the best efforts of both gentlemen, it is therefore patently clear that their evidence as to how the refrigerator may or may not have performed more than 10 years previously was to an uncomfortable extent largely speculative.

[59] Both experts were in agreement that the nature of the injuries allegedly sustained by the appellant pointed to what Mr Tyson described as a "possible grounding (electricity) fault". The appellant's expert, Mr Hudson, told the court that a 'fault' could be described "as an unintentional and undesirable creation of a conducting path for electrical power", which usually exists where there is a leakage of current between a conductor (electric wire or cable) and "another item of material or a body which will conduct the electrical current to earth". Mr Hudson's conclusion that this is what had

occurred in the instant case, resulting in the electric shock sustained by the appellant, was primarily based on the "two points of damage to the insulator at the end closest to the metal frame of the refrigerator". Thus, Mr Hudson theorised, leakage of current occurred "through the body of the refrigerator back to the earthing system because of the cut in the wire", resulting in the appellant receiving an electric shock when she came into contact with the refrigerator through her bare feet on the damp floor.

[60] On the face of it, assuming that the cuts in the wire predated February 1996, this appears to me to be a plausible theory of what happened to cause the appellant to receive an electric shock on 15 February 1996. Indeed, had it stood alone, it may well have been difficult to sustain the judge's conclusion that there was insufficient evidence to allow her "to determine the cause of the shock at the time of the incident", on a balance of probabilities. However, that evidence fell to be assessed in the light of the revelation (which must have been startling, to Mr Hudson at any rate) that one of the points of damage or cuts to the wire which had caught Mr Hudson's eye had in fact been deliberately inflicted by Mr Tyson during his inspection of the refrigerator in 2007, that is, fully 10 years after the accident. Mr Hudson's response to this revelation in cross examination, which was that Mr Tyson had actually been present when he observed the cuts and had reacted with "utterings of astonishment" (which was denied by Mr Tyson), gave rise to a pure issue of credibility which it was solely the province of the trial judge to resolve. Although the judge did not make any specific finding of fact on this, it could well have influenced her in her conclusion that there was insufficient evidence before her, since, if one were to put on one side the cut in the wire made by

Mr Tyson, what remained was the speculation, in respect of which there was absolutely no evidence, that the damage might have been caused by rodents.

[61] Further, and in any event, even if it were accepted that there was a cut in the wire before the appellant's unfortunate accident, there was no evidence of when it might have been inflicted, so as to allow the court to infer from the fact that it was still there in 1996 that either or both the 1st or 2nd respondents were negligent in allowing it to remain unrepaired.

[62] It therefore seems to me that, if all that the appellant was able to rely on in proof of negligence on the part of the respondents was Mr Hudson's evidence, the learned trial judge's conclusion that at the end of the day, due to "this dearth of evidence", the case against the 1st respondent had not been made out, would have been difficult to fault. But there still remains, in my view, the question of *res ipsa loquitur*, the appellant having clearly indicated in her particulars of negligence that she proposed to rely "so far as is necessary" on the principle. Curiously, no reference was made to the principle by the learned trial judge in her judgment, although we were told by Mr Batts (as also appears from the written submissions at trial, which we have seen) that the matter, though pleaded, was not ventilated before the trial judge. Be that as it may, it was an issue on the pleadings and it might reasonably have been expected that the judge would have dealt with it in some way.

[63] Mr Batts sensibly accepted that the first criterion for the application of the maxim, that is, that the thing that inflicted the damage must have been under the

control of the defendant, was satisfied in this case, certainly as regards the 1st respondent.

[64] As to the second criterion, that is, that the occurrence must be such that it would not have happened without negligence, it seems to me that there was material in the evidence of Mr Tyson himself to satisfy this criterion. Firstly, Mr Tyson responded affirmatively when he was asked if "where safety requirements for maintenance [of a refrigerator] are breached, there is a risk of shock"; then secondly, when he was asked whether, if someone was shocked by a refrigerator, "there could be a breach of maintenance, his answer was "Could be breach of installation regulation"; and finally, when it was suggested to him that where "the body of a refrigerator has become live, safety regulations breached". His response was "Installation breached". By all three responses, it seems to me, Mr Tyson was indicating his own view that the electric shock allegedly received by the appellant upon coming into contact with the refrigerator on 15 February 1996 was not possible without a want of proper care of some kind, whether in its maintenance or installation.

[65] And as regards the third criterion, that is the absence of an explanation from the defendants as to how or why the accident occurred, it must be remembered that the respondents' principal line of defence in this case was that the appellant's "whole claim was faked and staged...". Indeed, Mr Tyson's unqualified evidence was, it will be recalled, that assuming that the refrigerator which he inspected in 2007 was in the same condition on 15 February 1996, "there would be no possibility for any human

being to be electrically shocked from the refrigerator [and] Professor Adele Shtern could not have been shocked under these perfect electrical conditions...". So, far from providing an explanation for the appellant having received an electric shock on 15 February 1996, as the learned trial judge by her findings accepted that she did, the respondents, through Mr Tyson, maintained emphatically that no such thing had, or could have, happened. Although the respondents did put forward an alternative in their amended defence, to the effect that, if the appellant did receive an electric shock, she accepted that risk "by going barefoot and wet to the said refrigerator", absolutely no evidence was adduced at the trial in support of it. It therefore seems to me to be clear that, on the respondents' case at any rate, the "*res*" in this case has remained entirely unexplained.

[66] For these reasons, I have come to the conclusion on this point that, the appellant having proved that she received an electric shock from an ordinary domestic refrigerator during the course of its everyday use for the customary purposes, this raised a prima facie inference that the accident was caused by the negligence of the respondents (subject, in the case of the 2nd respondent, to the question of whether she was an occupier for the purposes of the Act – see paras [74] – [81] below). No answer having been provided by the evidence adduced on behalf of the respondents to displace that prima facie inference, the appellant was accordingly entitled to succeed by virtue of the operation of the maxim, *res ipsa loquitur.*

Issue (ii) - the duty to take reasonable care/unforeseen occurrences

[67] But Mr Batts also referred us to a number of cases in support of his submission that the 1st respondent's duty to the appellant was to take reasonable care in the particular circumstances of the case and that this duty did not extend to guarding against "mere" or "remote" possibilities. Thus in ***Phillips v Brittania Hygienic Laundry Co*** [1923] 1 KB 539, 556, Bailhache J said that "...the duty [of a defendant] is to take reasonable care that the motor vehicle shall be fit for the road...[not]...to have it reasonably fit for the road". Similarly, in ***Wells v Cooper*** [1958] 2 All ER 527, 530 Jenkins LJ said, of a landlord who personally effected repairs which turned out to be defective to a door handle on premises occupied by the tenant, thus causing injury to the tenant, "...the standard of care and skill to be demanded of the defendant...must be the degree of care and skill to be expected of a reasonably competent carpenter doing the work in question". And again, in ***Corporation of Glasgow v Muir and Others*** [1943] 2 All ER 44, 48, Lord Macmillan observed that "the degree of care for the safety of others which the law requires human beings to observe in the conduct of their affairs varies according to the circumstances...it may be said generally that the degree of care required varies directly with the risk involved".

[68] ***Fardon v Harcourt-Rivington*** [1932] All ER Rep 81 was an unusual case by any measure. The defendant parked his car in a street with its back against the pavement and left it shut, with his dog inside of it. There was no evidence that the dog had a vicious propensity. Just as the plaintiff, who had parked his car near the defendant's car, was walking past the defendant's car, the dog, which had been barking

and jumping about in the car, broke the rear window of the car, with the result that a glass splinter flew out and entered the plaintiff's eye, which later had to be removed. The plaintiff sued for damages for personal injuries and it was held by the House of Lords (affirming the decision of the Court of Appeal) that his action failed for want of proof of negligence.

[69] Lord Dunedin, who delivered the leading judgment, pointed out (at page 83) that "what is negligence depends on the facts with which you have to deal", and so if the possibility of the danger emerging "is reasonably apparent, then to take no precaution is negligence; but if the possibility of danger emerging is only a mere possibility which would never occur to the mind of a reasonable man, then there is no negligence in not having taken extraordinary precautions". In a passage upon which Mr Batts relied heavily, Lord Dunedin concluded as follows:

> "Given that a dog left for some time in a motor car may bark and jump about, would any person expect that in jumping about he would break a small window with a blow directed at such an angle as to project a fragment of the glass into the face of a passer-by on the pavement? This is such an extremely unlikely event that I do not think any man could be convicted of negligence if he did not take into account the possibility if its occurrence and provide against it either by not leaving the dog in the car or by tying it up so that it could not reach the window. In other words, people must guard against reasonable probabilities but they are not bound to guard against fantastic possibilities. Many dogs have been left in many motor cars near pavements, but before this case who ever heard of a dog breaking a window as such an angle as to send a fragment of glass into the eye of a passer-by?"

[70] In a brief concurrence, Lord Macmillan observed (at page 84) that the duty of care which was owed by one member of the public to another in the use of the road was not "to guard against every conceivable eventuality, but only against such eventualities as a reasonable man ought to foresee as being within the ordinary range of human experience".

[71] Mr Batts also relied on a number of other cases in which there was held to be no duty to guard against an event which was foreseeable, but improbable and hence not reasonably foreseeable, notwithstanding that serious injury had resulted from the event. The most famous of these is, of course, ***Overseas Tankship (U.K.) Ltd v Morts Dock & Engineering Co. Ltd***, ***'The Wagon Mound'***, [1961] 1 All ER 404, in which the defendant, which carried on business as a ship-builder, was held not to be liable for the consequence of its employees' carelessness in causing a large quantity of bunkering oil to spill into a bay in the Port of Sydney. The basis of the decision was that it was not reasonably foreseeable that the oil would have caught fire when spread on water.

[72] Another example of such a case is provided by ***Brewer v Delo*** [1967] QB 488, in which the plaintiff, who was a golfer, lost an eye when he was struck by a golf ball driven by the defendant, while he was waiting to play his own shot. Hinchcliffe J held that, on the whole of the evidence, he did not consider that the defendant was in breach of his duty to take care, in that he had done nothing which was not the normal

practice at his golf club and that his duty had to be based on reasonable foreseeability of damage. The learned judge formulated the applicable test in this way:

> "Would any reasonable person foresee that the act of driving off would cause damage? I think not. Even if damage was foreseeable, the possibility of injury happening to a person on the sixth fairway involves a risk so small that a reasonable man would feel justified in disregarding it. I take the view here that no danger was foreseeable, and therefore there was no need to take precautions. Obviously as the danger increases so must the precautions increase. In my judgment this was a pure accident, and it would not be right to hold that the defendant was in any way to blame or that he in any way failed in his duty to take care."

[73] Of the three other cases cited by Mr Batts in this category, it is only necessary to mention the best known of them all, which is ***Bolton v Stone*** [1951] 1 All ER 1078 (the other two are ***Longhurst v Metropolitan Water Board*** [1948] 2 All ER 834 and ***Graham v Co-operative Wholesale Society Ltd*** [1957] 1 All ER 654). In ***Bolton v Stone***, as will be recalled, a batsman involved in a cricket match at a ground occupied by the defendants hit a ball out of the ground, which struck and injured the plaintiff, who was standing on a highway adjoining the ground. The ball was hit out of the ground at a point at which there was a protective fence rising to 17 feet above the cricket pitch, the distance from the batsman to the fence was some 78 yards and, to the spot where the plaintiff was hit, about 100 yards. The ground had been occupied and used as a cricket ground for about 90 years, and there was evidence that on no more than six previous occasions in a 30 year period a ball had been hit onto the highway, though no one had been injured. The plaintiff's action for negligence failed, the House of Lords considering unanimously that, for an act to be negligent, there

needed to be not only a reasonable possibility of its happening but also of injury being caused thereby. On the facts of the case, the risk of injury to a person on the highway resulting from the hitting of a ball out of the ground was so small that the probability of such an injury would not be anticipated by a reasonable man.

[74] Lord Oaksey considered (at page 1083-4) that "[the] standard of care in the law of negligence is the standard of an ordinarily careful man, but, in my opinion, an ordinarily careful man does not take precautions against every foreseeable risk...Many foreseeable risks are extremely unlikely to happen and cannot be guarded against except by almost complete isolation". And Lord Reid said (at page 1086) that "the test to be applied here is whether the risk of damage to a person on the road was so small that a reasonable man in the position of the [defendant], considering the matter from the point of view of safety, would have thought it right to refrain from taking steps to prevent the danger".

[75] Mr Batts' submission on the strength of these cases was that the 1st respondent's duty was to take reasonable care and not to guard against mere possibilities or eventualities which were not reasonably foreseeable. I do not consider that these cases bear any true analogy to the instant case. It is clear from the evidence of both Messrs Hudson and Tyson that, for various reasons, improper installation or maintenance of ordinary domestic appliances can create a danger to unsuspecting members of the public. The steps required to obviate or guard against those dangers can, in my view, be accomplished without the need for extreme or unusual steps, such as complete

isolation. In my judgment, therefore, it cannot be said that the risk of injury or harm to a person from negligence in the installation or maintenance of such appliances, such as the refrigerator in this case, was so small that the probability of such an injury could not be anticipated by a reasonable man.

Issue (iii) - occupiers' liability

[76] Section 2(2) of the Act provides that "...the persons who are to be treated as an occupier and as his visitors are the same as the persons who would at common law be treated as an occupier and as his invitees or licensees". Section 3 (1) and (2) provide as follows:

> "(1) An occupier of premises owes the same duty (in this Act referred to as the **'common duty of care'**) to all his visitors, except in so far as he is free to and does extend, restrict, modify or exclude his duty to any visitor by agreement or otherwise.
>
> (2) The common duty of care is the duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there."

[77] In ***Jolley v Sutton London Borough Council*** [1998] 3 All ER 559, it was held that the same test for remoteness of damage applies under the equivalent of the Act as applies in the ordinary law of negligence. So a claimant under the Act is equally obliged to show that he suffered loss or injury of a kind that was reasonably foreseeable.

[78] ***Indermaur v Dames*** is one of the leading older cases on occupier's liability. In that case, the plaintiff, who was a lawful visitor on the defendant's premises, fell through an open and unfenced hole on the premises and injured himself. Willes J, who delivered the judgment of the court, considered it (at page 288) to be settled law that someone in the position of the plaintiff, "using reasonable care on his part for his own safety, is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger, which he knows or ought to know...".

[79] ***London Graving Dock Co. Ltd v Horton*** is another well-known case on the scope of the common duty of care owed by an occupier to an invitee. That was a case in which the plaintiff was an experienced welder, who had for at least a month been carrying out work on a ship as an employee of sub-contractors engaged by ship-repairers in occupation of the ship. The plaintiff sustained injuries, without negligence on his part, owing to the inadequacy of certain staging (or scaffolding), constituting an unusual danger, of which he had full knowledge and which, despite complaints, the ship- repairers had failed to remedy. A bare majority of the House of Lords held that, the welder being an invitee, his knowledge of the unusual risk exonerated the ship-repairers from liability for the damage suffered by him. Lord Porter observed (at page 746) that:

> "[An] invitor's duty to an invitee is to provide reasonably safe premises or else show that the invitee accepted the risk with full knowledge of the dangers involved."

[80] The effect of section 2(2) of the Act is that the rules of the common law continue to determine who is an occupier and the definition given by the editors of Clerk & Lindsell (16th edn, para. 13-06) is that an 'occupier' of premises is someone "who has a sufficient degree of control over premises to put him under a duty of care towards those who come lawfully onto the premises". Thus two or more persons may be occupiers, as ***Fisher v C.H.T. Ltd*** demonstrates. That is a case which naturally catches the eye in the instant context, because it was a case in which the plaintiff, a workman, who was a lawful visitor on premises owned by the first defendant, received a shock from an exposed electric light wire. The accident was caused by the negligence of an electrician employed to the second defendant, who was the first defendant's licensee in respect of the restaurant on the premises. The Court of Appeal held that both the first and second defendants were occupiers of the premises and as such under a common duty of care to workers coming on the premises, including the plaintiff. Lord Denning MR observed (at page 481) that "it is quite clear that more than one person can be in occupation...[a]lthough [the second defendant] had the use of the restaurant, [the first defendant] still had the right to go through it".

[81] In the instant case, Mr Batts did not contend, as I understood him, that the damage suffered by the appellant was not damage from an "unusual danger". Indeed, in relation to the 1st respondent, his only dispute was with respect to the issues of causation and proof of negligence. But, with regard to the 2nd respondent, he maintained with some force that, although she was the registered owner of the hotel

premises, she owed no duty to the appellant, either as occupier or under the general law of negligence.

[82] The question that therefore arises is whether the 2nd respondent was an 'occupier' for the purposes of the Act. On this issue, Miss Davis firstly took a pleading point, which arises in this way. The 1st and 2nd respondents, it will be recalled, were the 1st and 2nd defendants in the Supreme Court action. The 3rd defendant was Mr Keith Black, who was the manager of the hotel in 1996, but was no longer a party to the action by the time the matter came on for trial. In para. 3 of the further amended statement of claim, the appellant alleged that "The First and/or Second and/or Third Defendants were at all material times the owners and/or occupiers and/or operators of the said hotel" and, in their amended defence, the respondents admitted this paragraph of the statement of claim. Thus, it was submitted, the fact that the 2nd respondent was an occupier of the hotel premises was, on the pleadings, an admitted fact.

[83] I cannot accept this submission. In ***Stanton v Richardson*** 45 L.J.C.P. 82, to which we were referred by Mr Batts, Cairns C observed that "[w]here statements or stipulations are coupled by 'and/or' they are to be read, either disjunctively or conjunctively". On this basis, it therefore seems to me that, by admitting para. 3 of the further amended statement of claim, the respondents cannot be taken to have necessarily been admitting one meaning over the other. Thus, the position on this point remained wholly equivocal on the pleadings and I would accordingly not regard this as a secure basis upon which to decide this aspect of the case.

[84] So I am obliged to turn to the evidence. There is no dispute that the 2nd respondent was the owner of the property upon which the hotel was situated or that the 2nd respondent's family home was situated on the same property, albeit in a building separate from the hotel. Although the 2nd respondent, who lived abroad, would from time to time visit the property on vacation, on these occasions she resided in the family home and not in the hotel. The hotel was owned and operated by the 1st respondent and there was no evidence that the 2nd respondent played any role in its management (and, as Mr Batts also pointed out, Mr Black, the manager of the hotel at the material time, was the 1st respondent's employee).

[85] All of these facts, which Mr Batts naturally highlighted, suggest that the 2nd respondent could not on the evidence be considered to be an occupier of the hotel premises for the purpose of the Act. On the other side of the coin, there are at least two other facts which call for consideration. The first is that, although the refrigerator, which was originally purchased by the 2nd respondent (and may even have still been technically owned by her), was located in the office of the hotel, it was occasionally used by her, by members of her family and close friends, as well as by guests at the hotel who were also on occasion allowed access to the refrigerator. The second is that the 2nd respondent's nephew, Mr Cummings, who had lived in the family home on the property from childhood, from time to time assisted in the hotel operations by taking guests' luggage to their rooms, washing plates, effecting repairs and operating as a handyman whenever he was able to do so, despite the fact that he was not an

employee of the hotel. It is at least arguable on the basis of both these facts that, although the hotel business was formally separated from the 2nd respondent's personal life, there was in fact a close connection, and certainly some degree of overlap, between the two.

[86] I have already pointed out (at para. [80] above) that two or more persons can be occupiers of premises. So the question now must be whether the 2nd respondent can also be said to have been an occupier of the hotel premises for the purposes of the Act; that is, as a person having a sufficient degree of control over the premises to put him under a duty of care towards those who come lawfully onto the premises. Although there is some evidence that the 2nd respondent did have access to the premises for certain limited purposes, so did others, and there is, in any event, no evidence to suggest that, as in ***Fisher v C.H.T. Ltd***, she "still had the right to go through it". Further, there is absolutely no evidence to suggest anything other than that it is the 1st respondent which had the direct charge of and control over both the refrigerator and the hotel. On balance, therefore, my conclusion is that the evidence adduced on behalf of the appellant was not sufficient to establish that the 2nd respondent was an occupier of the premises for the purposes of the Act.

Conclusion and disposal of the appeal

[87] I would therefore allow the appeal as it relates to the 1st respondent, but dismiss it as it relates to the 2nd respondent. The appellant is entitled to her costs against the 1st respondent, while the 2nd respondent is entitled to her costs against the appellant.

[88] In the light of the manner in which the matter was disposed of by Lawrence-Beswick J in the court below, no judicial consideration has been given to the extensive evidence, medical and otherwise, which was proffered by the appellant in support of her claim for damages. Despite the fact that the accident with which this case is concerned took place over 15 years ago and the original action is now more than 12 years old, I can see no alternative to remitting the matter to the Supreme Court for an assessment of the damages to which the appellant is entitled. In the unusual circumstances of the case, I do not consider that there is any reason why this exercise cannot be undertaken by Lawrence-Beswick J herself.

PHILLIPS JA

[89] I have had the opportunity of reading in draft the very thorough and detailed judgment of my learned brother Morrison JA and I agree with his reasoning and conclusions. However, as we are differing from the learned trial judge I wish to make a few comments.

[90] The facts of this case are somewhat unusual. The appellant claimed that she had received serious personal injuries in attempting to open a refrigerator door while standing bare foot on the floor. It was her case that she had sustained severe electric shock as a result. The evidence of the appellant, which the learned judge accepted, was that "she was stuck to it (refrigerator) and could neither breathe, speak nor detach her hand". The learned judge found, on a balance of probabilities, that the appellant had

sustained an electric shock from the refrigerator. However, having in her judgment posed the question, "What caused the electric shock?, she thereafter analyzed the competing expert evidence and concluded that she had been, "provided with insufficient evidence to allow me to determine the cause of the shock at the time of the incident".

[91] I will not go through the evidence of the experts as my learned brother has done so comprehensively, but suffice it to say it is understandable that their evidence was unhelpful, both experts not having attended on the premises until some 11 years and more after the incident, resulting in their opinions in respect of the cause of the incident being mere conjecture, as neither could speak definitively as to the state of the refrigerator at the material time, viz on 15 February 1996, which the issues with regard to the two cuts on the electric cable proved categorically. One wonders why in the circumstances of this case, neither party sought to obtain the assistance of expert opinion in respect of the incident closer to its occurrence, or as soon as they were aware that some action could arise there from, say October 1999. Be that as it may, I am also somewhat surprised that the learned trial judge did not address the pleaded case of res ipsa loquitur particularly since she rejected the evidence of the respondent's expert, Mr Tyson who, having examined the refrigerator, stated that it was in perfect condition, and that if it had been in the same condition in February 1996, as it was when he examined it in 2007, there was no possibility of any human being, being electrically shocked from it. The learned judge rejected this evidence as she had

made a specific finding that the appellant had received severe electric shock from attempting to open the door of the refrigerator.

[92] The learned trial judge accepted that the claim was based on negligence which she recognized involved, (a) a duty of care, (b) breach of that duty, (c) damage caused by the breach of that duty and (d) foreseeable damage. However, she found that due to the dearth of evidence, she could not "determine whether or not a breach of duty of care caused the damage, and indeed if there were any duty at all whose breach caused damage". She therefore decided that there was no need to determine whether or not other elements of negligence had been established.

[93] The learned judge also found that as she had decided that there was no evidence of the cause of the electric shock, it followed that she was similarly unable to determine if there was a breach of the common duty of care which is required under the Occupiers Liability Act. She therefore concluded that in the absence of evidence of the circumstances occurring in 1996, either directly or from which she could draw an inference, she was unable to determine the cause of the incident and thereby to determine liability.

[94] However, had the learned trial judge addressed the issue of res ipsa loquitur, and its applicability, as set out specifically in paragraphs [51] to [57] herein, in the reasons of my learned brother, she may have concluded differently. Firstly, I do not see why the learned trial judge was in any doubt that the 1st respondent as the owner and operator of the hotel owed a duty of care to the appellant who was a guest paying

for services in the hotel. The refrigerator was, in the circumstances of this case, certainly under the care and management of the first respondent. It also seems clear as set out in the reasons of my learned brother that one would not normally obtain severe electric shock from attempting to open the door of a refrigerator made available for use in a hotel, located in a place open to members of the public, without negligence. Additionally, there has been no satisfactory acceptable evidence to explain how the incident occurred. The appellant therefore, in my view, must succeed on the issue of liability pursuant to the doctrine of res ipsa loquitur.

[95] I also accept that the risk of injury or harm to a person using a refrigerator would not be considered unforeseeable without negligence, nor the extent that one would be expected to provide for against that harm.

[96] I would also conclude that the 1st respondent was liable under section 2(2) of the Occupiers Liability Act, as the injury was reasonably foreseeable and the occupier's duty was to provide the invitee, the appellant, with premises that were reasonably safe. I am, however, (also in agreement with my learned brother) not of the view, based on the evidence and the circumstances of this case that it has been shown that the 2nd respondent was in occupation of the hotel. She may have had continued access, but then so did other persons, and she did not appear to have had that sufficient degree of control over the premises, at the material time so as to put her under a duty of care towards the appellant. I would therefore find that she owed no duty of care under the Act and was not liable for any damages suffered by the appellant as a result of the electric shock sustained.

[97] I agree that the matter must, in the circumstances, be remitted to the Supreme Court for an assessment of the damages suffered by the appellant. I too see no reason why the assessment cannot be done by the learned trial judge, Lawrence-Beswick J.

PANTON P

ORDER:

(1) The appeal is allowed in part and the order of Lawrence-Beswick J that there should be judgment for the 1st respondent against the appellant is set aside.

(2) It is ordered that there should be judgment for the appellant against the 1st respondent, with costs both in the court below and in this court, to be agreed or taxed.

(3) The matter is remitted to Lawrence-Beswick J in the Supreme Court for an assessment of the damages that may be payable by the 1st respondent to the appellant.

(4) The appeal against the order of Lawrence-Beswick J giving judgment for the 2nd respondent against the appellant is dismissed, with costs to the 2nd respondent to be agreed or taxed.