Neutral Citation Number: [2023] EWHC 190 (KB)

Case No: G80YX675

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
BIRMINGHAM DISTRICT REGISTRY

Birmingham Civil and Family Justice Centre
33 Bull St, Birmingham B4 6DS

Date: 16/02/2023

Before :

MR JUSTICE JULIAN KNOWLES

- -

Between :

Après Lounge Limited	**Appellant**
- and -	
Nicolle Wade	**Respondent**

- -
- -

Jamie Hill (instructed by **Kennedys Law LLP**) for the **Appellant**
Simon Dawes (instructed by **Easthams**) for the **Respondent**

Hearing dates: **24 May 2022**

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Approved Judgment

This judgment was handed down remotely at 10.00am on 16 February 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

Mr Justice Julian Knowles:

Introduction

1. This is an appeal with the permission of Cotter J granted on 25 March 2022 against the judgment and order of His Honour Judge Hedley sitting at the County Court at Leicester on 17 November 2021 in which he found after a trial for the Respondent in her claim for personal injuries against the Appellant. He awarded the Respondent £4104.67 plus her costs. This appeal concerns the judge's findings on liability. There is no appeal in relation to quantum. The Appellant says the judge was wrong to find it was liable.

2. For clarity, hereinafter I shall refer to the Appellant as 'the Defendant', and to the Respondent as 'the Claimant'.

3. I have full audio recordings of the hearing before me, which was conducted over MS Teams. I am grateful to both parties for their written and oral submissions.

The factual background

4. This is a 'slipping on liquid' case. Such cases are common. The legal principles are largely uncontentious. Everything usually depends upon the facts.

5. On the evening into the early hours of 15/16 June 2019 (a Saturday/Sunday) the Claimant visited the Defendant's bar, the Après Lounge, in Leicester city centre. The premises has two floors, each containing a bar. The ground floor is long and narrow and connects the street entrance with an outside garden area at the rear for use by customers. At the far left end of the ground floor bar from the street there is a staircase to the upstairs bar. The lower level bar runs along the right hand side as one enters from the street, and there is a shelf on the left hand opposite wall. The area between the bar and the wall is fairly narrow (about 2m). The judge described it as being like a 'corridor', and Mr Dawes said it was a 'thoroughfare', and I think those are fair descriptions.

6. The Claimant had gone to the bar with friends. They spent some time in the garden before coming back inside. The judge found that as the Claimant was getting ready to leave at about 12.30am, she slipped on some liquid (almost certainly a spilt drink) on the wooden floor of the downstairs indoor bar. She fell to the floor, twisting her ankle and foot, and was helped up by a customer. She left the bar with her friends. She did not report the fall to the bar's staff. She was in pain as she went home. She visited hospital the following day and discovered that she had suffered a fractured metatarsal. This required treatment, but eventually resolved. I do not doubt that her injury would have been painful for a time.

7. Her claim against the Defendant was brought in negligence and under the Occupiers' Liability Act 1957 (the 1957 Act). Her case was that, in particular, the Defendant had failed to 'devise, institute and/or maintain any or any adequate' regime for the inspection of the premises; had caused or permitted the floor to become wet; and failed to ensure the floor was kept dry and safe for visitors. Other particulars of negligence were pleaded which I do not need to set out.

8. Section 2 of the 1957 Act is headed ‘Extent of occupier’s ordinary duty’ and provides:

> “(1) An occupier of premises owes the same duty, 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 or visitors by agreement or otherwise.
>
> (2) The common duty of care is a 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.
>
> (3) The circumstances relevant for the present purpose include the degree of care, and of want of care, which would ordinarily be looked for in such a visitor, so that (for example) in proper cases -
>
> (a) an occupier must be prepared for children to be less careful than adults; and
>
> (b) an occupier may expect that a person, in the exercise of his calling, will appreciate and guard against any special risks ordinarily incident to it, so far as the occupier leaves him free to do so.
>
> (4) In determining whether the occupier of premises has discharged the common duty of care to a visitor, regard is to be had to all the circumstances, so that (for example) -
>
> (a) where damage is caused to a visitor by a danger of which he had been warned by the occupier, the warning is not to be treated without more as absolving the occupier from liability, unless in all the circumstances it was enough to enable the visitor to be reasonably safe; and
>
> (b) where damage is caused to a visitor by a danger due to the faulty execution of any work of construction, maintenance or repair by an independent contractor employed by the occupier, the occupier is not to be treated without more as answerable for the danger if in all the circumstances he had acted reasonably in entrusting the work to an independent contractor and had taken such steps (if any) as he reasonably ought in order to satisfy himself that the contractor was competent and that the work had been properly done.
>
> (5) The common duty of care does not impose on an occupier any obligation to a visitor in respect of risks willingly accepted as his by the visitor (the question whether a risk was so accepted to be decided on the same principles as in other cases in which one person owes a duty of care to another).

> (6) For the purposes of this section, persons who enter premises for any purpose in the exercise of a right conferred by law are to be treated as permitted by the occupier to be there for that purpose, whether they in fact have his permission or not."

9. In an *ex tempore* judgment following the trial, the judge found that the Claimant did indeed fall as she had described, having slipped on a spilt drink. There was no CCTV footage of the incident. Mr Dorman, then the general manager, said in a witness statement (he did not give live evidence) that he had viewed the bar's CCTV, and it did not show the Claimant's fall.

10. The judge said, quoting Pill LJ in *Dawkins v Carnival Plc* [2011] EWCA Civ 1237, that the liquid represented a danger and that the Claimant had made out a *prima facie* case of negligence and, 'The bar was a dark busy place where drinks were being obtained and there were likely to be spillages.' He said the bar's wooden floor was likely to become slippery when wet. I will return to *Dawkins* later.

11. Turning back to the case before me, the Defendant's case in the court below was that it took reasonable care to ensure that the Claimant was reasonably safe, *per* s 2(2) of the 1957 Act. Ms Osborne, the bar's assistant manager at the time, gave evidence. She explained the bar's system.

12. Ms Osborne said in her witness statement there were various members of staff, a rota as to who was to do what that evening, and 'a manager, a supervisor and two additional members of staff [referred to as 'spotters'] who would continually walk around the floor to collect glasses and check for any safety issues, including spillages and breakages' (at [13]). There was also a doorman, and members of staff serving behind the bar. Ms Osborne herself was present some of the time, but also ran another bar next door, and so was at that other bar some of the time.

13. Ms Osborne said at [15]-[17] of her statement (which the judge quoted and accepted):

> "15. As a business we take the health, safety and well-being of our staff and customers very seriously. All of our staff are trained in how to deal with spillages and breakages during their initial induction training prior to their first shift. Part of the induction is spent walking new staff around the premises and showing them where everything is and what they are expected to do. During the induction the staff can ask questions and the managers ensure they understand our systems and procedures before they start work. We also run refresher training an approximately six monthly intervals.
>
> 16. Staff are encouraged to check all areas thoroughly, including checking inside pot plants for broken glass. Although there are no specified intervals for inspection the floor is continuously monitored and in practice I would estimate that every area is checked at least every 10 to 15 minutes.
>
> 17. If the staff identify a spillage, or one is reported to them by a customer, they are trained to clean it up immediately using blue

> roll. For larger spillages they are trained to deploy a 'Wet Floor' sign before cleaning the area thoroughly with a mop and bucket. The staff ensure that customers are made aware of the spillage until the clean-up kit has been retrieved and signage deployed. The 'Wet Floor' signs will remain in place until the area is completely clear and dry."

14. The judge described Ms Osborne as being 'honest', 'straightforward' and 'open', and found as a fact that the system she described was being operated on the night of the accident with three staff 'moving around clearing glasses and tables and ostensibly at least doing checks which Ms Osborne set out' (at [21] and [22]). There was in evidence a bar plan and rota showing who was to do what that night. As I will come to later, the judge did make some observations on the Defendant's evidence about its system, but as I have said, he accepted in terms the system Ms Osborne described had been in operation.

15. The nub of the judge's ruling, and the principal reasons he found for the Claimant, are set out in [24]-[27] of his judgment.

16. He said at [24] that the issue was whether the *prima facie* case of negligence which the Claimant had established was displaced by the Defendant's evidence of its system. He then said at [25]-[27]:

> "25. … notwithstanding the absence of the CCTV I am satisfied on the basis of Ms Osborne's evidence, which I accept, that there was a system for glass collecting and monitoring by the staff going about every 10 to 15 minutes. The question which I have to address is whether that, as an operational system, is sufficient to displace the *prima facie* case which Ms Wade has established.
>
> 26. Having borne everything in mind, I have come to the conclusion that having a system which involved checking areas every 10 to 15 minutes is simply not sufficient. In my judgment the following matters are important. First, as I have said, the accident occurred in place close to the bar. This was an area where spillages of drinks were likely. Secondly, this was a busy area, particularly on a Saturday night. Although there was evidence of a system in place, there was no evidence from those who were implementing the system and no evidence as to how long the liquid had been on the floor. Fourthly, not only was the area where Ms Wade fell close to the bar and the risk of spillage, it was, I find, dark as Ms Wade describes. Fifthly, the floor was wooden. Although, as Mr Dornan says, it was not slippery when dry, in my view it was likely to become slippery when wet. Sixthly, that area was also being used as a thoroughfare between the bar, the outside of the premises at the front and the garden of the premises at the rear. Seventhly, the system described by Ms Osborne was not documented in terms of the checks which were actually undertaken, where or when.

> 27. In those circumstances, I am satisfied on the balance of probabilities that this accident occurred as a result of a breach of duty on the part of the defendant pursuant to s 2 of the Occupiers' Liability Act 1957."

17. The judge then turned to *quantum* which, as I have said, I am not concerned with.

Grounds of appeal

18. There were five grounds of appeal in Mr Hill's Appellant's Notice and Skeleton Argument on the application for permission. Cotter J granted permission on Grounds 1, 2, 4 and 5. He refused permission on Ground 3. That was not pursued before me and so I need not say any more about it.

19. The four grounds of appeal on which permission was granted are as follows:

    a. Ground 1: the trial judge was wrong in law to find that checking the floor every 10-15 minutes was not sufficient to discharge the duty of care owed to the Claimant, and thereby misapplied the 1957 Act.

    b. Ground 2: the trial judge wrongly imposed an unreasonably high burden upon the Defendant and thereby erred in law.

    c. Ground 4: the trial judge failed to state what system, in his judgment, the Defendant ought to have been operating, and how this system, if operating, would have prevented the Claimant's fall, on the balance of probabilities.

    d. Ground 5: it was unjust for the trial judge to find that the system the Defendant was operating at the material time was not sufficient, in circumstances where: (a) it was not argued before him that more frequent inspections were reasonably required; and (b) the trial judge did not invite the Defendant to address him on this point.

20. In granting permission, Cotter J said this:

> "It is arguable that this experienced judge did impose a standard of case which was too high. It is also arguable that not having had the benefit of direct argument on the point may have contributed to an error of law (as alleged in Ground 5) in that he imposed a requirement, in effect, of constant (or near constant) surveillance. The argument advanced under ground 4 in respect of causation is interlinked with the other grounds and merits argument at an appeal hearing."

Submissions

21. On behalf of the Defendant, Mr Hill submitted as follows.

22. He accepted that the Defendant was the bar's occupier for the purposes of the 1957 Act, and that the Claimant was a lawful visitor. He rightly did not challenge any of the judge's findings of fact, made as they were after he had heard the evidence. Mr Hill

also expressly did not challenge the judge's finding of *prima facie* negligence because the Claimant had slipped on a spilt drink.

23. Mr Hill accepted the judge was experienced in this sort of case. However, he said that the judge's overall finding in the Claimant's favour had been wrong. He said the key question (per *Dawkins*) was whether the Defendant's system had been reasonable to keep the Claimant reasonably safe, and the judge had been clearly wrong in law to find that it had not been. He said the judge had imposed too high a duty of care upon the Defendant.

24. Mr Hill noted that the duty under s 2(2) of the 1957 Act is doubly qualified: it imposes a duty to take *reasonable care* that the visitor will be *reasonably safe* in using the premises. In other words, the word 'reasonable' (and its adverb form) are both used.

25. Mr Hill referred to Pill LJ's judgment in *Dawkins* at [24] (see above), and also to *Ward v Tesco Stores Limited* [1976] 1 WLR 810, which was referred to in *Dawkins*. I will return to *Ward* later.

26. Regarding Ground 1, Mr Hill said that the judge had found the 10-15 minute periodic floor checks not sufficient, and thus it followed that it must have been his view that this system was not reasonable to keep the Claimant reasonably safe whilst in the bar.

27. In relation to what was reasonable, Mr Hill cited *Tomlinson v Congleton Borough Council* [2004] 1 AC 46, [34]. Mr Hill said three staff carrying out continual floor checks so that every area was inspected at least every 10-15 minutes was plainly a reasonable system. More frequent inspections would have required, in reality and in practice, constant monitoring of the whole bar's floor by a large number of staff. The judge's approach would therefore have placed the Defendant (and, he said, every bar owner) under an absolute duty, requiring them to maintain constant vigilance (certainly on a busy Saturday night). He therefore said the judge's standard went far beyond what is required by s 2(2) of the 1957 Act.

28. Orally, Mr Hill pinned down what he said had been the judge's key error in the judgment as lying in the first sentence of [26] ('Having borne everything in mind, I have come to the conclusion that having a system which involved checking areas every 10 to 15 minutes is simply not sufficient.')

29. In relation to Ground 2 (which Mr Hill orally rolled up with Ground 1), he said the judge had failed to consider the effect of his lack of reasonableness finding, namely, by failing to consider the cost and difficulty of having a constant monitoring system, and so again had imposed an unreasonably high burden on the Defendant.

30. In relation to Ground 4, Mr Hill said the judge had failed to consider what system *would* have been sufficient, having held the Defendant's system was not sufficient. He therefore failed to consider causation, which he was required to consider. Mr Hill relied on *Laverton v Kiapasha* [2002] EWCA Civ 1656, [20], as showing he was required to do so.

31. Lastly, on Ground 5 (an overarching submission) Mr Hill submitted that there had been procedural unfairness, in as much as he said it had not been the Claimant's case that 10-

15 minutes periodic checks had not been reasonable; her case (as conducted in cross-examination of Ms Osborne by Mr Dawes) was to the effect that the system she described had not actually been operated on the night in question. Mr Hill pointed out that the judge expressly found that the system had been in operation (see above), but found for the Claimant on the basis that it had not been adequate. The judge did not raise with the Defendant, during closing submissions, the question of the reasonableness of the inspection regime. His interventions were focussed on the question of *prima facie* negligence. Mr Hill said this had been unfair, and relied on *Labrouche v Frey* (Practice Note) [2012] EWCA Civ 881, [24].

32. On behalf of the Claimant, Mr Dawes did not produce a Skeleton Argument for the appeal, but relied on the Particulars of Claim, and said the judge had been right to reach the conclusion he did, for the reasons he gave, which were full and reasoned and reached after a trial. Everything depended on the facts. The judge had been right and entitled to find as he did. Mr Dawes said that the Defendant had been negligent and had obviously breached the duty in s 2(2) of the 1957 Act. There was no Respondent's Notice.

Discussion

The approach on appeal

33. Mr Dawes emphasised that I cannot simply substitute my own view for that of the judge. I accept that proposition. This experienced judge heard the evidence and made his findings of fact which I cannot lightly depart from.

34. The approach I have to take was explained by Jackson LJ in *Hufton v Somerset County Council* [2011] EWCA Civ 78, where a pupil had slipped on a wet school floor. He said at [29]:

> "29. The judge's conclusions on the question of reasonable care involved not only findings of primary fact but also an evaluation of the facts. The Court of Appeal will not interfere with such an evaluation unless the Judge fell into error."

Grounds 1 and 2

35. Taking Grounds 1 and 2 together, as Mr Hill invited me to, I am satisfied that the judge fell into error when he held that the Defendant's system of inspection, as described by Ms Osborne, had not been reasonable in all the circumstances to keep the Claimant reasonably safe, as required by s 2(2) of the 1957 Act. I consider that it was. My reasons are as follows.

36. On the question of what is reasonable, in *Tomlinson*, Lord Hoffmann said at [34]:

> **"**34. My Lords, the majority of the Court of Appeal appear to have proceeded on the basis that if there was a foreseeable risk of serious injury, the council was under a duty to do what was necessary to prevent it. But this in my opinion is an over-simplification. Even in the case of the duty owed to a lawful

> visitor under section 2(2) of the 1957 Act and even if the risk had been attributable to the state of the premises rather than the acts of Mr Tomlinson, the question of what amounts to "such care as in all the circumstances of the case is reasonable" depends upon assessing, as in the case of common law negligence, not only the likelihood that someone may be injured and the seriousness of the injury which may occur, but also the social value of the activity which gives rise to the risk and the cost of preventative measures. These factors have to be balanced against each other."

37. *Tomlinson's* facts were very different from those before me. They concerned a trespasser who had injured himself doing something that was very obviously dangerous, and then sued the occupier. Lord Hoffmann's approach was therefore expressed at a high level of generality based on those facts.

38. In the context of visitors' slips in shops, bars, etc, the starting point is the judgment of Lord Goddard CJ, sitting in the Queen's Bench Division at first instance, in *Turner v Arding & Hobbs Ltd* [1949] 2 All ER 911. This has been much cited in subsequent cases. It identified that a shopkeeper is under a duty to use reasonable care to see that the shop floor on which people are invited is kept reasonably safe, and if an unusual danger is present of which the injured person was unaware and the danger is one which would not be expected and ought not be present, the onus of proof is on the defendant to explain how it was that the accident happened. Later, he said at p912:

> "Assistants cannot be expected to walk behind each customer to sweep up anything he or she may drop, and if this accident had happened at a very busy time when the shop was crowded with people, I can well understand that it would be difficult to say that the defendants were negligent because something had got on the floor which they may not have had the opportunity to sweep up. Here, however, I think there is a burden thrown on the defendants either of explaining how this thing got on the floor, or giving me far more evidence than they have as to the state of the floor and the watch that was kept on it immediately before the accident. I do not mean that it was their duty to have someone going around watching it, but in a store of this sort into which people are invited to come, there was a duty on the shopkeeper to see that his floors are kept reasonably safe."

39. In *Hassan v Gill* [2012] EWCA Civ 1291, [12], where a customer had slipped on some fruit on the floor in front of a greengrocer's stall, Lloyd LJ distilled the following principle from this passage:

> "12. That shows the forensic process whereby the claimant shows that she slipped on something that ought not to have been on the ground, and an evidential burden then shifts to the defendant to show that he took all reasonable steps to see that the floor was kept reasonably safe, the details of such reasonable steps clearly depending on the circumstances."

40. *Turner* was followed and applied by the Court of Appeal in *Ward*. In that case the claimant had slipped on yoghurt on the floor of the defendants' supermarket. There was no evidence as to how long the yoghurt had been there. The judge found for the claimant and, by a majority, the Court of Appeal upheld that finding.

41. Giving the leading judgment, Lawton LJ stated at p814:

> "Now, 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 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."

42. He went on to say, at p814:

> "The next question is whether the defendants by their evidence gave any explanation to show that they had taken all reasonable care."

43. In relation to the first stage, Megaw LJ took a similar view, at pp815-816:

> "It is for the plaintiff to show that there has occurred an event which is unusual and which, in the absence of explanation, is more consistent with fault on the part of the defendants than the absence of fault; and to my mind the judge was right in taking that view of the presence of this slippery liquid on the floor of the supermarket in the circumstances of this case. . . . "

44. Megaw LJ stated, at p816, that defendants:

> ". . . could escape from liability if they could show that the accident must have happened, or even on the balance of probability would have been likely to have happened, even if there had been an existence of proper and adequate system, in relation to the circumstances, to provide for the safety of customers".

45. Megaw LJ dealt with the 'next question' in this way (also at p816):

> "But if the defendants wish to put forward such a case, it is for them to show that, on balance of probability, either by evidence or by inference from the evidence that is given or is not given, this accident would have been at least equally likely to have happened despite a proper system designed to give reasonable protection to customers."

46. As I have said, the judge below referred to the Court of Appeal's decision in *Dawkins* (which in turn referred to *Ward*), which was also a 'slipping on liquid' case. The claimant had slipped in the restaurant on the respondent's cruise ship and injured herself. The test to be applied under the relevant shipping legislation was the same as under the 1957 Act (see at [2]-[3]). After a trial, the judge found for the respondent, and the claimant appealed.

47. Giving the leading judgment, at [22] Pill LJ quoted Lord Pearson in *Henderson v Henry E Jenkins & Sons* [1970] AC 282, p301:

> "In an action for negligence the plaintiff must allege, and has the burden of proving, that the accident was caused by negligence on the part of the defendants. That is the issue throughout the trial, and in giving judgment at the end of the trial the judge has to decide whether he is satisfied on a balance of probabilities that the accident was caused by negligence on the part of the defendants, and if he is not so satisfied the plaintiff's action fails. The formal burden of proof does not shift."

48. Pill LJ continued at [23]-[24]:

> "23. This case has the following features:
>
> (a) The place where the accident happened was under the control of the respondents. It was a busy place where drinks could be obtained by passengers and there were likely to be spillages.
>
> (b) The volume of passenger use was such that the area needed to be kept under close observation, as the respondents accepted.
>
> (c) There was evidence of the existence of a safety system, including inspection and observation.
>
> (d) There was no evidence from those with the duty to implement the system at or around the time of the accident.
>
> (e) There was no evidence as to how long the liquid had been on the floor.
>
> 24. I approach the case in stages:
>
> (a) The burden of proof is upon the appellant. At the end of the trial it is for the claimant to show on a balance of probabilities

that the accident was caused by negligence on the part of the respondents.

(b) Where premises, such as the floor of the Conservatory in this case, are under the management of defendants and a hazard is present on the floor, there may be a *prima facie* case of negligence against the defendants. The strength of the case will depend on all the circumstances.

(c) In the present circumstances, there was a prima facie case, as the judge found.

(d) The issue is whether, on the evidence as a whole, that case was displaced. The respondents submitted that by calling evidence of a usually good system of inspection and observation, it was displaced."

49. Pill LJ expressed his conclusion on the facts of the case as follows, at [25]-[30]:

"25. For the respondents, Mr Palmer QC submitted that the Recorder was entitled to reach the conclusion he did. Though not spelt out precisely in these terms, the Recorder drew, and was entitled to draw, the inference from the evidence of a system of work that it was operating at the material time. That being so, the liquid could not have been on the floor for a significant time and the claim failed. It was not fatal to the defence that no evidence was called from those working in the Conservatory at or around the time of the accident. In the absence of evidence that the water had been on the floor for a significant period of time, the appellant had not discharged the burden on her of proving negligence, it was submitted.

26. On the face of it, the presence of the liquid was more consistent with fault on the part of the respondents than with absence of fault on their part. The area was under their close control and liquid was present on the floor.

27. I accept that if the probability is of such contemporaneity between the spillage and the accident that remedial action could not reasonably be taken during the gap between them, the claim would fail. The Recorder did not make a finding as to time but, if the defendants could demonstrate such contemporaneity, the claim would fail.

28. The absence of evidence from one or more of the many members of staff claimed to be present in the Conservatory at the material time is remarkable. The explanation for the lack of evidence from a member or members of staff was, the Recorder found, that the defendants "could not establish who it was." In my judgment, in the absence of evidence from members of staff

> claimed to be implementing the system, the judge was not entitled to infer from the existence of a system that the spillage which led to the fall occurred only a few seconds, or a very short time, before the accident.
>
> 29. The claim succeeds on the evidence in this case. There is nothing to suggest such closeness in time between the spillage and the accident as would, at a place where close observation was required, exclude liability. In the absence of evidence to the contrary, I can conclude only that on a balance of probabilities the water had been there for longer than the very brief period which, in this particular place, would have excused the defendants from taking remedial action before the accident.
>
> 30. I would allow this appeal and remit the case to the County Court for the assessment of damages …"

50. Returning to *Hassan,* at [16] of that case Lloyd LJ said:

> "16. It is not the law that anyone in charge of any retail premises to which the public are invited must have a proactive system of walking inspection or the like … The precautions required of a reasonable system must depend on the circumstances of the particular premises, including for example its size and other physical features, the nature of the goods stocked, the number and nature of the staff, and the number and perhaps nature of the customers."

51. Sir Stephen Sedley said at [27]:

> "[Counsel for the appellant] is right to stress that there is no principle of law which requires a defendant in a public liability and negligence action to establish a proactive system, typically a walking inspection procedure, for obviating risk to the public."

52. Turning to the present case, here – unlike I think in *Ward* and *Dawkins* - there *was* direct and detailed evidence of the system which was being operated in the bar that night. Having regard to the realities of running a late night bar, the system of floor inspections by several members of staff as described by Ms Osborne – and which the judge accepted was being done - was sufficient to fulfil the statutory duty lying upon the Defendant. Its system was proactive and not reactive. It was one of continuous monitoring. And the context was spilt drinks – a not unknown phenomenon in late nights bars, and one which I consider most such customers would have been aware of - although I do not blame the Claimant in any way for what happened to her. As the judge said, the bar was dark. The Claimant could not therefore have been expected to spot the specific danger which befell her.

53. To make this good, I need to quote again what Ms Osborne said in [13] and [16] of her witness statement (emphasis added):

> "13. We typically have at least two staff serving behind the bar and a doorman on the door. We also have a manager, a supervisor and two additional members of staff *who will continually walk around the floor to collect glasses and check for any safety issues, including spillages and breakages* ...
>
> 16. … Although there are no specified intervals for inspection *the floor is continuously monitored* and *in practice* I would estimate that every area is checked *at least* every 10 to 15 minutes."

54. So, the evidence established that the Defendant's system had been one of continuous monitoring by continual walking, with the result that every area was checked at least every 10 to 15 minutes, as staff carried out their inspections. That is not the same as that which the judge found. I think the judge erred, in the sentence which Mr Hill identified, when he said the system of inspection was every 10 to 15 minutes. Every area would have been checked at least with that frequency, but there was continuous monitoring. No doubt if the staff, as they carried out their continuous walking checks in what was a reasonably compact bar, saw a drink being spilt, they would have reacted straight away to deal with it in accordance with their training.

55. I think Mr Hill was therefore right to submit that on the judge's approach, a system which in the judge's view would have complied with s 2(2), would effectively have placed the Defendant under a duty to have had in place a system of continuous surveillance and monitoring, so that no spilt drink could ever be present on the floor at all. Mr Hill said this would be unreasonable. It would, for example, have required many more members of staff, with each person simultaneously being responsible for the continuous monitoring of separate patches of floor (eg, one square meter each across the two floors, as well as in the garden and on the stairs) and instantaneously reacting to spilt drinks. That, I consider, would have gone far beyond that which was required by s 2(2) of the 1957 Act and its doubly qualified duty. That is especially so because there does not appear to have been any evidence that spilt drinks were a particular problem at this bar, thus requiring special vigilance (over and above what common sense would suggest, namely such an event can happen from time to time in any bar, which the judge acknowledged at [14] of his judgment).

56. Overall, Mr Hill said the Defendant had operated a 'well-planned and properly executed' system on the night of the accident which discharged its duty under s 2(2). I agree.

57. I respectfully echo what Jackson LJ said in *Hufton* at [28]:

> "28. It is not possible, and the law does not require, the occupier of premises to take measures which would absolutely prevent any accident from ever occurring. What is required both by the common law and by section 2 of the Occupiers' Liability Act 1957 is the exercise of reasonable care."

58. As I said at the beginning, I have sympathy for the Claimant's injury. However, I have reached the clear conclusion that the judge did impose too high a standard in the particular circumstances of this case. It was, in effect, a counsel of perfection, and the law does not require that.

59. Hence, in my judgment, the Defendant was not in breach of its duty of care under s 2(2). On the facts found by the judge, and the evidence he accepted, the only conclusion he could properly have come to was that the Defendant had satisfied its duty under s 2(2). Thus, the judge was wrong to find for the Claimant. His judgment in her favour is therefore set aside and there will be judgment for the Defendant.

Ground 4

60. In relation to Ground 4, and *Laverton*, which Mr Hill relied upon, that case was another slipping on liquid case, this time in a takeaway shop late at night. It had been raining, the shop was very busy, and the trial judge found that the floor of the shop had become very wet from rain walked in by customers. The judge found for the claimant and against the defendant shop owner.

61. At [9], Hale LJ (as she then was, later Baroness Hale of Richmond PSC) summarised the judge's reasons as follows:

> "The judge however found that given the amount of water there was that night reasonable care had not been taken in operating the cleaning system: the tiles were slippery when sufficiently wet, no mat was in place, substantial quantities of water had got in, and the system designed to remove it was not effective in doing so. The judge also declined to find any contributory negligence. He accepted that the claimant had taken a considerable amount of alcohol that evening. But there was no evidence that she was unsteady on her feet. She said that she was sober. The judge accepted her evidence."

62. In upholding the defendant's appeal, Hale LJ referred at [16] to the passage from *Turner* that I set out earlier. She then said at [17]-[23]:

> "17. … Hence, in *Ward v Tesco Stores Ltd* [1976] 1 WLR 810, this Court held that where a supermarket customer had slipped on yoghurt from a pot which had fallen on the floor, it was not for her to show how long it had been there. This sort of accident did not happen in the ordinary course of events if the floor was kept clean and spillages dealt with as soon as they occurred. The probability was that the spillage had been on the floor long enough to be dealt with. Hence there was an evidential burden on the defendant to show that accident did not arise from want of proper care on their part.
>
> 18. The judge in this case found it unnecessary to resort to the principle in *Ward v Tesco*. In my judgment he was right not to do so. There was no question that the floor was wet. The issue then is what it is reasonable to expect a shopkeeper to do about it. There is a distinction between particular dangers such as greasy spillages, which it is reasonable to expect a shopkeeper to deal with straightaway, and the general problem posed by walked in water on a wet night, which can never be completely avoided.

Everyone coming in from the wet outside to the drier inside brings water with them on their feet.

19. A take-away shop or other food outlet has to consider cleanliness and hygiene as well as safety. It is reasonable for him to have a tiled rather than a carpeted floor (indeed it would not surprise me to learn that the food hygiene regulations required a surface which could be easily cleaned). Some tiled surfaces are slippier than others are when wet and it is reasonable to expect him to choose a surface which is more rather than less resistant to slips. In doing so he should go to a reputable manufacturer, but he is entitled to rely upon their promotional literature unless and until experience shows that this is over-optimistic. The manufacturer's brochure for these tiles has already been quoted. The defendant's uncontradicted evidence was that there had been no previous incidents of this sort.

20. It is not reasonable to expect such a surface to be kept dry at all times. If the judge was saying that the defendant should have done so, then in my view he was wrong. But wetness does increase the risk of slipping and it is reasonable to expect the shopkeeper to do something to prevent and control it. After all, there is not much the customer can do about it: she may be expected to wipe her feet on a mat but not to mop the floor. In some large businesses it may be reasonable to expect stringent precautions at the shop door, including mats large enough to absorb the moisture from large numbers of customers who do not wipe their feet and/or a member of staff stationed near the door to mop up as required. Even this is unlikely completely to eliminate the problem, for most mopping operations leave some moisture on the floor unless it can be closed off while it dries. Mopping up spillages, while decreasing one type of risk, is likely to leave a damp floor for a while.

20. The question is what was reasonable to expect of the defendant in the particular circumstances of this case and whether anything else would have made a difference.

21. In my view, it would not. A doormat is a sensible precaution on both hygiene and safety grounds but it would be going too far to say that every business of this type must have a fixed doormat: many do and many do not and there are no doubt arguments either way. More importantly in the present case, unless it filled a large amount of the floor space, thus bringing a different problem, it would not eliminate the risk of enough water being brought in at very busy times to make the floor slippery. Mopping is practicable outside peak times, but has the limitations already mentioned. At busy times in a business such as this, the defendant must be right that it is simply not practicable to mop up the water as it arrives. The only solution would be to close the shop, which

he can only be expected to do if the customers cannot otherwise be reasonably safe.

22. The reality is that at such times the customers can be reasonably safe if they take reasonable care for their own safety. The unchallenged evidence of the claimant's two female companions was that it was obvious that the floor was wet. This cuts both ways. If the floor had been swimming wet so that no-one could walk on it with reasonable safety, then the shopkeeper should undoubtedly have noticed and done something about it, even closing for a short time if necessary. But the evidence went nowhere near supporting this. The judge himself wavered from 'considerable' to 'significant', to 'substantial' quantities of water. The more obvious such water is, the greater the need for the customer to take care. But all floors are to some extent slippery when wet.

23. In my view, in that particular shop, at that particular time, it was not reasonable to expect the shopkeeper to ensure that the mat was in place and mop the floor often enough and efficiently enough to prevent its being wet, even significantly or considerably so. To suggest otherwise is a counsel of perfection imposing a near strict liability which the law does not at present do. I would therefore allow the appeal and dismiss the claim in its entirety."

63. Agreeing with Hale LJ, Peter Gibson LJ said at [34]-[39]:

"34. The Judge's finding that the Claimant slipped on the wet tiles is not in dispute. In finding that the Defendant was in breach of his duty, the Judge gave 3 reasons:

(1) The floor could present a danger when water was upon it.

(2) The doormat was not fixed and at the time of the accident was not fulfilling its purpose of taking up moisture from the feet of customers coming into the shop.

(3) The system of cleaning the floor, using the mops and bucket, was not operated, or not operated with sufficient care or frequency that evening.

35. I shall consider those reasons in turn.

36. As to the first reason, I agree that a wet floor does present a danger. But when the wetness comes from rain brought in by the feet of customers, that danger seems to me both obvious and unavoidable. It might have been otherwise if the Defendant on a fine day had mopped the floor, leaving it wet, or if there had been some spillage of food which the Defendant could reasonably be

expected to clear up. It was entirely reasonable for a take away shop to use non-absorbent tiles which were slip-resistant.

37. As to the second reason, while the Judge was entitled to find that the mat was failing to fulfil its purpose, it is unrealistic to think that the presence of the mat at the door, if it had been fixed there, would have prevented the floor from becoming wet and would have avoided the accident. I say that because of the length of time it had been raining and the large number of customers in the shop at the time of the accident.

38. As to the third reason, the Judge appears to have been of the view that it would have been reasonably practical for the Defendant to have removed the water from the floor by mopping it before the Claimant took her place in the queue and that that would have avoided the accident. But mopping would not leave the floor completely dry and it would have continued to present a danger. Further I have difficulty in accepting that it would have been reasonably practical to expect the Defendant to mop the floor at a time when there were so many in such a confined space. It may be that the Judge thought that the water seen by the Claimant represented the accumulation of all the water walked into the shop throughout the evening and that the Defendant had failed to take advantage of opportunities to mop the floor when it was less crowded. I do not know on what evidence before the Judge such a conclusion was reasonably open to him. It appears to have been an inference merely from the amount of water which the Claimant saw. I respectfully doubt the validity of that inference, given the number of customers in the shop. As the Judge found, "As people were coming into the shop, they were bringing in more water". I do not think it reasonable to expect a person in the position of the Defendant to have a system which would prevent the floor being wet from customers' feet on a rainy evening, still less when the shop was so busy.

39. For these as well as the reasons given by Hale L.J., despite my sympathy with anyone who suffers so serious an injury as the Claimant did, I have reached the conclusion that the Judge did impose too high a standard of care in the particular circumstances of this case and that the Defendant was not in breach of his common duty of care. I would allow the appeal, set aside the order of the Judge and dismiss the action."

64. Mance LJ (as he then was, later Lord Mance JSC) dissented. He said at [29]-[30]:

"29. The heart of the judge's reasoning as I see was that there would and should have been materially less water on the floor, if the mat had been in place and/or the system of cleaning up water had existed or been operated, in the way described by the defendant himself, over the course of the evening viewed as a

> whole. As to the mat, whilst no criticism can attach to the absence of some form of well inside the door, I cannot think that it is satisfactory to install (and presumably to an extent rely on) a mat inside the door, in order to mop up some excess water, in circumstances where it was known that customers would soon be likely to kick it aside. Some form of fixing would seem an obvious step to take. As to the presence of water, it is of course entirely understandable that the defendant's take-away should be full after clubs closed in the small hours of Saturday morning. But it seems most improbable that it was similarly occupied throughout the whole or even most of the earlier evening. There must have been opportunities for the defendant to observe whatever was the state of the floor. It is true that rain would continue to lie on the ground outside after the rain died down, and to be carried in. But the judge was, it seems to me, entitled to conclude that the situation at the time when the claimant entered would have been materially different as regards water on the tiles inside the shop, if the mat and/or the system, on both of which the defendant relied to keep the floor safe, had been in place and in operation.
>
> 30. For these reasons, I would uphold the judge's conclusion that negligence was established on the part of the defendant, but allow the appeal to the extent only of reducing the claimant's recovery to 50%, on account of her own failure to take reasonable care for her own safety."

65. I observe that the fact that such eminent jurists could reach different conclusions just goes to underline that these common - and apparently factually simple - cases are not always so straightforward.

66. Mr Hill fastened on [20] of Hale LJ's judgment as establishing the propositions (Skeleton Argument, [8.3]-[8.4]) that it was 'incumbent on the judge to consider causation' and that, 'In failing to consider whether any other system would have made a difference, the Trial Judge obviated the need for the Claimant to prove causation'.

67. I do not think that *Laverton* establishes the propositions for which Mr Hill contended. I cannot see from my post-hearing researches that it has been so treated in any subsequent case. It is always for a claimant to prove causation. Hence, *Ward* in particular made clear that it is always open to a defendant to say 'but even if I had done what was required by s 2(2) – and so not been negligent - the accident still would have happened, so the claimant fails on causation'. *Laverton* was not such a case. It was a straightforward case where causation was not in issue, as Hale LJ made clear in [17] and the first sentence of [18] when she said *Ward* did not apply. *Laverton* simply involved the issue of whether what the takeaway owner had done had been sufficient to fulfil his duty under s 2(2), having regard to the type of risk involved, namely of slipping on rainwater, which customers would obviously have been aware of. For the reasons given by Hale LJ and Peter Gibson LJ, they found that he had, and it would not have been reasonable to have required him to do more. The claim therefore failed for want of negligence under s 2(2) of the 1957 Act, and not on causation.

68. I think that the present case is the same sort of case as *Laverton*. The Claimant slipped on a spilt drink. Hence, there was *prima facie* negligence because bars should not have spilt drinks on their floors. As I said earlier, Mr Hill did not dispute that. Also, causation was not seriously in issue: the Claimant slipped because of the spilt drink. The principal issue was whether the Defendant, by its evidence, could show on a balance of probabilities that it had taken such care as in all the circumstances of the case was reasonable to see that the Claimant was reasonably safe on its premises, thus evidentially negating the Claimant's *prima facie* case on negligence (the legal burden of proof of which was always upon her).

69. It was *not* the Defendant's case, for example, that the Claimant would have still slipped even if it had had the sort of continuous monitoring I described earlier (for example). Its case was that it could not say and did not know how or when the accident occurred; but, however it happened, it had fulfilled its duty under s 2(2) through its inspection system. If it *had* set up a *Ward* causation defence then the judge would no doubt have had to have addressed it. But it did not. I do not consider that the judge was required to conjure up for himself a different inspection regime that he thought would theoretically have satisfied s 2(2), and then asked himself whether, on that basis, the Claimant could still prove causation on the basis it would have prevented the accident.

70. I therefore reject Ground 4.

Ground 5

71. Mr Hill said that the main issue at trial had been whether the system Ms Osborne described was actually being operated on the night in question. She was cross-examined by Mr Dawes on the basis that because she had been responsible for two different premises (the Après Lounge and the bar next door), she had not been present all evening, and so could not say what had been happening in her absence. Mr Hill said that whether the system she described had been reasonable so to fulfil the Defendant's s 2(2) duty, had not been an issue.

72. Mr Dawes broadly - but not entirely - accepted this. He said he had indeed mainly been concerned to explore in his cross-examination of Ms Osborne, 'who was there, who was doing what and when and why'. That had been the 'thrust' of his cross-examination, as he put it. He pointed out, for example, that she had not been able to say how many people had been on the premises. However, he also said that the reasonableness of the Defendant's system had been in issue, and been directly raised by the pleadings.

73. I do not have the benefit of a transcript of the hearing and I do not consider, therefore, I am in a position to resolve this issue. I cannot be sure exactly how the case ended up being argued. A finding of unfairness in how the trial was conducted sufficient to set aside the judgment would be a significant finding, and it is not one I think that I can properly make on the limited material before me.

74. However, in light on my clear conclusions on Grounds 1 and 2 allowing the appeal in any event, there is no injustice in my not deciding this ground of appeal one way or the other.

Conclusion

75. This appeal is allowed for these reasons.