[2014] UKPC 18
Privy Council Appeal No 0021 of 2013

JUDGMENT

Adele Shtern (Appellant) *v* Monica Cummings (Respondent)

From the Court of Appeal of Jamaica

before

Lady Hale
Lord Wilson
Lord Sumption
Lord Toulson
Lord Hodge

JUDGMENT DELIVERED BY

Lord Toulson

ON

10 June 2014

Heard on 10 March 2014

Appellant
Carol Davis

(Instructed by Blake Lapthorn)

Respondent
James Guthrie QC

(Instructed by Davenport Lyons)

LORD TOULSON:

1. This appeal is from a decision of the Court of Appeal of Jamaica (Panton P, Morrison and Phillips JJA), upholding the dismissal by Lawrence-Beswick J of the appellant's claim against the respondent for damages for personal injury resulting from an accident on 15 February 1996 at the Villa Mora Hotel at Norman Manley Boulevard, Negril, Westmoreland ("the hotel").

2. The appellant is a citizen of the USA. The accident occurred when she was staying at the hotel as a paying visitor. On the appellant's account, which the trial judge accepted and is no longer challenged, the accident occurred when she opened the door of a refrigerator in the office of the hotel and received an electric shock.

3. The appellant issued proceedings against three defendants. The first defendant was a private company called Villa Mora Cottages Ltd ("the company") which ran the hotel. The respondent was the second defendant. She is the owner of the land on which the hotel stands and is the controlling director and shareholder of the company. The third defendant was Mr K Black. He was employed by the company as the manager of the hotel at the time of the appellant's accident, but by the time that the action came to trial he was no longer a party and had died.

4. The proceedings were lamentably slow. The writ and statement of claim were not served until 26 October 1999, which was three years eight months after the date of the accident. The appellant claimed to have suffered severe continuing injury and financial loss (the particulars of special damages amounting to nearly USD1.4 million at the date of trial). She alleged that her accident was caused by one or more of the defendants' negligence and/or breach of statutory duty under the Occupiers' Liability Act (an enactment modelled on the Occupiers' Liability Act 1957 of the Westminster Parliament). Paragraph 3 of the statement of claim alleged:

> "The first and/or second and/or third named defendants were at all material times the owners and/or occupiers and/or operators of the said hotel."

5. Paragraph 3 of the defence served on behalf of the respondent stated:

> "The second defendant admits paragraph 3 of the amended statement of claim."

The defence admitted that the appellant complained of receiving an electric shock on the date of her alleged accident, but denied that the complaint was true. It alleged that the refrigerator was inspected afterwards and found to be safe. The defence concluded:

> "The defendants say the whole claim of the plaintiff is faked and staged so as to extort money from either the first defendant or the Jamaica Tourist Board."

6. The case came to trial in June 2009, over thirteen years after the accident. Both sides called engineers to give expert evidence, but each suffered from the great disadvantage of not having been instructed until over a decade after the event. The defendants' expert, Mr Tyson, examined the refrigerator in March 2007 and found it to be in perfect condition. He concluded that "there would be no possibility for any human being to be electrically shocked from the refrigerator, if the system was in the same condition on 15 February 1996 as . . . in March 2007."

7. The appellant's expert, Mr Hudson, inspected the refrigerator in December 2008. He said that close examination of the supply cable revealed two points of damage to the insulation at the end nearest to the metal frame of the refrigerator. He said that the metal frame and components underneath the refrigerator were in a poorly maintained state, with an accumulation of moist dust and rust on the metallic parts of the cables. He said that Mr Tyson, who was also present at the time of the inspection in December 2008, expressed amazement on seeing the damage to the sections of the supply cable. In Mr Hudson's opinion, the cause of the accident was that the damaged section of cable came into 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 at a time when the appellant, standing barefoot on a damp floor also became an electric path to earth.

8. Mr Tyson rejected this as a possible explanation for various reasons. He said that the small exposed area of the cable could not make contact with the body of the refrigerator without someone deliberately twisting it and forcing it to do so. He also said that the doors of the refrigerator were insulated by non-conductive painting on them, with the result that if electricity flowed through the refrigerator it could not be felt or have any effect on someone touching the door.

9. The respondent gave evidence that in 1996 she was living mainly in Florida, but would visit Jamaica from time to time. When she was in Jamaica she would stay in a property built on the same site as the hotel. She said in her witness statement that she bought the refrigerator in the USA in the early 1990s and used it in Florida for about three years, but in about 1995 she shipped it to Jamaica with the intention of having it for her personal use when she was there. She said that the refrigerator was put in the office of the hotel and to the best of her knowledge it was not moved. According to her

evidence, the refrigerator was used by employees at the hotel, herself, members of her family and close friends who visited the property from time to time. It was not for the direct use of guests, because there were refrigerators in most of the guest rooms, but not every guest room had a refrigerator and so hotel staff would use the refrigerator to store the belongings of a guest if asked to do so. If the guest wanted to remove something from the refrigerator, they would be required to ask the person in charge of the office. This procedure was to prevent theft. The respondent said that prior to the alleged accident Mr Black never told her that the refrigerator was causing problems or malfunctioning in any way, and that after the alleged incident the refrigerator had remained in use in the office up to the date of the trial without causing any problems.

10. The trial judge gave judgment on 10 August 2009. She accepted the appellant's account of her accident as truthful, but she found that it was impossible to determine the cause of the incident because of the paucity of evidence about the circumstances in 1996. The action was therefore dismissed.

11. On appeal, the Court of Appeal reversed the judge's dismissal of the appellant's claim against the company, but upheld the dismissal of her claim against the respondent. Morrison JA, with whom the other members of the court agreed, held that the judge's conclusion that the appellant suffered an electric shock from an ordinary domestic refrigerator in the course of its everyday use raised a prima facie inference that the accident was caused by the negligence of the company as the occupier of the hotel. That prima facie inference had not been rebutted by the evidence adduced on the defendants' part. On the contrary, the effect of Mr Tyson's evidence, particularly certain answers given in cross-examination, was that the electric shock allegedly suffered by the appellant on opening the refrigerator door was not possible without a want of proper care of some kind, whether in its maintenance or installation. However, the court held that the respondent could not on the evidence be considered to be an occupier of the hotel for the purposes of the Act. Although she was the owner of the property on which the hotel was situated, she was not in operational control of the hotel. She stayed at the property when she was in Jamaica but in her own home and not in the hotel. The staff of the hotel were employed by the company and not by the respondent personally.

12. The company has not appealed against the Court of Appeal's decision that it was liable for the appellant's accident.

13. The appellant's notice of appeal to the Board contains a number of grounds, but they raise essentially two issues. The first issue involves a procedural question whether it was open to the respondent on the pleadings to deny that she owed a duty of care to the appellant as an occupier. If the Court of Appeal was right on that procedural question, the second issue involves the substantial question whether the court was right to hold that the respondent owed the appellant no relevant duty.

14. On the procedural issue, the appellant's argument is based on paragraph 3 of the statement of claim and the "admission" in paragraph 3 of the defence. The argument advanced on her behalf before the Court of Appeal and the Board is that there was a pleaded admission by the respondent that she was an occupier of the hotel, and therefore that issue was not explored at the trial. The first problem about that argument is that there was no such clear admission. There was an ambiguity in the pleadings. As Morrison JA rightly observed, the appellant's pleading in paragraph 3 of the statement of claim advanced alternative cases. It would have been open to the appellant to seek clarification of paragraph 3 of the defence, but this was not done, and Morrison JA was right to conclude that the pleadings did not provide "a secure basis upon which to decide this aspect of the case". In any event, the Board would be slow to intervene in a procedural matter of this kind unless satisfied that there had been a clear miscarriage of justice. In that regard the appellant faces additional problems.

15. Whatever the uncertainty of the pleadings, the respondent's witness statement was clear about her role in relation to the business of the hotel. Moreover, in their closing written submissions at the trial, both parties addressed the question whether she owed a duty to the appellant under the Act. It was not argued in the appellant's written submissions at first instance that the point was foreclosed by the pleadings. Rather, the appellant relied on the respondent's admission in her witness statement that she owned the title to the land and submitted that in those circumstances the respondent owed a common duty of care to the appellant ("…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…"). Conversely, in the respondent's written submissions it was argued that there was no evidence that she was the occupier of the relevant premises. It was submitted that it was manifest that the company was in possession and control of the premises and that the appellant was "invited" by the company and not by the respondent. The ownership of the refrigerator by the respondent was irrelevant; the important fact was that it was in the possession of the company and under the company's control. It was in the company's office and under the control of the company's employee, Mr Black.

16. The trial judge clearly regarded it as a live issue whether the respondent was an occupier because of her ownership of the property on which the hotel operated. She referred to the question in her judgment, but concluded that it was unnecessary for her to determine the point, since she had determined that there was no evidence of the cause of the accident. The pleading point now relied upon by the appellant was first taken on appeal, and the Court of Appeal was right to reject it.

17. The second and substantial issue is whether the Court of Appeal was wrong to find that the respondent owed the appellant no relevant duty of care. It was suggested on behalf of the appellant before the Board that the matter needed to be considered separately under the headings of negligence and breach of statutory duty, but the points are indistinguishable. The Occupiers Liability Act did not alter the rules of the common

law as to the persons on whom a duty of care is imposed as an occupier, or to whom it is owed; what it did was to replace different levels of duty towards different classes of visitor by a uniform "common duty of care" to all lawful visitors. Lord Denning explained this in the leading case of *Wheat v E Lacon & Co Ltd* [1966] AC 552, 577.

18. That case concerned an accident at a public house owned by the respondents. The first floor was used by the manager and his wife, Mr and Mrs Richardson, as their private dwelling. Mrs Richardson also took in guests for private profit. The appellant and her husband arranged with Mrs Richardson to stay there as paying guests. In the evening, as it was getting dark, Mr Wheat fell down a staircase in the private part of the premises and was killed. There were two causes of the accident. The stairs had a handrail, but it stopped short of the foot of the stairs; and someone had removed the light bulb at the top of the stairs. The question arose whether the respondents owed any, and if so what, duty of care towards Mr Wheat. The House of Lords held that whether a person is an occupier of premises depends on whether they have control of the premises; that more than one person may be an occupier; and that the measure and content of their duty of care may vary according to the circumstances of the case. Lord Morris of Borth-y-Gest said at 586:

> "It may . . . often be that the extent of the particular control which is exercised within the sphere of joint occupation will become a pointer as to the nature and extent of the duty which reasonably devolves upon a particular occupier."

19. In that case it was held that the respondents had sufficient occupational control to owe a duty of care to see that the structure was reasonably safe, including the handrail, and that the system of lighting was efficient. But they were not in such occupational control as to be responsible for day to day matters such as changing a light bulb.

20. In the present case the argument presented to the Board on behalf of the appellant focused on two matters, the respondent's ownership of the premises and her ownership of the refrigerator. In the view of the Board, the Court of Appeal was right to draw the distinction which it did between the company which carried on the business of running the hotel and the respondent. As a matter of routine maintenance, no doubt a hotel operator ought periodically to check the safety of electrical appliances in use at the premises. However, taking the evidence at its highest, there was no basis for holding that the respondent owed a duty of care to the appellant to see that the refrigerator was maintained in a safe condition.

21. As to the respondent's ownership of the land, even if for the sake of argument this gave her some occupational control over the structural condition of the hotel, the appellant's accident had nothing to do with its structural condition but with the

condition of the refrigerator used in the ordinary running of the hotel business. The fact that the respondent was the owner of the site on which the hotel was built did not make her operationally responsible for the running of the hotel. Whatever the respondent's powers as a director of a company, she was not personally responsible for the day to day operation of the hotel business. The respondent had no direct personal relationship with the appellant. The appellant was not on the premises by invitation of the respondent as a personal friend. The appellant was at the premises as a customer of the company.

22. As to the respondent's ownership and supply of the refrigerator, a refrigerator is a standard item of household equipment. If the respondent had supplied to the hotel a refrigerator which for some unusual reason she had cause to believe was in a dangerous condition, without warning the hotel staff, such conduct would potentially have created a hazard and the situation would have been different. She might well in such circumstances have incurred a liability in negligence, which would not have been on the basis of her being an occupier, but that was not the case, and the mere fact that she was the owner of the refrigerator did not give rise to any duty of care on her part as an occupier towards the appellant.

23. The Court of Appeal was therefore right to find that the respondent owed no relevant duty of care to the appellant. In those circumstances it is unnecessary to consider a further argument raised in the respondent's written case that the Court of Appeal ought not to have interfered with the trial judge's conclusion that there was insufficient evidence about the circumstances of the accident to justify any finding of negligence. The fact that the company did not appeal is no bar to the respondent raising the point, but it is unnecessary for the Board to reach any conclusion about its merits. The Board will humbly advise Her Majesty that the appeal should be dismissed.