IN THE CARIBBEAN COURT OF JUSTICE
APPELLATE JURISDICTION

ON APPEAL FROM THE COURT OF APPEAL OF BARBADOS

CCJ Appeal No BBCV2024/001
BB Civil Appeal No 25 of 2021

BETWEEN

SANDY LANE HOTEL CO. LTD. **APPELLANT**

AND

SONIA EVERSLEY **RESPONDENT**

Before: **Mr Justice Saunders, President**
Mr Justice Anderson
Mr Justice Barrow
Mr Justice Burgess
Mme Justice Ononaiwu

Date of Judgment: **18 March 2025**

Appearances

Mrs Marguerite Woodstock Riley KC and Mrs Amanda R Riley-Jordon for the Appellant

Ms Yasmin S Brewster and Ms Courtni M Holder for the Respondent

Tort – Negligence – Personal injury — Res ipsa loquitur – Concurrent findings of fact – Falling marble injured appellant – Whether res ipsa loquitur needs to be specifically pleaded – Whether employer breached standard and duty of care owed to respondent – Whether statements of trial judge detrimental to their findings – Whether concurrent findings of lower courts should be overturned.

SUMMARY

This case arose from an accident at the Sandy Lane Hotel in Barbados. The respondent, Mrs Sonia Chase nee Eversley, a housekeeper employed by the appellant, Sandy Lane

Hotel Co Ltd ('Sandy Lane'), was injured on 4 December 2010, when a piece of marble installed above the doorway of room 417 fell on her while she was cleaning. Mrs Chase filed a claim against Sandy Lane, alleging negligence, breach of its duties under the Occupiers Liability Act, Cap 208 and breach of its duty to provide a safe place of work. The trial judge found that Sandy Lane acted reasonably and responsibly in entrusting the construction of the marble door frame to a reputable independent contractor and that Mrs Chase did not establish that the hotel breached the common duty of care under the Occupiers Liability Act. On the issue of a breach of the duty to provide a safe place and system of work, the trial judge ruled in favour of Mrs Chase. The trial judge also found for Mrs Chase by applying the maxim of *res ipsa loquitur* despite it not being specifically pleaded. The Court of Appeal upheld the decision of the High Court and Sandy Lane appealed to the Caribbean Court of Justice ('CCJ').

The primary issues before the Court were: (i) whether the hotel breached its duty to provide a safe workplace; (ii) whether the trial judge was correct in applying the principle of *res ipsa loquitur*, despite it not being pleaded; (iii) whether the Court of Appeal erred in affirming the trial judge's factual findings and inferences; and (iv) whether the trial was conducted unfairly, as alleged by the hotel.

Shortly after the hearing, the Court dismissed the appeal with reasons to follow and ordered an interim payment in the sum of BBD100,000 in favour of the respondent.

Burgess J delivered the lead judgment of the Court, noting that *res ipsa loquitur* is not a distinct, substantive rule of law, but an application of an inferential reasoning process, emphasising that the burden of proof remains with the claimant throughout. He rejected Sandy Lane's argument that *res ipsa loquitur* must be explicitly pleaded. The judge found that Mrs Chase's statement of claim, which described how the marble frame suddenly fell on her, adequately set out the necessary facts. The Supreme Court (Civil Procedure) Rules 2008 ('CPR') provided no support for the argument that their introduction changed the position at common law to now require a claimant to plead *res ipsa loquitur* in negligence cases.

In response to Sandy Lane's challenge to the factual findings of both the High Court and the Court of Appeal, Burgess J reiterated the CCJ's established principle that it is only in exceptional circumstances that this Court would review concurrent findings of fact: *Ramlagan v Singh*, *Ramdehol v Ramdehol* and *Apsara Restaurants (Barbados) Ltd v Guardian General Insurance Ltd*. There were no exceptional circumstances in this case warranting interference with the trial judge's factual conclusions.

In a concurring opinion, Saunders P found that the trial judge and Court of Appeal properly assessed the evidence and reached reasonable conclusions. Sandy Lane's initial position was that Mrs Chase was wholly or partly to blame for the accident, yet it made no attempt to provide any evidence whatsoever to substantiate that she was. Although the hotel conducted a full review of the accident which was captured in a written report it did not proffer that report in evidence or explain its absence and its chief witness either did not refresh her memory from it before coming to court or she was deliberately not being forthright with the court about its findings.

On the issue of *res ipsa loquitur*, Saunders P agreed that it is not absolutely required to be pleaded. The maxim is simply a specific instance of circumstantial evidence that should be left to the normal operation of the law of evidence governing circumstantial evidence generally. The President rejected the hotel's complaint that it was denied a fair trial noting that Sandy Lane had ample opportunity to respond to the inference of negligence.

In a dissenting opinion, Barrow J found that the evidence adduced did not support a conclusion of negligence against Sandy Lane. He disagreed with the trial judge's conclusions, the Court of Appeal's endorsement of those conclusions, and the application of *res ipsa loquitur*. The judge noted that the experts on both sides had agreed that the cause of the marble falling was that the adhesive agent had failed and considered that the courts below had erred in failing to act on this evidence. The judge found that the principle of *res ipsa loquitur* was misapplied, noting that the maxim applies only when the cause of an accident is unknown, which was not the situation in this case.

Barrow J rejected the trial judge's inference that no inspections had been conducted simply because no direct evidence was led regarding room 417. He emphasised the principle of continuity, which presumes that longstanding practices continue unless proven otherwise and noted that the claimant had been injured while doing the cleaning after which followed standard inspection. On the issue of foreseeability, the judge found that the accident was not something the hotel could have reasonably anticipated or prevented, noting that there had been no previous or subsequent incidents of marble falling. He would therefore have allowed the appeal.

Saunders P, Anderson and Ononaiwu JJ concurred with the judgment of Burgess J.

Cases referred to:

Al-Medenni v Mars UK Ltd [2005] EWCA Civ 1041; *Anchor Products Ltd v Hedges* (1966) 115 CLR 493; *Apsara Restaurants (Barbados) Ltd v Guardian General Insurance Ltd* [2024] CCJ 3 (AJ) BB, BB 2024 CCJ 1 (CARILAW); *Ballard v North British Railway Co* [1923] SC (HL) 43; *Bennett v Chemical Construction (GB) Ltd* [1971] 3 All ER 822[1971]; *Beresford v Justices of St Albans* (1905) 22 TLR 1; *Byrne v Boadle* [1863] 2 H & C 722, 159 ER 299; *Commonwealth v Introvigne* (1982) 150 CLR 258; *Eversley v Sandy Lane Hotel Co Ltd* BB 2021 HC 038 (CARILAW), (31 August 2021); *Fitzgerald v Penn* (1954) 91 CLR 268; *Fontaine v British Columbia (Official Administrator)* [1998] 1 SCR 424; *Franklin v Victorian Railways Commissioners* (1959) 101 CLR 197; *Granville Technology Group Ltd (in liquidation) v LG Display Co Ltd* [2024] 1 WLR 100; *Greschuk v Kolodychuk* (1959) 16 DLR (2d) 749; *Lam Fong & Ho Kok Keong v Hung Wan Construction Co Ltd* [1986] HKEC 122; *Lesperance v Larue* [2018] 3 LRC 181; *Lloyde v West Midlands Gas Board* (1971) 2 All ER 1240; *Mark v Belize Electricity Ltd* BZ 2010 CA 25 (CARILAW), (20 October 2010); *Ng Chun Pui v Lee Chuen Tat* [1987] UKPC 7, [1988] RTR 298; *Nystedt v Wings Ltd* [1942] 3 WWR 39; *O'Reilly v Lavell*e [1990] IR 372; *Pearce v Round Oak Steel Works Ltd* [1969] 1 WLR 595; *R v Henry* [2018] CCJ 21 (AJ) (BZ), (2018) 93 WIR 205; *Ralph v Weathershield Systems Caribbean Ltd* TT 2016 CA 34 (CARILAW), (26 September 2016); *Ramdehol v Ramdehol* [2017] CCJ 14 (AJ) (GY); *Ramlagan v Singh* [2014] CCJ 5 (AJ) (GY), GY 2014 CCJ 2 (CARILAW); *Sands v Hutchison Lucaya Ltd* BS 2018 CA 81 (CARILAW), (17 May 2018); *Sandy Lane Hotel Co Ltd v Eversley* (BB CA, 18 December 2023); *Sans Souci Ltd v VRL Services Ltd* [2012] UKPC 6, JM 2012 PC 2; *Sawler v Franklyn Enterprises Ltd* (1992) 117 NSR (2d) 316; *Schellenberg v Tunnel Holdings Pty Ltd* [2000] 200 CLR 121; *Scott v London and St Katherine Docks Co* (1865) 3 H & C 596, 159 ER 665; *Sevick v Canadian National Railway* [1933] 4 DLR 668; *Shtern v Villa Mora Cottages Ltd* [2012] JMCA Civ 20, JM 2012 CA 32 (CARILAW); *Sweeney v Erving* (1913) 228 US 233; *Wong Sau Chun v Ho Kam Chiu* [2000] 2 HKLRD E18;.

Legislation referred to:

Barbados – Caribbean Court of Justice Act, Cap 117; Occupiers Liability Act, Cap 208; Supreme Court (Civil Procedure) Rules 2008.

Other Sources referred to:

Atkin's Court Forms (2023 Issue) vol 31(2); Charlesworth J and Walton C T, *Charlesworth & Percy on Negligence* (12th edn, Sweet & Maxwell 2010); Jones M A (ed), *Clerk & Lindsell on Torts* (20th edn, Sweet & Maxwell 2010); Jones M A (ed), *Clerk & Lindsell on Torts* (23rd edn, Sweet & Maxwell 2020); McNeil P and McNeil S, 'Presumption of Continuity' (2014) 35(22) PTN 169; Sopinka J, Lederman S N and Bryant A W*, The Law of Evidence in Canada* (Butterworths, 1992); Wright C A, 'Res Ipsa Loquitur' in *Evidence* (Special Lectures of the Law Society of Upper Canada, Richard de Boo 1955).

REASONS FOR DECISION

Reasons:

BURGESS J:

Introduction

[1] The respondent in this appeal, Ms Sonia Eversley, brought a negligence claim against her employer, the appellant, Sandy Lane Hotel Co Ltd, for injuries

suffered by her at her workplace. As such, the respondent had to prove that the injuries she suffered resulted from the breach of some duty owed to her by the appellant. McCarthy J held that the respondent had supplied sufficient evidence to prove her case. The trial judge, however, invoking the legal formula encapsulated in the Latin phrase *res ipsa loquitur*, held as an alternative, that, even though *res ipsa loquitur* was neither pleaded nor advanced in written or oral submissions, there was a multitude of facts from which the respondent's fault could be conclusively inferred applying *res ipsa loquitur*.

[2] The appellant appealed the trial judge's decision to the Court of Appeal essentially against the trial judge's application of *res ipsa loquitur*. The appellant also complained that the judgment of the High Court was without evidentiary basis or went against the weight of the evidence. The Court of Appeal dismissed the appeal and upheld the judgment of the High Court.

[3] Being dissatisfied with the decision of the Court of Appeal, the appellant appealed to this Court. Following the hearing of this appeal on 17 December 2024, on 20 December 2024 this Court made the following three orders:

1. The appeal is dismissed with reasons to follow.

2. An interim payment in the sum of BBD100,000 is awarded to the Respondent, to be paid by the Appellant on or before 3 January 2025.

3. The Appellant will pay the costs of the Respondent.

[4] In keeping with the first of those orders, this Court now provides the reasons for its decision.

Factual Background

[5] The respondent was at all material times employed by the appellant to work as a housekeeper at the famous Sandy Lane Hotel in Barbados. Ms Eversley had been

so employed for little more than five years when, on 4 December 2010, she suffered an accident on the job. She was cleaning the bottom of a door made of glass and mahogany, which leads from the foyer to the bedroom in guest room 417. The frame of the door, which was made of marble, then crashed down on her unexpectedly and caused personal injury.

[6] On 18 February 2013, Ms Eversley brought an action against Sandy Lane in the High Court of Barbados.[1] She claimed *inter alia* damages for personal injury and consequential loss caused by Sandy Lane's negligence and breach of the common duty of care it owed to her pursuant to the Occupiers Liability Act, Cap 208. Sandy Lane filed a Defence on 8 May 2013 denying liability and alleging that it was Ms Eversley's negligence that wholly or partially caused the accident.

[7] A trial was conducted in the High Court on liability only in 2019 and judgment delivered on 31 August 2021.

Judicial History

Before the High Court[2]

[8] At the trial, McCarthy J in the High Court assessed whether Sandy Lane had breached its duty of care, either as an employer to provide a safe system of work or as an occupier pursuant to the Occupiers Liability Act, Cap 208. He also assessed whether Ms Eversley was contributorily negligent.

[9] After hearing the evidence from the claimant and defendant respectively, McCarthy J first disposed of the issue of contributory negligence. He found that there was no evidence that Ms Eversley was negligent.[3] The two remaining issues

[1] Record of Appeal, 'Claim Form' 270.
[2] *Eversley v Sandy Lane Hotel Co Ltd* BB 2021 HC 038 (CARILAW), (31 August 2021).
[3] ibid at [86].

therefore concerned whether Sandy Lane had breached the duty of care it owed as employer and occupier, respectively.[4]

[10] At [88] of his judgment, McCarthy J summarised the material findings of fact thus:[5]

> My findings are:
>
> 1. Mrs. Chase was injured when going about her work. The marble architraves and door linings which framed the door leading from the foyer to the bedroom of room 417 came crashing down unexpectedly.
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> 2. No evidence was led by the defendant with respect to the cause of the collapse of the marble.
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> 3. No evidence was led by the defendant with respect to actual maintenance inspection or upkeep of room 417. There was abundant evidence about checklists, the several layers of inspection, maintenance, and practice and procedures to ensure high standards at Sandy Lane. However, neither witness for the defence provided any direct evidence that anybody had visited the room prior to the fall of the marble and had verified that they carried out any checks on the marble or any other aspect of room 417. In response to a question on cross-examination, Ms. Roett boldly declared that she did not make a mental note of the rooms she visited.
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> 4. Although I am prepared to accept that until 2010, there was no case of marble falling of which Mr. Weekes or Mr. Chase was aware, I have not been similarly convinced with respect to Ms. Roett. In her evidence, she appeared to leave open the possibility that other incidents may have occurred.
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> 5. I accept, on the evidence presented, that Sandy Lane did engage reputable contractors, one of whom employed Habtoor, who installed the marble.
>
> 6. I do not accept that prior to the incident in 2010, that any procedures or checks, such as tapping the marble or checking the grout, were done to discover whether the integrity of the marble was compromised. It is my finding that checks of this nature were instituted after the 2010 incident, most likely on the advice of the

[4] ibid at [89].
[5] ibid at [88].

overseas experts who would have visited Sandy Lane after the incident.

7. Having not visited Sandy Lane, Ms. Prescod's theory as to how the accident had occurred was flawed to the extent that she felt that the grout was disturbed when the door was opened. However, her comments about lippage (i.e., movement of the tiles) and observing the grout lines seem to be a credible explanation for the fall of the marble. This view is supported by the fact that tapping the marble and inspection of the grout form part of the revised checklist after the accident.

8. In respect of the 2010 calamity, the facts that would explain the fall of the marble were in the control of Sandy Lane and the evidentiary rule 'res ipsa loquitur' would have been appropriate on the facts of this case. On this view, the mere fact of the marble falling suggested negligence in the defendant, who then had a duty to adduce evidence to show that it was not negligent. No such evidence was given by the defendant.

[11] McCarthy J held that Sandy Lane had not breached its duty as occupier under the Occupiers Liability Act as it acted reasonably and responsibly in entrusting the construction and installation of the marble door frame to an independent contractor.[6]

[12] In considering whether Sandy Lane breached the duty of care it owed as an employer to provide for the safety of its employee, McCarthy J found Sandy Lane liable. He held, first, that unlike in the case of occupiers' liability, Sandy Lane's duty as employer is non-delegable and Sandy Lane remains liable if its duty was performed negligently, whether by itself or by a third party over whom it had control. Second, based on the evidence of the claimant's expert witness, in the absence of a definitive cause of the incident, the court was able to draw an inference that the incident likely occurred as a result of movement of marble and failure to observe and remediate disintegration of the grout. Third, Ms Eversley having established a prima facie case of negligence, the defendant adduced no evidence to show that the system it designed to provide for its employees' safety

[6] ibid at [94].

was observed, especially in relation to room 417. Fourth, the application of the evidentiary rule of *res ipsa loquitur* meant that Ms Eversley had established a prima facie case of negligence on the part of Sandy Lane, and the hotel's failure to adduce cogent evidence that the accident occurred for reasons other than want of care on its part.[7]

[13] McCarthy J applied the rule of *res ipsa loquitur* even though that rule had not been pleaded or urged on behalf of Ms Eversley.[8]

Before the Court of Appeal

[14] Sandy Lane appealed to the Court of Appeal (Narine, Belle, Reifer JJA) against the judgment of McCarthy J. Sandy Lane raised six grounds of appeal in its Notice of Appeal. These were: (i) That the decision is erroneous in holding *res ipsa loquitur* applicable and deciding the case on that basis; (ii) That the trial judge decided the case on (a) Matters not pleaded or raised; (b) Evidence not before the court; (c) Without giving the appellant an opportunity to address the court; (iii) The trial judge did not in his judgment accurately state, or sufficiently appreciate, the evidence of the defendant's witnesses; (iv) There was no evidence to support the decision or the decision is against the weight of the evidence; (v) The trial judge did not in his judgment accurately state, or sufficiently appreciate, the evidence of the defendant's witnesses; (vi) The trial judge breached Sandy Lane's right to a fair hearing.

[15] It can readily be seen that four of Sandy Lane's six grounds of appeal challenged the High Court judge's application of the *res ipsa loquitur* evidentiary rule without that rule having been pleaded or advanced at trial on behalf of Ms Eversley and without Sandy Lane being given an opportunity to address the court on the issue. The result, argued Sandy Lane, was that it was deprived of a fair hearing.

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[7] ibid at [97] – [105].
[8] ibid at [106].

[16] Sandy Lane's other two grounds of appeal before the Court of Appeal complained that the judgment of the High Court was without evidentiary basis or went against the weight of the evidence.

[17] The Court of Appeal did not agree with Sandy Lane's assertion that the judge erred in applying the evidentiary rule of *res ipsa loquitur* in the circumstances of the case. The Court of Appeal understood that McCarthy J raised *res ipsa loquitur* as an alternative route to liability after finding independently that Sandy Lane had breached its duty of care to provide for the safety of its employee. The Court of Appeal affirmed that it was not necessary for the rule to be pleaded and that it was sufficient to plead the material facts relating to how the accident occurred.[9] Furthermore, once the trial judge was entitled on the evidence to infer negligence on the part of the defendant because the claimant had established a prima facie case of negligence, the evidential burden shifted to the defendant to adduce evidence that negatived that inference. The defendant must show that the accident occurred otherwise than because of want of care on its part.

[18] The Court of Appeal also did not agree with Sandy Lane's argument that *res ipsa loquitur* was unavailable because Ms Everley knew, or asserted, the cause of the accident. The Court of Appeal found that Ms Eversley's case was pleaded in general terms precisely because the cause of the accident was unknown.

[19] Similarly, the Court of Appeal did not agree with Sandy Lane's contention that the High Court's judgment went against the evidence or was without evidentiary basis. Both expert witnesses at the trial posited theories as to what may have caused the accident, but neither could say with certainty what in fact caused it. Ms Roett, Sandy Lane's witness, testified that the hotel's investigations after the fact discovered the cause but that she could not remember what it was. The inference McCarthy J drew that the accident occurred because of lippage, walking of the tiles or inadequacy of the adhesive used was in keeping with the evidence

[9] *Sandy Lane Hotel Co Ltd v Eversley* (BB CA, 18 December 2023) at [16].

since it was clear that Sandy Lane instituted processes for checking for these deficiencies after the incident, which were not part of its system before.

Before the Caribbean Court of Justice

[20] By way of a Notice of Appeal filed on 25 July 2024, Sandy Lane appealed as of right against the judgment of the Court of Appeal affirming the decision of the High Court in which the High Court found that Sandy Lane breached its duty to Ms Eversley to provide her with a safe system of work and a safe place of work.

[21] Sandy Lane mounted its appeal to this Court on eighteen grounds, which were subdivided into two categories – (i) errors of law, and (ii) misapprehension and errors of fact. The grounds are set out below:

Errors of Law

a) The Court of Appeal erred in holding that Res Ipsa Loquitur is not required to be specifically pleaded and or that the Respondent/Trial Judge was entitled to rely on it without the Respondent setting it out as an allegation or factual argument in her Statement of Claim pursuant to Rule 8.5 of the Supreme (Civil Procedure) Rules 2008;

b) The Court of Appeal erred in holding that the Appellant was afforded a fair trial despite not having an opportunity to be heard on the issue of res ipsa loquitur

c) The Court of Appeal erred in finding that a fair trial is afforded where a Claimant does not set out in its case the facts and issues it intends to rely on and that the Trial Judge relies on.

d) The Court of Appeal erred in finding that the inference of negligence was available to be drawn by the Trial Judge on the case presented by the Respondent. The Respondent led clear evidence as to why or how the occurrence took place.

e) The Court of Appeal erred in holding that the Trial Judge may apply res ipsa loquitur as an alternative route to establishing liability.

f) The Court of Appeal erred in failing to consider the Trial Judge's misstatement of the law that the burden of proof had shifted to the Appellant and treating the shifting of an evidential burden as the same and applicable in the circumstances.

g) The Court of Appeal erred in finding that the evidence alone of control of the premises by the Appellant was sufficient to raise an inference of negligence without evidence that the accident was of such a kind as would not have happened in the ordinary course of things without negligence.

h) The Court of Appeal erred in failing to consider the standard of care required by an employer in providing a safe system of work and safe place of work.

i) The Court of Appeal erred in failing to consider the element of foreseeability and likelihood of harm in determining whether the Appellant was negligent.

j) The Court of Appeal erred in finding that the Trial Judge was correct in holding that the Appellant was required to provide evidence of the cause of the marble falling order to rebut any inference of negligence.

k) The Court of Appeal erred in finding that in the circumstances of the Respondent alleging a cause of the incident it should have been obvious given the factual scenario that the inference of negligence was available to be drawn by the Trial Judge

l) The Court of Appeal erred in failing to consider the Trial Judge relied on the evidence not given in the proceedings and made his own evidential assertions to support his conclusions.

Misapprehension and Errors of Fact

a) The Court of Appeal erred in misapprehending the facts in the proceedings and was plainly wrong in upholding the Trial Judge's findings of fact which were erroneous and against the weight of the evidence.

b) The Court of Appeal erred in holding that the Appellant on the facts found did not adduce enough evidence to rebut the inference of negligence; if such an inference could be considered as arising.

c) The Court of Appeal erred in failing to review the primary facts and inferences made by the Trial Judge including an analysis of the complete evidence of the witnesses in the trial and accurately applying the evidence.

d) The Court of Appeal erred in holding that the trial judge's finding of fact as to the cause of the separation is a finding of fact that was available on the evidence

e) The Court of Appeal erred in holding that the Trial judge's finding of negligence under employer's liability was not against the weight of the evidence

f) The Court of Appeal erred in failing to consider and address the Trial Judge's contradictory findings of fact regarding the cause of separation.

Analysis and Conclusions

[22] We turn now to considering these grounds of appeal. We begin with the submissions on *res ipsa loquitur.*

Res Ipsa Loquitur

[23] As is apparent from the Notice of Appeal, nine of the twelve grounds[10] alleging errors of law focused again on the vexed issue of the application of *res ipsa loquitur* in circumstances where it was not pleaded or advanced on behalf of Ms Eversley at the trial. Sandy Lane argues that it was not available because Ms Eversley led evidence as to the asserted cause of the accident. Sandy Lane also argues that it was not given an opportunity to address the High Court on the issue, as it appeared for the first time in the judgment, resulting in Sandy Lane being given an unfair trial. Given the burden of Sandy Lane's arguments before us, we consider it advantageous to predicate our judgment on a careful exploration of *res ipsa loquitur* in the common law.

The Provenance of Res Ipsa Loquitur

[24] The term *res ipsa loquitur* appears to have its origin in the 1863 case of *Byrne v Boadle*[11] where a man was injured by a flour barrel rolling out of a second story

[10] Grounds (a) – (g), (j), (k) under the heading Errors of Law.
[11] (1863) 2 H & C 722, 159 ER 299 at 300.

warehouse window. When he brought suit for his injuries, Chief Baron Pollock made the remark to counsel that 'there are certain cases of which it may be said *res ipsa loquitur*, and this seems to be one of them'. This comment quickly became the foundation stone for a type of circumstantial evidence in the field of negligence.

[25] Two years later, in *Scott v London and St Katherine Docks Co*[12] Erle CJ enunciated the basis of the principle of *res ipsa loquitur* in terms which have been regarded as the 'foundation of all subsequent authority'. Erle CJ said:

> There must be reasonable evidence of negligence. But where the thing is shewn 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.

[26] At the present time, there is more or less general agreement on the conditions that must be shown to bring *res ipsa loquitur* into operation. These are: (1) the accident must be of the type which does not ordinarily occur in the absence of someone's negligence; (2) the accident must be caused by an agency or instrumentality within the exclusive control of the defendant; (3) there must be no evidence as to why or how the occurrence took place.

The Scope and Effect of Res Ipsa Loquitur

[27] Two instances where West Indian courts have pronounced on the scope and effect of *res ipsa loquitur* are to be found in the judgment of Morrison JA in the Court of Appeal (Jamaica) decision in *Shtern v Villa Mora Cottages Ltd*[13] and in the judgment of Smith JA in Court of Appeal (Trinidad and Tobago) decision in *Ralph v Weathershield Systems Caribbean Ltd.*[14] In addition to these cases, we have

[12] (1865) 3 H & C 596, 159 ER 665 at 667.
[13] [2012] JMCA Civ 20, JM 2012 CA 32 (CARILAW).
[14] TT 2016 CA 34 (CARILAW), (26 September 2016).

found the statements on the principle in other common law jurisdictions very helpful in delineating the scope and effect of *res ipsa loquitur* in the common law.

[28] One such a statement is that of the Supreme Court of the United States in *Sweeney v Erving*[15] that:

> ...*res ipsa loquitur* means that the facts of the occurrence warrant the inference of negligence, not that they compel such an inference; that they furnish circumstantial evidence of negligence where direct evidence of it may be lacking, but it is evidence to be weighed, not necessarily to be accepted as sufficient; that they call for explanation or rebuttal, not necessarily that they require it; that they make a case to be decided by the jury, not that they forestall the verdict. *Res ipsa loquitur*, where it applies, does not convert the defendant's general issue into an affirmative defense. When all the evidence is in, the question for the jury is, whether the preponderance is with the plaintiff.

[29] A dictum of Dixon CJ in the High Court of Australia case of *Franklin v Victorian Railways Commissioners*[16] is even more compelling. He said there:

> The three Latin words [*res ipsa loquitur*] merely describe a well known form of reasoning in matters of proof. Convenient as it is sometimes to use them to direct the mind along that channel of reasoning they must not be allowed to obscure the fact that it is a form of reasoning about proof leading to an affirmative conclusion of fact and that whenever the question is whether the proofs adduced suffice to establish an issue affirmatively, all the circumstances must be taken into account and the evidence considered as a whole.

[30] In *Fontaine v British Columbia (Official Administrator),*[17] a decision in which the Supreme Court of Canada abolished the maxim *res ipsa loquitur*, Major J, who delivered the judgment of the Court stated thus at [26] – [27]:

> 26. Whatever value *res ipsa loquitur* may have once provided is gone. Various attempts to apply the so-called doctrine have been more confusing than helpful. Its use has been restricted to cases where the

[15] (1913) 228 US 233 at 240.
[16] (1959) 101 CLR 197 at 201.
[17] [1998] 1 SCR 424.

> facts permitted an inference of negligence and there was no other reasonable explanation for the accident. Given its limited use it is somewhat meaningless to refer to that use as a doctrine of law.
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> 27. It would appear that the law would be better served if the maxim was treated as expired and no longer used as a separate component in negligence actions. After all, it was nothing more than an attempt to deal with circumstantial evidence. That evidence is more sensibly dealt with by the trier of fact, who should weigh the circumstantial evidence with the direct evidence, if any, to determine whether the plaintiff has established on a balance of probabilities a *prima facie* case of negligence against the defendant. Once the plaintiff has done so, the defendant must present evidence negating that of the plaintiff or necessarily the plaintiff will succeed.

[31] In *Schellenberg v Tunnel Holdings Pty Ltd,*[18] the High Court of Australia declined to accede to the submission made by counsel for the appellant that the Court follow the lead of the Supreme Court of Canada and abolish the application of *res ipsa loquitur* in Australia. Kirby J, who formed part of the majority, expressed a positive view of the approach taken by the Canadian court but clarified that it was not necessary at that time for the Australian court to make a similar pronouncement as the outcome of the matter before it would not be affected whether *res ipsa loquitur* was applied or not.[19]

[32] This Court, like the High Court of Australia, considers that the instant case does not necessitate a decision on whether to abolish the evidentiary rule of *res ipsa loquitur*. That said, this Court observes that all the authorities, including *Fontaine*,[20] make certain things about *res ipsa loquitur* plain. These are (i) that it is not a distinct, substantive rule of law; (ii) that it is merely an application of an inferential reasoning process; and (iii) that the plaintiff bears the onus of proof of negligence even when the principle is applicable. As was said by Windeyer J in the High Court of Australia case of *Anchor Products Ltd v Hedges*:[21]

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[18] [2000] 200 CLR 121.
[19] ibid at [124].
[20] *Fontaine* (n 17).
[21] (1966) 115 CLR 493 at 500.

> ... *res ipsa loquitur* denotes a fact from which, if it be unexplained, it is permissible to infer negligence: but that the onus in the primary sense – that is the burden of proving the case against the defendant – remains with the plaintiff. To say that an accident speaks for itself does not mean that if no evidence is given for the defendant the plaintiff is entitled in law to a verdict in his favour. The occurrence speaks of negligence, but how clearly and convincingly it speaks depends upon its circumstances.

When it applies, the trier of fact may conclude that the defendant has been negligent although the plaintiff has not particularised a specific claim in negligence or adduced evidence of the cause of the accident. But it does nothing more.

Whether Res Ipsa Loquitur may be Relied on Even Though not Pleaded?

[33] What emerges from the foregoing statements is that, while *res ipsa loquitur* may ameliorate the difficulties that arise from a lack of evidence as to the specific cause of an accident, the inference to which it gives rise is merely a conclusion that is derived by the trier of fact from all the circumstances of the occurrence. In our opinion, it is this which is at the bottom of the principle enunciated in *Bennett v Chemical Construction (GB) Ltd*[22] that a claimant may rely on *res ipsa loquitur* even though he or she has not pleaded it.

[34] *Bennett*,[23] concerned the fall of electrical control panels which were stacked against a wall. The fall of the panels resulted in serious injury to the plaintiff. In relation to the doctrine of *res ipsa loquitur*, Davies LJ stated, inter alia, as follows at 825, s [f] and [g]:

> In my view it is not necessary for that doctrine to be pleaded. If the accident is proved to have happened in such a way that prima facie it could not have happened without negligence on the part of the defendants, then it is for the defendants to explain and show how the accident could have happened without negligence. As I have said, they made no attempt to do that in this case. In my judgment this is really a classic case of *res ipsa*

[22] [1971] 3 All ER 822.
[23] ibid.

> *loquitur*. Here one has the panel being moved by the defendants' men, and it falls. It should not have fallen. The defendants might, as Edmund Davies LJ said in the course of the argument, if it were so, have called evidence to show that one or more of the men had a sudden stroke or something of that kind, which one could not foresee. But here the panel fell, and I entirely agree with the learned judge that it could not have possibly fallen without some negligence on the part of the defendants.

[35] In our opinion, the principle enunciated by Davies LJ flows inevitably from, and is a logical corollary of, the principle that *res ipsa loquitur* is not a distinct, substantive rule of law, but an application of an inferential reasoning process.

[36] Sandy Lane accepts the authority of *Bennett*[24] that it is not necessary to plead *res ipsa loquitur*.[25] Counsel argues, however, that r 8.5 of the Supreme Court (Civil Procedure) Rules 2008 ('CPR') in Barbados changed the position at common law to now require a claimant to plead *res ipsa loquitur* in negligence cases, failing which it would not be available. Counsel has not cited any direct case law authority or legal text authority to support this view. However, counsel cites the cases of *Lesperance v Larue*[26] and *Mark v Belize Electricity Ltd*[27], as underlining the importance of pleadings and issues being clearly defined in Civil Procedure Rules regimes. These authorities, counsel urges, are in effect oblique authorities against the *Bennett* rule.

[37] We do not agree that either of these cases aid in this appeal. Both of those cases concerned instances where the trial judge decided the cases solely on issues different from those which were raised in the pleadings.

[38] The appellant has also placed considerable reliance on the case of *Al-Medenni v Mars UK Ltd*[28] as supporting a proposition that the *Bennett* rule does not represent the law in Civil Procedure Rules regimes. In our view that case does not purport

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[24] ibid.
[25] ibid.
[26] [2018] 3 LRC 181.
[27] BZ 2010 CA 25 (CARILAW), (20 October 2010).
[28] [2005] EWCA Civ 1041.

to lay down any such principle and in any case is distinguishable from the present appeal.

[39] The claimant in *Al-Medenni* pleaded that a certain employee precariously placed a roll of foil wrapping paper on a machine. The roll fell and struck the claimant, injuring her. The trial judge ruled in favour of the claimant but found that some other employee must have placed the roll of foil wrapping paper on the machine. The defendant appealed. The essence of the Court of Appeal's decision was that the judge was not entitled to find for the claimant, having rejected the basis on which her claim was advanced, and substituted his own. In stark contrast, the Respondent to this appeal pleaded that the Appellant breached a duty of care owed to her as her employer. The learned trial judge accepted this basis on which the claim was advanced and held that a case of employer's liability had been established.

[40] Importantly, the Court of Appeal in *Al-Medenni* also noted that although the claimant's counsel had suggested that she could rely on *res ipsa loquitur*, there was nothing in her case to indicate that she was relying on it. Conversely, the Court of Appeal in the case at bar stated as follows at [16] of its decision:

> "*Res ipsa loquitur*" is not a fact which must be pleaded: *Bennett v Chemical Construction (GB) Ltd* (supra). What must be pleaded is the factual scenario surrounding the occurrence of the accident. In paragraph 3 of her statement of claim the respondent pleaded that on 4 December 2010, while she was bending down, cleaning the door in room 417, the marble around the door frame collapsed and fell on her, causing her personal injury. These were the material facts that had to be pleaded. Once evidence was led by the claimant (respondent) to support these facts, the inference may be drawn by the court that the accident could not have occurred but for the negligence of the defendant.

[41] In sum, this Court disagrees with Sandy Lane's submission that the introduction of the CPR in Barbados and r 8.5 thereof changed the position at common law to now require a claimant to plead *res ipsa loquitur* in negligence cases, failing

which the rule would not be available. This Court maintains that all that must be pleaded are the material facts relating to how the accident occurred.

[42] In reaching our conclusion that it is not a requirement of the CPR to plead *res ipsa loquitur* we note the opinion of the learned authors of the *Atkin's Court Forms*[29]. They note that:

> …whilst it is not a requirement of CPR Part 16 or its Practice Direction that res ipsa loquitur is a matter which must be specifically set out in the particulars of claim if relied on, it is suggested that the best practice is to plead *res ipsa loquitur* where it is intended to rely on it. A suggested alternative to the Latin maxim is that the facts of the accident speak for themselves as being an occurrence which cannot normally happen without negligence, and where appropriate the Forms use this form of wording (footnotes omitted).

[43] We agree with this approach to r 8.5 of the CPR in Barbados.

Whether Non-Pleading of Res Ipsa Loquitur Results in Denial of Natural Justice?

[44] Counsel for the appellant points to the fundamental principle of natural justice that both sides should be heard before a decision is made. In this regard, counsel cites *Sans Souci Ltd v VRL Services Ltd*[30] and *R v Henry*[31] to stress the importance of finality in litigation and the court's obligation to decide a case based on the issues on record. In our opinion, the trial judge did not violate these time-honoured principles which are beyond impeachment. In our judgment, he decided the case on the issues that arose on the pleadings.

[45] Very early in his judgment, the trial judge distilled the issues which arose before him. He identified these as the three issues of employers' liability, occupiers' liability and contributory negligence. In our opinion, these were an accurate reflection of the parties' pleadings. Having eliminated the issue of contributory

[29] *Atkin's Court Forms* (2023 issue) vol 31(2), para 75.
[30] [2012] UKPC 6, JM 2012 PC 2.
[31] [2018] CCJ 21 (AJ) (BZ), (2018) 93 WIR 205.

negligence, the learned judge identified the remaining two issues at [89] of the judgment as occupiers' liability and employers' liability.

[46] He decided the issue of occupiers' liability in favour of the appellant and expressed his opinion and that the discussion with respect to the duty of care for the safety of the employee at common law would ultimately determine liability. At [102] of his decision, the trial judge determined that a case of employers' liability had been established on a balance of probabilities. This decision was also captured in his disposal of the case at [119] of the judgment.

Whether the Courts Below Erred in Respect of the Burden of Proof in Applying Res Ipsa Loquitur?

[47] We turn now to the appellant's argument that the trial judge and the Court of Appeal erred by erroneously placing emphasis on the appellant's failure to adduce evidence as to why the marble fell. Here, the appellant, relying on *Ng Chun Pui v Lee Chuen Tat*[32], contends that when the courts focused on the evidentiary shift in their application of *res ipsa loquitur*, they failed to consider that the burden of proving the case remained with the respondent. In *Ng Chun Pui*[33], the Privy Council said:

> Although it has been said in a number of cases, it is misleading to talk of the burden of proof shifting to the defendant in a *res ipsa loquitur* situation. The burden of proving negligence rests throughout the case on the plaintiff… So 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 its 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…Resort to the burden of proof is a poor way to decide a case; it is the duty of the judge to examine all the evidence at the end of the case and decide whether on the facts he finds to have been proved and on the

[32] [1987] UKPC 7, [1988] RTR 298.
[33] ibid 300-301.

> inferences he is prepared to draw he is satisfied that negligence has been established.

[48] It is apparent from this statement by the Privy Council, which is equally apparent from the statements cited above, that there is no legal burden on the defendant to disprove the claimant's case because *res ipsa loquitur* does not reverse the burden of proof. *Res ipsa loquitur* allows a claimant to establish a prima facie case from which the court can infer that a defendant was negligent.

[49] In our view, this is the principle which both the trial judge and the Court of Appeal followed. At [116] and following of his judgment, the trial judge stated:

> In this case the facts relating to why the marble fell were, and are clearly within the knowledge of the defendant. There was therefore, a responsibility that fell to the defendant to adduce evidence that the marble fell through no negligence on its part …
>
> [117] Remarkably, the defendant in whom the knowledge resides, claims that the claimant has failed to prove how the accident occurred and therefore she was unable to discharge the burden of proving negligence. I am of the view that the evidential burden had shifted to the defendant to adduce evidence that no acts or omissions of itself or its employees or agents were responsible for the accident. On the facts it manifestly failed to do so.
>
> [118] I reviewed the cases submitted by both counsel and found them to be helpful. However I consider that the absence of an explanation for the fall of marble was perhaps the most significant characteristic of the facts of this case. The cases provided did not address this aspect of the case which was addressed in the cases cited herein [(by the judge himself)] under the rubric: 'Res ipsa loquitur' and are but a small fraction of such cases in the reports.

[50] The Court of Appeal agreed with the trial judge and noted:

> [17] Once an inference of negligence is drawn from the circumstances of the accident, the evidential burden shifts to the defendant to provide a reasonable explanation as to how the accident occurred without any negligence on his part: Clerk and Lindsell on Torts (20th ed) at paragraph 8-176.

> [18] As the trial judge pointed out, the appellant failed to provide evidence as to the cause of the marble falling, and failed to provide evidence that its maintenance procedures were carried out, specifically with respect to the marble installations in room 417.
>
> [19] In our view, the trial judge was correct in observing the facts of this case lend themselves to the inference of negligence being drawn.

[51] These statements make it plain that the courts below were not seeking to place the legal burden on the appellant to disprove the respondent's case. The principle on which those courts were proceeding was that *res ipsa loquitur* does not reverse the burden of proof. *Res ipsa loquitur* allows a claimant to establish a prima facie case from which the court can infer that a defendant was negligent. If the defendant adduces no evidence to show that it acted reasonably, the claimant will succeed. In other words, the legal burden of proof never shifts to the defendant and the case is always the claimant's own to prove. However, if the facts as pleaded by the claimant invite an inference that the defendant was negligent, there is a common-sense expectation that a defendant who has evidence to rebut the inference will adduce it.

Employers' Liability

[52] We turn to addressing grounds (h) and (i) in the appellant's Notice of Appeal which are listed in its written submissions under the rubric 'Errors of Law'. These grounds are to the effect that in determining whether Sandy Lane was negligent, the Court of Appeal failed to consider the standard of care required by an employer in providing a safe place of work and a safe system of work, and the element of foreseeability and likelihood of harm. It is to be remembered that in its Notice of Appeal to the Court of Appeal, the appellant challenged the trial court's decision on six grounds. The notice did not identify the standard of care required by an employer or the foreseeability and likelihood of harm as holdings of law which the appellant was challenging. Similarly, none of the six grounds urged the Court of Appeal to review errors of law relating to the trial judge's

consideration of the standard of care required by an employer or the foreseeability and likelihood of harm. Aside from its assertions that the case was decided on matters not pleaded or raised and that the decision was against the weight of the evidence, the appellant's singular focus was the trial judge's application of *res ipsa loquitur*.

[53] It is undisputed that it is not permissible for an appellant in an apex court, such as this Court, to raise an issue that was not appealed against in the Court of Appeal. This is because of the principle that appeals to this Court are limited to issues raised in the lower court and that new issues cannot be introduced before this Court unless compelling reasons are shown to do so. No such reasons have been shown by the appellant. In any event, the judgment of the Court of Appeal suggests that that Court did not find any egregious errors of law or fact in the trial judge's decision on the standard of care required by an employer or the foreseeability and likelihood of harm compelling that Court to disturb the trial judge's decision. On the contrary, the Court of Appeal appears to have upheld the trial judge's treatment of these issues.

[54] At [7] of its judgment, the Court of Appeal referred to the trial judge's treatment of the standard of care owed by an employer. The Court of Appeal stated that:

> [i]n coming to the conclusion [that Sandy Lane breached its duty as employer to provide a safe place of work], the judge noted that an employer has a duty to take all reasonable precautions to ensure the safety of the employee. The employer must provide a safe system of work and a safe place of work and not expose the employee to unreasonable risk.

No issue can be taken with that characterisation of the employer's relevant duty of care.

[55] The Court of Appeal noted that the High Court found, based on the expert evidence adduced and Sandy Lane's implementation of tapping after the incident, that it did not take all reasonable precautions to ensure the respondent's safety. A

reasonable man could also foresee that an employee could suffer injury as a result of his employer's failure to take those reasonable precautions.

Overturning Concurrent Findings of Facts

[56] In its written and its oral submissions before this Court, the appellant addresses six grounds of appeal under the heading 'Misapprehension and Errors of Fact'. With regard to these, the appellant argues that the Court of Appeal was plainly wrong in upholding the trial judge's findings of fact which were erroneous and against the weight of the evidence. The appellant argues further that the Court of Appeal erred in failing to consider and address the trial judge's contradictory findings of fact regarding the cause of the marble separating from the door frame. In some ways, this appeal comes very close to seeking to have this Court retry the case, as it were, to give the appellant a third opportunity to persuade a court to take a view of the facts favourable to them. Put in legal language, the appellant is essentially requesting this Court to review the concurrent findings of fact of the courts below.

[57] This Court's precedents firmly establish that, generally, it is only in exceptional circumstances that this Court will review concurrent findings of fact of the courts below: *Ramlagan v Singh*[34] (Nelson J). The principle in *Ramlagan* was affirmed by Anderson J in *Ramdehol v Ramdehol*[35]. He explained what was meant by exceptional circumstances as follows:

> When we speak of exceptional circumstances, we mean cases including those where this Court is satisfied that: a. there was a miscarriage of justice; b. any advantage enjoyed by the trial judge, by reason of having seen and heard the witnesses could not be sufficient to explain or justify the judge's conclusion; c. the reasons of the lower courts are not satisfactory; d. there is a lack of clarity and conflicting findings of fact; or e. there is a lack of any evidential basis.

[34] [2014] CCJ 5 (AJ) (GY), GY 2014 CCJ 2 (CARILAW).
[35] [2017] CCJ 14 (AJ) (GY).

[58] It is clear from Anderson J's explanation that this Court's general rule of deference to concurrent findings of fact of the lower courts is to be strictly applied, at least in concurrent findings of primary facts. These principles were recently re-affirmed in *Apsara Restaurants (Barbados) Ltd v Guardian General Insurance Ltd*.[36]

[59] It follows from the foregoing that where, as in this case there are concurrent findings of fact, this Court will only overturn them in the exceptional cases where the appellant has shown that there has been some miscarriage of justice or violation of some principle of law or procedure. In our judgment, the appellant has not met this threshold. That is, Sandy Lane has not persuaded this Court that there is an exceptional feature of this case that causes the decisions of the High Court and Court of Appeal to amount to miscarriages of justice or decisions based on violations of principles of law or evidence.

[60] This disposes of the appellant's appeal under 'Misapprehension and Errors of Fact'. We will nonetheless address some of the 'Errors of Fact' claimed by the appellant.

[61] The appellant contends, inter alia, that there was no evidence led of overseas experts visiting its premises after the incident. The appellant's witness, Joanne Roett, testified that the Engineering Department took the lead in doing a post-mortem analysis of the incident that occurred on 4 December 2010. She also testified that there would have been a meeting with the General Manager, Human Resources and herself to review a security report. She stated that there would also have been a meeting with Engineering to review the room and corrective actions, and what might have caused it to occur. She confirmed that external contractors were brought in to assess the marbling of the room. She conceded that they may have provided an analysis as to what they found but stated that she did not remember. Given this, we agree with the respondent that the trial judge's

[36] [2024] CCJ 3 (AJ) BB, BB 2024 CCJ 1 (CARILAW).

characterisation of the external contractors as 'overseas experts' could scarcely be a reason to overturn his decision.

[62] Next, the appellant contends that the Court of Appeal erred in upholding the trial judge's findings that there were similarities in the evidence of the parties' respective expert witnesses. In this regard, Doran Prescod, the respondent's expert witness, opined that the appellant ignored the signs that preceded the incident on 4 December 2010. Such signs included movement of the marble which is called lippage, and the grout line coming down. Miles Weekes, the appellant's expert witness, expressed the opinion that lippage could only occur at a joint and is more applicable to a scenario where there are lots of joints, for example, with tiles. Nonetheless, in his description of the placement of the marble around the door frame, he acknowledged that there were at least two joints where two vertical pieces met one horizontal piece. Additionally, both witnesses testified that marble was a heavy material requiring strong adhesives to connect it to the structure. This was a sufficient basis on which the trial judge could determine that while Ms Prescod's theory as to how the incident occurred was flawed, there was still some element of validity to her views on lippage. Thus, the Court of Appeal did not err in upholding the trial judge's findings.

[63] The appellant's evidence was that routine inspections were carried out as part of its system checklist of work and those inspections were done in accordance with a checklist. Although the appellant contended that the requirements to tap the marble and check the grout were always a part of its system of work, it did not deny that those requirements were only added to the checklist after the incident on 4 December 2010. Therefore, it was open to the trial judge to reject the appellant's assertions that it had always employed such checks and procedures. It was also open to the judge to infer that whatever cause was determined after the investigation into the falling marble, it had something to do with movement of the marble and disintegration of the grout. Equally, he could infer that the requirements to tap the marble and check the grout were prompted by the

discovery associated with the investigation as to why the marble fell. In the absence of a valid reason why the learned judge's findings or inferences should be overturned, the Court of Appeal rightly upheld them.

[64] The appellant contends that the Court of Appeal erred in failing to consider and address the trial judge's contradictory findings of fact in the proceedings, namely, that it discharged its duty as an occupier but breached its duty as an employer. The duty of an occupier is captured in s 4(2) of the Occupiers Liability Act which states that '[t]he 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.' Section 4(6) of that Act provides that:

> [w]here damage is caused to a visitor by a danger due to the faulty execution of any work of construction, reconstruction, demolition, maintenance, repair or other like operation 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.

It appears, therefore, that the statute itself acknowledges that in certain circumstances, an occupier's duty can devolve to a third party and the occupier is absolved from liability if he can show that he acted reasonably in such devolution.

[65] The situation is otherwise for an employer whose common law duty to an employee is personal and non-delegable. It was, therefore, open to the trial judge and the Court of Appeal to conclude that the appellant failed to discharge its duty to the respondent as her employer, notwithstanding that it was successful in its defence as an occupier. The appellant, as an employer, cannot be heard to say that it acted reasonably in entrusting the installation of the marble to an independent

contractor for although it delegated the duty to another, it remained liable for the negligent performance of that duty.

[66] For the foregoing reasons, this Court made the orders set out at [3]. In particular, we considered that, as this accident occurred in 2010 and the Appellant has been out of pocket since then, the Court should exercise its power[37] to order an immediate interim payment. We trust that the parties can agree on the full quantum of damages payable to the Appellant, failing which the High Court must swiftly adjudicate on the same.

SAUNDERS P:

Introduction

[67] It was wryly suggested, over 100 years ago,[38] that had the phrase *res ipsa loquitur* not been expressed in Latin, no one would have considered the concept that the phrase captures to be a legal principle.[39] Such is the reverence accorded to a language that has not been used in everyday conversation since about the 7th century.

[68] It is one thing to elevate to a principle a phrase that merely encapsulates an instance of circumstantial evidence. Unfortunately, application of the maxim has often engendered difficulties. It is anyone's guess whether the confusion is also a consequence of the Latinism or the fact that the maxim is utilised almost exclusively by lawyers and judges.

[69] In the course of the first instance trial of this case, there was no mention of *res ipsa*. It was not referred to in the pleadings of either party nor was any reference

[37] Pursuant to r 17 of the CPR and s 11 of the Caribbean Court of Justice Act, Cap 117.
[38] *Ballard v North British Railway Co* [1923] SC (HL) 43.
[39] ibid at 56 (Lord Shaw).

made to it either during the taking of evidence or in the oral or written submissions made by counsel. Despite this, the trial judge took it upon himself, in his judgment, not merely to allude to the Latin expression, but to go further. He ostensibly deployed the maxim to form the fundamental premise for what he stated was an alternative basis for deciding this case in favour of Mrs Chase, the claimant. Mrs Chase had brought the action in negligence against her employer, the prestigious Five Diamond Sandy Lane Hotel. Whether the judge was entitled, and if so, right, to take this bold step has been perhaps the main complaint of counsel for the hotel both before the Court of Appeal, which dismissed the appeal, and before this Court. The time, energy and passion devoted by counsel to the judge's decision to apply *res ipsa* have almost obscured the fact that, even if the judge was wrong to do as he did, that was not the main or only ground on which he held for Mrs Chase against the hotel. I associate myself with the judgment of my brother, Burgess J and I agree that the appeal should be dismissed.

The Accident

[70] The case arose out of an unfortunate accident at the hotel. Mrs Chase, then Ms Eversley, had been employed there as a housekeeper from November 2006. On 4 December 2010 she was at work in guest room 417 preparing the room for the arrival of a guest. While bending to clean an internal door, she heard a loud, cracking sound from above. She looked up and saw marble falling down upon her. Instinctively, she raised her right arm to protect her head. Marble is, after all, a heavy stone. The marble struck her on the forearm and shoulder causing injury and subsequent loss. She filed suit against her employer on 18 February 2013.

[71] The legal proceedings before us did not concern themselves with the nature and extent of her injuries because, at the outset of the hearing on 19 June 2019, counsel and the judge agreed that the trial should be split, that is, that it should initially proceed only on the issue of the hotel's liability, if any, to Mrs Chase. If it was adjudged that the hotel was not liable, then that would be the end of the matter. If it was ultimately determined that the hotel was in fact partly or wholly

liable, then the parties would make every effort to agree on the damages due to Mrs Chase, failing which they would return to court for that issue to be adjudicated.

The Pleadings

[72] The case for Mrs Chase had two prongs. Firstly, it was claimed that the accident was caused by the negligence of the hotel, its employees or agents. Mrs Chase asserted that they were negligent by failing to provide her with a safe place of work that ensured her safety and did not expose her to the risk of injury from falling marble. The hotel's management, she claimed, negligently caused or permitted 'the ceiling' to be or become or to remain in an unsafe and dangerous state. She also claimed that, in the first place, the hotel failed to engage competent contractors effectively to supervise and install the marble. Secondly, it was alleged that the hotel was in breach of the common duty of care owed by virtue of s 4 of the Occupiers Liability Act, Cap 208.

[73] The hotel denied that the accident was caused by its negligence or that of its employees or agents. The hotel also denied that it had failed to meet its obligations under the Occupiers Liability Act. The hotel claimed in its pleadings that Mrs Chase was wholly or partly to blame for her injuries by failing to take appropriate steps to secure her own safety and neglecting to observe the falling material. The hotel also defended itself on the ground that the door and its surrounding marble architraves and linings were installed by reputable independent contractors; there was similar marble detail throughout all the rooms of the hotel; there were no previous incidents of this nature either before or since; the hotel's premises were regularly and scrupulously inspected and maintained; and management could not have reasonably foreseen the misfortune that befell Mrs Chase.

The Evidence Led

The Witnesses for the Claimant

[74] There was nothing remarkable about Mrs Chase's evidence. She alone was in the room when the marble fell on her. The fact that marble, applied to the room's doorway, had collapsed could not be disputed. The evidence of fallen marble was palpable. The hotel had photographs of the scene. There was some ambiguity in Mrs Chase's recollection about the layout of the room, the precise description of the door she was cleaning at the time and how exactly the marble was hung, but these matters did not detract from what she said occurred. While cleaning a door in a guest room, marble adhered to or on or surrounding a door suddenly and inexplicably began falling down on her, causing her to shield her face in the course of which she was injured. Nothing contradicted that account, and it is not to the hotel's credit that the suggestion was made that she herself caused or contributed to the regrettable accident.

[75] Mrs Chase's husband also gave evidence. He too was employed by the hotel. He was a floor care attendant. It is pure coincidence that part of his responsibilities at the hotel included cleaning, polishing and maintaining in pristine condition the abundant marble floors and marble features at the luxury resort. Much of his witness statement was more relevant to the issue of the impact of the accident on him and more so on his wife. In his oral testimony, however, counsel for the hotel was able to elicit, while cross-examining him, evidence that appeared to support the hotel's assertions that it has a careful, methodical approach to the maintenance of its plant, furnishings and safety systems.

[76] Mr Chase conceded, for example, that the hotel employs engineers, Information Technology ('IT') personnel and supervisors whose job it is, among other things, to check on the rooms. The hotel's duty managers also do spot checks in the rooms. The hotel provides 'Champion Employee Performance Development Appraisal Forms' that encourage staff to excel by letting them know how well

they are doing. One of the key tasks of housekeeping staff is to report maintenance defects. Periodically, the hotel also engages 'mystery shoppers', that is, professionals who pretend to be paying guests but whose mission is actually to covertly assess and evaluate the performance of staff, the condition of the rooms and, generally, to appraise and report on the standards maintained at the world-class facility.

[77] Mr Chase agreed with the hotel's counsel that hotel rooms undergo 'a full in-depth maintenance' over a period of three to five days as part of the hotel's care programme, but he later qualified his answer by saying that he was aware that only *some* of the rooms were placed in that programme and he could not say exactly for how long was the period.

[78] When he was re-examined, Mr Chase clarified some of the above concessions. As far as he was aware the 'mystery shoppers' were mainly concerned with how paying guests were treated by hotel staff and with the standards maintained in the rooms and in the hotel generally. According to him, the engineers went into the rooms to check the phone lines, the lights and light fixtures, the paint in the room, scuff marks, bathroom and toilet fixtures, and the plumbing and appliances in the room. The IT personnel checked on the phones, the televisions and TV remote devices and the doorbell. The supervisors checked to see that the housekeepers were doing a proper job; that, among other things, the rooms were spotlessly dusted and the beds well made. The duty managers checked up on pretty much the same things as the supervisors did and ensured that the supervisors were doing *their* job satisfactorily. At the end of the day, Mr Chase's evidence may have confirmed the hotel's thorough and conscientious approach to normal aspects of hotel maintenance and safety but few, if any of his answers, taken in the round, ultimately had significant relevance to any specific steps taken by the hotel to guard against the specific risk of marble falling from the hotel's walls or door linings.

[79] Mrs Chase's final witness was Ms Doran Prescod. After lengthy argument and back and forth discussion, Ms Prescod was grudgingly accepted by counsel for the hotel, and ultimately approved by the trial judge, as having special knowledge, skill and experience in the restoration and maintenance of marble. Her opinions were therefore considered in evidence.

[80] The problem with Ms Prescod's evidence was that she had not visited the hotel and seen for herself the layout of the room and the nature and precise location of the marble detail in question. So, despite the confidence she professed in her witness statement that she had 'a clear picture and understanding of where the marble is located and the set up in the room where the Claimant was injured', the truth is that her understanding was imperfect. It was based on accounts gleaned firstly from the witness statements of the hotel's witnesses and secondly, from discussions with Mr and Mrs Chase each of whom, in giving their testimony, struggled to give perfect answers about these details. As an aside, I would have thought that, ahead of preparing her expert's report, Ms Prescod would have requested and the hotel would have facilitated a visit to the hotel room in question so that she could see these things for herself, but that evidently did not occur.

[81] The consequence of all this was that Ms Prescod was unaware that the marble that fell on Mrs Chase was part of the architrave and lining *surrounding* the door, that is on the doorway, and not actually affixed to that part of the door that moved as the door was opened and shut. Nor was she aware that there were three large slabs of marble in question as distinct from a series of marble tiles that could range in size from 12 to 24 inches. These gaps in her understanding implicated some, albeit not all, of the opinions she gave and the theories she provided for what may have caused or contributed to the accident. For example, her hypotheses that '[e]very time the door is opened, the marble is being disturbed' and 'the constant pulling and tugging of this door would have created stress on the above marble…' could not be sustained as a contributing cause of the accident.

[82] It is only fair to say, however, that some of the opinions Ms Prescod gave were relevant and found to be useful to the trial judge. For example, she stated that with marble it was important occasionally, 'to examine the grout to see if there has been disturbance. If there has been, that would be an indication of movement however slight of the marble.'

She also noted that:

> … marble can 'walk forward' in the sense that the top marble moves however slightly forward over the bottom tile. When this happens, in the construction industry this is known as a 'lip'. This is one clear indicator of movement and the grout line will be disturbed. The process by which the marble finally falls off occurs over a period of time, could be months…

She reiterated this in cross-examination, stating that once marble starts to lip and is ignored, 'it would take maybe from that on, to about three months, sometimes or even more…'.

[83] In an effort to undermine her views about possible lippage of the marble in question in room 417, it was strenuously suggested to her by the hotel's counsel that, instead of marble tiles, there was 'a single monolithic' piece of marble lining the door and hence no possibility whatsoever of noticing any lipping. It turned out that this suggestion of counsel was equally erroneous because the hotel's expert later clarified that there were in fact three separate pieces of marble that surrounded the door, namely a lintel or horizontal piece and two parallel vertical pieces on either side of the doorway stretching respectively from the floor upwards. These vertical pieces met the lintel and so, it stands to reason that there would at least be grout lines between the top of each of them and the lintel.

The Witnesses for the Hotel

[84] The hotel called two witnesses. The first was Ms Roett, the Director of Finance, Risk and Compliance at the hotel. She has been employed at Sandy Lane since 2001 and was involved in project meetings, renovations, maintenance, engineering and all aspects of the hotel. In 2010 (the accident occurred in December 2010) she was charged with oversight of the engineering and IT departments as part of her role in Risk and Compliance. As such, she herself used to conduct inspections in the rooms.

[85] Ms Roett outlined in her witness summary that the hotel underwent redevelopment between 1998 and 2003. According to her, the redevelopment project was managed by the highly acclaimed and internationally experienced companies Brown and Root Building Co and CRSS Constructors Inc. The hotel's marble architraves and linings were supplied by the equally reputable Architectural Craftsman USA and the marble was installed by the world-renowned firm Al Habtoor from Dubai. There are over 700 doorways with marble linings at the hotel and, according to her witness summary, there had been no incident before or since of marble falling from the hotel's doorways. The rooms are regularly inspected by the hotel's engineering department and, as part of their routine inspection, the marble pieces in all the rooms are checked to make sure they are not cracked or loose or have moved away from the grout. This check, Ms Roett stated, included tapping the marble to ensure that it did not shift or that a hollow noise was heard. The evidence contained in the last two sentences ultimately assumes much significance.

[86] In her oral evidence-in-chief Ms Roett reiterated and reinforced the points elicited from Mr Chase regarding the thoroughness of the maintenance and safety mechanisms of the hotel. She elaborated on the September care programme by indicating that, among other things, checks are made on the woodwork and on the marble. According to her, this care programme is 'basically a very deep, intensive review of each guest room'. She also stated that the 'mystery shoppers' are not

only focused on the quality of the service guests receive but also on the hotel's infrastructure and cleanliness. As far as she was concerned, Sandy Lane had taken all reasonable steps to ensure that the room was safe for their guests and employees.

[87] Ms Roett had attached some exhibits to her witness statement. One of these was titled 'Sandy Lane Hotel Maintenance Checklist Guest Rooms'. This was a form that was used by the personnel in the engineering department. Ms Roett initially said that the form was a mere guideline to be used when checking the rooms. But later, she stated that the relevant personnel were required to complete all of the checks on the list. She was asked whether the checklist included any tapping of the marble. She said no, it did not.

[88] The hotel's expert, Mr Miles Weekes, had said in his witness statement that once installed, marble architraves and linings do not require further maintenance and that, in his opinion, the incident with Mrs Chase could not have been anticipated. Counsel for Mrs Chase therefore took up with Ms Roett the rationale for having her engineers tap the marble. There was the following exchange:

> Counsel: You said our rooms are regularly inspected by our engineering department and as part of their routine the marble pieces of all the rooms are checked to make sure they are not cracked or loose or have moved away from the grout. This says you tap on the marble to make sure that they do not shift or a hollow noise is heard. Now, you obviously do some form of maintenance on the marble, you agree with that?
>
> Ms Roett: Yes, Sir
>
> Counsel: But you saw what Mr Weekes said
>
> Ms Roett: Yes, Sir
>
> Counsel: Okay. So therefore, in doing your maintenance of the marble, there is something you are trying to prevent from happening. Is that not correct? You're checking it, you're

tapping it, to ensure that they do not shift or a hollow noise is heard. What are you trying to achieve by tapping it.

Ms Roett: It is planned preventative maintenance, so you inspect. You have to inspect everything…

Counsel (after some exchanges with counsel for the hotel): Yes, but the specifics of the maintenance include tapping the marble to ensure that they do not shift or a hollow noise is heard. That's what you said

Ms Roett: Yes, Sir

Counsel: Yes. So what are you trying to find out from that?

Ms Roett: You want to ensure – the team wants to ensure that nothing has occurred and that they conduct their checks to ensure that if something has occurred, they can address it.

[89] This was followed shortly afterwards by the following exchange:

Counsel: Put it this way, if there was some re-grouting that had to be done, that would be done by the engineering department. Is that not correct?

Ms Roett: *Correct, Sir*

Counsel: Your involvement would come in at the point where it's $50 to have it done

Ms Roett: When I was not responsible for engineering. Correct, Sir

Counsel: But the point is that the technical repair work would be done by engineering

Ms Roett: Yes, Sir

Counsel: Correct, that's all I wanted. And who would have instituted the use of tapping the marble, to ensure that it did not shift, or a hollow noise is heard? That would have been an initiative taken by the Engineering department?

Ms Roett: Yes, Sir

Counsel: And do you - well I do not know the answer to that so I would ask _____. They would also, once they have moved away from the grout, as you said, ensure that they are not loose or have moved away from the grout. They would also do the corrective work.

Ms. Roett: 'They' meaning who, Sir?

Counsel: Sorry?

Ms. Roett: Who is they?

Counsel: The engineering department. So, in other words, according to your statement, in all the rooms are checked to make sure that they are not cracked, or loose, or have moved away from the grout. If indeed any movement has occurred, the remedial work would be done by the engineering department.

Ms Roett: Correct, Sir

[90] Counsel for Mrs Chase proceeded to engage Ms Roett in a set of exchanges which again must be quoted at length since, fundamentally, this is a case about inferences and whether it was reasonable for the judge to have drawn certain inferences particularly from the testimony given by Ms Roett:

Counsel: Now when the event occurred, on the 4th of December, 2010, you are saying that this is the first time any such calamity occurred _____ at Sandy Lane. That correct? That's what you're saying?

Ms Roett: Yes, Sir

Counsel: And, did you carry out- was a post mortem done for Dwight Kirk? ['Dwight Kirk' must have been an error by the transcriber. It could perhaps have been 'why it occurred', but we don't know]

Ms Roett: Postmortem of why? yes, there was a full review, Yes, Sir

Counsel: There was a full review

Ms Roett: Yes, Sir

Counsel: And you were part of the review team?

Ms Roett: I would have gotten the security report, ‘cause they –

Counsel: You would have gotten the security report?

Ms Roett: Yes, Sir

Counsel: Very well, if they got the security report. Well, if you thought this was a security issue?

Ms Roett: No, you would have to understand the process at-

Counsel: Alright, well fair enough, fair enough. This an issue involving construction/maintenance

Ms Roett: Yes, Sir

Counsel: Correct. So which department took the lead in doing the post mortem analysis? I used the word ‘post mortem’ ____ to mean after the event that's what that means
So, which took the lead in doing the post mortem analysis

Ms Roett: That would be Engineering

Counsel: Engineering

Ms Roett: Sir

Counsel: And I'm sure they identified a cause for why this marble came down, but according to Miles Weekes the *memory is not coming up*? They said that it *caved up*. But I'm sure they identified a cause for it

Ms Roett: I don't recollect Sir, but I'm sure they did. No

Counsel: _____ you do not recollect what they said. But this is a dramatic event in the history of Sandy Lane, ma’am

Ms Roett: Agreed, Sir

Counsel: This is a one off –

Ms Roett: Yes, Sir

Counsel: Never happened before or subsequently

Ms Roett: Correct, Sir

Counsel: Would you tell this court that you do not recall what was the real reason the post mortem – found in the post-mortem why it came down? You don't recall?

Ms Roett: No, Sir. No, Sir

Counsel: Ms Eversley pull it down?

Ms Roett: Pardon me?

Counsel: Was she responsible for pulling it down – the ti-

Ms Roett: For pulling it down?

Counsel: Well, causing it to fall then

Ms Roett: I do not know, Sir

Counsel: So it came down, there was a post-mortem evaluation done, and you do not recall the reason why it came down?

Ms Roett: The technical reasons? No, I do not

Counsel: Did you enquire at any time, for the reasons why it came down?
[whispering]

Ms Roett: I am sure I would have done, Sir

Counsel: I'm sure you did and subsequently your memory became deficient

Ms Roett: Sorry?

Counsel: And subsequently, your memory became deficient, so you don't remember what you were told

At which point counsel for the hotel interjected. But after the interjection counsel for Mrs Chase resumed his line of questioning to Ms Roett who, at the time of the full review in question, had oversight of the engineering department.

Counsel: …. Was there an interdepartmental meeting at which you were present, that went through what really happened in 417?

Ms Roett: Hmmm, I'm thinking, Sir

Counsel: Well, we all do

Ms Roett: Hold on, sorry?

Counsel: We all do think

Ms Roett: There would have been a meeting to discuss what happened in 417-

Counsel: Yes

Ms Roett: Outside of the meeting- outside of the meeting with general manager- I thinking, sorry – general –

Counsel: Outside of the meeting with general manager –

Ms Roett: There would have been a meeting with general manager, HR and myself, to review the security report-

The Court: You said general manager …?

Ms Roett: HR director, and myself, to review the security report

Counsel: Good.

Ms Roett: There would also have been a meeting with engineering, obviously to review the room and corrective actions, and what may have caused it to occur

Counsel: _____, I accept all of that, but you still don't remember the real causes of why the marble came down

Ms Roett: I don't think – yeah – I don't think – yeah, I don't – I do not, Sir

Counsel: You don't. Were you part of the programme, part of the planning, in a broad sense, that was involved with the re-tiling, re-marbling of the room [mumbling] when the room was being re-marbled? Cause if the marble came down, you would have had to put back up marble.

Ms Roett: Of course, Sir, Yeah

Counsel: And were you given a report after it had been – I'll use the word 'tiled' in the neutral sense – after they had been re-marbled/tiled? Were you given a report as to when the works were completed?

Ms Roett: No, no, Sir

Counsel: How long was the room out of commission for after the incident

Ms Roett: I don't know, Sir

Counsel: Were any external consultants brought in to look at this miraculous event, well it's the first time it ever happened, so … were any external consultants brought in for that?

Ms Roett: Consultants or contractors?

Counsel: I use the word loosely – consultants/contractors

Ms Roett: No I just want to be sure. Contractors – Yes, Sir – would have been brought in

Counsel: And they were brought in to assess the marbling of the room?

Ms Roett: Yes, Sir

Counsel: But they gave no – provided no analysis to you as to what they found?

Ms Roett: They may have? But I honestly – I don't remember, Sir

Counsel: _____just now

Ms. Roett: They would have to someone in engineering department, for sure, but I do not –

Counsel: I know - and they are part of the records that you would have been privy to, ma'am?

Ms Roett: Yes

Counsel: Sure, I thought so. Because in your statement you had said that you are privy to the things

Ms Roett: Yes, I am

Counsel: Good. Did you read that report at some time, ma'am?

Ms Roett: I can't say, Sir

Counsel: You can't say. It's the memory again.

Ms Roett: No, not memory. I - you want me to answer honestly and definitively, so - I'm not going to –

Counsel: Yeah

The Court: Said you can't remember? That's what you said?

Ms Roett: Yes, sir

Counsel: You read it, but you can't remember its details

Ms Roett: no, no, no, no, mo, [sic] No, no, no, no, no

Counsel: You never read it

Ms Roett: No, no, no, no. I said I can’t recall.

The Court: Can’t recall whether you read it?

Ms Roett: Yes, I don't recall if I read a report or not. Or if I sat in a meeting and it was - I do not remember.

Counsel: You do not remember if you read the report. Let’s start with that. That’s a fact.

Ms Roett: Correct

Counsel: But you agree a report was done

Ms Roett: I agree a report should have been done

Counsel: Oh, no problem. It should have been done, but you don’t know if it was done.

Ms Roett: I don’t know, Sir

Counsel: And in the history of Sandy Lane, in the time you worked there, this is the first time an event like this occurred.

Ms Roett: Yes, Sir

Counsel: And this is an unusual event

Ms Roett: It is, Sir

Counsel: Yes. An unusual event by its very nature, sticks in your head, because it is out of the blue - according to your statement.

Ms Roett: Yes, Sir

Counsel: Yes, and, remember what you said at your opening ma'am - You are in charge of finance and compliance, engineering and IT

Ms Roett: At a point in time, Sir

Counsel: At that point in time

Ms Roett: At a point in time

Counsel: At a point in time. Does the reporting on a dramatic event like this, not work its way up right up to you?

Ms Roett: Yes, Sir

[91] Ms Roett later testified that *her* report to her superiors about the accident, given very shortly after the incident, was submitted in writing. Counsel continued to press her about whether that report of hers spoke to the cause of the falling of the marble. There followed the following exchange:

Ms Roett: Well, the Report that I am speaking of that I would have sent to my principals would be the initial report based on what it was, to them at that point in time

Counsel: I missed –

Ms Roett: So, I would not know the cause at that point in time

Counsel: But you subsequently learnt the cause

Ms Roett: I – pretty – I

Counsel: Yes

Ms Roett: Would hope so, yeah

Counsel: … You hope that you learnt the cause, but you've forgotten it right now?

Ms Roett: I cannot remember right now, Sir

[92] When further pressed, Ms Roett stated that she was not aware whether, since the accident, any remedial work had been done on the marble architraves of any of the other rooms at the hotel. She conceded that such work may have been done, but she, the Director of Risk and Compliance at the hotel, with oversight of the engineering department, was blissfully not aware. She did offer though that since the accident there has been an enhanced awareness of the need to look at the marble. The exact exchange is noteworthy because of the further inferences one can draw from it:

Counsel: Well, since the tile came down, is there an enhanced awareness at Sandy Lane – of the need to look at the marble? Since the marble came down, sorry. The engineering department keeps a sharper eye on the marble at Sandy Lane?

Ms Roett: That's one of the points added to the checklist, Sir

[93] In re-examination, Ms Roett insisted that the accident was unforeseeable and that nothing could have been done to prevent it.

[94] The expert retained by the hotel to present evidence on its behalf was Mr Miles Weekes, a chartered quantity surveyor and construction project manager with over 35 years' experience in the construction industry in Barbados. In his Witness Statement, Mr Weekes affirmed that Brown & Root Building Co, CRSS

Constructors and Al Habtoor Marble were all internationally acclaimed firms, selected by the hotel through competitive tenders and it was reasonable for the hotel's management to rely on their skill and expertise. According to him, once marble architraves and linings were installed, they did not require further maintenance. He did not believe that Mrs Chase's incident could have been anticipated. He was unaware of any previous incidents involving the marble architraves at the hotel.

[95] In his examination-in-chief, Mr Weekes amplified upon his witness statement. He clarified the distinction between doors and doorways. He noted that there were over 700 doorways in the hotel and that there was marble on all of them. He explained the nature of and difference between an architrave and a lining. It was his opinion that the hotel's management acted reasonably in entrusting Al Habtoor with the job of installing the marble features found on the premises. It was his opinion that once marble is installed:

> …[I]t doesn't inherently need any further work to it, any work that's done to it is really only to maintain its look, in terms of its polish. The adhesives that are used to glue the marble to the substrate are high quality, high strength adhesives which are expected to last the lifetime of the building. No one has a course of regular maintenance, goes and removes the marble, replace the glue and stick it back on. That is not done. It is expected that that piece of marble would stay in place for a considerable length of time. So, when I say it does not require further maintenance, I am referring to that preventative maintenance process. There is no preventative maintenance required on a marble lining or an architrave. Yes, you would clean it from day to day to remove dust. Yes, you might periodically shine it up, polish it up, to get its lustre back, but there's no requirement to remove it or replace it or replace the adhesives that's holding it.

[96] Immediately having said the above, Mr Weekes was referred to Ms Roett's statements about the hotel's rigor in inspecting the grout and tapping the marble. He then offered the following in response:

> Yes, yes, this is routine maintenance which requires looking at the product and if you are – if you see anomalies obviously you would want to take

> action, but it is really an inspection process. So, checking that the grout hasn't fallen out and that sort of thing. Tapping would give you a hollow sound which might suggest that it's moved away from its backing.

[97] Mr Weekes went on patiently to explain that the doorway from which the marble fell, led from the hallway to the bedroom. On each side that doorway faces, three pieces of marble hung, like an inverted 'U'. On the hallway facing side, from the floor to the top there two separate pieces about three-quarters of an inch thick, probably about three to four inches wide slabs adjacent to each other. The third piece of marble on the hallway facing side would be the lintel, which runs across the top. The only 'join' would be where the lintel met each of the two vertical pieces. A similar detail is repeated on the bedroom facing side of the doorway save that on the bedroom facing side there is a fourth piece of marble, with a fancy shape, that is positioned above the lintel.

[98] Mr Weekes was referred to Ms Prescod's views on lipping. His response was:

> …the lipping that Ms. Prescod talks about, I think it's more applicable to a scenario where you have lots of joins, because a lip can only occur at a joint. And as I have said, because you've only got three pieces of marble in the lining, you only have two joints. You also have to remember that this marble is glued to the structure, not in your typical way that you'd see for say, tiling. It's not just a smear of adhesive that is put on the back of the marble. They actually put quite substantial amounts of it because we're talking about marble, which she describes as a heavy stone, but still very delicate. So, it's easy to break when it's in tension, but in compression, it is very, very strong. So, you have to ensure that it is well adhered to vertical and horizontal surfaces, so that it never is brought into tension on its own.

[99] Mr Weekes rightly debunked the hypothesis, proposed by Ms Prescod, that constant opening and shutting of the door could have placed stress on the marble that fell. From him, the Court learned that the marble was not affixed to the door itself but to portions of the doorway that did not move with the door.

[100] In cross-examination Mr Weekes said that he was first made aware of the accident in 2017. To prepare for his role in the trial, he had been provided with 'various documents' relating to the accident including the witness statements of Ms Roett and Ms Prescod. He stated that he:

> …saw an accident report which would have been written at the time of the accident…documents relating to the cleaning of the room, what housekeepers would have seen. What would've been given when they went into a room.

[101] Attached to the accident report written at the time of the accident, which was 'no more than one page, probably two', were photographs which were taken just after the accident. Mr Weekes was not provided with the post-mortem security report Ms Roett knew she received but of whose contents she now had no recollection. It is also curious that Mr Weekes did not ask for any reports or material outside of those which were volunteered to him. Among the various documents he was given, he saw nothing that sought to determine any cause for the marble falling and he did not see a report from the engineering department.

[102] After extensive questioning from counsel about the firm Al Habtoor and the period for which properly installed marble should last, counsel got Mr Weekes to admit that the fact that marble in room 417 fell indicated that there was 'some anomaly' and that the anomaly may well be rooted in the quality of the adhesive that was used.

[103] In re-examination, counsel for the hotel attempted to have Mr Weekes place that last answer in context. Mr Weekes' response was:

> So, in general terms, in response to the question that was asked earlier, it could very well be related to the adhesive. In this specific instance, I have to look at what occurred in that vicinity. And bearing in mind that it was one small isolated area. Bearing in mind that the marble on the other side of the said door did not fall and has not yet fallen. I would not draw a conclusion, that the adhesive – the quality of the adhesive used in that particular instance, was in any way defective. Because I – if it was, why

> hasn't it fallen from the other side of the door. I mean, the adhesive they use, you know they don't come in tiny little tubes – you know, these are big drums of adhesive. So, I would think that what you would put up around a door opening, would serve more than one area and I find it difficult to draw the conclusion that it was the adhesive itself. I cannot deny that it fell. I cannot deny that the marble separated from the adhesive, because the pictures show that. But I have difficulty coming to a conclusion that it was the adhesive because it didn't occur anywhere else within that same room, or within the same block.

The Judgment of the Trial Judge

[104] In his judgment the judge first identified three issues for determination, namely:

> 1. Whether Mrs Chase caused or contributed to the cause of the accident;
>
> 2. Whether the hotel has discharged its common duty of care in keeping with s 4 of the Occupiers Liability Act, Cap 208;
>
> 3. Whether the hotel discharged its duty to provide a safe place of work and a safe system of work.

[105] The judge then set about assessing the testimony of the various witnesses. He preferred the evidence of the Claimant's witnesses. He was not at all impressed with Ms Roett and the evidence she gave. He found, and provided abundant justifications for his findings, that:

> [39] …Ms. Roett appeared to be very uncomfortable. Additionally, I found her evidence to be unreliable. At no point in cross-examination, which went on for just over an hour, did she appear lucid, comfortable or believable.
>
> [40] Some of [her] responses to questions were not credible. Other responses suggested an indifference which was, in and of itself, also unbelievable.

[106] The judge arrived at other conclusions, some of them inferences from the evidence given by the witnesses. These included the following:

a) The issue of contributory negligence on the part of Mrs Chase was not at all established.

b) No evidence was led by the hotel with respect to the cause of the collapse of the marble.

c) No evidence was led by the hotel with respect to actual maintenance inspection or upkeep of room 417 specifically, although there was abundant evidence about checklists and the several layers of inspection, maintenance, and practice and procedures generally to ensure high standards at the hotel.

d) Although until 2010, neither Mr Weekes nor Mr Chase was aware of any case of marble falling at the hotel, the judge was not similarly convinced that the same was true in respect of Ms Roett as, in her evidence, she appeared to have left open the possibility that other incidents may have occurred.

e) The hotel did engage reputable contractors, one of whom employed Al Habtoor, who installed the marble.

f) It is unlikely that, prior to the incident in 2010, procedures or checks, such as tapping the marble and/or checking the grout, were done in order to discover whether the integrity of the marble or the grout was compromised. The judge inferred that checks of this nature were instituted *after* the 2010 incident, most likely on the advice of the experts who would have visited Sandy Lane after the incident.

g) Tapping of the marble and inspection of the grout formed part of the revised checklist issued *after* the accident.

The Judge's Resolution of the Issues

[107] Short shrift can be made of the issue whether Mrs Chase caused or contributed to the cause of the accident. As previously stated, there was no evidence of this.

[108] As to whether the hotel discharged its common duty of care in keeping with s 4 of the Occupiers Liability Act, Cap 208, the judge found that the hotel acted reasonably and responsibly, in entrusting the construction of the marble door frame to a reputable independent contractor and, in all the circumstances, the claimant did not establish on a balance of probabilities that the defendant breached

the common duty under the Occupiers Liability Act. No appeal was lodged by Mrs Chase against this finding.

[109] As to the third issue, namely, whether the hotel discharged its duty to provide a safe place of work and a safe system of work, the judge noted that the employer has a duty to take all reasonable precautions to ensure the safety of the employee, to provide a safe system of work and a safe place of work and not expose the employee to unreasonable risk. This, stated the judge, is:

> [99] … a non-delegable duty, and therefore in the context of an independent contractor, it would not be enough to assert that the employer fulfilled his duty by entrusting the task of installation of the marble to a contractor of repute. While the employer can delegate the performance of the duty to others, the employer remains responsible for its negligent performance ...

[110] The judge noted that Ms Prescod had provided an opinion as to the reason for the marble falling. Having not visited Sandy Lane, her theory as to how the accident had occurred was flawed to the extent that she felt that grout was disturbed each time the door in question was opened or shut. However, her comments about failure to observe lippage and/or deteriorating grout lines appeared to be credible explanation for the sudden fall of the marble. The judge accepted her testimony that marble which was compromised due to the application of less than adequate adhesive would likely take some time before it falls and that it was necessary to tap the marble and properly inspect the grout lines. The judge considered that this testimony gave an insight into what could have caused the marble to fall. The judge concluded that:

> [101] The fact that the defendant subsequent to the 2010 incident, added the process of tapping the marble and inspecting the grout as part of its routine inspection, compels the inference that whatever the cause that was determined by the outcome of the investigation into the falling of the marble, it had something to do with the movement of the marble and the disintegration of the grout.

> [102] I have therefore concluded that the claimant has provided enough evidence to prove its case on a balance of probabilities. Moreover, since the defendant has provided no evidence to show that in relation to room 417, it carried out the inspections and other procedures to ensure that the duty to look after the safety of the employees was being observed, it is very easy to find that the case in respect of employers' liability has been established.

[111] The judge could have ended his judgment in favour of Mrs Chase at that point, but he chose to also rest his decision on what he regarded as an additional or alternative basis. He was of the view that the facts of this case lent themselves to the application of the evidentiary rule of *res ipsa loquitur* and that by reason of this Latin maxim there was a presumption of negligence on the part of the defendant which was not rebutted by Sandy Lane who had a responsibility to provide evidence to the contrary.

[112] According to the judge, it having been established that suddenly and without warning, marble collapsed and fell on the claimant, the proof of those facts led to an inference of negligence which the defendant must rebut by evidence that demonstrates that the sudden falling of the marble was not as a result of lack of care on its part. The judge said:

> [108] In the instant case there is no evidence as to how or why the marble fell. Experience suggests that marble will not fall unless there is negligence. The process of inspection and protection of the integrity of the marble is entirely within the control of the defendant. It is my contention that on the facts, it having been established that suddenly and without warning, marble collapsed and fell on the claimant, the proof of those facts leads to an inference of negligence which the defendant must rebut by evidence that demonstrates that it was not as a result of lack of care on its part.

The judge supported this conclusion by reference to *Bennett*[40] and *Pearce v Round Oak Steel Works Ltd.*[41]

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[40] *Bennett* (n 22).
[41] [1969] 1 WLR 595.

[113] The trial judge concluded his remarks on *res ipsa* by stating:

> [117] Remarkably, the defendant in whom the knowledge resides, claims that the claimant has failed to prove how the accident occurred and therefore she was unable to discharge the burden of proving negligence. I am of the view that the evidential burden had shifted to the defendant to adduce evidence that no acts or omissions of itself or its employees or agents were responsible for the accident. On the facts it manifestly failed to do so.
>
> [118] …I consider that the absence of an explanation for the fall of marble was perhaps the most significant characteristic of the facts of this case.

The Appeal to the Court of Appeal

[114] The hotel appealed the judgment of the trial judge. The principal grounds of appeal complained about the judge's decision to deploy *res ipsa loquitur* as an additional or alternative ground for finding for Mrs Chase. The hotel asserted that the trial judge's decision should be reversed because *res ipsa* was not pleaded or raised in the trial; that therefore the hotel was unfairly ambushed; that Mrs Chase had pleaded a cause of the accident and had not proven that cause; that there was no evidence of negligence by the hotel which had acted reasonably in entrusting the installation of the marble to reputable independent contractors; and that the judge's decision was against the weight of the evidence.

[115] In a crisp, lucid judgment authored by Narine JA in which both Belle and Reifer JJA concurred, the Court of Appeal dismissed the hotel's appeal. The Court of Appeal held that:

> [15] "Res ipsa loquitur" does not state a principle of law. It is simply a rule of evidence that may be applied to a set of circumstances from which negligence may be inferred: … It is particularly applicable in cases where the thing that caused the damage is under the management and control of the defendant, and the accident would not have happened without the negligence of the defendant ...

[116] For the above proposition the court cited *Clerk and Lindsell on Torts* (20th edn)[42], *Scott v St Katherine Docks Co*[43] and the statements of Megaw LJ in *Lloyde v West Midlands Gas Board*[44]. The court stated that *res ipsa* is not a fact that must be pleaded. Once an inference of negligence is drawn from certain unusual circumstances, the court stated, 'the evidential burden shifts to the defendant to provide a reasonable explanation as to how the accident occurred without any negligence on his part.' The Court of Appeal agreed with the trial judge that the circumstances here lent themselves to an inference of negligence on the part of the hotel.

[117] The Court of Appeal rejected the submission that the judge was not permitted to consider the *res ipsa* maxim because it had not been pleaded. The court noted that the trial judge's deployment of *res ipsa* was merely an alternative route to finding for Mrs Chase. The court succinctly summarised its judgment in the following manner:

> [26] …At the end of the day the judge determined that Ms. Prescod's evidence, although partly flawed due to her lack of knowledge of how the door was attached to the frame, did provide an insight as to how that accident occurred. His finding was based on the evidence and the inference the judge drew from the introduction of tapping the marble as part of the appellant's maintenance regime after the accident. We conclude, therefore that the judge's finding was supported by the evidence, and was not against the weight of the evidence.
>
> [27] The finding of the trial judge as to the cause of the separation is a finding of fact that was available to him on the evidence. Appellate courts are notoriously slow to set aside findings of fact at first instance, unless the finding is based upon some misapprehension of the evidence, or is clearly wrong having regard to the evidence. A perusal of the judgment reveals that the trial judge examined and analysed the evidence of Ms. Prescod, Ms. Roett and Mr. Weekes, and came to a finding as to the probable cause of the collapse based on the evidence. It is not correct to say, as the appellant contends, that the trial judge failed to analyse and ignored the evidence of Mr. Weekes.

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[42] Micheal A Jones (ed), *Clerk & Lindsell on Torts* (20th edn, Sweet & Maxwell 2010) para 8-172.
[43] *Scott* (n 12).
[44] (1971) 2 All ER 1240 at 1246.

[118] The Court of Appeal in assessing the trial judge's use of the maxim *res ipsa loquitur*, as an alternative basis for finding that the hotel was liable, considered that the expression 'prima facie case of negligence' was:

> [29] …more appropriate than the phrase "presumption of negligence". The evidential burden (as opposed to the formal burden of proof) then shifts to the defendant to displace the prima facie inference of negligence...

The court stated that:

> [32] …Ms Roett's evidence with respect to the cause of the separation [of the adhesive and/or the marble from the architraves] appeared to be evasive at best. It is surprising, to say the least, that she could not recall what was determined to be the cause.
>
> [33] In these circumstances, it can hardly be suggested that the cause of the accident was sufficiently known so as to preclude the application of "res ipsa loquitur" to the facts.

[119] Citing the Trinidad and Tobago case of *Ralph v Weathershield Systems Caribbean Ltd*[45] the court stressed that:

> [34] … it is not necessary to plead "res ipsa loquitur". What *Ralph* establishes, however, is that "res ipsa loquitur" can be relied on in the alternative if the cause of the incident is not sufficiently established on the evidence, although particulars of negligence are pleaded.

The Appeal to this Court/Discussion

[120] The essence of the hotel's grounds of appeal to this Court substantially re-hashed those stated in the appeal to the Court of Appeal. Later I will separately address those grounds that deal with *res ipsa*. Issue was also taken with the decision of the Court of Appeal to affirm several findings of fact and inferences made by the trial judge. The hotel claimed that those findings and inferences were not supported by the evidence and were 'plainly wrong'. It was said that the Court of Appeal

[45] *Ralph* (n 14).

misstated the evidence, referenced statements of evidence which did not exist and came to inaccurate inferences from evidence given. It is in deference to this last ground of appeal that I found it necessary to cite verbatim considerable parts of the trial transcript. The hotel also claimed that the hotel was not afforded a fair trial.

[121] It is the trial judge who heard and saw the witnesses and that judge is ordinarily best placed to assess issues of credibility, demeanour, or the weight of conflicting testimony. In *Apsara Restaurants (Barbados) Ltd*,[46] we said that if a fact in issue is a primary fact found by the trial judge, then, if the Court of Appeal endorsed that finding, we should only review it in exceptional circumstances. An exceptional circumstance would include, for example, instances where we were of the view that there was no or no sufficient basis for the finding or where our failure to review the finding would result in a miscarriage of justice.[47] Even in cases where we are reviewing inferences made by a trial judge and where appellate courts are in just as good a position as the trial judge, an appellate court should not substitute their own view of the evidence for that of the trial judge, unless of course the judge's conclusions are palpably wrong, unreasonable, irrational, inconsistent with other established facts or entirely unsupported by the evidence. I am not of the opinion that any of those characteristics can be attributed to the judge's findings and the inferences the judge drew. In my opinion, the trial judge was entitled to reach the conclusions that are recorded above at [110].

[122] There are some aspects of the hotel's case that the judge must have found self-contradictory. On the one hand, it was stressed, both by Ms Roett and by Mr Weekes, that the hotel could not and did not anticipate or foresee the risk to anyone of falling marble; that marble, once properly installed, requires nothing further to address any such risk; and that the hotel's marble, installed by a very reputable firm, was indeed properly installed. Yet, abundant evidence was given of various

[46] *Apsara Restaurants* (n 34).
[47] ibid.

measures that were supposedly taken prior to the accident and enhanced afterwards precisely to guard against the risk or 'mischief' of marble falling. These measures were enshrined in the engineers' checklist and the engineers were always required to complete every item on the checklist, according to Ms Roett. In her witness summary Ms Roett stated that the marble pieces in all the rooms are checked to make sure they are not cracked or loose or have moved away from the grout. Who expends time and resources and takes scrupulous measures to guard against a risk one neither foresees nor anticipates? This obvious contradiction was put to Mr Weekes. His explanation was, "You would do – you do things to ensure that everything is in place and in order, not necessarily because there is a particular mischief you are trying to cover."

Under counsel's unrelenting questioning, he finally conceded that it is possible to infer that these measures were indeed intended to cover a particular risk or mischief.

[123] Secondly, the hotel's initial position was that Mrs Chase was wholly or partly to blame for the accident. That is what they instructed their attorneys who boldly so declared in the pleadings. But in court the hotel stated, through Ms Roett, that they really did not know if Mrs Chase was to blame. Indeed, they made no attempt to provide any evidence whatsoever to substantiate that she was, and worse, they were unable to tell the court who or what caused the marble to fall. Thirdly, the hotel conducted a 'full review' or 'post-mortem' of the accident and its cause. That review was led by their engineering department. Ms Roett would have likely been at the time charged with oversight of the engineering department. She adroitly declined to answer if she was part of the review team:

Counsel: There was a full review

Ms Roett: Yes, Sir

Counsel: And you were part of the review team?

Ms Roett: I would have gotten the security report, 'cause they –

Counsel: You would have gotten the security report?

Ms Roett: Yes, Sir

[124] If, as is more probable than not, the report generated by this 'full review' that investigated the cause of the accident was what was referred to by Ms Roett as the 'security report', she admitted receiving that report. But she and the hotel did not proffer that report in evidence or explain its absence. And, judging from her answers, Ms Roett either did not refresh her memory from it before coming to court or she was deliberately not being forthright with the court about its findings. The court was not made privy to the contents of that report and specifically what the report determined to be the cause of the accident. The report was not even made available to the hotel's expert retained to give evidence on the hotel's behalf and who, the hotel must have known, was likely to face tough questions from opposing counsel about the hotel's conclusions as to the likely cause of the accident. When Ms Roett was asked whether she ever learnt of the cause of the accident her response was that she would hope that she had learnt of the cause, but she has forgotten it now. That is an incredible answer from the Director of Risk and Compliance in relation to an unusual accident that could perhaps have seriously maimed the toddler of a paying guest at the hotel and done untold damage to the hotel's reputation.

[125] This is a civil case to be decided on a balance of probabilities of contending narratives. The duty imposed upon an employer is not absolute. As the judge observed, however, it is not enough for an employer to assert that it has checklists and protocols and programmes that on their face appear to evince a safe system of work. There must be demonstrable compliance with those checklists and protocols. Here, a worker was injured in spite of those laudable systems and processes. The way I interpret Ms Prescod's evidence is that, absent some extraneous activity like perhaps an explosion or an earthquake (of which there

was no evidence given), marble that is for years in a constant battle with gravity, does not suddenly, abruptly lose that battle. It does so gradually, over a period of time, and an astute observer could notice indications that the marble was in danger of falling and taken appropriate remedial action before anyone suffered injury. I cannot fault the Court of Appeal when it concluded that:

> [7] … an employer has a duty to take all reasonable precautions to ensure the safety of the employee... Since this is a non-delegable duty, it would not be enough to assert that the employer fulfilled his duty by entrusting the installation of the marble to a reputable independent contractor.

Res Ipsa Loquitur

[126] This is the first occasion this Court has had to pronounce on the maxim *res ipsa loquitur* and so I seize the opportunity to give some views on it, especially as the caselaw throws up no little confusion on the subject. The first point to be made is that *res ipsa loquitur* is not a magical incantation which, when pleaded, places defendants on a hopeless footing, or puts them to proof of anything. The expression was intended essentially to suggest that a) damage has been caused by an event whose occurrence is unusual, and; b) at all material times the defendant had control over the thing that caused the damage, or else, the harm done to the claimant occurred in such circumstances, that; c) the event is such as would in the particular circumstances not normally happen without negligence on the part of the defendant. I refer to these below as 'conditions a), b) and c)'.

[127] Prime examples of the application of *res ipsa* are, as here, instances of an object inexplicably falling on the injured party. See for example, *Byrne v Boadle*[48] where a barrel of flour fell from the defendant's warehouse and struck the plaintiff; *Scott v London and St Katherine Docks Co*[49] where several bags of sugar fell from a crane on the defendant's premises and injured the plaintiff; *Wong Sau Chun v Ho*

[48] *Byrne* (n 11). See also *Scott* (n 12); *Fitzgerald v Penn* (1954) 91 CLR 268; *Commonwealth v Introvigne* (1982) 150 CLR 258.
[49] *Scott* (n 12).

Kam Chiu[50] which dealt with a falling pane of glass; *Lam Fong & Ho Kok Keong v Hung Wan Construction Co Ltd*[51] where a falling object struck a carpenter on the head; and *Sawler v Franklyn Enterprises Ltd*[52] where a 19oz steel plate fell off the indicator located above an elevator door and injured the plaintiff.

[128] In cases of this kind, although the claimant seeks damages on the basis of the defendant's negligence, they will often be unable to furnish direct evidence of such negligence. Nothing prevents them, however, from putting forward the unusual circumstances of an accident that would ordinarily not occur without negligence as circumstantial evidence in proof of their allegation of negligence. It follows that, in lieu of being treated as some rigid rule of law, *res ipsa loquitur* should be regarded as simply a specific instance of circumstantial evidence that should be left to the normal operation of the law of evidence governing circumstantial evidence generally.[53] This should, in my opinion, be the approach adopted by Caribbean courts.

[129] I agree entirely with the view expressed by the Supreme Court of Canada[54] that:

> … the law is better served if the maxim is treated as expired and no longer a separate component in negligence actions. Its use had been restricted to cases where the facts permitted an inference of negligence and there was no other reasonable explanation for the accident. The circumstantial evidence that the maxim attempted to deal with is more sensibly dealt with by the trier of fact, who should weigh the circumstantial evidence with the direct evidence, if any, to determine whether the plaintiff has established on a balance of probabilities a prima facie case of negligence against the defendant. If such a case is established, the plaintiff will succeed unless the defendant presents evidence negating that of the plaintiff.

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[50] [2000] 2 HKLRD E18.
[51] [1986] HKEC 122.
[52] (1992) 117 NSR (2d) 316.
[53] See Cecil A Wright, 'Res Ipsa Loquitur' in *Evidence* (Special Lectures of the Law Society of Upper Canada, Richard de Boo 1955) 103.
[54] See *Fontaine* (n 17).

[130] *Res ipsa* is not absolutely required to be pleaded[55]. No rule of court stipulates that inferences from facts *must* be pleaded. The CPR state unambiguously that what must be pleaded is a short statement of the facts upon which a party relies.[56] In this case, those facts, sparse though they may have been, were pleaded by Mrs Chase. She was bending to clean a door in room 417 when suddenly the marble above her gave way and fell on her. Whether those bare facts were enough by themselves to raise an inference of negligence is now, in my opinion, a moot point. The evidence given by Ms Prescod, Ms Roett and Mr Weekes respectively suggested that, on a balance of probabilities, the hotel was negligent in failing to observe warning signs that the marble was in danger of giving way.

[131] The details given by Ms Roett regarding the breadth and intensity of preventative checks and processes allegedly undertaken by the hotel did two things. First of all, it destroyed the notion that the risk of falling marble was unforeseeable. Secondly, it contradicted the argument that the hotel was or could have been taken by surprise when the judge inferred that the collapse of the marble could not have occurred without negligence on the part of the hotel. The 'anomaly' that the marble eventually surrendered itself to the force of gravity suggested that it was more likely than not that the hotel's supposedly extensive system of maintenance and inspection was either not sufficiently comprehensive and robust or else was not scrupulously and faithfully applied, in room 417 at least, by the servants or agents of the hotel who were responsible for applying them.

[132] Even if pleaded, what *res ipsa* connotes only has legal relevance if conditions a), b) and c) are first cumulatively satisfied. Whether pleaded or not, *res ipsa* does not alter the burden of proof, despite statements that are to be found to the contrary in some of the cases. The Court of Appeal was right to caution trial judges to avoid the use of expressions such as 'presumption' or 'onus' or 'burden of proof' in

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[55] *Sevick v Canadian National Railway* [1933] 4 DLR 668; *Nystedt v Wings Ltd* [1942] 3 WWR 39; *Greschuk v Kolodychuk* (1959) 16 DLR (2d) 749 (res ipsa loquitur applicable where warranted by evidence, notwithstanding lack of specific pleading); *Bennett* (n 22); *O'Reilly v Lavell*e [1990] IR 372; Michael A Jones (ed), *Clerk & Lindsell on Torts*(23rd edn,Sweet & Maxwell 2020) para 7-203.
[56] See CPR 8.5.

relation to the application of *res ipsa*. The presence of conditions a), b) and c) do not amount to a presumption of negligence that *must* be rebutted by the defendant giving evidence. The burden of proof remains on claimants to prove their case, but if the court is satisfied with the existence of those conditions, that in itself will produce an inference of negligence which the court will consider at the close of evidence, just like a judge considers any other evidence of circumstances that lean in this or that direction. Depending on the precise facts of the case, the inference drawn from the establishment of conditions a), b) and c) may be strong and compelling. In other cases, it may be weak, easily displaced. The inference may, for example, be repelled by effective cross-examination of the claimant and their witnesses who may adduce evidence that negatives the inference. In a case of that nature there is no reason why, even if *res ipsa* is pleaded, a no case submission made will not succeed. Or, as in this case, the inference may be so considerably augmented by the evidence given by the expert opinions of the claimant's witnesses and/or by the evidence of the defendant and their witnesses that resort to *res ipsa* is not needed.

[133] As stated in *The Law of Evidence in Canada* (1992), by John Sopinka, Sidney N Lederman and Alan W Bryant:[57]

> [i]f, at the conclusion of the case, it would be equally reasonable to infer negligence or no negligence, the plaintiff will lose since he or she bears the legal burden on this issue. Under this construction, the maxim is superfluous. It can be treated simply as a case of circumstantial evidence.

[134] The inference produced by the presence of conditions a), b) and c) is not destroyed because, as here, the claimant presents an unproven hypothesis or theory as to how the accident may have occurred. And obviously, if a claimant succeeds in proving specific acts of negligence, there is no necessity to rely on circumstantial evidence in proof of such negligence.[58] Where, as in this case, the court draws a

[57] Quoted in *Fontaine* (n 17) at [23] (Major J).
[58] See Cecil A Wright,'Res Ipsa Loquitur'(n 54).

range of inferences that supports a finding of negligence, there is, in my view, one basis and not two alternative bases for the ultimate finding of negligence. In this regard, I disagree with the trial judge's approach of treating the application of *res ipsa* in this case as an *alternative* or *additional* ground upon which to found liability.

Miscellaneous Complaints by Counsel

[135] Counsel for the hotel alleged that the trial was unfair to the hotel for a number of reasons. I have already addressed one of them, that is, the issue of the judge deploying the *res ipsa* maxim when it was neither pleaded nor referenced in the trial. Counsel also complained that the Court of Appeal erred in failing to consider that the trial judge had relied on evidence not given in the proceedings and had made his own evidential assertions to support his conclusions.

[136] In delivering the decision of the High Court, the trial judge made the following statement:

> Everybody accepts that marble is a heavy material. Of course, if you feel that it can't fall, and, mind you, marble has fallen elsewhere. I don't know if you follow these things but I, a number of years ago, was contemplating using marble for certain things and while the material can, when properly applied, ought not to produce the result that occurred, there are instances far and wide of marble falling. And if you introduce marble in the form that it was done, over seven hundred doors, it seems to me, that you cannot start with a belief that it can't fall. It seems to me, there is a responsibility to inspect it and, if anything, the falling of the marble justifies that belief that it should be inspected.

[137] This comment should not have been made. It is generally improper for trial judges to inject their personal experiences into their judgment when determining the facts of a case. Judicial impartiality requires that judges base their decisions solely on the evidence presented in court and the applicable law. As has apparently occurred here, comments of this nature can undermine the parties' confidence in the fairness of the proceedings and lead to allegations of bias or prejudgment. Judges may rely

on common knowledge or general societal norms to evaluate the plausibility of evidence, but they should be very cautious in doing so. I agree that the Court of Appeal should have drawn attention to this lapse.

[138] Does the making of the comment impugn the judge's findings? The transcript shows that the judge otherwise conducted the trial in an excellent manner. Apart from this lapse and the *res ipsa* 'ambush' point which had little merit, counsel pointed to nothing about the manner in which the proceedings were conducted to challenge that view. As I have already stated, this was a case that was largely based on inferences to be drawn from facts and testimony. The Court of Appeal, and this Court, were in almost as good a position as the trial judge was to assess the evidence and the reasonableness of the inferences that were drawn. I believe that the Court of Appeal was entitled to draw the same inferences of negligence as did the trial judge.

[139] Counsel for the hotel also complained that the conduct of the proceedings was characterised by what counsel considered to be 'repeated statements by the judges of the Court of Appeal during the proceedings which appear to be taking into account factors not before the Court and outside of the legal issues for consideration.' In particular, counsel cited certain statements made by a particular judge of the Court of Appeal.

[140] To simply cite the statements in question out of context does, in my view, a disservice to the judge concerned. What is that context? On 13 April 2022, the Court of Appeal held a case management conference on this matter. Counsel on both sides discussed with the judge a range of outstanding issues pertinent to preparing the appeal for trial. After those issues had been settled, the Bench then engaged counsel in the prospects of a settlement. There then followed this exchange. The passages complained about by counsel are highlighted below in italics:

Judge: I am just a little lost as to how this matter developed like this but I guess it is something that I'll become aware of when I see the transcript, et cetera, et cetera. It is a bit shocking to me that a matter like this got to this stage. I don't know if you understand my drift.

Counsel: I don't, My Lord, I am not sure.

Judge: I mean it is, I guess it is a straight matter of whether you believe the *Respondent* or not. I guess that is what it boils down to, but it seems to me that it is something that some possibility of settlement should have been looked at. That is how I see it, but as things come out I guess we could reflect upon it differently.

Counsel: I would just say, My Lord, that it -- for us it was a matter of law and the principles of negligence that it is not only an issue of damages but a breach of duty, so that an accident does not automatically give rise to damages. And this is where too why the transcripts are important. Accidents are always unfortunate but it does not automatically -- it wasn't a question of strict liability, and this is where the transcripts are important because the decision rested on things that we say were not raised in the trial and that's relevant to show, so for us it is a point of strict law.

Judge: Okay

[141] At this point the Presiding Judge intervened and asked counsel for the hotel directly -

Presiding Judge: Is it too late to consider a settlement in this matter?

Counsel: Commercially never so, My Lord, and just again to be clear though.

Presiding Judge: Yes.

Counsel: While the Claimant was injured, the basic principles of law is that the mere fact of an injury does not

entitle you to damages and that is our position and that's an unfortunate situation where people think you have an injury. You still have to prove breach of duty.

Presiding Judge: Yes

Counsel: At the same time, at the same time acting for an insurer as a commercial reality, in practice many times you settle a matter even when you are a hundred percent confident that you are not liable because of the commercial reality of litigating.

Associate Judge: Nobody is liable?

Counsel: Sorry?

Associate Judge: Nobody is liable?

Counsel: That can happen, My Lord, yes.

Associate Judge: So it is an act of God?

Counsel: If an accident occurs you still have to prove somebody is liable. The fact that you are injured, does not mean you are going to recover damages.

Associate Judge: Yes, but I am -- the place is insured we would assume, so what is it, that's where I am a little -- the place, the building is insured, so what is it?

Counsel: But the insurance was not employers liability insurance so whether somebody was negligent or not you are going to recover that's a different type of insurance but where you have an injury that you have to prove liability that is the basic principles of law and unfortunately car accidents can happen...

Associate Judge: I would have also thought that it is a basic human principle that you are employing people who in good faith expect to be safe.

Counsel: Yes.

Associate Judge: And they find themselves not being safe and that you would want to convince them that, you known, it wouldn't happen again on our premises. So anyway, a matter for you all.

Counsel: I must express some concern, My Lord, because the point is you should be safe that is a requirement.

Associate Judge: Right.

Counsel: And if you have not made your employees safe, then yes, you are liable but that is a decision of law. If your actions ...

Associate Judge: I know but ...

Counsel: So the mere fact that you are injured ...

Associate Judge: I find that there is not just -- it is not always a hundred percent law that determine these things, right, I am looking at the parties involved, but anyway, I don't want to go any further.

Counsel: Actually, it does, My Lord, and that's why Lady Justice is blind.

Associate Judge: It is not always the only determinant of these things, it is not always and especially when you are dealing with insurance companies, you know that very well, it is not always the determinant of these things but at the end of the day there is law.

Counsel: I must express some concern.

Associate Judge: I've looked at it, no, no, I have looked at it and I understand the legal, I understand your concern. I understand the legal point, okay. But in human relations there is more than the legal point, that's the

> end of my contribution, okay, I would say no more. But at the end, in human relations there is more than the legal point.

After further back and forth, the judge ended by stressing to counsel:

> ... Don't take it that I have made up my mind on anything. I have read what is there and I understand the legal points being taken, and Iunderstand why they have been taken. I am just concerned that the whole story, there seems to be something missing for me, there seems to be -- as a person who has done trials of this kind, both as lawyer and as a judge, there seems to be something missing in the equation and that something is probably the key to the solution, but I don't know what it is.

[142] This was a case management conference in which the parties themselves were not on the call. It is not at all unreasonable for counsel and the Bench to engage in the kind of without prejudice discussions that transpired here about the prospects of a settlement being achieved. Of course, there are limits to such discussions, but I do not think the judge had overstepped those bounds. The judge evinced his own alertness to the need for circumspection. He ultimately made it clear that he had not made up his mind on anything and there is nothing to suggest that he had done so. In all the circumstances I do not find the complaint of counsel to be a valid one.

[143] For all the reasons set out above I too would dismiss this appeal with costs to the respondent. The trial judge and the Court of Appeal were entitled to the view that, on a balance of probabilities, negligence on the part of the hotel was reasonably inferred.

BARROW J (dissenting):

[144] This appeal arises out of a claim for compensation for injury the respondent (claimant) sustained in the course of her employment at the Sandy Lane Hotel that

the appellant (defendant) operated. The respondent was injured on 4 December 2010 by the fall of the marble that lined the doorway where the respondent was cleaning. The Court of Appeal[59] upheld the decision of the High Court[60] that the appellant was negligent and breached its employer's duty to provide a safe place of work.

[145] The decision on negligence that the Court of Appeal upheld consisted of two parts. The first part of the decision was that the appellant (sometimes referred to as 'Sandy Lane') failed to inspect the marble and so failed to see that the marble had been moving and was going to fall. The second part of the decision, presented as an alternative finding, was that Sandy Lane failed to rebut the presumption that the marble would not have fallen in the absence of negligence.

The Case Against Sandy Lane

[146] The Statement of Claim, dated 10 February 2013, alleged that the fall of the marble was caused by the negligence of the appellant in failing to provide the respondent with a safe place of work and by breach of the common duty of care under the Occupiers Liability Act.[61] The relevant particulars of negligence and breach of statutory duty included:

(i) Failing to provide or maintain a safe system of work;

(ii) Failing to take any or any reasonable care to ensure that the Claimant would be reasonably safe during her course of employment;

(iii) Failing to take any or any adequate care for the safety of the Claimant;

(iv) Exposing the Claimant, while she was engaged upon her work, to a risk of damage or injury from the falling marble of which the Defendant knew or ought to have known;

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[59] *Sandy Lane Hotel* (n 9).
[60] *Eversley* (n 2).
[61] ibid at [94] – [95]. This part of the claim failed.

(v) Failing to take suitable and sufficient steps to prevent, so far as was reasonably practicable, the fall of the marble from the building so that it would not fall and strike the Claimant;

(vi) Causing a permitting the ceiling to be or to become or to remain in an unsafe and dangerous state, in that marble was likely suddenly to fall therefrom.

[147] The substance of the defence was that the marble details in the hotel were installed by contractors of the highest standards, that the details existed throughout the hotel in all rooms, and there had been no previous or subsequent incidents of marble falling. The pith of the defence was that the appellant could not reasonably have foreseen the incident and that its property was regularly maintained and inspected.

The Findings of Negligence

[148] The judge gave a clear statement of his findings. He stated as follows:[62]

> [88] …
>
> 1. Mrs. Chase was injured when going about her work. The marble architraves and door linings which framed the door leading from the foyer to the bedroom of room 417 came crashing down unexpectedly.
>
> 2. No evidence was led by the defendant with respect to the cause of the collapse of the marble.
>
> 3. No evidence was led by the defendant with respect to actual maintenance inspection or upkeep of room 417. There was abundant evidence about checklists, the several layers of inspection, maintenance, and practice and procedures to ensure high standards at Sandy Lane. However, neither witness for the defence provided any direct evidence that anybody had visited the room prior to the fall of the marble, and had verified that they carried out any checks on the marble or any other aspect of room 417. In response to a question on cross-examination, Ms. Roett boldly declared that she did not make a mental note of the rooms she visited.

[62] *Eversley* (n 2).

4. Although I am prepared to accept that until 2010, there was no case of marble falling of which Mr. Weekes or Mr. Chase was aware, I have not been similarly convinced with respect to Ms. Roett. In her evidence, she appeared to leave open the possibility that other incidents may have occurred.

5. I accept, on the evidence presented, that Sandy Lane did engage reputable contractors, one of whom employed Habtoor, who installed the marble.

6. I do not accept that prior to the incident in 2010, that any procedures or checks, such as tapping the marble or checking the grout, were done to discover whether the integrity of the marble was compromised. It is my finding that checks of this nature were instituted after the 2010 incident, most likely on the advice of the overseas experts who would have visited Sandy Lane after the incident.

7. Having not visited Sandy Lane, Ms. Prescod's theory as to how the accident had occurred was flawed to the extent that she felt that the grout was disturbed when the door was opened. However, her comments about lippage (i.e., movement of the tiles) and observing the grout lines seem to be a credible explanation for the fall of the marble. This view is supported by the fact that tapping the marble and inspection of the grout form part of the revised checklist after the accident.

8. In respect of the 2010 calamity, the facts that would explain the fall of the marble were in the control of Sandy Lane and the evidentiary rule 'res ipsa loquitur' would have been appropriate on the facts of this case. On this view, the mere fact of the marble falling suggested negligence in the defendant, who then had a duty to adduce evidence to show that it was not negligent. No such evidence was given by the defendant.

The Supporting Reasoning

[149] In the reasoning in support of these findings, the judge observed[63] that it had been alleged by the defendant that the claimant had not provided any evidence to discharge its burden of proof in the case; however, he did not share that view. The

[63] ibid at [100].

determination of whether the claimant had discharged its duty depended on not only the evidence of the claimant, but the evidence of the claimant's expert, Ms Doran Prescod, and any other supporting evidence. The judge said Ms Prescod had provided a reason for the marble falling, which although partly flawed, because of lack of knowledge of the doors at Sandy Lane, gave an insight into what could have caused the marble to fall, by the focus on the possibility that the tiles may have moved, and the grout may have been deteriorating. The fact that the defendant, subsequent to the 2010 incident, added the process of tapping the marble and inspecting the grout as part of its routine inspection, compelled the inference that whatever the cause that was determined by the outcome of the investigation into the falling of the marble, it had something to do with the movement of the marble and the disintegration of the grout.

[150] Therefore, the judge concluded, the claimant had provided enough evidence to prove its case on a balance of probabilities. Moreover, he stated, since the defendant had provided no evidence to show that in relation to room 417, it carried out the inspections and other procedures to ensure that the duty to look after the safety of the employees was being observed, it was very easy to find that employer's liability has been established.

[151] The essence of the decision, extracted from the statement of findings and supporting reasoning, was that the accident occurred because the 'tiles' moved, and the grout deteriorated, and the defendant did not carry out inspections in room 417 to look after the safety of its employees. That led to the determination that the defendant was negligent in failing to see, as was plain to be seen, the signs of the impending fall of the marble and the danger it posed to the safety of the employees. There was no finding of negligence in the fact that the marble moved, or the grout deteriorated; the negligence was failing to guard against the fall of the marble which could have been foreseen from the signs.

The Core of the Appeal

[152] The core of Sandy Lane's appeal is that the decision was against the weight of the evidence. In *Apsara Restaurants (Barbados) Ltd*[64] in the judgment of Burgess J, this Court discussed the principle by which it will be guided in considering an argument that it should interfere with findings of fact made by the trial court:

> …if any particular fact in issue was an inference reached by the trial judge, this Court should not decline to review that inference merely because the Court of Appeal supported the trial judge's conclusion. Secondly, if the fact in issue is a primary fact found by the trial judge, then, if the Court of Appeal endorsed that finding, we should only review it in exceptional circumstances. An exceptional circumstance would include, for example, instances where we were of the view that there was no or no sufficient basis for the finding or where our failure to review the finding would result in a miscarriage of justice. It may be said that the former is embraced within the latter. I take this approach to concurrent findings because my view is that an apex court should not lightly or ordinarily encourage re-litigation of factual disputes between or among individual litigants that have already been contested and resolved at the courts below. That is plainly not the prime role of a final appellate court.

[153] The respondent submitted that the appellant had not discharged the burden of persuading the Court that this is an exceptional case which justifies interference with the facts found by the High Court and endorsed by the Court of Appeal. The appeal, therefore, calls for the deconstruction of the judge's findings, which may be seen as comprising three limbs being that no evidence was led by the defendant as to cause; the defendant failed to inspect room 417 where the accident happened; and if it had done so it would have seen signs of movement of the marble indicated by lippage and crumbling grout. For convenience, these will be referred to by their paragraph number in the list of findings reproduced at [148], above.

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[64] *Apsara Restaurants* (n 34) at [6].

Evidence as to Cause

[154] A primary and enabling finding of the judge[65] was that no evidence was led by the defendant with respect to the cause of the collapse of the marble. The significance of this finding was that it cleared the landscape of the consideration of any competing cause advocated by the defendant and left only the cause presented by the claimant to consider. However, it is a view of the evidence that was directly contradicted in the finding by the Court of Appeal, at [24], that both expert witnesses recognised that the marble separated from the structure, and they gave evidence of failure of the bonding agent and lippage as a possible explanation for the collapse. This is a clear finding that the defendant's expert witness, being one of the 'both witnesses', gave evidence as to the cause of the collapse.

[155] The court expanded on its recognition of the defendant's evidence as to cause aligning with that of the claimant when it stated:[66]

> [26] It was the task of the trial judge to consider the evidence of the expert witnesses with a view to identifying the probable cause of the separation. It was accepted on both sides that the marble installation above the door had separated from the wall and had fallen on the respondent … Possible causes were discussed by the expert witnesses, notably, failure of the bonding agent or adhesive applied between the marble and the wall, and lippage. At the end of the day the judge determined that Ms. Prescod's evidence, although partly flawed due to her lack of knowledge of how the door was attached to the frame, did provide an insight as to how that accident occurred. His finding was based on the evidence and the inference the judge drew from the introduction of tapping the marble as part of the appellant's maintenance regime after the accident. We conclude, therefore, that the judge's finding was supported by the evidence, and was not against the weight of the evidence.

[156] That statement from the Court of Appeal has not been given its proper weight. The court distinctly identified that 'possible causes were discussed by the expert witnesses' and that these included 'failure of the bonding agent or adhesive applied between the marble and the wall and lippage.' Therefore, the decision of

[65] See finding no 2 in *Eversley* (n 2) at [88].
[66] *Sandy Lane Hotel* (n 9).

the Court of Appeal settles that there was evidence from both sides before the judge with respect to the cause of the collapse of the marble.

[157] The evidence of failure of the bonding agent as the cause is directly seen in the conclusion from the claimant's expert that: 'The incident which the claimant experienced tells me that the lifespan of the bonding agent either is about to expire or has expired.' That conclusion had been fully developed in Ms Prescod's report:

> … When the bonding agents release or start to release from either the wall or the marble, the marble begins to walk forward, creating a lip, and it puts pressure on the surrounding marble, causing it to also (sic) to be released from the bonding materials. Eventually, when the first marble falls, a series of marble will follow. In other words, when one marble falls the surrounding marble will come down with it.

[158] There were two aspects to the theory of the releasing of the bonding agent in the report of Ms Prescod that need to be examined because they supported contrary judicial results. One aspect was that the lifespan of the bonding agent had expired, and it released. The other aspect was that the door hitting against the marble caused the bonding to release. It was this alleged action of the door that caused the alleged forward movement of the marble and the physical signs of its movement, being lippage and crumbling grout.

[159] The premise of the door hitting the marble and causing it to move was dismissed as mistaken. It is more than an oddity that the Court of Appeal accepted that it was an erroneous premise that the door hit the marble and moved it forward yet upheld the theory that there had been forward movement of the marble, lippage and crumbling grout. These were all stated to have been caused by – and only by – the door hitting the marble. The court never considered that since the door did not hit the marble to make it move forward then on the claimant's own evidence, it was simply that the bonding failed and the slab fell – in the vernacular, it 'fell down'.

[160] The desire to know what caused the release of the bonding agent – what was the cause of the cause, or what was the underlying cause – is natural human curiosity. But that inquiry goes beyond the issue of foreseeability of the accident. It would be satisfying to have some scientific determination rooted in classic physics or chemistry of the cause of the failure of the bonding – of it releasing. Or to have evidence that the marble installer who did the installation was feeling poorly when working on room 417 or had been distracted and got his mixtures wrong or applied inadequate quantities. Or that the adhesive property of the wall or the marble for this installation had been compromised by some foreign substance such as dust or oil. A host of causes for the bonding failing may be imagined but it would not matter that it was one cause and not another that was the cause of the cause (or the indirect cause). Whatever was the underlying cause of the bonding releasing, of the adhesion failing, the direct cause of the marble falling was known: the bonding released; the chemical used to bond the marble to the wall ceased bonding. The court failed to recognise this precise fact and that on the evidence the fall of the marble occurred without any negligence.

[161] The failure of the court to discern exactly what happened may have been fostered by confusing different physical actions in relation to the marble, these being: (1) *release*; (2) *separation*; (3) *movement*; (4) *lippage*; and (5) *collapse* or fall. As to the first action, release, it was common ground that the bonding agent or adhesive ceased to perform; it ceased to bond or to adhere – it released. On the discredited aspect of the theory of Ms Prescod, this release was caused by the door hitting the marble. However, on the other aspect of her theory, the lifespan of the bonding agent had expired, and it ceased to bond.

[162] The second action, separation, was caused by the first – when the bonding released, it caused the marble to separate from the door lining to which it had been attached. It may elucidate the matter to consider that if the marble had been attached with screws and these had ‘walked out’ or rusted there would equally have been a release (or failure) of the agent, the screws, that bonded the marble

to the door lining. This clarifies that it is the failure of the attaching agent or device – its releasing – that caused the separation.

[163] As to the third action, movement, it was the fact that the marble moved since it fell but the exact nature of the movement was differently perceived by the two experts. Ms Prescod for the claimant theorised that the marble moved *along* the wall, or forward, as she put it, while Mr Weekes indicated that the marble moved *away* from the door lining by falling *down*.

[164] The fourth action, lippage, generally refers to the condition when a tile is on a different plane to an adjacent tile so that its edge is at a different height and forms a lip. According to Ms Prescod, it was the forward movement of the marble that created lippage, and the significance of lippage was that it provided a visible sign of tile movement and impending fall. It may be gathered from the evidence that the third and fourth actions were not coterminous; movement is not the same as lippage because the marble could have moved by falling straight down and there would not have been lippage as described by Ms Prescod. Mr Weekes testified there would have been no lippage in this case because lippage occurs where there are multiple tiles and, in this case, there were three slabs of marbles: two vertical and one horizontal. It was the horizontal slab that fell. The theory of Ms Prescod that there was lippage was founded purely on her misconception that there was a 'series' of 'surrounding' 'tiles'.

[165] The fifth action, collapse or fall, requires mention only to note that it was the consequence of the movement. As inferred from Mr Weekes, the marble moved by falling; it did not move forward and then fall.

The Finding of the Marble Moving and Lippage

[166] The judge's consequential finding[67] in his discussion of the evidence as to cause was that a 'credible explanation' for the marble falling was that there had been

[67] See finding no 7 in *Eversley* (n 2) at [88].

lippage, that is 'movement of the tiles' and crumbling of the grout lines. It has been seen that lippage is not movement of the tiles, but rather that movement of tiles may result in lippage. The supposedly credible explanation came from the report of Ms Doran Prescod[68] as part of the erroneous proposition that the movement of the door disturbed the marble and caused it to move forward and then fall. As observed, this could not be credible when its entire foundation was of the door hitting the marble and this was discredited. The more credible explanation, on Ms Prescod's own evidence, was that the bonding agent ceased to bond because it had reached the end of its lifespan. It is striking that the notion that there had been movement of 'tiles' and resulting lippage came only as an assumption from this witness: there was no evidence whatsoever that it happened. It is not something the witness saw. Not a single person saw it or signs of it. There is no explanation why the High Court chose to accept Ms Prescod's opinion about lippage after it rejected her theory that the marble moved and caused lippage because the door disturbed the marble. No justification was stated or can be inferred from the evidence for the judge to have accepted that lippage had appeared. None. The evidence was that the operation of the door did not cause the marble to move. On the evidence, nothing moved the marble. Hence, there would have been no lippage.

[167] Along with there being no reason for the judge to have accepted movement and lippage as the 'explanation' for the marble falling, there were positive reasons for him to have rejected the 'explanation'. The evidence of Mr Weekes brings this home by establishing the error in Ms Prescod's report produced at [157] above, that when:

> … the marble begins to walk forward, creating a lip, … it puts pressure on the *surrounding* marble, causing it also to be released …Eventually, when the first marble falls, a *series* of marble will follow. In other words, … the *surrounding* marble will come down with it (emphasis added).

[68] See [149] above.

[168] The error was that there was no surrounding marble. Also, there was no series of marble to fall following the first marble falling. The accepted evidence was that there were three monolithic slabs: one on each side and one on top of the lining of the door. It was the top or horizontal slab that fell. Ms Prescod's error was contagious: it misled the judge into accepting there had been 'movement of the tiles'.[69] There were no tiles. Mr Weekes explained that there would have been no movement of marble and lippage because lippage occurs where there are multiple tiles but not where there are slabs of marble.

[169] The unchallenged opinion of Mr Weekes was that the marble had ceased bonding to the wall – it had ceased adhering – and visual inspection could not have revealed it because there was nothing to inspect and to see. The opinion of Mr Weekes was not challenged. On one aspect of her theory of the cause of the marble releasing, Ms Prescod's theory was the same as that of Mr Weekes. However, the judge chose to rely on the singular opinion of Ms Prescod and not on the common opinion despite his conclusion that the basis of the singular opinion was flawed. The judge gave no reason why he chose to rely on the aspect of the theory whose foundation had been discredited, and no reason appears to be deduced from the decision and the Court of Appeal offered nothing to suggest a reason. A choice made without reason may be considered irrational and that conclusion is strengthened by the fact that there was no other evidence that the marble moved forward and produced lippage. The determination that it had moved forward was purely an act of belief. It was not the product of reasoning.

No Evidence of Inspection

[170] The judge's finding that there was no evidence from the defendant regarding the inspection of the marble[70] was dispositive because he concluded from this that the appellant failed to carry out the actual maintenance or inspection or upkeep of

[69] See finding no 7 in *Eversley* (n 2) at [88].
[70] ibid.

room 417, and that if there had been such inspection the movement of the marble would have been seen and the fall prevented. The court decided[71] that although there was abundant evidence about checklists, inspection, maintenance, and practice and procedures to ensure high standards at the hotel, there was no direct evidence that anybody had visited the room prior to the fall of the marble and had verified that they carried out any checks on the marble or any other aspect of room 417. The Court of Appeal endorsed the finding that no evidence was given that the inspection and checks were in fact carried out in respect of room 417. It concluded 'Accordingly, the appellant led no evidence to displace the prima facie inference of negligence.'[72]

[171] It is a deceptive finding that is contained in the simple statement that absent evidence that the specific room was inspected, it was to be concluded that it had not been inspected. The fact situation in this case was that there was no specific evidence one way or the other and the court chose to presume there had been no inspection. The decision to draw that inference failed to have regard to an apposite presumption at common law being the presumption of continuity, a presumption of fact rather than a presumption of law. This presumption has broad application, and it has been stated to be '…a principle of law, somewhat like Newton's first law of motion. It assumes that circumstances will continue as they are, unless there is evidence to the contrary.'[73] The presumption has been said to have a long history. 'In 1905, it was used to convict a motorist of knocking down a pedestrian – on the basis that if Mr X drove a particular vehicle at point A on a journey then, without evidence to the contrary, it was reasonable to presume that he was still driving later in the same journey (*Beresford v Justices of St Albans* (1905) 22 TLR 1).'[74]

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[71] *Eversley* (n 2) at [29].
[72] *Sandy Lane Hotel* (n 9) at [29].
[73] Phillip McNeil and Sarah McNeil, 'Presumption of Continuity' (2014) 35(22) PTN 169.
[74] ibid.

[172] In the instant case, the fact situation which called for consideration of the application of the presumption of continuity was the abundant evidence the court acknowledged about checklists, inspection, maintenance, and practice and procedures to ensure high standards at the hotel. As stated in a recent English conflict of laws decision, *Granville Technology Group Ltd (in liquidation) v LG Display Co Ltd*[75] discussing the application of the presumption of similarity, the presumptions form part of the law of evidence.

> '… when it applies, it provides one way in which a party may prove part of its case (as an alternative to adducing evidence of the facts which must be proved). To that extent it resembles other presumptions of fact such as *res ipsa loquitur*, the presumption of regularity, and the presumption of continuance...'[76]

This meant the appellant did not need to call specific evidence that the specific room had been inspected – if, indeed, there was such a need – because the evidence that each room was inspected made the presumption easily apply in relation to room 417.

[173] Beyond the applicability of the presumption, the case for the appellant is that the finding there was failure to inspect goes against the weight of the evidence and was erroneous. That submission benefits from the courts' acceptance that if the system had been 'carried out' in relation to room 417 the appellant would have discharged its duty of care. This makes it important to fully appreciate the breadth of the system that was in place to be able to decide on the reasonableness of the deduction made by both courts that the system had not been carried out in room 417. It is a significant observation that this conclusion was purely a deduction from the outcome.

[174] An appreciation of the system begins with a review of Exhibit JR 6, The Leading Hotels of the World Hotel Membership Agreement that Sandy Lane signed as a member of that organisation to maintain its status of being of the highest deluxe

[75] [2024] 1 WLR 100.
[76] ibid at [12].

quality. In brief, the hotel bound itself to operate and maintain the hotel in the manner strictly in conformance with the standards generally observed by hotels considered to be of the highest deluxe category in the industry, as set by a standards organisation. The maintenance of such standards was stated to be the requirement of membership in the organisation. To ensure quality control, the organisation's monitoring body had the right to cause the hotel to be inspected annually without prior notice or arrangement, by a specialist organisation appointed by the group and to be reinspected as may be required. Benchmarks were set with the minimum score being 74 per cent and rising over a period of years to 80 per cent. The hotel was required to pay a fee for being inspected by the third-party provider designated by the monitoring committee in the amount of GBP2565. The hotel would be notified whether it made the minimum benchmark score or not. If the hotel failed to meet the minimum score it risked being put in borderline status and further adverse consequences, including financial ones.

[175] Sandy Lane's vaunted Five Diamond rating was first conferred in 2003, and they continued to earn it every year since. It apparently is awarded very sparingly, and an internet search indicates there are only a handful so ranked across the Caribbean. It resounded for the appellant that the Evaluation Summary for this inspection specifies door frames to be inspected.

[176] Exhibit JR 1 which the judge accepted was part of the appellant's operating system is a document headed Maintenance Checklist (Guest Rooms) that contains 67 items on separate lines under various headings for persons from the engineering department to check the cleaning of a room by the housekeeper. Beside each item there are two columns to enter the status of the item, working or not working. Then beside this is a line for comments. The items are grouped under the areas to which they relate and include Panel, In Corridor, Bathroom, Bedroom and other. The first item *in relation to the Bedroom, is 'check entrance door (sliding/closing/opening/locking properly)'* which was the door lined by marble. To appreciate the detail captured in the items listed for checking, it is observed

that these included checking the grouting in the shower and behind the toilet and bidet for discolouring and leaking (emphasis added).

[177] Exhibit JR 2 is headed 'Standards And Procedures' and is for the Housekeeping department. Under the rubric Service Guest Room and Clean the Bathroom it itemises the checks and actions for the housekeepers and among these is the instruction to 'Clean the bathroom marble walls, vanity and floors with Marble Safe Bathroom cleaner and mirrors, chrome and glass doors with Glass cleaner.' There are some seven other items on these standards pointing to particular attention being required for marble surfaces and the use of marble safe bathroom cleaner. The document indicates the requirement for Housekeeping to 'Report defects to engineering' and that 'All property defects are to be reported to Butler Services', and it is specified that 'All broken, loose, faulty items should be reported' with the example given of lamps, doors, lights and fixtures. The document directs Housekeeping to report to Butler Services immediately, the defective item, its location and fault, and make note of the time of the report, and provides for the logging and follow up by other units.

[178] Exhibit JR 3 is headed Richey International Benchmarking Standards and contains a list of some 35 items located in various areas of the hotel to be inspected including in the Guest Bedroom. Among the items in the guest bedroom for the inspector to consider are that door locks and peepholes are clean, in good condition and operable; door latches shut automatically. Further, that 'all doors and frames in the room are in good condition, free of wear and damage', that all doors and frames in the room are clean, free of marks and scuffs, and further that walls, floors and ceilings are in good repair, free of wear and damage and are clean free of soil and debris.

[179] There was no indication the judge considered the improbability of Sandy Lane's housekeepers and entire housekeeping, maintenance, supervision, engineering and quality assurance staff without exception failing to see (or to report) grout

flaking and marble moving. The evidence was compelling because confirmation came from the claimant's husband that it was standard for each room, after it was cleaned, to be inspected by the engineering department, the IT department and supervisors.[77] The further dimension to this oversight was the failure to consider if it was at all probable that there could be such a failure to inspect by the staff at this hotel, which paid GBP2565 a year to be inspected and graded for adherence to world standard luxury class with risk of suspension or expulsion from the ranking for failing to adhere to highest standard. As a matter of everyday experience, no ordinary homeowner not living in squalor would, for three months, fail to see and be disturbed by grout falling out of their wall or door frame. It is astonishing to imagine that room 417 could have been left for so long in that state of defect and blight.

[180] As observed, the conclusion that there had been no visual inspection of room 417 was solely a deduction. There was no testimony from anyone that there had been, for over three months, this purported buildup of lippage and crumbling grout that told of the movement of the marble. When the misfortune occurred, the claimant had been working at Sandy Lane as a housekeeper for about 5 years and her husband for about fourteen (14) years, also in housekeeping. Neither of them spoke to any instance ever before (or since) of the system not being carried out in relation to a room. In relation to room 417, neither saw any sign of movement of marble or grout. The claimant and other housekeepers had the very specific task of cleaning the door to the bedroom because this was specifically an item of their daily performance that engineering came after them to check. It was the very task the claimant was doing when the marble fell.

[181] Having accepted the evidence of Ms Prescod, the judge was obliged to accept her repeated statement that the lippage would have occurred over time, a three-month period, before the fall occurred. Along with this, she rankly speculated that what happened was the 'grout and tiles' moved, such movement was seen, and those

[77] Record, 'Cross-examination of Mr Chase' 753-4.

who saw it concluded nothing would happen anytime soon and so they kept doing nothing. As she declared, all these indications 'doesn't happen overnight. The signs were ignored. They all keep saying in their head it gon' eventually come down but not today.' The narrative that this is what occurred came entirely out of Ms Prescod's head.

[182] The irony is that the respondent was injured while cleaning, as she put it, 'from top to bottom,' the door in the very doorway where her expert declared crumbling grout and lippage would clearly have been seen for about three months. It is a pity that the judge did not stop to wonder how what the expert said could ever be true with the respondent saying not a word about crumbling grout or movement of 'tiles'. The case of negligence for the respondent would have been conclusively made were it true, as conjured by the expert, that the signs of impending collapse of the marble were there to be seen and ignored by everyone. Had that been the fact, there was no better person than the respondent to testify to such fact. The respondent's legal representation was of the highest quality, so it was no oversight that evidence existed which was not elicited. With respect, the trial judge got it wrong, and the Court of Appeal upheld the error. The finding of failure to inspect and, therefore, negligence was unreasonable and cannot stand.

The Composite of Negligence

[183] As it emerged, the negligence of the appellant that the courts found was its failure to inspect, its failure to see what allegedly was there to be seen and to guard against the foreseeable fall. Negligence was also presumed from the failure to rebut the presumption of negligence by failing to show a cause that proved there was no negligence.

[184] In reaching the conclusion that the appellant had been negligent, the judge failed to consider the opinion stated by Mr Weekes that the fall of the marble was unforeseeable. Remarkably, the judge mentioned this proposition only once and

simply passed on – he said not a word about it. The judge ignored the very essence of the defence which was that the exercise of reasonable care and due diligence could not have avoided the fall. He did not consider or discuss the defence.

Res Ipsa Loquitur

[185] The decision to apply a presumption of negligence because the appellant failed to show a cause that rebutted the presumption of negligence was a decision contrary to the evidence because, as discussed above, a cause – the same cause – was clearly stated by both experts, namely the release or failure of the bonding agent. Accordingly, there was no room for presuming negligence because the claimant's own evidence showed the cause, which involved no negligence. The Court of Appeal thought the maxim, res ipsa loquitur, meaning the thing speaks for itself, applied as a rule of evidence in the sense that where an event occurred that would not ordinarily occur in the absence of negligence then negligence was to be presumed where there was no evidence that indicated its absence. The foregoing discussion posits that the maxim of res ipsa loquitur cannot apply because the evidence spoke to how and why the incident occurred.

Duty of Care

[186] It is fundamental that the duty of care that was owed by the appellant to the respondent was not absolute, as is stated in the standard texts such as *Charlesworth & Percy on Negligence*.[78] The application of this principle was demonstrated in *Sands v Hutchison Lucaya Ltd,*[79] a decision by the Court of Appeal of the Bahamas, where a hotel employee, a banquet chef, twice suffered back injuries while reaching for items and claimed that her employer was negligent and breached their duty of care to provide a safe system of work. In dismissing the employee's appeal, the court accepted that the duty owed by the employer was to make the place of employment as safe as reasonable care and skill would permit and identified '…the main issue in the present appeal in our

[78] John Charlesworth and C T Walton, *Charlesworth & Percy on Negligence* (12th edn, Sweet & Maxwell 2010) para 11-11
[79] BS 2018 CA 81 (CARILAW), (17 May 2018).

view was causation, that is to say, did something the respondent do or not do lead to the injuries suffered by the appellant.'[80] The court upheld the determination of the trial judge that:

> … just because an employee is injured on the job does not necessarily mean that the employer has been negligent or has breached its statutory duty to the employee.[81]

That left intact the conclusion of the trial judge that the injuries the employee suffered were not due to the negligence or breach of duty on the part of the employer; that it was simply an unfortunate accident, for which no one was to blame.[82]

[187] Similarly, in the present case, the appellant could have done nothing to prevent the accident. The respondent's counsel sensibly accepted that visual inspection of the marble would have discharged the duty of care to provide a safe place of work which included preventing marble falling. The conclusion reached in this opinion based on the presumption of continuity as well as the evidence about the system of inspection, was that there was, indeed, such inspection and there were no visible signs that marble had moved so nothing was revealed by inspection. Therefore, it must be decided that the marble fell without negligence on the part of the appellant.

Conclusion

[188] In my opinion, the appeal should be allowed.

Disposition

[189] The following were the orders of the Court made on 20 December 2024:

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[80] ibid at[31].
[81] ibid at [50].
[82] ibid at [51].

1. The appeal is dismissed;

2. An interim payment in the sum of BBD100,000 is awarded to the Respondent, to be paid by the Appellant on or before 3 January 2025.

3. The Appellant will pay the costs of the Respondent.

/s/ A Saunders

Mr Justice Saunders (President)

/s/ W Anderson

Mr Justice Anderson

/s/ D Barrow

Mr Justice Barrow

/s/ A Burgess

Mr Justice Burgess

/s/ C Ononaiwu

Mme Justice Ononaiwu