[2015] JMCA Civ 19

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 152/2010

BEFORE: THE HON MR JUSTICE PANTON P
THE HON MR JUSTICE DUKHARAN JA
THE HON MS JUSTICE LAWRENCE-BESWICK JA (AG)

BETWEEN **ELITA FLICKINGER** **APPELLANT**

AND **DAVID PREBLE**
(T/as Xtabi Resort Club & Cottages)

AND **XTABI RESORT LIMITED** **RESPONDENTS**

Ainsworth Campbell, Rudolph Francis and Andrew Campbell for the appellant

Christopher Samuda and Miss Danielle Chai instructed by Samuda & Johnson for the respondents

12, 13 November 2013 and 27 March 2015

PANTON P

[1] This appeal is against the judgment of Roy Anderson J who dismissed a claim brought by a widow seeking damages for negligence, and for compensation under the Fatal Accidents Act arising from the death of her husband by drowning in the sea at Negril.

[2] The deceased, Robert Flickinger, an American citizen aged 49 years, and described in the statement of claim as an avid snorkeler, arrived at the Xtabi Resort with his wife on 9 February 1995 with the intention of spending a few days there. Within a short time of his arrival, he acquired snorkeling equipment and affixed a ladder to aid his descent from his assigned cottage into the sea to snorkel. According to his widow's witness statement which was recorded by a police corporal on the same day within a short time of the death, she had advised him against going into the sea due to its roughness and the presence of "big waves". However, the deceased did not heed the advice and said that he was going to snorkel "just for a few minutes". The deceased got into difficulty shortly after he had been in the sea and he drowned despite efforts to save him.

The pleadings

[3] The negligence alleged by the appellant against the respondents included the following:

a) failure to warn the deceased of the danger of "storms that often develop in and around the sea" proximate to the Xtabi resort;

b) failure to take note, and to warn the deceased, of an impending storm;

c) failure to lock away the ladder that was used by the deceased, and failure to lock the entrance to the sea;

d) failure to rescue the deceased; and

e) failure to prepare for the eventualities of a developing storm.

[4] The respondents denied that storms often develop in and around the area, but stated that "as occurs sometimes at resorts and hotels the sea becomes rough and choppy". They stated that the deceased "knew or ought to have known that the sea was rough or choppy as he was expressly forewarned but notwithstanding voluntarily and freely and with full knowledge of the nature of the risk involved expressly or impliedly agreed to incur it". The respondents' general position was that the deceased was reckless in disobeying the warning of his wife and others, and he failed to take care for his own safety.

The evidence

[5] The learned judge heard evidence from, among others, Mrs Flickinger, the widow of the deceased, Corporal Lindel Colthirst, Mr David Preble and Mr Justin Bell. Mrs Flickinger's evidence was perhaps the most important as she had seen and spoken to the deceased prior to him changing into snorkeling gear and descending into the sea. She said that their visit to Jamaica was part of their wedding anniversary celebrations, and they had decided on Xtabi as a result of what they had seen in a brochure in the office of the Jamaica Tourist Board in Chicago. They arrived at Xtabi between 1:00 pm and 2:00 pm on the fateful day. By 3:30 pm Mr Flickinger had acquired snorkeling gear and had changed into it and was on his way into the sea. Mrs Flickinger said she asked

him to snorkel later. According to her evidence, she made that request of him as she wanted him to stay with her so they could enjoy themselves on their balcony. Under cross-examination, at first she denied that she had asked him to stay "because the sea had big waves". However, she later said that she might have told the police that she told him not to go because of the big waves. Still further in her testimony under cross-examination, the following transpired:

> "Q. Did you tell police that there were a lot of big waves?
>
> A. I must have.
>
> Q. Told police on basis of what you saw?
>
> A. I saw big waves, yes."

Mrs Flickinger also denied saying to the police that as the deceased went down, the sea became rougher. However, her witness statement reads thus:

> "When he went down it was a bit calmer and as he was down the sea became rougher… ."

Mrs Flickinger gave evidence of her husband calling for help and told of the efforts to save him. These efforts included, she said, the throwing of a rope which was too short, and the arrival of two jet ski riders who helped to remove Mr Flickinger from the sea. However, their efforts were too late as the doctor, who was waiting ashore, immediately pronounced the deceased dead.

[6] The respondent David Preble gave evidence. He said that he was the manager of the resort, and had been so since about 1983. According to him, Ms Veronica Woods, an employee of the hotel, checked in Mr and Mrs Flickinger. The former was quite

anxious to get to the room. Ms Woods advised Mr Flickinger that there was an advisory as to the existence of rough seas. He was told not to go into the water. In addition, there was a sign which advised caution as there was no lifeguard on duty. It also advised its readers that swimming would be at the swimmer's risk.

The missing notes of evidence

[7] Complaint has been made by the appellant that the evidence of certain other witnesses has not been included in the record of appeal. However, I would suggest that that is not to be interpreted as an indication that the evidence was not considered. My understanding of the correspondence that passed between the learned judge and counsel is that when it was time for the record of appeal to be put together, the judge's notes of portions of the evidence were not located – hence his request for assistance from counsel. The reasons for judgment had been delivered on 10 November 2010, whereas the notes were being requested on 11 March 2011. If the judge did not have the notes at the time he was crafting the judgment, he would have said so then. He would not have waited until after he had written and handed down the judgment. It is therefore obvious that the notes went missing after the judge had completed his handling of the case. It is also clear that there is a need for tighter administrative control of case records.

[8] It is my view that the missing notes of evidence do not in any way affect the outcome of the appeal, even if it is accepted that the content of such evidence was as stated by Mr Ainsworth Campbell in his various affidavits and submissions.

The judge's findings

[9] The learned judge found that the sea was rough and that Mrs Flickinger had implored the deceased not to go into the water. He accepted the evidence of Mrs Flickinger that a storm arose suddenly and without warning after the deceased had gone into the sea. He also found that there were warning signs such as that which was tendered in evidence by the respondents. The learned judge accepted what he described as "the undisputed evidence that the ladder had been pulled up, and it was the deceased who replaced it to use it to go down to the sea".

[10] The learned judge found that the appellant had "failed to establish to the requisite standard, on a balance of probabilities, that the respondents or either of them, had breached a duty of care owed to the deceased so as to allow her to succeed in this claim. Nor has it been established that if there was a breach of duty, such breach was the cause of death".

Summary of the submissions

[11] As stated earlier, complaint was made in respect of the missing notes of evidence. I shall not repeat the view that I expressed earlier about that complaint. Mr Campbell said that the main points for this court to contemplate are: the ladder, the ignorance of the deceased as regards the current, and the failure of the respondents to inform the deceased of the special dangers. He added that there were witnesses who said that they saw no warning sign and the learned judge ought to have mentioned them so as to demonstrate that he had considered their evidence. I find no merit in the complaint, seeing that a judge is not required to comment on every bit of the evidence.

Were it otherwise, judgments would have no end. Mr Campbell submitted that the appellant's warning to the deceased was of no significance as there was no evidence that she had knowledge of the danger or risk of the danger. He acknowledged "that there were rough seas" but submitted that there was no evidence that the mind of the deceased had been alerted to the dangers. However, that submission was not in keeping with the evidence that was accepted by the learned judge.

[12] Miss Danielle Chai for the respondents pointed out the irrelevance of the statement of Asher Williams (one of the witnesses whose evidence is missing) given the various timelines contained therein which do not match the times that are relevant to the instant matter. As regards the credibility of Mrs Flickinger, she submitted that the learned judge was entitled to prefer the statement she gave to the police just after the incident, rather than her evidence 12 years later. She submitted that the deceased knew he was taking a risk, but decided to take it anyway. In the same way that Mrs Flickinger saw the danger signs, the deceased could have seen them. Finally, she said that hotel operators are not required by law to "straight jacket and tie up their guests to prevent them from hurting themselves".

Conclusion

[13] There was evidence before the learned judge entitling him to find that the deceased was aware of the rough condition of the sea, having been warned by his wife and others, but decided to snorkel in any event. There was credible evidence also that there was at least one warning notice that would have been visible to the deceased. There is no basis for disturbing these factual findings, given the learned judge's distinct

advantage in seeing and hearing the witnesses: ***Industrial Chemical Co (Ja) Ltd v Ellis*** (1986) 23 JLR 35. In that case on appeal from this court, Lord Oliver restated the "principles governing the approach of an appellate court to the review of the decision of the judge of trial on disputed issues of fact" by quoting as follows from the case ***Watt (or Thomas) v Thomas*** [1947] AC 484 at 487 :

> "Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that 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 trial judge's conclusion."

[14] The evidence as I appreciate it, and as accepted by the learned judge, indicates quite clearly that the deceased, sad to say, was quite reckless in how he sought to commence his holiday. In the face of warnings from persons including his wife, immediately upon arrival at the property he plunged headlong into dangerous waters, caring not what might befall him. I do not see how the respondents can be blamed in any way for this unfortunate act of recklessness on the part of the deceased. I am unable to embrace the idea that the respondents, having warned the deceased of the danger he faced, are to be blamed for not having successfully arranged for his rescue. Hoteliers cannot be expected to provide a safety net for every dangerous escapade that their guests may choose to embark upon. I cannot fault the learned judge for the conclusion at which he arrived.

[15] In the circumstances, I would therefore dismiss the appeal and order that the respondents do have their costs agreed or taxed.

DUKHARAN JA

[16] Having read the draft judgments of the learned President and my sister Lawrence-Beswick JA (Ag), I agree with the reasoning and conclusion of the President and I too would dismiss the appeal.

LAWRENCE-BESWICK JA (Ag) (DISSENTING)

[17] The appellant Mrs Elita Flickenger is the widow of the late Mr Robert Flickenger. Both Mr and Mrs Flickenger had arrived on 9 February 1995 at the Xtabi Resort Limited (2nd respondent) which was operated and managed by Mr David Preble (1st respondent). Shortly after checking into cottage number 1 on the premises, Mr Flickenger went into the sea in order to snorkel. It was not long before Mr Flickenger fell into difficulty and thereafter he disappeared from view. His lifeless body was recovered a few hours later.

[18] Mrs Flickenger sued Mr Preble and Xtabi Resort Ltd, alleging that their negligence had caused her husband's death. A trial was held after which the learned trial judge found that there was no negligence, and entered judgment for the defendants. This is an appeal against that judgment.

Grounds of appeal

[19] The amended notice and grounds of appeal were filed on 17 September 2012. They are quite voluminous and are contained below.

> "1. The Learned Trial Judge failed:
>
> (a) To properly assess the evidence given in the case by all witnesses including the First Respondent. The evidence of Asher Williams and Dwight Flickenger are not mentioned and or recognized by the Court.
>
> (b) To differentiate between the duty and performance (sayings) of the Appellant in all the circumstances and more particularly what the Appellant is said to have said to a Police Officer immediately after the tragedy of her husband's drowning before her very eyes.
>
> 2. The Learned Trial Judge allowed the case to drift for too long at a time after having been adjourned C.A.V before considering the evidence or giving judgment e.g. for upwards of one year after the case had been adjourned C.A.V. and for Attorneys-at-Law representing the parties in the claim to present their submissions, the Learned Trial Judge wrote to Counsel for the Appellant pointing out that the Submissions that were to be made after the C.A.V. adjournment had not been submitted by that Counsel. The Order of the Court at the time of the C.A.V. was for Counsel for the Defendants/Respondents to prepare Written Submissions and to deliver these Submissions to the Attorney-at-Law for the Appellant. Copy of the said Letter dated 28th November 2007 is annexed hereto. Attorney-at-law for the Appellant had to forthwith without seeing the Defendants/Respondents' Submissions made if any deliver his Submissions to the Court and consequently failed to reply to any point made erroneously or mistakenly.

3. The Learned Trial Judge dealt with the issue of the location of the scene of drowning facetiously and irresponsibly and consequently failed to appreciate the geographical location of the scene of the drowning of the deceased.

4. The Learned Trial Judge failed to record or to record accurately or at all vital evidence tendered in the case; and having thus failed arrived at the conclusion that the substratum of the Appellant's case had fallen out; that is, there was no evidence to support it. Had the evidence of Asher Williams and Dwight Flickinger been considered the Court would have been obliged to hold that the substratum of the case was present and intact.

5. The Learned Trial Judge erred when he failed to properly assess the evidence in the light of the pleadings. In the Particulars of Negligence as pleaded by the Appellant, she had alleged:-

    a) Failure to warn the decease [sic] of the danger of storms that often develop in and around the sea that is proximate to the Defendant's premises.

    b) Failure to take note of an impending storm and or to warn the deceased of the danger posed thereby to the deceased.

    c) Failure to lock a ladder that allowed access to the sea in circumstances and conditions when it was dangerous for persons including the deceased to go snorkeling

    d) Failure to rescue the deceased when he became imperiled.

    e) Failure to lock or to close the entrance to the sea when in all the circumstances it should have been locked or closed.

f) Failure to have any preparation for the eventualities of storm developing that endangers persons including the deceased using the facilities of the Defendants' premises.

g) Failure to assist or to assist sufficiently in a rescue operation (of) for the deceased.

In the Particulars of Negligence by the deceased the Defendants/Respondents in the Further Amended Defence filed the 7th February 2005 alleged:

a) Recklessly disobeying the warnings and prohibitions given by his wife the Plaintiff and others that he should not go into the sea.

b) Intentionally and or recklessly ignoring the rough, choppy and therefore dangerous nature of the sea; and

c) Deliberately entering the sea at a time when it was dangerous so to do.

The Defendants further deny the particulars of negligence contained in the Amended Statement of Claim and specifically deny that there developed any storm in the sea or around the said premises and aver that the death of the deceased was caused solely or alternatively contributed to by his own negligence.

a) Failing to take any or any special care for his own safety.

b) Entering the sea when he knew or ought to have known that it was dangerous so to do.

c) Failing to heed the warning and prohibitions given by his wife, the Plaintiff, the Defendants and others that

he should not go into the sea given its rough and choppy nature.

d) Failing to keep afloat and/or to wade in the sea water safely or at all.

e) Failing to take any or any proper measures so as to prevent himself from drowning.

In paragraph 7 of the Further Amended Statement of Claim the Claimant/Appellant had alleged 'Access to the sea from the premises of the Defendants was obtained by a ladder that descended from the edge of the Defendants' premises (land) to the sea.' And in the Particulars of Negligence the Claimant/Appellant pleaded at Particulars of Negligence '(c)' and '(e)'

(c) Failure to lock a ladder that allowed access to the sea in circumstances and conditions when it was dangerous for persons including the deceased to go snorkeling.

(e) Failure to lock or close the entrance to the sea when in all the circumstances it should have been locked or closed.

The Defendants/Respondents through their witness Justin Bell had admitted the presence of the ladder on the platform. The Appellant had given evidence of the deceased taking up the ladder from the platform; and the First Defendant/Respondent David Preble in his evidence stated that the ladder was left where it was left inadvertently on the particular day the 9th day of February 1995 and should not have been in the area witnesses said it was on the day when the deceased drowned.

It was on the basis of this evidence that an application was filed in the Supreme Court by the Appellant for an Order for the Learned Trial Judge to deliver his Judgment when there was such an inordinate delay in handing down Judgment in the

case. On the admission of the First Respondent Judgment should have been entered for the Claimant/Appellant.

6. The learned Trial Judge dealt with the case in a cavalier manner and without regard to the possible damage to the Appellant's case. Without even notifying the Attorney-at-Law for the Appellant of his intention to do so extended the time within which the Attorneys-at-Law for the Defendants/Respondents should deliver their Submissions. The learned Trial Judge had by his Order required the Attorneys-at-Law for the Defendants/Respondents to file their Submissions within two (2) weeks of the adjournment after the evidence in the case had been tendered and to deliver a copy to Attorney-at-Law for the Claimant/Appellant. Suffice it to say that the submission has not been tendered by Attorneys-at-Law for the Defendants/Respondents nor has the Court or the Attorneys-at-Law for the Defendants/Respondents advised the Attorney-at-Law for the Claimant/Appellant that the Submission had been delivered to the Court. In this regard the Court showed palpable bias and impropriety to the detriment of the Appellant. C.A.V. was on the 25th day of July, 2007. Delivery of the Judgment was on the 10th November 2010."

Orders

[20] The appellant seeks the following orders:

"(i) That the Judgment entered by the Honourable Mr. Justice Roy Anderson as contained in the written judgment dated November 10, 2010 be set aside.

(ii) That judgment be granted in favour of the Appellant.

(iii) That the Costs of the Appeal and the Court below be awarded to the Appellant to be agreed or taxed.

(iv) Any specific power which the Court has, it is asked to exercise.

(v) Such Further and/or relief as this Honourable Court deems fit."

The affidavits

[21] By virtue of an order of this Court, a supplemental record of appeal was filed on 18 October 2013 which included affidavits of counsel for the appellants, Mr Ainsworth Campbell, sworn to on 16 January 2009 and 6 December 2012.

[22] The affidavit of January 2009 concerned the failure of counsel for the respondents to provide submissions after the trial to the learned judge and asked that the learned trial judge treat the trial as concluded and deliver judgment without waiting any longer for the submissions.

[23] In the affidavit of 6 December 2012, counsel stated that the learned trial judge's notes did not record that Mr Preble had testified during cross-examination that it was by inadvertence that the ladder was left on the platform on 9 February 1995. Counsel also stated in that affidavit that the judgment did not refer to the evidence of Mr Asher Williams and Mr Dwight Flickenger, both of whose evidence he submitted, could have affected the findings of the court.

[24] In response, counsel for the respondents submitted that Mr Campbell was mistaken about this allegedly omitted evidence and stated that there was no record of any such evidence.

Submissions

[25] The grounds overlap to some extent and I aim to do no disservice to counsel's submissions as I merge some grounds and consider them together.

Grounds 1 and 4

Improper/Insufficient recording and assessment of evidence of David Preble, Asher Williams and Dwight Flickenger

Findings against the weight of the evidence

[26] Mr Asher Williams and Mr Dwight Flickenger, brother of the deceased, had both testified that there was no sign cautioning persons as to the danger of the sea. Counsel argued on behalf of the appellants that the learned judge ought to have commented on the effect which the evidence of Mr Asher Williams and of Mr Dwight Flickenger had on the credibility of the other witnesses whose evidence was that there were in fact cautioning signs.

[27] Counsel for the respondents submitted that even though the learned trial judge did not specifically mention Mr Asher Williams and Mr Dwight Flickenger's evidence, it should not be assumed that he had not considered it, and the evidence which had not been highlighted by the learned trial judge was in any event unreliable and would have made no difference to the deliberations. The submission was that Mr Flickenger's evidence was by affidavit so that he was not cross-examined and his evidence was therefore of little value and further, that in the notes of evidence, counsel, Mr Campbell is noted as agreeing that there is a picture which his client had tendered showing the cautionary sign.

[28] Counsel, Miss Chai, argued that counsel for the appellants had misquoted the evidence when he said that Mr Asher Williams' evidence was that the seas were rough from December to February. He had in fact said that the seas were not rough. Further Mr Asher Williams would not know if there were warning signs because the evidence was that he had only passed the hotel from outside.

[29] Counsel for the respondents relied on **Eagil Trust Co Ltd v Pigott-Brown and Another** [1985] 3 All ER 119 to argue that a judge does not have to deal with each point raised.

[30] Although counsel Mr Campbell orally argued ground 1 of the appeal as is detailed above, his written submissions on this ground were more general and complained that the judgment and findings of the court were against the weight of the evidence.

[31] He submitted that Mrs Flickenger had not contradicted her evidence and indeed her evidence as to the time and circumstances of her husband's drowning had been significantly corroborated by the respondent's witness, Justin Bell. He argued that her evidence supported the pleading that Xtabi had acted negligently, either by way of acts of commission or of omission and that those negligent acts led to the drowning of Mr Flickenger.

[32] For the appellant, counsel argued further that Xtabi's witness, Mr Bell, and the respondent, Mr Preble himself, both gave evidence supporting Mrs Flickenger's evidence and the pleadings that there was a ladder on the premises at just about the place

where the deceased had entered the water. The submission was therefore that the learned judge erred when he found that Mrs Flickenger was not a credible witness because such a finding was against the weight of the evidence.

[33] On behalf of the respondents, counsel submitted that the learned judge had adequate basis on which to make his findings. He had assessed the demeanour of the witnesses further and thereby came to a proper determination. He had taken into account the fact that the appellant had made a previous inconsistent statement to the police and had relied on that statement as being the more reliable account of the incident.

Grounds 2 and 6

Failure to properly manage the case resulting in bias and impropriety to the detriment of the appellant

[34] Counsel for the appellant argued that the learned trial judge had shown "palpable bias and impropriety" in the manner in which he dealt with the submissions. On 25 July 2007 when he reserved judgment, the judge had ordered that the defendants file their submissions and deliver them to the appellant's attorney-at-law by 1 August 2007. Submissions of the appellant should thereafter be filed by 14 August 2007. Counsel Mr Campbell submitted that four months later, the submissions of the respondents had not been filed and, according to Mr Campbell, the court had unilaterally given counsel for the respondents an extended time within which to file his submissions. Still, Mr Campbell did not receive the respondents' submissions. He therefore prepared his submissions and filed them on 6 December 2007, without having

had sight of the respondents' submissions. He argued that he was thereby deprived of responding to the arguments contained in them.

[35] Indeed, he says that to date, he has not received or seen any submissions made by the respondents' counsel. Nor has he been advised as to whether the respondents' submissions were ever delivered to the learned trial judge.

[36] Counsel for the appellant submitted further that the learned judge had not considered all the evidence presented in the case because he had mislaid his notes or at least some of his notes. Counsel argued that this was evident from the fact that on 11 March 2011, the judge had e-mailed the attorneys-at-law representing the parties and had enquired if they could provide him with the notes of proceedings prior to 20 January 2006 as he was unable to find them and they were needed for purposes of the appeal. Counsel's affidavit of 6 December 2012 exhibited a purported copy of this email.

[37] According to counsel, the judge's notes of evidence, which formed part of the record of appeal contained a "partial recording" of the cross-examination of Mr Asher Williams, the appellant's witness. Further, counsel argued, in the judgment the learned judge did not refer at all to the evidence of Mr Asher Williams or Mr Dwight Flickenger, another witness for the appellant, both of whom counsel regarded as being vital witnesses.

[38] Counsel argued that these omissions support his contention that the learned trial judge had fallen into error by preparing his judgment when he was not in possession of all the material evidence and that the appellant had thereby suffered great prejudice.

[39] Counsel Mr Campbell filed an affidavit containing his record of the evidence of these witnesses. It forms part of the supplemental bundle of appeal which he was given leave to file for consideration of this court.

[40] According to counsel, the respondents had made some admissions but because the trial judge had failed to either record the evidence or had recorded it incorrectly, he had not followed the logic of those admissions when the admissions had in fact corroborated the appellant's evidence and that of her witnesses.

[41] Counsel concluded in his submissions that because of the various mistakes, omissions and errors which the learned trial judge made in recording the evidence and in evaluating the witnesses, this court should direct that the judgment be entered for the appellant as the appellant had proved her case on the balance of probabilities by overwhelming evidence.

[42] On the other hand, counsel for the respondents relied on **Cobham v Frett** [2001] 1 WLR 1775 to submit that delay alone does not invalidate the decision. The argument was that although the submissions may have been late, the quality of the judge's notes was good and this court should look on that, as also the judgment, and scrutinize the findings of fact and reasons. Counsel also relied on **Saunders v Adderly** [1999] 1 WLR 884 to argue that the court should be slow to disturb findings of fact (para 892 H).

Ground 3

Failure to appreciate the geographical location of the scene of drowning

[43] Counsel had described the approach of the learned trial judge to the evidence concerning the location of the drowning as irresponsible but he made no further submissions on this ground and there was therefore no response by the counsel for the respondents.

Ground 5

Failure to assess the evidence as against the negligence of the respondents as pleaded by the appellant and as pleaded by the respondents

[44] The pleadings of the appellant to which counsel for the appellant referred were the particulars of negligence. Here I consolidate the pleadings which the appellants asserts amounted to negligence by the respondents.

(a) Failure to warn Mr Flickenger of the impending storm and its danger.

(b) Failure to lock/close the entrance to the sea when it should have been locked/closed. Failure to lock ladder which allowed access to the sea.

(c) Failure to rescue/assist sufficiently in rescue operation of/for the deceased.

[45] Counsel argued that Mr Flickenger could only exercise caution based on knowledge. He had been enticed by brochures to go to the "lovely Xtabi" and would not have been made aware of its dangers. Counsel submitted further that the sea on that fateful day was dangerous for persons, including the deceased, to go snorkeling. Access to the sea from the respondent's premises was by way of a ladder from a

platform which was at the edge of the premises, and, counsel urged, it was the respondents' negligence in failing to lock away that ladder which allowed the deceased to gain access to the sea which ultimately resulted in his death.

[46] Counsel argued that the respondent Mr Preble had admitted in evidence that he had in fact left the ladder available inadvertently on the day in question. That was in contradiction of his pleadings which had stated that there was no relevant ladder at all near the sea or on the platform. Counsel, Mr Campbell, further informed this court that although the admission does not appear in the notes of evidence, the admission by Mr Preble of the presence of the ladder had been so clear in counsel's mind that it had formed the basis of an interlocutory application for judgment to be entered for the appellant, as it was in his view, an admission of liability by the respondent**.** Further, he said, witness for the defence, Justin Bell had admitted that the ladder had been on the platform and Mrs Flickenger had also given evidence that the deceased had taken up the ladder from the platform.

[47] Mr Campbell's submission was that the judge had therefore fallen into error by failing to find that the very fact that the respondents had the ladder on the platform or in the immediate environment of the sea was an act of negligence. Counsel submitted further that the respondents' failure to lock and/or close the entrance to the sea, when in all the circumstances it should have been locked or closed, also showed negligence on their part.

[48] The respondents had filed particulars of negligence of Mr Flickenger. Counsel for the appellant in this ground also submitted that the learned trial judge had failed to consider the evidence as against those pleadings. Here I consolidate those pleadings of the respondent which particularize the negligence of Mr Flickenger as in:

(a) Recklessly disobeying the warnings of his wife and others to not go into the sea.

(b) Failing to take care of his own safety by deliberately or recklessly going into the sea when it was rough, choppy and dangerous.

(c) Failing to keep afloat and/or to wade in the sea safely or to take proper measures to prevent himself from drowning.

[49] Counsel for the appellant submitted that Mrs Flickenger was not qualified to assess the danger that existed in the sea just before her husband went into it because she too would not know of the danger. How then could she warn against it? He argued that the judge had therefore erroneously held that Mrs Flickenger was qualified to assess the danger and warn her husband. He further submitted that the judge also fell into further error in finding that the deceased himself must have calculated a risk of drowning and thereafter disregarded the warning of his wife. Mrs Flickenger denied having given any warning to her husband, and in any event, there was no evidence of any response from the deceased to allow a finding that he had heard any words spoken.

[50] Counsel for the respondents countered those arguments by submitting that Mr Flickenger had voluntarily exercised the option of going into the sea, being aware of the

inherent risk and dangers of so doing. Further, counsel argued that it is unchallenged that there was a struggle between Mr Flickenger and Mr Justin Bell, who testified as to preventing him from taking the ladder. The argument therefore was that Mr Flickenger, by his own actions, caused his death.

[51] In response to the pleadings asserting that the respondents provided insufficient or no method of rescuing guests from the sea, counsel for the respondents argued that the evidence of Mr Justin Bell and Mr David Preble had given the details of the efforts made to rescue Mr Flickenger.

[52] Mr Campbell also argued under the Occupiers' Liability Act that the occupier of the premises had an obligation to warn Mr Flickenger of danger.

Analysis and Discussion

Grounds 1 and 4

Improper/Insufficient recording and assessment of evidence of David Preble, Asher Williams and Dwight Flickenger

Findings against the weight of evidence

Caution Signs

[53] This ground of appeal concerns primarily the absence of signs of caution on the property, which is a major part of the argument which counsel for the appellant raises in proof of the negligence of the respondents.

[54] The learned trial judge accepted that there were in fact cautionary signs on the property. In making that determination, he referred to one sign which was exhibited

and which he described as having been "purportedly taken from the way to the cottage taken by the deceased" [para 27 of the judgment]. He used that sign to assist in his decision that Mr Flickenger had been sufficiently warned of the danger of the seas. He found that the signs posted on the property were to the effect of "Swim at your own risk: No lifeguard on duty". This he accepted from the evidence of the respondent Mr David Preble and of Mr Justin Bell whom he said was shown to be barely literate [para 27 of the judgment].

[55] Mr Justin Bell had worked at Xtabi and had assisted Mr and Mrs Flickenger to their cottage on the day of the incident. Mr Bell testified that there were warning signs on the property where the cottages were. However when asked in cross-examination to spell individual words which were on the sign-"Caution" "Swim" "Risk" "Lifeguard" "Duty" "Rough" "Dangerous" "Can't"- he testified that he could not. He was only able to spell "your".

[56] In view of this evidence, the learned judge could not properly conclude that the witness Bell was being truthful when he testified that he had himself seen signs on the property which had words cautioning the guests about the dangers of the seas. The witness had testified that he could not read those words which were important in the context of the warning written on the signs, and there would be no basis for the judge to rely on his evidence that there were signs on the property bearing those same words to warn about the dangerous seas.

[57] How then could the judge have concluded that the cautionary signs were there? Total reliance would have had to be placed on Mr Preble's evidence. It was indeed open to the learned judge to rely on him. The judge had seen the witness, listened to the evidence and had decided that he spoke the truth in saying that the signs were there. If viewed in isolation there would be no basis to interfere with his decision in that regard.

[58] However, the affidavit of Mr Dwight Flickenger, brother of the deceased, had been admitted into evidence, and it stated that there were no signs of caution on the property at the time. His evidence was supported by photographs he had taken on the property the day after the incident and there was no challenge to the accuracy of the photographs. They were photographs of various locations on the property and also of signs, none of which warned of the dangers of the sea. However, the appellant's case became less clear because the notes of evidence record the evidence:

> "He agrees there is a picture which his client had tendered showing this sign." (page 364 of the record)

["He" referred to counsel Mr Campbell and "sign" referred to the exhibited sign]. This seems to indicate that counsel for the appellant agreed that the caution sign which was exhibited, had in fact been on the premises. This is of course, contrary to the case of the appellant.

[59] As it concerns Mr Asher Williams, the record of his evidence is incomplete, but, according to the notes of evidence provided, he testified that he had been to Xtabi to

drink with friends and he did not see signs there. The notes make no mention of evidence that he had only passed the hotel from the outside. Because the record of the notes of evidence is incomplete, it is not helpful in this regard. In the notes, there is no obvious demarcation between the evidence of each witness. The result is that some words have to be assumed in order to understand what is recorded. One such assumption is that it is Mr Asher Williams who is the witness recorded as testifying as follows:

> "Did not see any signs on property rough seas - especially December … No rough seas in February." [page 316 of the record]

However, there was no reference to Mr Asher Williams' evidence in the judgment, and this absence therefore left unresolved the issue of what he actually testified.

[60] As it concerns the photographs taken on the property by Mr Dwight Flickenger, counsel for the respondents had argued that they were taken on the day after the incident and therefore could not be evidence that there were no signs on the day of the incident. In any event, in the judgment, there is no mention of the photographic evidence and any effect it had on the assessment of the pertinent evidence including that of the barely literate Mr Justin Bell. The judge did not give reasons for accepting as true the evidence of the respondent Mr Preble and of Mr Justin Bell, in preference to the photographic evidence of Mr Flickenger. The learned judge thoroughly examined the aspects of the matter as detailed in his written judgment and concluded in accordance with the evidence which he had considered. However, the notes of

evidence are incomplete. In some areas, the precise content of the evidence and the witness who is testifying are left to conjecture. In these circumstances therefore, the submission is properly made that there was an improper assessment of the evidence of the three named witnesses.

Grounds 2 and 6 Failure to properly manage the case resulting in bias and impropriety to the detriment of the appellant

[61] The respondents had called witnesses at the trial and the order which the learned trial judge made at the conclusion of the hearing on 25 July 2007, allowed for counsel for the appellant to be served with submissions of the respondents some two weeks before being required to reply to them by filing his own submissions.

[62] The judge stated that he waited for over a year to receive the submissions from counsel [para 1 of the judgment]. It is unchallenged that counsel for the appellant had been awaiting the submissions of the respondents and that he eventually filed his own submissions in December 2007, some five months after the last date of the hearing, without having been served with the respondents' submissions. However, the judge had intended both counsel to exchange submissions. He therefore remarked:

> "Regrettably also, despite both counsel having presented written submissions, neither had served their submissions on the other. Thus on April 27, 2009, I made further orders for the exchange of submissions and time for the Defendant to reply to any authorities cited by the Claimant. It was therefore not until the Summer Term that I had access to all submissions and authorities cited by counsel for the parties." [para 3 of the judgment]

[63] Although counsel for the appellant has stated that to date he has not been served with any submission, he did not identify any argument which was mentioned in the judgment as having been raised on behalf of the respondents and which he had not anticipated and addressed in his own submissions.

[64] Therefore, one of the questions to be resolved in this ground of appeal is whether the failure to properly file the submissions inured to the detriment of the appellant. Counsel has not shown any particular prejudice which the appellant suffered, and it may well be viewed as a tribute to the skill of counsel for the appellant, Mr Campbell, that he was able to anticipate the arguments and address them. Nonetheless, the delay of over one year awaiting submissions from counsel for the respondent, with no reason proffered, does not benefit the trial process. The judge's orders regarding filing and serving of the submissions were disobeyed with impunity.

[65] The learned judge fell short in proper management of the trial when he failed to ensure that the submissions from both counsel were either presented in a timely fashion, or alternatively, to make appropriate orders where the submissions were not so filed, in order to cause the matter to be concluded. However, in the absence of any actual evidence of detriment to the appellant, this failure of the learned judge to manage the trial in this regard does not amount to "bias and impropriety".

[66] I turn now to the complaint that the learned judge did not consider all the evidence. In preparing the notes of evidence for use in the appeal the judge sought the assistance of both counsel to provide the notes of evidence of the trial dates prior

to 20 January 2006. He had only been able to find notes from 20 January 2006 onwards. Had they been stolen, destroyed, misplaced, never recorded? There was no reason given for the fact that the learned judge could not locate them and there was no indication as to whether or not he had access to them while he was deliberating on, and writing his judgment. Nonetheless the record of appeal contains notes of evidence taken before January 2006, but there is no explanation as to how they were eventually compiled when the judge had earlier said that he not been able to locate them.

[67] Disturbingly however, the dates recorded in the judgment as being dates on which the matter was heard, do not accord with the dates stated in the notes of evidence as the dates when evidence was given or submissions made. In the judgment, there are 12 dates listed as hearing dates. Of these dates, there are five when there is no record in the notes of evidence of any proceedings occurring or of any evidence being taken - 26 and 28 November 2002, 16 January 2006, 4 April 2006 and 15 May 2006.

[68] Similarly, there are 16 dates listed in the notes of evidence as being dates when evidence was taken or submissions made. Yet 10 of these dates are not recorded in the judgment as being dates when the matter was heard although the notes of evidence are specific as to the proceedings on those dates. There was no explanation for the inconsistency between the dates of trial and the dates of the notes of evidence.

[69] Further, the observation of counsel for the appellant that there was but a "partial recording" of the cross-examination of Mr Asher Williams, the appellant's witness, may

well be accurate. The notes contain evidence which was described as being taken on 21 July 2000, (page 316 of the record), but there is no indication as to the name of the witness giving evidence. It is recorded in its entirety thus:

> "Exhibit 1 as tendered on 16/1/2006 I know that a man died. Drown by the reef side in Xtabi. I have been at that place at Xtabi. Went there about 1994, December. I go there to drink with friends. Did that all the time. Did not see any signs on property rough seas - especially December… No rough seas in February.
>
> **No re-examination**."

[70] It cannot be identified as to whether this was/included examination in chief or cross-examination and indeed whether this contained all of the evidence of this witness who was unnamed, but who, by a process of elimination can be assumed to be Mr Asher Williams. The evidence, as recorded above, spoke to the absence of signs on the property, but it does not appear to represent the evidence of the witness in its entirety. Interestingly, there was no reference in the judgment to the evidence of Mr Asher Williams.

[71] Mr Dwight Flickenger's evidence, admitted at the trial by way of affidavit, on 18 June 2005 (page 320 of the record) was that he had visited Xtabi on 10 February 1995, the day after his brother's death, and that at no time did he see any written warning sign about dangerous surf. He supported that with appended photographs of varied sections of the property showing no such signs. This too, is one of the dates which is

not noted in the judgment as a date when the trial was being heard. Again, the judgment makes no reference to this evidence.

[72] It is true, as submitted by the respondents, that even if the trial judge did not specifically mention the evidence of Mr Asher Williams and Mr Dwight Flickenger, it must not be assumed that he did not consider it in assessing the arguments as to whether or not negligence had been proved. In any event, the court need not deal with every single point. This was the view re-iterated by the House of Lords in **Eagil Trust Co Ltd v Pigott – Brown and Another** (supra) at 122 when Lord Griffiths observed:

> "I cannot stress too strongly that there is no duty on a judge, in giving his reasons, to deal with every argument presented by counsel in support of his case. It is sufficient if what he says shows the parties and, if need be, the Court of Appeal the basis on which he has acted, and if it be that the judge has not dealt with some particular argument but it can be seen that there are grounds on which he would have been entitled to reject it, this court should assume that he acted on those grounds unless the appellant can point to convincing reasons leading to a contrary conclusion."

[73] However, in my view, the circumstances surrounding the conduct of this trial are noteworthy. There was inconsistency between the dates of hearing stated in the judgment and the dates in the notes of evidence. The judge stated that he could not locate certain notes. There was an absence of reference to the evidence of two witnesses for the appellant. It would thus be reasonable to conclude that the learned judge did not have in his possession all the evidence when he had prepared his

judgment. However, counsel Mr Campbell has provided this court with his record of the notes which he complained had not been recorded or considered by the judge. They concern primarily the issue of the presence of cautioning signs. The discussion as to the effect of the cautioning signs which follows infra will show that these omissions by the judge do not affect the outcome of the case.

[74] The learned judge ought therefore to have more properly managed the trial, but in the particular circumstances of this case, his failure to properly manage the case was not to the detriment of the appellant. There is therefore no merit in these grounds of appeal.

Ground 5 Failure to assess the evidence as against the negligence of the respondents as pleaded by the appellant and as pleaded by the respondents

[75] The learned judge determined that there had not been negligence because there was no breach of duty, and in any event, no proof that any such breach caused the death. The substance of this ground is that the evidence was not properly assessed to determine if there were negligence attributable to the respondents.

[76] The judge considered whether Mrs Flickenger had established her case for negligence against the defendants. She had averred that the defendants failed to warn the deceased about the storms that often develop in the area and of the dangers posed by such a storm. However, the judge concluded that Mr Flickenger had been warned because he found that there were in fact warning signs such as that which had been tendered as evidence in the case.

[77] He found that a storm had arisen suddenly and without any warning after Mr Flickenger had gone into the sea and he said that the suddenness of the storm raised on its face the defence of "Act of God".

[78] The learned judge also opined that if such a sudden unexplained storm "came up without warning and rain lasted two or three minutes" as had been the evidence of the appellant, it would raise for him the question whether this had represented an intervening event which avoided the liability of the defendants (para 65 of the judgment).

[79] Counsel for the appellant submitted that there was no basis on which the learned trial judge found that Mrs Flickenger was not credible. According to him, her evidence was the same as her statement to the police. There was no basis on which to accept Mr Justin Bell's evidence in preference to Mrs Flickenger's.

[80] The judge however said that he had observed Mrs Flickenger as she testified and he noted an inconsistency between her statement to the police and her evidence in court, and he regretted that he found her evidence to be quite unreliable and not credible (para 50 of the judgment).

[81] In concluding that negligence had not been proved, the learned judge bore in mind, at para 53 of his judgment, that an essential element of negligence is causation and that the claimant must show that the alleged breach was the cause of the damage and of the injury suffered. He relied on a Canadian Supreme Court decision of

Resurfice Corp v Hanke 2007 SCC 7, para 11, where the Supreme Court of Canada held unanimously that the basic test for determining causation remains the "but for" test. There this test was described as articulating the principle that causation only exists if the harm suffered by a party would not have happened in the absence of the defendants' conduct [para 56 of the judgment].

[82] In this matter Anderson J's findings were that:

> "[E]ven if the defendants had failed to provide the warning signs, (I have found as a fact that they did provide signs), and even if the other particulars of negligence alleged had been established, and I hold that they have not, the claimant would still have to fail as they failed to establish the principle of causation." (para 57 of the judgment)

He then considered whether the respondents had any liability under the Occupier's Liability Act ("the Act"), although he noted at para 33 that there was in fact no pleading that the defendants were to be found liable pursuant to that Act.

Occupier's Liability

[83] As it concerns responsibility under the Act, the learned judge found that the deceased had been warned that the rough seas were dangerous and that there had been no lifeguard on duty and therefore a claim under this Act failed. He described the judgment of **Tomlinson v Congleton Borough Council and others** [2003] UKHL 47 as being instructive where the claim had failed because the claimant had been unable to prove that the defendants were at fault.

[84] The learned judge opined that adults must be taken to appreciate the dangers posed by rough seas, and he inferred from the evidence that Mr Flickenger had some ability as a swimmer and would have had respect for the inherent risk associated with the sea. The evidence had suggested that Mr Flickenger was an avid snorkeler [para 59 of the judgment].

[85] Although the judge had described Mrs Flickenger as unreliable, he accepted on a balance of probabilities, her statement to the police that the sea was rough with big waves and that she had warned her husband not to go swimming. He viewed the evidence of the defence as corroborating that statement. His opinion was therefore that the respondents were faultless and should not be held liable for the death of Mr Robert Flickenger.

Negligence

[86] It has long been established that the tort of negligence has four ingredients – the existence of a duty of care, a breach of the duty, a causal connection between the breach and the damage and forseeablity of the particular type of damage caused (Clerk and Lindsell or Torts 19th edn para 8-04). It cannot be disputed that the respondents had a duty of care to the deceased who was a customer at their hotel. The question is whether the judge was correct in concluding that the appellant had failed to prove the elements of negligence. Was there a breach of the duty? If so, was any damage thereby caused which was reasonably foreseeable?

The Ladders

[87] It is agreed that the deceased gained access to the sea by way of a ladder from a platform below his cottage which led down to the sea. The submission was that the respondents had a duty to prevent access to the sea by the ladder, and that they had breached that duty. The particulars of negligence that were pleaded included:

> "c) Failure to lock a ladder that allowed access to the sea in circumstances and conditions when it was dangerous for persons including the Deceased to go snorkeling.
>
> d) …
>
> e) Failure to lock and or close the entrance to the sea when in all the circumstances it should have been locked and or closed."

[88] It is the placement of the ladder which was in fact one of the complaints most vigorously pursued on behalf of the appellant by counsel Mr Campbell. It was his argument that had the ladder been inaccessible to the deceased then he could not have used it to gain entry to the sea. He submitted that it was important evidence concerning this accessibility that the judge had not recorded.

[89] The judge accepted what he described as undisputed evidence that the ladder had been pulled up and that it was the deceased who replaced it to use it to go down to the sea.

[90] The unchallenged evidence was that there were ladders throughout the property. Was the only access to the sea by way of that particular ladder? There was no such

evidence. Nor was there evidence of a method by which entrance to the sea could be locked. In my view, it follows that the submission that the respondents had been negligent in failing to lock the entrance to the sea is without merit.

Rescue

[91] Further instances of negligence were argued by the appellant. In the particulars of negligence there were pleadings that there was:

> "d) Failure to rescue the deceased when he became imperiled.
>
> e) …
>
> f) …
>
> g) Failure to assist and or to assist sufficiently in a rescue operation of the Deceased."

These can properly be considered together as an assertion that negligence arose from the inadequate provision for rescue of the deceased from the seas.

[92] In the judgment, the learned judge concluded that there was no evidence from the claimant to support her assertion that there was a failure to rescue Mr Flickenger and further, that any such assertion was a conclusion which should be determined by the court.

[93] In considering the evidence of the respondents' attempt to rescue the deceased by throwing a rope with a life ring to him, the learned judge found that there was no mention of the length of the rope to which the life ring was attached. He concluded that there was therefore no evidence as to whether, in the particular circumstances,

that was an adequate attempt at rescue. The judge opined that there was no evidence that the respondents had failed to do enough to rescue Mr Flickenger, and further that the appellant did not say what reasonably ought to have been done by the respondents.

[94] He observed that it had not been established precisely where in the sea the deceased had died. Presumably, if a precise location of death were identified, then, the learned judge would have assessed the adequacy of the attempted rescue by the life ring. That approach carries with it two challenges: - firstly, there is no evidence of the moment of death to determine exactly where in the seas he was at the precise time of his death, and secondly, in any event, there would likely be no ready method of identifying such a precise location in the sea.

[95] The rope with the life ring was too short to reach Mr Flickenger where he was in the sea. This must mean in and of itself that that method of rescue was not adequate and the judge therefore erred in finding that there was no evidence of its adequacy.

[96] The evidence is that the other methods or rescue available on the property were a dinghy boat and lifeguards. Mr Preble testified that the boats could not be safely used in the circumstances, and the lifeguards were absent at the time of the incident.

[97] The evidence speaks to the deceased being within the view of persons on the property. The inference in my judgment is that he was at a distance from where he might have been rescued if there had been adequate provision for such an effort. There

is no evidence that the deceased had gone outside of the waters which were adjoining the Xtabi property.

[98] It seems to me that there was a breach of the duty of both respondents to have reasonable rescue facilities available for the guests, including the deceased. It is undisputed that rescue eventually came many minutes after he had fallen into difficulty by way of jet-ski operators who were sought from off the property. When they towed Mr Flickenger to shore he was dead.

[99] Although there was no evidence of the time of death, the evidence shows that Mr Flickenger was still alive at the time when the unsuccessful attempt was made to rescue him with the life ring. For negligence to be established there must be reasonable foreseeablity of damage by breach of a duty of care. [**Bolton and others v Stone** [1951] 1 All ER 1078]. Here the respondents advertised Xtabi as providing scuba/snorkeling facilities and invited guests to the property. There would always be a possibility of a guest encountering difficulties in the sea and the probability of injury to him from failing to provide rescue facilities. There must, in my view, be a duty to guard against that reasonable probability.

[100] The breach of duty to provide a timely and efficient method of rescue ultimately caused the death of Mr Flickenger, and the learned judge fell into error in failing to recognize the negligence which arose from this breach.

Occupiers' Liability

[101] The Occupiers' Liability Act provides that an occupier of premises owes a common duty of care to all visitors, except there be an agreement otherwise (section 3(1)).

[102] Section 3(2) of the Act provides for the nature of the duty of care owed to a visitor to premises:

> "(2) The common duty of care is the duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there."

[103] Did the respondents have a duty under this Act to warn persons in these particular circumstances and did they warn the deceased? Here the learned judge correctly found that in this case:

> "… there is no evidence that the waters in the vicinity of the Xtabi Resort were any more or less treacherous than anywhere else in Jamaica." [page 64 of the judgment]

Indeed the unchallenged evidence was that there were ladders throughout the premises allowing access to the sea and that even the children of the respondent Preble swam in the sea where the incident had occurred.

[104] In coming to his decision that they did not have a duty to warn the appellant of the danger of the seas, the judge placed reliance on the reasoning to be found in **Tomlinson** (supra). There Lord Hoffmann said:

> "I think it would be extremely rare for an occupier of land to be under a duty to prevent people from taking risks which are inherent in the activities they freely choose to undertake upon the land." (para 45 of that judgment)

[105] Section 3(3)(b) and (4) of the Act in addressing the extent of the duty provides:

> "(3) The circumstances relevant for the present purpose include the degree of care and of want of care, which would ordinarily be looked for in such a visitor and...
>
> (b) An occupier may expect that a person, in the exercise of his calling, will appreciate and guard against any special risks ordinarily incident to it, so far as the occupier leave him free to do so.
>
> (4) In determining whether the occupier of premises has discharged the common duty of care to a visitor, regard is to be had to all the circumstances."

[106] Here the evidence is that the deceased was an adult, accomplished in his chosen field of work, and also an experienced world traveller and snorkeler. He had chosen to go snorkeling. He must take some responsibility for his own decision and his own safety, especially in surroundings which were unfamiliar.

[107] Any duty of care which either of the two respondents may have had towards the appellant as prescribed under the Act, was not breached by failing to display any

cautionary sign in these circumstances where there is no evidence of any particular and/or unusual danger. It must be contemplated within the human experience that the sea has intrinsic danger and that the condition of the sea changes from time to time. Lord Hoffman's view in **Tomlinson** is to be noted.

> "The law provides compensation only when the injury was someone else's fault." [para 4]

[108] May LJ's observation in **Darby v National Trust** [2001] PIQR 372 provides a pragmatic approach to the law:

> "It cannot be the duty of the owner of every stretch of coastline to have notices warning of the dangers of swimming in the sea. If it were so the coast would have to be littered with notices in places other than those where there are known to be special dangers which are not obvious."

[109] However, in my judgment, where a hotel and its operator accept a paying guest onto its premises which are adjacent to the sea, a duty arises under the Act to provide a readily accessible method of rescue of the guest from the adjacent sea within a reasonable time.

Conclusion

[110] The deceased had come onto the property as a paying guest in response to an advertisement. The property borders the sea and is advertised as offering an enjoyable snorkeling experience. It must be that there was a duty to have available a method of

rescuing guests from the sea, within a reasonable time and from a reasonable distance from the shore, especially where the entrance to the sea could not be closed.

[111] The respondents breached that duty resulting in the death of Mr Flickenger, which in the circumstances was foreseeable. The learned judge fell into error in not recognizing that breach, and in concluding that Mrs Flickenger "has failed to establish to the requisite standard on a balance of probabilities, that the defendants or either of them had breached a duty of care owed to the deceased so as to allow her to succeed in this claim". He further erred in concluding that it had not been established that "if there was a breach of duty such breach was the cause of death" (para 67 of the judgment).

[112] It is true that there had been no breach of duty of care which allowed or caused Mr Flickenger to enter the sea and the learned judge's conclusion in that regard cannot be faulted. Mr Flickenger made that decision to snorkel in those waters at that time, in conditions which would appear to have not been safe. He failed to exercise care to ensure the surroundings were safe for his activity, and in so failing, contributed to his eventual demise. In my view, he was 50% contributorily negligent.

[113] The respondents' negligence in failing to provide an adequate method of rescue contributed equally to Mr Flickenger's death. In view of the fact that in the court below the respondents had not been found to be liable for negligence, no consideration had been given to the evidence and submissions concerning damages resulting from the death.

[114] To say that it is unacceptable for a matter such as this to have remained unresolved in the court system for so many years is to state the obvious. All parties involved contributed in some way to the delay, whether large or small. Regrettably, there would now be some further delay to allow for the assessment of damages arising from Mr Flickenger's death.

[115] I would allow the appeal, enter judgment for the appellants and remit the matter to the Supreme Court for an assessment of damages within the upcoming term. Costs of the appeal and of the court below to the appellants to be agreed or taxed.

PANTON P

ORDER

By a majority (Lawrence-Beswick JA (Ag) dissenting), appeal dismissed. Costs to the respondents to be agreed or taxed.