COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

COMMON LAW & EQUITY DIVISION

2006/CLE/GEN/0713

B E T W E E N

RUDY HIGGS

EULIMAE HIGGS

SHERIAE HIGGS

Plaintiffs

AND

BAHAMAS ELECTRICITY CORPORATION

Defendants

Before: The Hon. Sir Michael Barnett, Chief Justice

Appearances: Ms. Eleanour Albury for the Plaintiffs
Mrs. Genell Sands for the Defendant

Hearing Dates: 27th and 28th November, 2013

J U D G M E N T

Barnett, CJ:

1. This is an action by the owners of a dwelling house situate on Harbour Island for damages caused by the destruction of their property by a fire on the 14th July,

2005. The action is brought against the Bahamas Electricity Corporation, a statutory body charged with the provision of electricity supply to consumers on the island.

2. The Plaintiffs' claim that their home was destroyed by a fire which was caused by the negligence and or breach of statutory duty by the Defendant.

3. The relevant parts of the statement of claim are as follows:

> **3. The Defendant is and was at all material times a body corporate providing for the transmission of electrical energy for lights or power for the use of the general public in any part of the said Island of Eleuthera. Further, the Defendant is and was at all material times the owner of an electrical equipment known as a "Transformer" used in the supplying of electrical energy as stated herein and attached to an electrical pole installed by a system of electrical wires.**
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> **4. The said Transformer had been installed by the Defendant its servants or agents and was at all material times under its management and control.**
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> **5. On or about the 14th day of July A.D., 2005 the said Transformer malfunctioned caught on fire and the sparks thereof spread to the electrical wires leading from the said Transformer to the Plaintiffs' home thereby setting fire which completely destroyed the said dwelling home, goods, and property thereon the Plaintiffs' said premises.**
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> **6. The said fire was caused by the negligence and/or breach of statutory duty under the Electricity Act (Out Islands) and the Rules made under the said Act of the Defendant, its servants or agents.**
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> **PARTICULARS OF NEGLIGENCE**
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> **1. Failed to maintain and keep the said Transformer equipment in good and proper condition.**
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> **2. Failed to maintain or keep the said electrical wires in safe and workable condition;**
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> **3. Failed to inspect the said Transformer regularly or at all;**
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> **4. Allowing the said Transformer to fall into a defective and dangerous condition in that it was liable to and did in fact cause fire as hereinbefore set out;**
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> **5. Causing and permitting the said fire and the destruction of the Plaintiffs said dwelling home, goods and property;**
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> **6. Failed to prevent the said Transformer from setting fire to the Plaintiffs' house, goods and property;**
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> **7. Failed to put into any effect any or any adequate system of inspection or maintenance of a system for the operation of the said Transformer and electrical wires attached thereto whereby the fault/fire hereinbefore stated might have been detected and the same remedied before the said fire;**
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> **8. Negligently and/or in breach of Section 58 (d) of the said Rules failed to ensure that the class or design of wires, fittings and apparatus used by consumers, and in the manner in which such wires fixed, arranged, protected, controlled, inspected, tested and maintained;**

9. **The Plaintiffs will further rely upon the fire of the said Transformer as evidence f negligence and upon the doctrine of res ipsa loquitur as proof of negligence.**

4. The Defendant denies liability. It pleads:

3. **The Defendant admits that it is a statutory body corporate and is a supplier of electricity to the public in parts of the Island of Eleuthera. The Defendant further admits that it is the owner of an electrical equipment known as a "transformer". Save as is hereinbefore admitted Paragraph 3 of the Statement of Claim is denied.**
4. **In response to Paragraph 4 of the Statement of Claim the Defendant avers that the supply of electricity was connected to the Plaintiffs' residence before the Defendant commenced its provision of the supply of electricity to the said Island in 1985 and to the Plaintiff's residence in particular on or about the 31st May, 1985. The transformer was installed by the Defendant between 1990 and 1992. The said transformer has never been replaced since it was installed. The transformer was at the time of the fire and still is in good working condition.**
5. **Save that it is admitted that a fire occurred at the Plaintiffs' residence on the 14th July, 2005, Paragraph 5 of the Statement of Claim is denied. The Defendant avers that the fire began within the residence of the Plaintiffs. The fire from the residence melted the service wire leading from the Plaintiffs' residence and caused one of the Defendant's low voltage lines attached to a utility pole across the street from the home to be damaged. The Defendant's transformer operated as intended disconnection the fault caused by the fire and remained in service.**
6. **The Defendant denies that the said fire was caused by any negligence and/or breach of statutory duty on its part or on the part of its servants and or agents as alleged in Paragraph 6 of the Statement of Claim or at all. The Defendant further denies that the doctrine of res ipsa loquitur is applicable having regard to the facts of this case. The Defendant avers that the fire to the Plaintiffs' residence started while the electricity was off. The Defendant denies that the facts of this case give rise to an inference that the fire was caused by negligence on the part of the Defendant.**
7. **The Defendant avers that the fire was caused wholly or was contributed to by the negligence and/or recklessness of the Plaintiffs.**

PARTICULARS OF NEGLIGENCE

The Plaintiffs were negligent and/or reckless in that they:

(i) Failed to take reasonable and/or proper precautions to prevent a fire in the residence;
(ii) Failed to take any or any sufficient steps to alleviate or remove or render harmless the contents of their residence and or objects on their property from fire;
(iii) Failed to maintain their residence or to take sufficient steps to avoid a fire;
(iv) Failed in all respect to take any or any proper care for their residence;

(v) **Internationally and/or negligently and/or recklessly and without authority increased the amount of load to the residence;**
(vi) **Caused or permitted an unauthorized installation, connection and/or overloading.**

5. As Counsel for the Plaintiffs acknowledges in her written closing submission:

> **"The Plaintiff rely solely on the evidence of two eyewitnesses having not called an expert witness to prove its case"....The Plaintiff case is that the Defendant whether by its servants or agent was responsible for the fire which destroyed their home...It is the Plaintiffs' contention that the eyewitnesses sight of blue flames on the lines leading into the Plaintiff's house and sparks from the transformer is prima facie evidence of negligence. The evidence before the court is that the weather condition was fair... in other words that there was no lightening to trigger such flames on the wires and sparks from the transformer. The Plaintiff's case is dependent on the witnesses of fact when they saw the blue flames and sparks and that the electricity was on. Further on the fact that the Defendant was not able to show with credible evidence as to what was done to the transformer after the fire. The expert witness did not even bother to scientifically analyze the transformer even though he had been commissioned since 2009. Although the Defendant seem to contend that there was no fault with the transformer because other consumers would have been affected. What is missing with this theory is that other consumers did not have a service wire that led into their homes as did the Plaintiffs. Further, the witness statements and oral evidence of the main witnesses of the Defendant, namely Chris Lewis and Leslie Clear proved incredible and untruthful."**

6. The eyewitnesses to whom Counsel for the Plaintiffs referred were Humphrey Percentie and Perry Grant.

7. Humphrey Percentie said:

> 1. **I was at my family's night club Vic-Hum Club around 10;00p.m. talking to my mother, Ruby Percentie, when I noticed that the transforming on the light pole across the street was sending off sparks.**
> 2. **Almost immediately the fire started to travel along the electrical wires in the direction of the home of Rudy Higgs**
> 3. **Persons in the street were calling out fire and running toward the house to see if they could help Rudy but the fire moved too fast and in the matter of minutes the house was burning out of control.**
> 4. **I ran with others to put water on my mother's house that is located right next door to Rudy.**

8. During cross-examination, Mr. Percentie corrected himself and said that the blue flame he saw was not from the pole with the transformer but on the line from the

service pole to the Plaintiffs' property and that he could not see the pole with the transformer as it was to his back. He said that the power was on when he saw the flames.

9. Perry Grant in his witness statement said:

> 1. **That on 14th July, 2005 I was celebrating my birthday while standing in the main entrance of the Vic-Hum night Club located in Barracks Street a little after 10:00 p.m. I noticed sparks running from the transformer along the electrical lines heading towards Mr. Rudy Higgs house that is located on Barracks Street opposite the Vic-Hum Club.**
> 2. **I heard someone saying "Perry, Perry come and assist me and check out my house".**
> 3. **When we got the house we first checked a side window but smoke was coming from the window.**
> 4. **We then ran to the back door where flames were already inside the house. Rudy then ran to get his house as he turned the water-pump on the local water supply was off. I then jumped in my truck that was parked in front of the Vic-Hum Club and then drove to the Police Station but there was no answer.**

10. He clarified his evidence and said:

> **"When the sparks came from the wires from the transformer, it first started out in sparks and it turned into this pretty blue fiery flame and went from one pole to a next. And the next pole had electrical wire running from there to Mr. Rudy Higgs house and the same blue flame went into his house from the wire."**

11. He said that he saw the blue flame:

> **"coming from the transformer. It started out like sparks at first popping and doing and when the sparks start to run down the wire, it start to turn into this pretty blue flame and the same blue flame continued right into Mr. Higgs house. In about a minute or so someone ran into Vic Hum and told Mr. Higgs that his house was on fire".**

12. Based on that evidence the Plaintiffs ask the Court to find liability on the Defendant.

13. The Plaintiffs have adduced no evidence of negligence. They rely upon the doctrine of res ipsa loquitur. I set out the Plaintiffs' submission on the matter:

> **"It is the Plaintiffs' case that whether or not the precise cause of the fire can be identified there must have been a defect or malfunction with the transformer that caused the wires which led to the meter to the Plaintiffs house in order to cause the fire to the said home. Further, that the said wire which was improperly replaced (or installed) just two weeks prior to the fire by the Defendant's linesman, Chris**

Lewis, the servant or agent of the Defendant also caused the fire or contributed to the cause of the fire.
Further, the Plaintiffs submit that the blue flames on the wire leading into the Plaintiffs' house and the sparks coming from the transformer is prima facie evidence of negligence on the Defendant's part even if the cause of the fire cannot be identified in these circumstances and must fall within the principle of res ipsa loquitur that the Defendant had the control and management of the instruments used to transmit electricity to the Plaintiff home."

14. It is settled law that a Plaintiff must prove all of the elements of the tort that he seeks to rely upon to impose liability on a Defendant.

15. The Plaintiffs must prove that the Defendant was negligent and in breach of his statutory duty and that negligence and/or breach caused the damage to the Plaintiff for which he seeks recovery.

16. In **Toromont Industries Ltd et al v DJSS Transport et al. [2014] ONSC 1124** where the claim against the Defendant was for damages arising out of the negligent repair of a truck engine Douglas, J of the Ontario Superior Court of Justice said:

> **To succeed in a claim of negligence a plaintiff must prove each element of the tort. The basic elements supporting a finding of negligence are the following: (i) there must be a duty of care arising out of a relationship between the parties; (ii) there must be a breach of said duty by some act or omission that constitutes a failure to observe the appropriate standard of care; and (iii) that breach must cause the proven loss or damage.**
> **The doctrine of res ipsa loquitur has not been valid law for a long time. When applicable the doctrine was "restricted to cases where the facts permitted an inference of negligence and there was no other reasonable explanation for the accident". (See: McAlister (Donoghue) v. Stevenson, [1932] A.C.562(U.K.H.L.), at 599 cited in Hollis v. Birch, [1990] B.C.J. No. 1059 (B.C. S.C.))**
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> **In negligence actions, a plaintiff must prove the defendant failed to meet the standard of care of a reasonable person. Opinion evidence is not necessary to decide the appropriate conduct of the average person in the community. However, where the defendant carries on "a technical profession" the proof of the standard must come from other experts in the same field - in this case the reasonable mechanic. The case law is clear it is not a standard of perfection. In its submissions Toromont invoked the standard of reasonable mechanic. 1017907 led no evidence of anything that Toromont ought to have done, or refrained from doing, which fell below any standard of care. Instead the trial judge relied on the doctrine of res ipsa loquitur. It was not open to the trial judge to conclude that Toromont was negligent because the engine**

problems speak for themselves, when Toromont led evidence as to the details of the repairs.
(my emphasis)

17. In **Yu Yu Kai v Chan Chi Keung [2009] HKEC 328,** the Court of Final Appeal of Hong Kong discussed in some detail the doctrine of 'res ipsa loquitur'. In the majority judgment it said:

> **41. Use of the phrase "res *ipsa loquitur*" is sometimes viewed with a degree of disapproval. The classic statement of the evidential rule going back to 1865 is by Erle CJ in *Scott v London and St Katherine Docks Co*, as follows:**
>
> > **"... 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."**
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> **42. *Res ipsa loquitur* is, as Hobhouse LJ pointed out in *Ratcliffe v Plymouth and Torbay Health Authority*, "no more than a convenient Latin phrase used to describe the proof of facts which are sufficient to support an inference that a defendant was negligent and therefore to establish a prima facie case against him."**
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> **43. Whether one uses the label "res *ipsa loquitur* " or one speaks (as Hobhouse LJ would have preferred) of establishing a prima facie case, one is concerned with a rule regarding the proper approach to the evidence. It is an approach whereby, in cases where the plaintiff is unable to say exactly how his injury was caused but, consonant with his duty of care, one may expect the defendant to know, one asks whether the evidence has raised a prima facie case against the defendant and if it has, whether the defendant has, at the end of the day, dispelled that prima facie case by providing a plausible explanation for the plaintiff's injury which is consistent with the absence of negligence on his part.**
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> **44. Thus, in *Lloyde v West Midlands Gas Board*, Megaw LJ explained the approach as follows:**
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> > **"I doubt whether it is right to describe *res ipsa loquitur* as a 'doctrine'. I think that it is no more than an exotic, although convenient, phrase to describe what is in essence no more than a common sense approach, not limited by technical rules, to the assessment of the effect of evidence in certain circumstances. It means that a plaintiff prima facie establishes negligence where (i) it is not possible for him to prove precisely what was the relevant act or omission which set in train the events leading to the accident; but (ii) on the evidence as it stands at the relevant time it is more likely than not that the effective cause of the accident was some act or omission of the defendant or of someone for whom the defendant is responsible, which act or omission constitutes a failure to take proper care for the plaintiff's safety. I have used the words 'evidence as it stands at the relevant time'. I think that this can most conveniently be taken as being at the close of the plaintiff's case. On the assumption that a submission of no case is then made, would the evidence, as it then stands, enable the plaintiff to succeed because, although the precise cause of the accident cannot be established, the proper inference on the balance**

> of probability is that that cause, whatever it may have been, involved a failure by the defendant to take due care for the plaintiff's safety? If so, *res ipsa loquitur* . If not, the plaintiff fails. Of course, if the defendant does not make a submission of no case, the question still falls to be tested by the same criterion, but evidence for the defendant, given thereafter, may rebut the inference. The *res*, which previously spoke for itself, may be silenced, or its voice may, on the whole of the evidence, become too weak or muted."

45. Mr Coleman, relying on a dictum of Stuart-Smith LJ in *Delaney v Southmead Health Authority*, suggested that this approach is not applicable to medical negligence cases. I can see no reason in principle why that should be so, particularly bearing in mind the purpose of the rule which is well-recognized. As Lord Normand stated in *Barkway v South Wales Transport Co Ltd*, "its purpose is to enable justice to be done when the facts bearing on causation and on the care exercised by the defendant are at the outset unknown to the plaintiff and are or ought to be within the knowledge of the defendant."

46. Although the approach will not be important in medical negligence cases where the issues of causation and negligence are wholly fought out on competing evidence, it seems to me obvious that in a significant number of such cases - particularly where the patient is unconscious when the injury is incurred - the *res ipsa loquitur* or prima facie case approach will be indispensable. As Hobhouse LJ stated in *Ratcliffe v Plymouth and Torbay Health Authority*:

> "Medical negligence cases have the potential to give rise to considerations whether the plaintiff has made out a prima facie case and whether or not the defendant has provided an adequate answer to displace the inference to be drawn from the plaintiff's prima facie case. Further, it is commonplace that the plaintiff will not, himself or herself, have fully known what occurred, particularly if the relevant procedure was an operation carried out under anaesthetic. The procedures were under the control of the defendant and what the defendant did or did not do is exclusively within the direct knowledge of the defendant."

47. In my view, adoption of the prima facie case or *res ipsa loquitur* approach would have been wholly opposite in the present case. A prima facie case would have arisen against the defendant if the occurrence of the injury is something which would not have happened in the ordinary course of events without someone's negligence and if the injury falls within the sphere of the defendant's responsibility to take due care of the plaintiff.

48. To dispel such a prima facie case, the defendant would have to point to evidence supporting a plausible explanation consistent with the absence of negligence. As to the meaning of "plausible", Buxton LJ pointed out that:

> "...mere assertion will not do; but neither need the explanation be shown to be the probable or likeliest answer. An explanation to that modest standard has to be reasonably available on the evidence taken in the round."

49. Similarly, in his summary of the law, Brooke LJ in *Ratcliffe* stated:

> "(4) The position may then be reached at the close of the plaintiff's case that the judge would be entitled to infer negligence on the defendant's part unless the defendant adduces evidence which discharges this inference.
>
> (5) This evidence may be to the effect that there is a plausible explanation of what may have happened which does not connote any negligence on the defendant's part. The explanation must be a plausible one and not a theoretically or remotely possible one, but the defendant certainly does not have to prove that his explanation is more likely to be correct than any other. If the plaintiff has no other evidence of negligence to rely on, his claim will then fail."

> **50. I would add that in the context of an appeal, the plausibility of the proffered explanation must be assessed in the light of the Judge's unchallenged findings and in the light of what the evidence as a whole may fairly be taken to have established.**

18. And later in a dissenting opinion, Litton N.P. said:

> **"Res ipsa loquitur was no more than an exotic though convenient phrase to describe what was in essence no more than a common sense approach. It was always a question of whether, upon proof of the happening of a particular event, it could with truth be said that the thing spoke for itself. The event or "thing" must be so clear-cut that a court could say with assurance: unless the defendant could come forward with some credible explanation, it must be concluded that want of care produced that result. In the medical context, because of the complexity of the human body and the fact that medical science was perpetually evolving and changing, things were seldom so clear-cut. When expert evidence had been adduced on both sides and the cause of the mishap had been explored evidentially at trial, the foundation for applying the Rule, shifting the burden of proof to a defendant, would seldom exist. And so it was in this case. Here, the opinion evidence as to causation covered a wide spectrum: the NIBF cuff was the cause, a potential cause, a contributing factor. From none of this could an inference of negligence without more, be drawn. At the end of the day, the case could not be decided solely upon a "thing", a single matter to determine liability. And here, the state of the evidence on causation, at the end of the day, was nebulous and incomplete (Moore v R Fox & Sons Ltd [1956] 1 QB 596, Lloyde v West Midlands Gas Board [1971] 1 WLR 749, Ratcliffe v Plymouth and Torbay Health Authority & Another (1998) 42 BMLR 64 applied). (See paras.132-135, 138, 140.) (All emphasis are mine)**

19 Whilst I have much sympathy for the Plaintiffs' case, and hold a suspicion that the fire was caused by a surge when electricity was restored to that part of the island, there is simply insufficient evidence for me to be satisfied that, that is in fact the case.

20. I do not agree with Counsel for the Plaintiff that the evidence of the Defendant's expert was unreliable or not credible. I was satisfied as to his expertise and objectivity and in the absence of any other expert evidence challenging his opinion (although I am not bound to accept it) there is really no credible reason to reject it. Moreover, there is ample reason to accept it as valid.

21. There is no direct evidence that the transformer was defective or that it was malfunctioning. Indeed, as it was never replaced, the evidence suggests that it was perfectly in order. The evidence of the sparks and blue flame (which I accept

that Mr. Grant and Mr. Percentile saw) is evidence not of any malfunction with the transformer but rather that the wires were arcing or that they had been compromised and were touching each other. This compromise may well have been as a result of the insulation melting from a fire which started in the Plaintiffs' home rather than as a result of a fire that started elsewhere and in particular from the service pole.

22. The evidence from both Mr. Percentie and Mr. Grant was that the fire was inside the house and not outside the house. If the fire was caused by the flames on the wires outside then it is more likely than not that the fire would have been seen on the outside of the house. Further the evidence is that the wire to the service pole was still connected whilst the wire at the house was not. The inference is that the heat was at the house and not at the pole.

23. The evidence of Mr. Finneran was that factual evidence was consistent with the fire starting in the house and not at the pole. His conclusion as stated in his report was:

> **It is my opinion, within a reasonable degree of scientific and engineering certainty, based on the material reviewed to date, the origin and cause of the fire is undetermined. There is no physical evidence to conclude Bahamas Electricity Corporation's transformer was involved in causing this fire. The witness statement from Mr. Lewis and Mr. Cleare indicated the transformer was not energized at the time the fire originated. The times provided by both plaintiff's witnesses indicated the fire occurred a little after 10:00p.m. and Mr. Lewis and Mr. Cleare stated the transformer was not energized until 10:26p.m. If the times provided by both the plaintiff's witnesses and BEC employees are accurate, the transformer was not energized at the start of the fire and could not have been the cause of the fire. Mr. Rudy Higgs also states in his Supplemental Witness Statement the fire could not have started in his home by anything he did because the power was off. It there is no power inside the residence at the time of the fire, there is also no power to the transformer which eliminates the transformer as the cause for this fire.**
>
> **Even if the times provided by both plaintiff and defence are incorrect, the information stating the transformer was not replace after the fire indicates the transformer was not defective and did not malfunction resulting in the fire at the Higgs' residence. The fact the service drop was served at the residence indicates the first fault occurred at the residence due to the fire compromising the insulation. Once the power was restored, the service drop would start to spark due to the compromised insulation and travel back toward the power source which is the transformer. The witnesses indicate they saw sparks traveling on the electrical wires. The arcing would cause the insulation to ignite and continue to burn. The arcing**

would travel toward the source which is the transformer. In the process, the insulation would ignite and continue to burn.
The Plaintiffs have not provided any physical evidence or supportive documentation which would substantiate their claim that the transformer caused this fire. However, the date provided by BEC concerning the transformer conclusively indicates the transformer did not cause the fire. If the times provided are accurate, and Mr. Higgs' Supplemental Witness Statement is accurate indicating there was no power in the home at the time of the fire, the transformer could not have been the cause of the fire because it would not have been energized.

24. During his cross-examination he said:

THE COURT: I want to ask something.
There is evidence that people saw a blue flame.
THE WITNESS: Yes.
THE COURT: Let's assume that that was accurate, that in fact happened.
THE WITNESS: Okay. Let's assume that.
THE COURT: And let's assume that that happened when power was put on.
THE WITNESS: Correct.
THE COURT: That's possible?
THE WITNESS: I would say yes, because the reason why I would say yes is because when the house is already on fire, it had melted the service line, the service wire that was going to the house which caused the lines at the service wire to come together.
THE COURT: Uh-huh.
THE WITNESS: And during that time when the insulation was melted down at that point and when the electricity did come on, you would see an arc at that point. And that's about the only place you are going to see that is right there.
THE COURT: Let me try and understand what you are saying. If when the electricity is turned on there is blue sparks, you say that that could only happen if --
THE WITNESS: The insulation has already been broken down on the service wire that feeds Mr. Higgs' house.
THE COURT: Okay. Now --
THE WITNESS: And that would be due from the fire.
THE COURT: No, no, no, no. You can't get that quantum leap. Is it possible for that insulation to have been compromised even though there was no fire at Higgs' house?
THE WITNESS: I highly doubt it. I would say no.
THE COURT: Okay. Anything else?
BY MS. ALBURY:
Q. Now, I am just a little confused with this same paragraph 8 where he said:
"Because the low voltage service lines had melted ogether, when the electricity was restored a surge was sent back to the transformer which may have caused the sparks which the Plaintiffs' witness saw."
But the plaintiffs were seeing these sparks before the fire as well, before the fire.
A. They are saying they were seeing it before the fire?
Q. Yeah. It is like you are saying it was after. It may have caused -- after the fire. That's how I am reading this.

A. Right. I am saying the fire had started when the electricity was off, because the low voltage lines had melted together. That is what I just told you. During the fire it had melted the service lines. It had caused a short when the power supply came back on --
Q. No, but they were seeing the sparks --
A. Before the power came back on?
Q. As I understand it, the witness --
THE COURT: They are not saying that they saw any sparks before the fire came on. The plaintiffs' scenario is electricity was off, Higgs' house was in darkness, no fire. The electricity came on, blue sparks appeared and the blue sparks went to the house, and as a result of those blue sparks the house was burned down.
THE WITNESS: No, I don't think so.
THE COURT: Yeah, well, that's really what their case is.
THE WITNESS: I don't think so, no.
MS. ALBURY: My Lord, you see what I am saying? This is written as if after it was accounting for that.
MS. SANDS: It says when electricity was restored, not after.
THE WITNESS: They only could have seen that when electricity was restored.
THE COURT: Your case is that the wires were compromised by the fire?
THE WITNESS: Correct.
THE COURT: Before electricity came on?
THE WITNESS: That's right.
THE COURT: I understand. I understand.

25. Later Mr. Finneran said:

THE COURT: That's one of them.
Now, if I find as a fact that shortly after the transformer was energized sparks emanated from the transformer and a blue flame was seen on the service wire from the house to the service pole, and that blue flame led to the house, and the fire took place; what would you say?
THE WITNESS: I would say it's impossible.
THE COURT: Why?
THE WITNESS: First of all, if the transformer became energized and they actually saw sparks at the transformer, it wouldn't travel down the service wire to the house. If it is sparking at the transformer, it means it is sparking at the leads of another transformer. Those wires will arc.
THE COURT: What do you mean by that?
THE WITNESS: The sparking is really part of an arcing event. Sparking is because either the wires touched and they shorted, and now you have molten metal that's coming off. It is actually a splatter of the material. That's what the spark is you are seeing. So it's similar to a sparkler. If you light a sparkler, the sparks coming off of it is the material that you ignite. Well, the sparks that would be coming off the wire. So if it initiated at the transformer it is going to melt those wires.
An arcing event produces temperatures well above 3,000 degrees. Aluminium, which is what these wires are -- they are referred to as a triplex because there are three wires - it's two insulated and one uninsulated wire. Aluminium melts at 1200 degrees, so if the event starts up here at the pole at that transformer, it is going to melt those wires and they are going to fall to the ground.
THE COURT: What would cause -- what would cause the blue flame?

THE WITNESS: Well, on insulated wires you wouldn't see a blue flame.
THE COURT: Let's assume for the sake of argument that I accept -- because I have no reason to reject -- the evidence that they saw a blue flame on the service wire from the service pole to the house; what would cause that?
THE WITNESS: There is nothing I can think of that would cause it on the insulated wires. But blue flame is seen due to moisture and dirt that accumulates, for instance, on an insulator. When you see high voltage lines or wires that are on the pole coming off, there is an insulator; you can see a corona, which is a blue arc that actually is going from one wire to the other. So in an arcing event, the material --
THE COURT: When you say arcing, tell me what you mean by arcing event? I don't know what that means.
THE WITNESS: Have you ever used an arc welder?
THE COURT: No.
THE WITNESS: An arcing event is -- we have two wires. We have one that's neutral and one that's hot. So it would be like 120 volts in the receptacles. Arcing is when either these two wires touch and you get molten metal that's blown away from it, and then you get a corona that builds between the two wires. It actually looks like lightning. So you get a spark that's jumping between the wires.
THE COURT: But that can only happen if there is power?
THE WITNESS: Absolutely. It can only happen if there is power.

26. Mr. Finneran continued:

THE COURT: Could it be possible that the wires, the service wires from Mr. Higgs' house to the service pole were compromised because of bad wiring or for whatever reason, not because it was melted from the wire beforehand, but it was compromised? Is that possible?
THE WITNESS: Anything is possible. I mean, whether the insulation was damaged, there is absolutely no way for me to say it's damaged after the fact. But the statements are that they see fire travelling down from the transformer all the way to the house. And so we go from the transformer to the service pole that is in Mr. Higgs' yard and then to the house.
THE COURT: I got the impression -- no, I didn't understand the evidence like that. I thought the evidence was they heard sparks from the transformer, but the only blue flame they saw was from the service pole to the house. And I don't remember them saying that they saw blue flames on the wires or from the transformer to the service pole.
THE WITNESS: Okay. I interpreted it that way and I could be incorrect.
THE COURT: That's really how I understood the evidence.
THE WITNESS: I would go back and look at the statements just to verify.
THE COURT: Let's assume that that is accurate.
THE WITNESS: All right. If we assume that they were travelling from the service pole to Mr. Higgs' home, there is going to be a time frame involved. If something happens, the insulation is damaged for whatever reason and there is an arcing event at the service pole -- and arcing and sparking I am using similarly.
THE COURT: I am talking about blue flames, that's more important. Because I get the impression that blue flame is more serious than the sparks.

THE WITNESS: Actually the sparks or more serious because they are at much higher temperature. But, regardless. If we have fire at the service poles and it is travelling along the lines to Mr. Higgs' home, the lines go into what is referred to as a weather head near the top of the roof and then they transfer down through a conduit, which is a metal piece of pipe, and goes into the meter base. It will take a great deal of time for fire to move along that line into the weather head, through the conduit and into the meter base and start a fire. And there is just no evidence of that. The fire would have been on the outside of the house, not the inside of the house. And both Mr. Grant and Mr. Higgs state that when they are notified of the fire which, listening yesterday, it seems like it is a very short period of time when Mr. Higgs walks from his house in dark to the Vic-Hum Club, gets into the doorway, and someone says, "Your house is on fire." He and Mr. Grant immediately go over to the home and they find fire in the house. There is no mention of fire outside the house. And if you are going to have a fire started from the service drop, it is going to start on the outside of the house. It is not going to start on the inside of the house.

The other problem I have with it is once the sparking or blue flame is going on at the service pole, the wires are going to be severed there. They are actually going to melt because of the heat of the arc/spark flame. At that point there is no more power except right at the service point, because the transformer is still putting out power. Based on what I heard in the courtroom, the Vic-Hum Club had power when Mr. Lewis and Mr. Cleare arrived and they had to actually turn the -- pull a fuse out of the transformer to make power stop. So we know the transformer is operating in this period of time.

The scenario appears more likely that you have a fire that starts in the house (especially based on what I heard today or yesterday) and actually got to the service wires. Once those service wires are energized -- they have to be. All of this is under the scenario they are energized -- fire attacking that insulation can cause that insulation to char and become conductive and it will start to spark. And it will ignite the insulation and the insulation will burn.

A failure at the house moving back towards the transformer is what would happen. A failure at the pole will move away from the transformer.

THE COURT: Go back to what you just said. Just the sentence before you said --

Can you read back what he just said?

(Record read back)

THE COURT: A failure at the house going back to the -- so your evidence really is that the fire started in the house?

THE WITNESS: Yes.

THE COURT: And as a result of that fire those service wires were compromised. And when the electricity came on that gave rise to the blue flame?

THE WITNESS: Yes. The electricity has to be on. Whether the electricity was on when the fire actually originated in the house, I have no way of knowing, but once the fire attacks the insulation on that service drop, it is going to arc. So, you know, there is no time frame that I can say absolutely the fire started in the house, with power to the house, because I don't know that.

27. In short, the res ipsa doctrine cannot apply because there is another plausible explanation for the flames and sparks which does not amount to negligence of breach of statutory duty. It must be recalled that there is no burden on the Defendant to *"prove that his explanation is more likely to be correct than any other".*

28. For these reasons, I am of the view that the Plaintiff has not proven that the Defendant was negligent and or in breach of its statutory duty. It is a matter of regret that the Plaintiffs (probably due to their modest means) were not able to adduce any expert evidence that may have assisted them in establishing their claim. I understand that their financial circumstances may have prohibited them from doing so and thus force them to rely upon the doctrine of res ipsa loquitur. However, the burden remained upon the Plaintiffs to prove their case and they have not discharged that burden.

29. The Plaintiffs' case is dismissed. The Plaintiffs must pay the Defendant's costs to be taxed if not agreed.

Dated this 10th day of December, A.D., 2014

Michael L. Barnett
Chief Justice