Case No: QA-000055-2021
Neutral Citation Number: [2021] EWHC 3783 (QB)

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand
London
WC2A 2LL

BEFORE:

MRS JUSTICE HEATHER WILLIAMS

BETWEEN:

MR. PETER VICTOR LYDFORD (A PROTECTED PARY, BY HIS LITIGATION FRIEND MRS. DOROTHY EVA LYDFORD)	**CLAIMANT**
- and -	
MRS ROSE VIOLET SKINNER (A PROTECT PARTY BY HER LITIGATION FRIEND MR. STEVEN SKINNER)	**DEFENDANT**

Legal Representation
Mr Lee Nowland (Counsel) on behalf of the Claimant
Ms McTague (Counsel) on behalf of the Defendant

JUDGMENT

Hearing date: 11 November 2021

Reporting Restrictions Applied: No

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Number of folios in transcript 154
Number of words in transcript 11,030

Heather Williams J:

1. Mr Lydford, a protected party acting through his wife and litigation friend, appeals the decision of His Honour Judge Simpkiss ("the Judge"), made on 13 January 2021 dismissing his claim in nuisance and in negligence for personal injuries and losses arising out of an accident that occurred on 8 February 2016. Permission to appeal was refused by the Judge. It was subsequently granted on consideration of the papers by Stacey J by an order sealed on 14 May 2021.

2. With the consent of the parties this hearing has taken place via MS Teams. For clarity I will refer to the parties as they were known below, that is to say the Claimant and the Defendant.

3. The Defendant is the freehold owner of a house and surrounding land known as South Lodge, Vicarage Lane, Felpham, Bognor Regis in West Sussex. This property adjoins a public road called Blakes Road. At about 7.30am on 8 February 2016 the Claimant was walking with his dog. It was a windy day, the day of Storm Imogen. As he walked alongside the wall it collapsed, very sadly injuring him and killing his dog.

4. The trial was of liability alone. There was no dispute that the Claimant's injuries were caused by the collapse of the wall. The liability trial took place over two days at Brighton County Court on the 24th and 25 November 2020.

5. The Claimant called a number of witnesses of fact: his wife; a builder, Mr Strange, who repaired the wall after it had collapsed; Mr Hirons, who was the publican of the Fox Inn which was near the property; and Mr Johns who was a trustee of Blake Cottage Trust which owns the cottage next door to the property.

6. Both parties relied on expert evidence, the Claimant on a Mr Hunt who was a Chartered Surveyor and the Defendant on Mr Huband who was a member of the Institution of Civil Engineers. The experts had both prepared reports in advance and a joint statement. Mr Hunt gave evidence during the trial and was cross-examined. The Claimant elected not to cross-examine Mr Huband.

7. The Claimant's pleaded case was that the Defendant was negligent in causing or permitting the wall to become or remain in a state of disrepair such that it was unsuitable and potentially dangerous. In the alternative, the Claimant contended the facts and circumstances of the wall collapse spoke for themselves and were themselves evidence of the Defendant's negligence. Further or alternatively, he said that the defective wall constituted a nuisance for which the Defendant was liable.

8. By the time of the trial, nuisance was the primary way the case was put for reasons that will become apparent. The Defendant denied that the wall was in a state of disrepair and denied all claims. It was also asserted in the Defence that the high winds during the storm were responsible for the wall's collapse but it is accepted by both parties that the Judge did not make such a finding at the trial.

9. In essence, the Judge concluded, in relation to the nuisance claim, that the Claimant had to prove that the collapse of the wall was because it was in disrepair (paragraph 22), and that the Claimant had failed to do this for reasons that I will come on to but which, in essence, the Judge set out in paragraph 27. For similar reasons he rejected the claim in negligence as set out in paragraphs 28 and 29.

10. The grounds of appeal (which I will come onto in more detail), concern whether the Judge erred in finding that the Claimant had to prove the wall collapsed due to disrepair, whether he erred in finding that the Claimant had not shown this on the evidence; whether he erred in failing to find that the res ipsa loquitur principle applied to the claim in negligence; and lastly, whether there was a serious procedural failing in declining to permit the Claimant's counsel to elicit supplementary evidence in chief from the witness, Mr Strange.

Summary of evidence and the Judge's conclusions

11. At this stage I will summarise the evidence and the Judge's conclusions. It will be necessary to return to some other aspects of the evidence when I deal with specific grounds.

12. At paragraph 7 of the judgment the Judge said:

> **"Mr Hirons and Mr Johns gave evidence that prior to the accident they had noticed a lean in the Wall by some trellising which had been attached to its inside. Mr Johns had not taken any action in relation to it (he said it did not affect Blake Cottage) and Mr Hirons said he had not reported it because he did not know who to report it to but that the lean was '*long standing*'. I am satisfied that neither of them had any serious concerns prior to the collapse and I am not satisfied that Mr Hirons gave any thought to reporting it to anyone. This case is not going to turn on any disputed facts nor on any views of the witnesses who saw the Wall before the accident."**

13. At paragraph 8 the Judge said he noted that the statement of Mr Strange contained opinion evidence which was not admissible as he was not an expert. At paragraph 11 the Judge said:

> **"This leaves the evidence of Mrs Lyford. She was a very straightforward witness who was doing her best to assist the court. She referred to cracks in the Wall and said that there had been a bulge in the wall for: '*a long time, at least 5years'* before the accident."**

14. She said she was unaware of any other walls falling in the village as a result of this storm. There is no evidence to support a suggestion that other walls fell and Mr Strange confirmed this in his oral evidence.

15. The rest of the Judge's paragraph 11 dealt with the part of Mr Strange's evidence that relates to the last ground of appeal. In essence, the Judge referred to the fact that he had refused the Claimant's application for Mr Strange to give supplementary evidence-in-chief about a conversation he had with Mrs Lyford in which she had said that he told her that the wall was in disrepair, at the time when he was involved in repairing it after the accident.

16. The Defendant called no witnesses of fact.

17. Mr Hunt had prepared a written report dated 1 April 2020. He referred to the construction of the wall as being predominantly natural flint nodules and some brick

elements set together using mortar. The original construction and maintenance history of the wall was not known, but that it was his belief that the wall was at least 100 years old. Pausing there, the age of the wall was also confirmed by other evidence that was before the Judge.

18. The Judge attributed significance to what Mr Hunt said at paragraph 4.2 of his report under the heading, 'Consideration of the wall failure', so I will quote it in full:

> **"It is clearly apparent that the Wall suffered failure resulting in its partial collapse. However, the reasons for the failure are not clear but it is likely that a combination of factors would have been affecting the Wall making collapse more probable should a tipping point be reached or critical event occur. These factors would have included the following:**
>
> - **An intrinsically weak design due to the following:**
>   - **Use of relatively small flint nodules with rounded surfaces**
>   - **A lack of interlock between the flint nodules**
>   - **The use of an internal rubble**
>   - **Lack of a solid foundation to the masonry**
>   - **Lack of a moisture resisting plinth or other feature**
>   - **Lack of an overhanging coping to help protect the masonry**
>   - **Lack of regular buttressing**
>   - **Lack of a damp-resisting membrane below the capping.**
>
> - **The separation of the Wall into sections created by the inclusion of brick piers.**
> - **Reduction in strength over time due to smaller scale failures of the masonry.**
> - **Damage to the mortar from frost and salt attack facilitated by the occurrence of capillary moisture rise from the ground.**
> - **Type and strength of the mortar.**
> - **Lateral forces from wind effects.**
> - **Cyclical expansion / contraction effects due to changes in moisture, temperature and other environmental factors.**
> - **Seasonal / cyclical growth of organic matter around and within the Wall, the latter suggesting the possible presence of cracking that was being exploited by the organic matter.**
> - **The possible effects of salts which might have been derived from the adjacent road from de-icing actions.**
> - **Influence of roots from adjacent trees.**

(I am going to skip the next two points)

> "
>
> - **Direct influence (via impact) from adjacent trees.**
> - **The dimensions and aspects of the Wall.**
> - **Exposure rating.**
> - **Maintenance of the Wall, or lack thereof."**

19. The two points I skipped referred to the presence of a trellis, which was subsequently discounted by both experts as a causative factor. Mr Hunt went on to note in his report:

> **"The partial collapse of the Wall would have destroyed much of the evidence of the causes of failure and so there has to be reliance on the historic photographs prior to the collapse. Unfortunately there can be little reliance on visual observations as to the condition of the wall prior to failure, as these do not have proper points of reference to compare and contrast against."**

20. He continued:

> **"What can be gleaned from the historic photographs is the presence of cracking affecting the Wall in March 2009 and subsequently until the time of the incident. It would therefore appear that this cracking was never attended to before the incident. Had there been any maintenance undertaken of the wall such a crack would have been a priority to resolve."**

21. Then to Mr Hunt's conclusion (where the reference to IBIS' opinion is a reference to his, the author's, opinion). He says:

> **"It is IBIS' opinion that the failure of the Wall occurred over a protracted period of time in response to cyclical stresses and the influence of weathering mechanisms. The design of the Wall is such that regular maintenance is imperative to prevent such failure."**

22. A little later in the conclusion section he said:

> **"It is IBIS' opinion that the Wall may have been suffering gradual disaggregation in response to the various stresses and weathering mechanisms, but this cannot be confirmed and is only suggested by the rubble created by the failure. Disaggregation may be why the Wall collapsed in response to the relatively low wind loadings. Weathering mechanisms had denuded the base of the Wall in the location of the failure, further reducing its resistance to wind loading.**
>
> **It is IBIS opinion that the lack of stress relief to the Wall construction is also a major factor in its performance. The stresses appear to have exploited weak points created by the incorporation of brick piers. The resulting collapse of the wall partly exploited the weak points.**
>
> **There are many other factors that could be involved in the failure and collapse of the Wall but these are considered by IBIS to be of low significance. All factors involved have led to a tipping point in the performance of the wall whereby collapse occurred.**
>
> **It is apparent that there is a requirement for regular appropriate maintenance of such walls but there is no specific guidance available and, in any case, certain design inadequacies may never be able to be corrected. This confirms the need for vigilance and dealing with issues as and when they arise. It is IBIS' opinion that cracking and other**

issues affecting the Wall had been ignored for many years. This should be taken as an indicator that appropriate maintenance that may have prevented the failure and subsequent collapse of the Wall had not been carried out.

The opinions provided by IBIS must be considered to be provisional as they are based on the evidence provided and a limited desk study. It is recommended by IBIS that a visit to the property should be carried out to confirm the condition of the masonry and to compare and contrast the construction with adjacent similar walls. The analysis of mortar samples would also reveal the strength of the mortar and thus the potential strength of the Wall, as well as the possible changes to the mortar due to local conditions."

23. It is right to say that analysis of mortar samples did not take place. A visit to the post accident wall was undertaken at the time of the experts' joint statement.

24. Mr Huband's report was dated April 2020 and did not address directly the cause of the collapse of the wall, but in the 'Analysis' section he said as follows (at paragraph 4.2):

"I could see no evidence of significant defects to the Wall prior to its collapse in 2016, save for a small vertical crack, potentially at a joint in the brickwork at the step in the top of the Wall."

25. Then in paragraph 4.3 he said:

"It may be this crack was a result of differential movement between the new brickwork and the original cobblestone wall when the brickwork was added to raise the height of the Wall . . . I do not however believe that this crack is of significance to the structural stability of the Wall."

26. At paragraph 4.5 Mr Huband said he had examined the photos but he could not see any evidence of a significant bulge or lean to the wall. Then at paragraph 4.7 he said he had seen no evidence of defects in the wall that might have led a homeowner to have concerns about the stability of their wall, particularly when the presence of many similar and, in some cases, taller walls in the vicinity were taken into account.

27. The experts' joint statement was set out by way of a table. For present purposes I will simply refer to certain items.

"3.4 Effect of the cracks."

Mr Hunt was recorded as saying:

"The cracks are a result of some form of partial failure of the wall and the crack at the northern end of the collapse zone may have helped to facilitate the eventual collapse."

Mr Huband said:

"The cracks are unexceptional in a structure of this age and type and it is unlikely that they contributed to the failure."

28. At 3.6 the experts agreed that there were various different age mortar patch repairs.

29. At 4.1 it was agreed that the wall fell towards the road.

30. At 4.4 it was agreed that the amount of lean in the wall at the time of collapse could not be confirmed.

31. At 4.5 it was agreed that the applied force required to cause the wall to collapse was unknown due to many unknown factors.

32. At 5.2 it was agreed that spray and salts from the road was likely to be partly involved in the weathering of the base.

33. At 6.1 it was agreed that there was evidence of maintenance prior to the wall's collapse.

34. At 6.2 it was agreed that maintenance was put in place possibly only when the large flints were seen to have fallen out or moving.

35. At 6.3 it was agreed that some lower areas of the wall had flints exposed by erosion of mortar, but these flints were not loose when struck. This was a reference to the fact that emerged in evidence, that the experts had kicked the wall and this did not cause any apparent dislodgement or movement.

36. At 7.3 Mr Hunt said that he had no comment in relation to Mr Huband's observation which I have already cited as to whether there were defects that should have put the homeowner on notice.

37. In terms of the Judge's analysis of the factual material and the expert evidence, the significant paragraphs are 24 to 27 of his judgment which I will therefore read in full. At paragraph 24 the Judge said:

> **"The Claimant's expert, Mr Hunt, was cross-examined in some detail about his report. He had not seen the Wall nor carried out any analysis of its construction, mortar nor of the rubble. His opinion was based on his observation of photographs produced before and after the collapse and from the witness evidence. He agreed that anecdotal evidence, such as the degree to which parts of the Wall were leaning, was not reliable. None of the witnesses who gave evidence about the Wall before the accident was concerned about it prior to the collapse. In any event, their evidence was not sufficiently reliable about the angle of lean and state of the Wall to enable any analysis of the risks of the lean causing a collapse to take place. Mr Hunt had not been able to examine any of the rubble nor to take any measurements and in his report says that little reliance can be placed on visual observation of the photographs because there are no proper points of reference to compare and contrast against.**
>
> **25. All Mr Hunt could really do was, as he accepted, point to *'potential'* causes of the collapse. He agreed it was difficult to draw any**

> **conclusion from the photographs as they were so bad. He also agreed that the effect of cracks in a wall on its structural integrity was for a structural engineer. He listed 16 potential causes of the collapse in paragraph 4.2 of his report. His view that the trellis work on the Wall might have been factor was withdrawn. His last point was '*lack of maintenance*' but he was unable to say that the part of the Wall that had collapsed had not been maintained. In conclusion, he agreed that he could not point to any particular matter that caused the collapse, it could have been a design fault when it was originally built 150 years ago, the best he could say is that over the years walls decay and then '*give up the ghost*'.**
>
> **26. Nor was there any evidence that walls of this construction (which appear all over Sussex and this part of the South of England) are liable to collapse.**
>
> **27. In conclusion, there is no real evidence from which the court could conclude, on a balance of probabilities, that the wall was defective or that it collapsed because it was defective. The nuisance claim therefore fails."**

38. The Judge then went on to say, at paragraphs 28 and 29, that the claim in negligence must also fail as the cause of the collapse had not been shown to have been due to disrepair.

39. He then explained, at paragraph 31, his reasons for rejecting the alternative submission based on res ipsa loquitur.

> **"The problem with this submission is eloquently set out in Mr Hunt's report at paragraph 4.2. He has set out 16 possible causes of the collapse, only one of which is a failure to maintain the Wall. This is not an incident that '*speaks for itself*'. There are numerous potential causes of the collapse, ranging from a weak design, weather and other environmental conditions as well as disrepair. Mr Hunt says the reason for the collapse '*is not clear*' but is '*likely to have been a combination of factors*.' His list of 16 is not even exclusive. He also acknowledges in his conclusion that the design faults, '*may never be able to be corrected*'. It was never part of the Claimant's case that the Defendant knew or ought to have known of any design faults and taken appropriate action (presumably, reconstruction of the Wall). In these circumstances the claim does not succeed."**

<u>Ground 1</u>

40. Ground 1 contends that the Judge erred in law in finding the Claimant had to prove that the collapse of the wall was because it was in disrepair. This was how the Judge addressed this at paragraph 22:

> **"I am therefore satisfied that, in the first place, the Claimant must prove that the collapse of the wall was because it was in disrepair. It is not for the Defendant to adduce evidence to prove that it was not in**

> **disrepair or, if it was, this was a latent defect or from the act of a trespasser."**

41. In summary, the Claimant's submission is that the collapse of the wall into the public highway, of itself, shows that the wall was a danger and a public nuisance. In circumstances where there is no dispute that the Defendant was responsible for the wall and its maintenance, it is submitted that findings of liability and public nuisance follow unless the Defendant establishes that one of the recognised exceptions applied, namely, that the collapse was due to the act of a trespasser, due to a secret and unobservable operation of nature or due a latent defect. Accordingly, it is submitted the Judge was wrong in law to find that the Claimant had to prove the wall was in disrepair and that it collapsed because of this.

42. The Defendant, in the first instance, raises objection to Ground 1 being advanced at all. This is on the basis that at trial the Claimant accepted that he had to prove the wall collapsed by virtue of disrepair and, it is said, has since then and for the purposes of this appeal impermissibly changed his position. In any event, submits the Defendant, as a matter of law the Judge was correct in finding that the Claimant did bear the burden of proof of showing causative disrepair in the collapse of the wall.

43. Ms McTague set out a number of references to the transcript in her skeleton which appeared to make clear beyond doubt that the Claimant had, indeed, accepted below that he bore this burden. During the course of his submissions this morning, Mr Nowland very fairly accepted that was the case and that his Ground 1 represented a change of position.

44. As I have observed during the hearing, it is unfortunate that this change of position was not made clear in his skeleton seeking permission to appeal; as a result it is not something that the Judge considering permission to appeal would have been aware of. It also follows, as Ms McTague submits, that it cannot be said that the Judge erred in rejecting the submission because the submission simply was not made to him.

45. I have a discretion to allow this point to be advanced even though it was not raised below and, indeed, below was the subject of a concession that the Claimant must prove causative disrepair. Ms McTague drew my attention to paragraph 52.21.1.1 in the White Book and to the judgment of Haddon-Cave LJ, in *Singh v Dass* [2019] EWCA Civ 360, where the principles are summarised as follows:

> "16. First, an appellate court will be cautious about allowing a new point to be raised on appeal that was not raised before the first instance court.
>
> 17. Second, an appellate court will not, generally, permit a new point to be raised on appeal if that point is such that either (a) it would necessitate new evidence or (b), had it been run below, it would have resulted in the trial being conducted differently with regards to the evidence at the trial . . .
>
> 18. Third, even where the point might be considered a 'pure point of law', the appellate court will only allow it to be raised if three criteria are satisfied: (a) the other party has had adequate time to deal with the point; (b) the other party has not acted to his detriment on the faith of the earlier omission to raise it; and (c) the other party can be adequately protected in costs."

46. I do consider that the stance taken by the Claimant bore on the approach to the evidence taken below, as I accept there is force in Ms McTague's submission that had it been known by the Defendant that this was the line that the Claimant was taking, then a different forensic decision may have been made about the extent to which the Defendant adduced evidence.

47. For this reason, and whilst acknowledging that the Defendant has had time to deal with the point for the purposes of the appeal, I would not be inclined to exercise my discretion to allow the point to be raised. However, since it is clear to me, in any event, that the point is misconceived I do propose, in the alternative, to deal with it on its merits.

48. In *Mint v Good* [1951] 1 K.B. 517 at 526 Denning LJ explained the position as follows.

> **"The law of England has always taken particular care to protect those who use a highway. It puts on the occupier of adjoining premises a special responsibility for the structures which he keeps beside the highway. So long as those structures are safe, all well and good; but if they fall into disrepair so as to be a potential danger to passers-by, then they are a nuisance and, what is more, a public nuisance and the occupier is liable to anyone using the highway who is injured by reason of the disrepair. It is no answer for him to say that he and his servants took reasonable care; for, even if he employed a competent independent contractor to repair the structure, and has every reason for supposing it to be safe, the occupier is still liable if the independent contractor did the work badly."**

After citing *Tarry v Ashton* (1876) 1 QBD 314, Denning LJ continued:

> **"The occupiers duty to passers-by is to see the structure is as safe as reasonable care can make I;, a duty which is as high as the duty which an occupier owes to people who pay to come on to his premises. He is not liable for latent defects which could not be discovered by reasonable care on the part of anyone, nor for acts of trespassers of which he neither knew nor ought to have known, see *Barker v Herbert*, but he is liable when structures fall into dangerous disrepair because there must be some fault on the part of someone or other for that to happen; and he is responsible for it to persons using the highway even though he was not actually at fault himself."**

49. In the scenario that Denning LJ was addressing, the nuisance was one that arises in relation to a structure adjoining the highway which has fallen into disrepair and in circumstances where the occupier is liable to a highway user injured by reason of that disrepair. In the *Mint v Good* case itself the court positively found that the structure was defective. The Claimant was injured by the collapse of a wall which the trial judge had found to be in a defective condition and which could have been ascertained by reasonable examination by a competent person. The Court of Appeal overturned the trial judge's finding the defendant was not liable on the basis he had an implied right to enter the tenanted property.

50. In other words, the issue of liability in that case turned on the extent of the landlord's repairing responsibilities; but a precursor, as Ms McTague puts it, to that decision was that there was clear evidence of and a finding that the premises were defective and in disrepair in a material respect.

51. A similar position also applied in the two cases that were cited to the Judge. *Mint v Good* was not cited. *Tarry v Ashton*, which I have already referred to briefly, concerned a plaintiff who was injured when a lamp fell on her as she walked along the highway. It fell from the defendant's adjacent premises. The defendant had, in the past, employed an experienced gas fitter, C, to put the lamp into repair, but it appears that this was not done. On examination it turned out that the fastening by which the lamp was attached to the lamp iron was in a decayed state. The jury found that there had been negligence on the part of the gas fitter, C, but no negligence on the part of the defendant personally; that the lamp was out of repair through general decay but not to the knowledge of the defendant. The question was whether that was enough to fix the defendant with liability. However, it will be clear from my summary that, again, there had been specific findings at trial that the condition of the lamp was in disrepair. The appeal issue related to the extent of knowledge required on the part of the defendant and specifically whether it was sufficient for him to rely on the fact that he had retained someone else, apparently competent, to carry out repair. Blackburn J, as he then was, said:

> **"…if there was a latent defect in the premises, or something done to them without the knowledge of the owner or occupier by a wrongdoer, such as digging out the coals underneath and so leaving a house near the highway in a dangerous condition, I doubt - at all events, I do not say - whether or not the occupier would be liable. But if he did know of the defects and neglected to put the premises in order, he would be liable. He would be responsible to this extent, that as soon as he knew of the danger he would be bound to put the premises in repair or pull them down. So also the occupier would be bound to know that things like this lamp will ultimately get out of order and, as occupier, there would be a duty cast upon him from him time to time to investigate the state of the lamp. If he did investigate, and there was a latent defect which he could not discover, I doubt whether he would be liable; but if he discovers the defect and does not cure it, or if he did not discover what he ought on investigation to have discovered, then I think he would clearly be answerable for the consequences."**

52. The short judgments of Lush J and Quain J were to similar effect. So again the case was decided on the basis that it had already been established that the relevant aspects of the premises adjoining the highway were in disrepair.

53. The same may be said of the second case that was cited before the Judge, *Wringe v Cohen* [1940] 1 K.B. 229. This was a case where the plaintiff was injured as a result of the collapse of the gable end of the defendant's house in a storm. It fell through the roof of the plaintiff's nearby shop. According to the evidence, the wall at the gable end of the defendant's house had been in defective repair for three years. The pointing and collaring were defective and there was an outward bulge of the wall. The property was tenanted, and the issue was the extent of the defendant's liability and the extent of knowledge that he was required to have. Again, it was clearly established that the

property was in disrepair and that disrepair had caused the collapse which had injured the plaintiff.

54. Atkinson J, giving the judgment of the court, carried out a very extensive review of the cases involving injuries caused as a result of the collapse of structures adjoining the highway. The principles that he identified are found in the following paragraph:

> **"In our judgment if, owing to a want of repair, premises on a highway become dangerous and therefore a nuisance and a passer-by or an adjoining owner suffers damage by their collapse, the occupier or the owner, if he has undertaken the duty of repair, is answerable whether he knew or ought to have known of the danger or not. The undertaking to repair gives the owner control of the premises, and a right of access thereto for the purposes of maintaining them in a safe condition. On the other hand, if the nuisance is created, not by want of repair but, for example, by the act of a trespasser or a secret and unobservable operation of nature such as a subsidence under or near the foundation of the premises, neither an occupier nor an owner responsible for repair is answerable, unless with knowledge or means of knowledge he allows the danger to continue. In such a case he has in no sense caused the nuisance by any act or breach of duty. I think that every case decided in the English courts is consistent with this view."**

55. Accordingly, those cases do not assist the argument which the Claimant now seeks to make and I consider that the Judge set out a correct understanding of the law when he said, of the latter two of these cases that:

> **"18. It can therefore be seen that in each of these cases there was a finding the structure was in disrepair. In these circumstances the issue for the court was whether the defendant was liable where he did not know about the disrepair.**
>
> **19. The difference in the present case is that there is no evidence that the Wall was in disrepair when it collapsed. Since the basis of the above principle is that the owner is under a duty to keep the structure in repair (whether he knows it is in disrepair or not) it is an essential part of the cause of action in nuisance that disrepair is proved as the cause of the collapse - or at least the danger of possible collapse."**

56. Then, at the beginning of paragraph 20, the Judge said :

> **"There is an absolute duty to keep the structure into repair but that begs the question of whether it was in disrepair. If, in fact, it is in disrepair and falls injuring someone, then there is absolute liability. For causation to be established the Claimant must prove the Wall collapsed because it was in disrepair."**

57. This appears to me to be a fair and accurate summary of the authorities that were before the Judge and I agree with it.

58. The Claimant has not been able to identify a case which says, in terms, that the defective condition and thus nuisance is simply presumed from the fact of the collapse

of a structure adjoining the highway which the Defendant has responsibility for and which injures the Claimant in circumstances where the Defendant does not establish one of the recognised exceptions. If that were the position, I would have expected to see it clearly articulated in the authorities by this stage but, in any event, and for the reasons that I have identified, the authorities plainly proceed on a different basis, namely, that it is integral to the cause of action that causative disrepair exists and is shown to exist.

59. The Claimant relied on two cases in particular before me to seek to establish the contrary proposition. The first is *Southport Corporation v Esso Petroleum Co Ltd* [1954] 2 QB 182. A decision, at this juncture, of the Court of Appeal. The factual circumstances were that owing to a defect in her steering gear, an oil tanker belonging to the first defendants became stranded in the estuary of a river and in order to prevent the ship from breaking her back, the second defendant, the master of the vessel, jettisoned 400 tons of her oil cargo, which was carried by the tide to the foreshore belonging to the plaintiffs and caused considerable damage. Claims were brought in nuisance and negligence, amongst other causes of action, and it was alleged that the stranding of the tanker was caused by faulty navigation by the Master for which the defendants were vicariously liable. The defendants denied negligence and said the faulty steering was due to the stern frame having been cracked or broken. The trial judge, Devlin J (as he then was), rejected the claims.

60. The Court of Appeal, by a majority, including Denning LJ, allowed the appeal, holding that the doctrine of res ipsa loquitur applied. During the course of his judgment, at 196 Denning LJ discussed the differences between the causes of action and in relation to public nuisance he said:

> **"It is, in my opinion, a public nuisance to discharge oil into the sea. In such circumstances it is likely to be carried onto the shores and beaches of our land to the prejudice and discomfort of Her Majesty's subjects…it seems to me plain that the discharge of 400 tons of oil into the estuary of the River Ribble was a public nuisance. It would inevitably be thrown up on some part of the coast. Indeed, the master accepted the likelihood of the oil reaching the Southport foreshore. The defendants can, therefore, properly be called upon to account for it."**

61. I cite that paragraph because it provides important context for the passage that then follows which the Claimant relies on. Under the subheading, 'Burden of Proof', Denning LJ said:

> **"One of the principle differences between an action for a public nuisance and an action for negligence is the burden of proof. In an action for a public nuisance, once the nuisance is proved the defendant is shown to have caused it, then the legal burden is shifted onto the defendant to justify or excuse himself. If he fails to do so, he is held liable, whereas in an action for negligence the legal burden in most cases remains throughout on the plaintiff."**

62. It is clear to me that Denning LJ was referring there to an onus shifting on to the defendant to "justify or excuse himself" in a context where, as he said in terms, the nuisance is proved and the defendant is shown to have caused it. There was in that

case, as I have said, a deliberate discharge of the oil. In my judgment it provides no support for a proposition that in relation to a case involving collapsing structures adjacent to the highway it is unnecessary to show the cause of the collapse, indeed that line of cases was not referred to in Denning LJ's judgment.

63. Furthermore, the decision of the Court of Appeal was overturned by the House of Lords. By that stage it was accepted by the parties that the master's actions were justified. But in the circumstances it cannot be said that the House of Lords' decision affords any endorsement of what was said by Denning LJ.

64. The second case that the Claimant relied on is a passage from Denning LJ's judgment in *Morton v Wheeler* (1956) The Times 1 February which was cited by Edmund Davies LJ in *Dymond v Pearce* [1972] 1 QB 496 at 506 - 507. Again, like *Southport*, this was a very different kind of nuisance and that is important because the statement of principle needs to be viewed in that context. *Dymond* was a case where the nuisance related to obstruction of the highway by the deliberate parking of a lorry on the side of the road for a sustained period. The *Morton* case that was cited was one where the occupier of premises adjoining the highway deliberately placed sharp iron spikes on their sill and thereby caused injury to the plaintiff; again, factually a very different situation and one where it is clear that a deliberate act of the defendant had caused the injury in question.

65. The passage that Mr Nowland relies on is as follows, from Denning LJ:

> **"There is a real distinction between negligence and nuisance. In an action for private damage arising out of a public nuisance, the court does not look at the conduct of the defendant and ask whether he was negligent. It looks at the actual state of affairs as it exists in or adjoining the highway, without regard to the merits or demerits of the defendant. If the state of affairs is such as to be a danger to persons using the highway… it is a public nuisance. Once it is held to be a danger the person who created it is liable unless he can show sufficient justific,ation or excuse."**

66. So, in my judgment, Denning LJ was again there was dealing with a situation where it is clear that a specific danger has been caused or created by the defendant, and in those circumstances an onus then moves to the defendant to justify that conduct. That is conceptually very different from the present situation and given this is the high point of the authorities relied on by Mr Nowland, even if I had exercised my discretion to enable this point to be advanced, I would have rejected it for these reasons.

Ground 2

67. Grounds 2 of Mr Nowland grounds alleges that the:

> **"The Judge was plainly wrong in failing to conclude that the wall was in a state of disrepair (due to a lack of maintenance), not least in the absence of the Defendant raising or advancing (and certainly not evidencing) any of the exceptions to the absolute obligation to prevent one's property from becoming a nuisance, namely: 2.1 the act of a trespasser; 2.2 a secret and unobservable operation of nature; 2.3 a latent defect."**

68. It follows from my rejection of Ground 1 that this simply misstates the test that the court was obliged to apply. The correct test was set out by the Judge at paragraph 22 of his judgment. It was necessary for the Claimant to positively prove causative disrepair to succeed in the negligence claim.

Ground 3

69. Ground 3 contends:

> **"The Judge erred in fact and/or was plainly wrong in finding that there was, '*no evidence that the Wall was in disrepair when it collapsed.*'"**

That ground unfairly alights on a particular phrase used by the Judge. It is quite clear, reading his judgment as a whole, that the Judge was not saying that there was no evidence that the wall was in disrepair. Rather, the Judge concluded that the Claimant had not shown, on a balance of probabilities, that the cause of the wall's collapse was disrepair.

Grounds 4 - 7

70. Grounds 4 to 7 relate to the Judge's conclusion that the Claimant had not proved, as a matter of fact, that the wall collapsed due to disrepair. Ground 4 essentially focuses on the factual evidence and Grounds 5 to 7 on the expert evidence.

71. Ground 4 says:

> **"The Judge wrongly failed to attach any or any adequate to:**
>
> **4.1 the evidence of Messrs Strange and Hunt (as well as common sense) as to the importance of maintenance of flint walls. (Indeed, the Judge observed during the trial that '*over a 100 to 150 years if you do nothing, eventually it will lose its structural integrity'*);**
>
> **4.2 the absence of any evidence (or even assertion on the part of the Defendant) that the wall had been the subject of inspection or maintenance (regular or otherwise);**
>
> **4.3 the fact that the wall had stood for some 100 to 150 years without collapsing;**
>
> **4.4 the absence of any evidence of other walls collapsing;**
>
> **4.5 the evidence of Mrs Lydford, Mr Johns and Mr Hirons as to the state of the wall prior to the accident, including the lean bulge and the photographs of the cracks in the wall and denuded mortar;**
>
> **4.6 the fact the wall fell in the direction of the bulge."**

72. For the purposes of analysis, I will consider Ground 4 now, but, as Mr Nowland submits, it is obviously important to consider the totality of the evidential picture in

relation to this issue, that is to say the expert evidence as well. There is plainly an overlap.

73. I also bear in mind that this is an attack on the Judge's finding of fact. In that regard Arden LJ (as she then was) in *Langsam v Beachcroft LLP* [2012] EWCA Civ 1230 said as follows at paragraph 72:

> "**It is well established that, where a finding turns on the judge's assessment of the credibility of a witness, an appellate court will take into account that the judge had the advantage of seeing the witnesses give their oral evidence, which is not available to the appellate court. It is, therefore, rare for an appellate court to overturn a judge's finding as to a person's credibility. Likewise, where any finding involves an evaluation of facts, an appellate court must take into account that the judge has reached a multi-factorial judgment, which takes into account his assessment of many factors. The correctness of the evaluation is not undermined, for instance, by challenging the weight the judge has given to elements in the evaluation unless it is shown that the judge was clearly wrong and reached a conclusion which on the evidence he was not entitled to reach.**"

74. It is also well established that the trial judge is presumed to have taken the whole of the evidence into consideration, unless there is specific reason to conclude otherwise: see, for example, *McGraddie v McGraddie & Anor* [2013] UKSC 58 at paragraph 27.

75. When considering the lay evidence it is important to bear in mind, as the Defendant submits, that the question the Judge was addressing was whether the wall collapsed because it was in disrepair, not simply whether there was any disrepair. In finding that that threshold test had not been met, the Judge was not necessarily finding that the wall was in a perfect condition, that it was crack free or that there was no disrepair of any kind.

76. None of the Claimant's lay evidence, in my judgment, went to show *why* the wall collapsed. It was part of the evidential picture to be considered along with the expert evidence; but it did not in itself establish a cause of collapse and that in itself, really, is an answer to Ground 4.

77. However, additionally and more specifically, Mr Hunt, the Claimant's own expert, was mindful of the limitations of the lay witness evidence. He said, during the course of his cross-examination (page 171 of the bundle), when Ms McTague asked him:

> "…**I assume therefore that you would agree that anecdotal evidence about there being a lean in the wall is equally unreliable evidence, without any measurement of movement over time, as the photographs themselves.**"
>
> **"I basically tried to avoid all hearsay… And anecdotal evidence. When I'm looking at something I just try and avoid that**."

78. As I put to Mr Nowland, during the course of his submissions, it is a bit rich to criticise the Judge for not attaching greater weight to the lay evidence when the Claimant's own

expert was highly mindful of its limitations and readily accepted those limitation during the course of his evidence.

79. So far as discrete points in Ground 4 are concerned. There was, in fact, some evidence of maintenance having taken place in the joint statement that I have already referred to. The bulge, in terms of the lay evidence by itself, did not take matters a great deal further. Indeed, Mr Nowland accepted in his submissions to me, that it was not "the most significant point" that he relied on. The fact that the wall had stood for a long time had some significance in terms of rejecting the proposition that it was the storm in itself that had caused it to collapse, but it is common ground that the Judge did not conclude the storm was responsible and so we can put that to one side.

80. In the circumstances and making all due allowance for the position of the Judge as the primary evaluator of the facts, I do not accept that there is force in any of the points raised in Ground 4 and I am unable to say that the Judge's conclusion was wrong or plainly wrong in any of the respects advanced.

81. I will now turn to consider Mr Hunt's evidence and the other expert evidence and, as I stress, I do so bearing in mind the context of the lay evidence as well.

82. Grounds 5- 7, which can be taken together, are as follows:

> **"5. The Judge was wrong in law to reject the uncontroverted expert evidence of Mr Hunt that the Wall failed due to a lack of maintenance.**
>
> **6. The Judge wrongly failed to attached any or any adequate weight to the evidence of Mr Hunt that the wall fell into disrepair (decay / general weathering) due to a lack of maintenance.**
>
> **7. The Judge was plainly wrong in his interpretation of the expert evidence of Mr Hunt in that he erroneously concluded that Mr Hunt had not been able to say that the Wall collapsed due to a failure to maintain."**

83. These grounds essentially make the same point, namely, submits Mr Nowland, that Mr Hunt's evidence was to the effect that the wall was in disrepair and collapsed due to a failure to maintain it and that the Judge was wrong in not accepting that proposition.

84. More specifically, as he developed this orally, Mr Nowland submitted that the evidence showed or indicated that walls of this nature will decay if they are not maintained, that there was evidence of cracks, of lean, of denuded mortar and there was no clear evidence of maintenance having taken place. He said that these aspects, looked at in the round, and taken with Mr Hunt's list of the potential reasons for the collapse, were indicative of decay and weathering, meaning that viewed cumulatively the Judge could and should have found that this was a collapse due to disrepair.

85. I have already set out the Judge's assessment of this evidence. I will come on to some more specific points, but in general terms it appears to me to be unobjectionable.

86. It is not strictly true to say that Mr Hunt's evidence was uncontroverted. He was cross-examined for at least an hour and a half, if not longer, during the afternoon of day one

of the trial and during that time the Judge engaged closely with his evidence and asked quite a number of questions himself as the transcript makes clear.

87. However, it is also clear from his judgment, that in arriving at his conclusion, the Judge did not reject the evidence of Mr Hunt or find his credibility wanting; rather he simply found that the limitations on Mr Hunt's evidence, including those which Mr Hunt himself had very fairly volunteered, meant that the threshold standard of proof had not been reached. That whilst Mr Hunt advanced *potential* causes of the collapse of the wall, his evidence did not enable a conclusion to be drawn, on the balance of probabilities, that it had been caused by disrepair.

88. The limitations on Mr Hunt's evidence, which the Judge recognised and which, as I say, Mr Hunt himself drew attention to, were that he had not seen the wall prior to its collapse and, indeed, had not seen it afterwards until the time of the joint statement; that he had not carried out the mortar test and that in his report he described his conclusions as provisional, absent those tests; that he was not a structural engineer and was also not in a position to undertake calculations regarding the stability of the wall; and the limits of the lay photographic evidence that he had to work with, which I have already referred to.

89. As regards the particular factors which Mr Nowland stressed in his submissions, the lean and the cracks, and the denuded mortar, I can deal with this quite briefly. It is not feasible to set out an entire record of the evidence given at trial, but I intend to indicate sufficient to show why I consider that it cannot be said that the Judge's conclusions were wrong or plainly wrong.

90. Mr Huband, who gave evidence briefly before Mr Nowland indicated that he did not propose to cross-examine him, said in relation to lean (at page 216D:

> **"A wall will remain stable providing its centre of gravity of the wall lies within the sort of middle third of its base. Beyond that point it starts to rely on the stickiness of the outside edge to stop it falling over. But up to that point, up to that degree of lean, it's actually stable still. That would be a, I think, our wall we're looking at today, approximately 70, seven zero millimetres of lean and it would still be stable. But at which point I think one would start to, start looking seriously at it."**

91. Mr Huband had addressed cracks in paragraph 4.3 of his written report, as I have already read. He did not believe the cracks were of significance to the structural stability of the wall. He was not, as I say, cross-examined and there is nothing in the joint statement to indicate a retreat on that point.

92. In relation to the elements of denuded mortar I have already referred to the evidence given by Mr Hunt that upon attending the wall, post-accident, even kicking the wall did not appear to elicit signs of instability.

93. In relation to maintenance of the wall, I have referred to the passages in the joint statement which indicate that it is too simplistic and, indeed, inaccurate for Mr Nowland to submit that there was no evidence of any maintenance taking place. It was agreed that some maintenance had taken place of the wall. And there was no expert

evidence called by the Claimant as to what further maintenance was required or should have been done in any specific sense.

94. The Judge, as I have noted, placed significance on Mr Hunt's list of factors which I have already referred to. He said that this was a non-exhaustive list. His first factor (which he then split into a number of sub factors) concerned the potential influence of a design defect. Indeed, some of the other factors in the list were also, essentially, design issues. I have in mind, in particular, in addition to the first factor:

> **"The separation of the Wall into sections created by the inclusion of brick piers"**
> **"Type and strength of the mortar"** and
> **"The dimensions and aspect of the Wall."**

95. Mr Hunt also introduced design issues into his evidence when he was being cross-examined. Overall, his evidence was, no doubt very fair, balanced and reflective, but taking it in the round and bearing in mind the factors that I have already highlighted, it cannot be said that the Judge was plainly wrong to come to the conclusion that he did.

96. In further support of that assessment, I will refer to a few passages in Mr Hunt's cross-examination, albeit it, of course, with the caveat that it cannot, possibly, replicate the full flavour of the evidence given.

97. Firstly, at page 178 of the appeal bundle, Ms McTague said:

> **"That's really why, isn't it, that regardless of the reason for it, you can't explain or point to a particular cause, an individual cause which caused the wall to collapse can you?"**

Mr Hunt said:

> **"I can point to many potential causes."**

Ms McTague:

> **"Yeah."**

Mr Hunt:

> **"They are all gathered together. So if I could say that I want to group them together, general weathering of the wall is probably the factor."**

98. On the next page the Judge asked:

> **"It's deteriorating due to old age?"**

Mr Hunt said:

> "**Yeah**."

The Judge said:

"So the mortar is crumbling, the bricks are flaking, ice and frost get in?"

Mr Hunt:

"Yes."

Judge:

"So over a span of 150 years, if you do nothing to it, or even if you do something, after a period of time since you last did something, eventually it's going to lose its structural integrity?"

Mr Hunt:

"Potentially, yes."

99. Then, on the next page, at 180D, Mr Hunt said that if he had come to the site and had seen a wall that was leaning and had cracks in it, he would have raised the alarm personally as a surveyor.

100. Then at page 186D Mr Hunt said:

"I know with the lean, we've, we've basically got an intrinsically weak structure but theoretically that should still be OK if that wall is upright, it's working against itself, it's been there a long time. It may well have been induced partly by the brickwork there but it's functioning reasonably well at that top level."

101. At page 187G is one of the instances where he emphasised that he was not a structural surveyor.

102. At page 189A Mr Hunt referred to the potential area of weakness of the wall because of the mortar being denuded.

103. Then at the bottom of page 192 Ms McTague said:

"And I think your point is that, that the design and construction, your point of view is that that was inherently or rather intrinsically a weak design to start with?"

Mr Hunt said:

"Yes, it's just a very, very basic, well it's relying on its sort of size and beefiness really, because the mortar's fairly weak, there's no great bonding between the different elements."

104. Mr Hunt said, a little further down page 193:

"So that's an intrinsic, they're actually quite intrinsically weak design, so it's the same thing."

105. Then, at page 199E Mr Hunt said:

> **"I think with having visited site and looking at all of the evidence, I've got a reasonable idea that there was an awful lot of, every other factor aside, for that wall to suddenly collapse like that, there we've got the base area which is, appears to be quite heavily denuded. And we've got a core construction there which may be loose. So eating away at the inside there, to me the, the balance of probabilities is very much on the grounds of there's an awful lot of stuff that's been eaten away there.**
> **We, we have cracking. We had that lean, possibly in relation to how the wall was progressing with that failure. Through to just the overall weathering, from salts coming off the road, damp. All these factors are coming together. Yes, you can't pin it on anything in fact, it's weathering and general stuff. This is a general decay of the wall. A wall that's just doing its job, and has just suffered decay over the years, and eventually given up the ghost."**

106. Then the last passage that I will refer to is on page 208 in the re-examination of Mr Hunt, where Mr Nowland asked him:

> **"So let's be clear as to your opinion. In, at 4.2 or anywhere else, can you clarify whether or not your, your opinion is that the wall has a defect, was defective in some way?"**

Mr Hart answered:

> **"No. It's just the fact that it's, it's that type of wall and that's it."**

107. So taking all those passages in the round (and I have read too, in fairness to Mr Nowland the passages that he relied on); they do, in my judgment, make good the proposition that ultimately it was entirely legitimate for the Judge to find that whilst there was some evidence, it did not establish, on a balance of probabilities, that the wall collapsed through causative disrepair.

108. Of course, the restraint that an appellate court should show towards a trial judge's assessment of the facts applies equally to the assessment of expert evidence, see *Britned Development Ltd v ABB AB And ABB Ltd* [2019] EWCA Civ 1840 at paragraph 123. That must be particularly so, where as here, there was some quite extensive cross-examination of Mr Hunt's evidence.

109. It is not for me to retry this case; it is for me to assess whether the Judge's conclusions were plainly wrong. And for all the reasons that I have set out, I do not consider that they were and I consider that his conclusions were entirely open to him. Mr Hunt's evidence, taken with all the other relevant evidence, was somewhat equivocal and it did not establish causative disrepair.

<u>Ground 8</u>

110. Ground 8 contends that the Judge was wrong in law in failing to infer negligence on the basis of res ipsa loquitur. This a reference to the Judge's conclusion in paragraph 31 which I have already read.

111. The parties are agreed as to the applicable legal principle. In *Scott v London and St Katherine Docks Co* (1865) 3 H & C 591 it was described 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 defendant, that the accident arose from want of care."**

112. In my judgment, the Judge was correct for the reasons he identified in paragraph 31 in finding that the collapse of the wall was not something that in the ordinary course of things could only happen because of a want of proper care. Plainly there are other potential explanations and, indeed, some were identified in this case by Mr Hunt.

Ground 9

113. Lastly, ground 9 contends that:

> **"The Judge erred in law or engaged in a serious procedural irregularity and wrongly and unfairly preventing Mr Strange . . . from continuing to give his evidence as to the condition of the constituent parts of the collapsed wall (not least when Mrs Lydford had, in her statement, referred to what Mr Strange had said to her in that regard)."**

114. As I have already indicated, this is a reference to the Judge's decision not to permit Mr Nowland to ask supplementary questions of Mr Strange regarding a conversation which Mrs Lydford recalled in her witness statement having had with him after the accident. She said that he had mentioned:

> **"The wall wasn't in a great state of repair at all and that a larger area than just the part that fell needed repair."**

Mr Strange signed his witness statement on 11 June 2019 and made no mention of this conversation whatsoever. CPR 32.5(3)-(4) empower a trial judge to permit amplification of a witness statement where there is:

> "…[A] good reason not to confine the evidence of the witness to the contents of his witness statement."

115. I have a transcript of the ex tempore ruling that the Judge gave on this point. He determined that it was not in the interests of justice or the overriding objective to permit the questioning. Firstly, because Mr Strange was being called as a witness of fact not as an expert. Secondly the topic had not been referred to at all in his witness statement which had been made and exchanged quite some time before. Thirdly no real explanation had been provided for why this had not been covered in his witness statement if, as the Claimant submitted, it was important. This was not a situation

where permission was sought in relation to a point that had unexpectedly arisen since the exchange of statements. Fourthly, this was a matter that if given in evidence could affect the evidence of the experts, such that an adjournment could be needed.

116. In his oral submissions Mr Nowland rightly recognised the difficulties with this ground. This was an entirely legitimate exercise of the Judge's broad case management discretion and I cannot say that his decision was wrong or that it was unjust because of a serious procedural irregularity within the meaning of CPR 52.21(3)(b).

117. In his skeleton, Mr Nowland also made the point that there was an unsigned witness statement, ostensibly from Mr Strange, submitted by the Defence, which he disavowed when he gave evidence and which the Judge, quite properly, in the circumstances, placed no reliance on (as he said in paragraph 8 of his judgment). However, this appears to me to be entirely irrelevant to the exercise of the Judge's discretion that I have just considered.

118. So in all the circumstances the appeal will be dismissed.

This Transcript has been approved by the Judge.

The Transcription Agency hereby certifies that the above is an accurate and complete recording of the proceedings or part thereof.

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