



# In The Supreme Court of Bermuda

**CIVIL JURISDICTION**

**No 107 of 2011**

**BETWEEN:-**

**JANIKA NICOLE MINORS**

**Plaintiff**

**and**

**(1) VENA DOREEN SIMON  
(2) DOROTHY EVELYN DOUGLAS**

**Defendants**

**and**

**HUBERT JERMAL DOUGLAS**

**Third Party**

## **JUDGMENT**

Date of hearing: 19<sup>th</sup> and 20<sup>th</sup> November 2012

Date of judgment: 20<sup>th</sup> December 2012; amended to correct drafting error 24<sup>th</sup>  
December 2012

Mr Craig Rothwell, Cox Hallett Wilkinson Limited, for the Plaintiff  
Mr Jai Pachai, Wakefield Quin, for the First and Second Defendants

## **Introduction**

1. The Plaintiff, Janika Minors (“Ms Minors”) claims for loss and damage caused by injuries sustained to her right leg on 9<sup>th</sup> October 2007 at premises known as 63 My Lord’s Lane, Hamilton (“No 63”) belonging to the Defendants, Vena Simon and Dorothy Douglas (“the Owners”).
2. The injuries were caused when the guard wall to an outside staircase collapsed (“the incident”). Ms Minors was either on the staircase or standing next to it at the time.
3. Ms Minors was 22 years old when she was injured and is 28 years old now. As a result of her injuries, her leg was amputated above the right knee.
4. The claim is brought under the Occupiers’ and Highway Authorities’ Liability Act 1978 (“the Act”). Ms Minors claims that the guard wall was dangerously defective and that the Owners knew or ought to have known this.
5. The Owners deny these allegations. Moreover, they claim that the accident was caused not by the state of the guard wall but by an assault perpetrated by the Third Party, Hubert Jermal Douglas (“Mr Douglas”) upon a man named Tajmal Webb (“Mr Webb”) which caused the wall to collapse. Mr Douglas is, and was at all material times, Ms Minors’ partner.
6. The Owners have therefore issued a third party notice claiming an indemnity from Mr Douglas. That was on 15<sup>th</sup> April 2011. As Mr Douglas has not entered a notice of appearance he will be bound by this judgment.
7. The case was listed before me for trial of the issue of liability only. Ms Minors and the Owners were ably represented by Craig Rothwell and Jai Pachai respectively. Mr Douglas was not represented, but he was present throughout the trial, gave evidence for Ms Minors, and addressed me on his own behalf at the end of the hearing.

### **Witnesses**

8. I have had the benefit of evidence from a number of eye-witnesses to the incident. It took place more than 5 years ago. Although witness statements stood as evidence in chief, the statements taken for the purpose of these proceedings were not made until 2012 or, in one case, 2011. There were, however, a few earlier statements taken by the police in 2007 and 2008. The non-expert witnesses were connected or divided by ties of blood and friendship.
9. Most of these witnesses fell into one of 2 opposing camps: friends or relatives of Ms Minors and/or Mr Douglas and friends or at least persons sympathetic to a woman named Kimberley Hollis (“Ms Hollis”), who was also assaulted by Mr Douglas on the night in question. I heard oral evidence from all these witnesses, including Ms Minors and Mr Douglas, except for Ms Hollis, whose statements was read as she is no longer in Bermuda.
10. I have therefore approached the fact finding exercise with particular caution. Having said that, there was a broad, although not universal, consensus as to the general outline of the material events, albeit with sharp disagreement as to certain details.

### **How the injuries occurred**

11. In October 2007 Ms Minors was living 20 metres down the hill from No 63 at 65 My Lord’s Lane (“No 65”). She shared the upper apartment with Mr Douglas, their 2 children, aged 4 and 5, and Mr Douglas’ brother, Javon Douglas.
12. Sometime previously, Javon Douglas had broken up with Ms Hollis, his partner of 7 years, with whom he had a 2 year old daughter. Javon Douglas had a new girlfriend. This was a source of friction between Ms Hollis and the Douglas family.

13. Tensions were exacerbated by the fact that Mr Douglas' father, Mr Douglas Senior, who owned the building, had given Ms Hollis and her child permission to occupy the ground floor apartment at No 65. At the date of the injuries, Ms Hollis kept her belongings in the ground floor apartment but for most of the time was not living there.
14. No 63 included 2 rental apartments. The upper apartment was occupied by Omar Allen ("Mr Allen"). The lower apartment was occupied by Tajmal Webb ("Mr Webb") and his fiancée Chloe Lambert ("Ms Lambert"). Mr Webb and Mr Douglas were cousins. Mr Allen had known both men's families since he was a child.
15. On the afternoon of 9<sup>th</sup> October 2007 an altercation took place in the yard outside No 65 between Ms Minors and Ms Hollis.
16. Ms Hollis and her daughter went off with Ms Lambert, who was also present, to Ms Lambert's apartment. Leaving Ms Hollis' daughter there with Mr Webb, they went to visit Ms Lambert's grandmother. Then they went to the Swizzle Inn for dinner. They wanted to stay away until things had died down.
17. They were at the Swizzle Inn for about 2 hours. While they were there, Ms Lambert received a telephone call from Mr Webb to say that Mr Douglas had been round to their apartment and was looking for Ms Hollis. Mr Webb told them to stay away. They returned to Ms Lambert's apartment at around 9.00 pm.
18. Meanwhile, at about that time, Ms Minors returned to her apartment with Mr Douglas, whom she had collected from work. She told him about the incident with Ms Hollis, although it is clear from the fact that Mr Douglas had been round to Ms Lambert's apartment that he was already aware of this from another source.
19. Mr Douglas went straight round to Ms Lambert's apartment. He barged in and assaulted Ms Hollis. He was later charged with assault occasioning actual bodily harm, and on a plea of guilty was sentenced to 6 months'

imprisonment. Although Mr Douglas will not have it, I have no doubt that the sentence accurately reflects the severity of the assault. This is relevant to the present case because it illustrates that Mr Douglas was in a violent and angry mood.

20. Mr Webb and Ms Lambert took Ms Hollis' child out of the apartment so that she would not witness the assault. When they had done so they found that Mr Douglas had locked himself and Ms Hollis behind one of the doors in the apartment. Mr Allen jumped into the apartment through a window to try and restrain Mr Douglas.
21. Ms Hollis managed to escape, and ran off. Then Mr Douglas turned his attention to Mr Webb, who was standing outside the apartment. Mr Douglas took exception to something that Mr Webb said to him. Mr Webb retreated up the outside staircase that led to Mr Allen's first floor apartment. Mr Douglas followed him. Mr Webb was retreating and Mr Douglas was advancing. Mr Douglas was the aggressor.
22. When Mr Webb was 3 or 4 steps up, Mr Douglas caught up with him. There was a confrontation between the 2 men. I shall consider this in more detail later in this judgment. As a result of the confrontation, Mr Webb backed or was pushed back against the guard wall. The impact caused the guard wall to collapse. It collapsed along its length from the bottom of the staircase to the landing halfway up the staircase. Both men fell over the wall. Neither was injured.
23. At some stage during the incident Ms Minors arrived on the scene. There is a conflict of evidence as to whether she was trying to restrain Mr Douglas or alternatively whether she was egging him on. I shall return to that question later.
24. Ms Minors was standing on or near the bottom step when the wall collapsed. It collapsed on top of her, causing the injuries that have given rise to this action.

### **The guard wall**

25. Two photographs of the staircase as it looked before the incident were put in evidence before me and I include them as an annexe to this judgment.<sup>1</sup> The first photograph was taken before Hurricane Fabian in 2003 and the second was taken shortly after the Hurricane. The parties agreed that the appearance of the staircase had not materially changed in the interim, save that the guard wall on the left hand side, which was destroyed during the Hurricane, had been rebuilt prior to the incident.
26. As can be seen from the photographs, the foot of the staircase is about 6 or 7 feet to the right of the apartment wall. (The distance is not important.) The staircase consists of 2 flights of steps. The first flight rises parallel to the apartment wall for 9 steps. It leads to a landing. The landing is about half way up the staircase. Then the staircase turns left at a right angle. The second flight of steps leads from the landing to the porch area outside the first floor apartment.
27. Photographs taken shortly after the guard wall collapsed show that the steps in the first flight show signs of wear, but not so much wear that they would be dangerous to use.
28. The staircase is about 3 or 4 feet wide. On either side of the staircase there is, or was at the time of the incident, a guard wall. I shall refer to the guard wall nearest to the apartment, which is on the left of the staircase looking up, as the inner guard wall, and the guard wall furthest from the apartment, which is on the right of the staircase looking up, as the outer guard wall.
29. There is a concrete wall running up either side of the staircase. The top of the wall is level with the top of the steps. The guard wall ran along the top of the concrete wall.

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<sup>1</sup> Trial Bundle, tab 17, page 1 (top photograph) and page 5.

30. The guard wall was about 3 feet high and 3 ¼ inches deep. It was built of ornamental concrete blocks in a design called “petal”. They were manufactured locally by Bierman’s Concrete Products.
31. At the base of the guard wall the concrete blocks were connected by a bed of mortar to the concrete wall on which they stood. They were not connected to the concrete wall by anything else. The blocks were also connected by mortar to each other. There were no reinforcing bars.
32. The segment of the guard wall with which we are concerned is the outer guard wall on the first flight of stairs. It was about 6 foot long. That is the segment that broke when Mr Webb was pushed against it. From now on, references in this judgment to the guard wall will be references to that segment, unless the contrary intention appears.
33. There was a concrete pillar at the lower end of the guard wall but, from the photographs, there does not appear to have been a concrete pillar at the upper end of the guard wall, ie at the junction of the top step with the landing. The pillar did not contain any reinforcing rods.
34. A concrete hand rail or “cap” ran along the top of the guard wall, to which it was connected by mortar. The concrete hand rail was not supported by the pillar, which it overhung but did not touch. William Lang (“Mr Lang”), who gave expert evidence for Ms Minors, stated that the cap did not strengthen the wall. Edward Pereira (“Mr Pereira”), who gave expert evidence for the Owners, did not dispute this.<sup>2</sup>
35. The staircase, including the guard wall, was built in the mid-1970s. The inner guard wall was rebuilt in the same style after it was destroyed by Hurricane Fabian. Following the incident with Ms Minors, both the inner and outer guard walls were rebuilt so that they were thicker and more robust.

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<sup>2</sup> The judgment as originally issued erroneously stated that Mr Lang gave expert evidence for the Owners (which was also stated at paragraph 58), and Mr Pereira for Ms Minors.

### **The statutory framework**

36. Liability is governed by the Act. Section 4 provides:

*“An occupier of premises owes a duty to every visitor on his premises to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purpose for which he is invited or permitted by law to be there.”*

This duty is designated by section 1(a) of the Act as the “*common duty of care*”.

37. “*Occupier*” is defined at section 1(d) of the Act to include “*a person who has responsibility for and control over the conditions of premises, the activities on those premises and the persons allowed to enter those premises*”.

38. “*Premises*” is not defined exhaustively in the Act. However it is not in dispute that the Owners were occupiers of the premises at No 63, including the staircase and surrounding area. Section 5(a) of the Act provides that the common duty of care applies, *inter alia*, to the condition of the premises.

39. Section 1(g)(iii) of the Act provides that “*visitor*” includes “*any ... person whose presence on premises is lawful*”. A visitor is to be contrasted with a trespasser. Section 12(i) of the Act provides that, subject to certain exceptions that do not apply here, “*an occupier does not owe a duty of care to a trespasser on his premises*”.

### **The questions to be decided**

40. In light of the statutory framework, I must decide the following questions.

- (1) Whether Ms Minors was present on the premises as a visitor or alternatively as a trespasser? I shall defer consideration of this question until later.



- (2) If Ms Minors was present as a visitor, whether her conduct gave rise to the defence at common law of *ex turpi causa*? I shall consider this question at the same time as I consider whether she was a trespasser.
- (3) If Ms Minors was present as a visitor, whether the Owners were in breach of their common duty of care towards her?

**If Ms Minors was present as a visitor, whether the Owners were in breach of their common duty of care towards her?**

**Case law**

41. The common duty of care is analogous to the common law duty of care in the law of negligence. Thus not only cases on occupier's liability, but also cases in negligence, are helpful in construing its ambit. The applicable principles are not controversial.
42. A person will be negligent if he does not take steps to eliminate a risk which he knows or ought to know is a real risk and not a mere possibility which would never influence the mind of a reasonable man. However it is justifiable not to take steps to eliminate a real risk if it is small and the circumstances are such that a reasonable man, careful of the safety of his neighbour, would think it right to neglect it. See Wagonmound (No 2) [1967] 1 AC 617 PC at 642 F – 643 A, *per* Lord Reid.
43. The *kind* of damage that gives rise to liability must be reasonably foreseeable. See Wagonmound (No 1) [1961] AC 388 PC at 426, *per* Viscount Simonds. What must have been foreseen is not the precise injury which occurred but injury of a given description. See Jolley v Sutton London BC [2000] 1 WLR 1082 HL at 1091 D, *per* Lord Hoffmann. But *how* the damage arose need not be reasonably foreseeable.
44. Thus in Hughes v Lord Advocate [1963] AC 837 HL the kind of damage, namely an accident to a child through burns from a paraffin lamp that

workers had left unattended, was reasonably foreseeable. But it was not reasonably foreseeable that the burns would be caused by an explosion that occurred when paraffin escaped from the lamp, formed vapour, and was ignited by the lamp's flame. Thus the Post Office, which employed the workers, was liable in damages. As Lord Morris put it at page 712 E, the defenders [it was a Scottish case] were not absolved from liability because they did not envisage "*the precise concatenation of circumstances which led up to the accident*".

45. The courts have repeatedly said that the notion of "*causing*" is one of common sense. In answering questions of causation for the purposes of holding someone responsible, both the law and common sense normally attach great significance to deliberate human acts. See Empress Car Co v NRA [1999] 2 AC 22 HL at 29 B and 30 G – H, *per* Lord Hoffman.
46. Thus, even where the plaintiff can show causation in fact, the court may still reject the defendant's breach of statutory duty as the legal cause of the damage in favour of some other more important factual cause with which the defendant's breach of statutory duty interacted. "*An unforeseeable, unreasonable, deliberate, violent act is a paradigm example of a new intervening cause.*" See Horton v Taplin Contracts Limited [2003] ICR 179 CA at paras 25 (approving a passage from Clerk and Lindsell on Torts, 18<sup>th</sup> Edition, 2000) and 26, *per* Bodey J.
47. But whether a statutory duty of care includes responsibility for the acts of third parties, and, if so, for any such acts or only some of them, is a question of statutory construction, having regard to the policy of the relevant statute. See Empress Car Co v NRA at 32 B, *per* Lord Hoffman.

### **Issues and evidence**

48. Ms Minors' case is as follows. As the Owners knew, or ought to have known, the guard wall was unsafe. Although the precise sequence of events leading to the injury might not have been reasonably foreseeable, it was

reasonably foreseeable that someone using the staircase might collide with the guard wall, eg because they slipped or tripped on the stairs. It was also reasonably foreseeable that even a small amount of pressure might cause the wall to collapse, and that the collapse might injure someone in the vicinity of the wall.

49. The Owners disagree. It is their case that the guard wall was safe, and that even if it wasn't, that was not something that the Owners knew or ought to have known. The injury was not caused by the state of the guard wall, whether or not it was unsafe, but by the deliberate, violent and unforeseeable act of Mr Douglas in assaulting Mr Webb.
50. The following issues therefore fall to be determined:
  - (1) Whether the guard wall was unsafe.
  - (2) If so, whether the Owners knew or ought to have known that it was unsafe.
  - (3) Whether the actions of Mr Douglas were an intervening cause sufficient to relieve the Owners of any responsibility that they might otherwise have had for Ms Minors' injuries.
51. I shall deal with these issues together.
52. Mr Rothwell submits that under no circumstances should a 3 ¼ inch thick wall, made up of decorative blocks held together merely with mortar, with no vertical anchoring, only one pillar and no lateral reinforcing, with a cap hanging in the air and not an integral part of the structure, be deemed to be fixed securely enough to guard against a falling, off-balance or leaning human body, ie to resist a fair amount of strain without collapsing – the very purpose of the requirement for guard walls. This, he submits, should be apparent to any layman. Mr Pachai does not accept this.
53. Mr Rothwell draws my attention to the Bermuda Residential Building Code 1998 (“the 1998 Code”). This provides at paragraph 4.6.4 that all guardrails

shall be designed for the worst case of a 200 pound concentrated load applied at any point and in any direction or a 20 pounds per foot uniform load applied at the top of the assembly.

54. The 1998 Code was not in force when the guard wall was built in the mid-1970s. However Mr Rothwell submits that it provides helpful guidance as to the standard that the guard wall should have met in order for the Owners to comply with their statutory duty of care towards visitors.
55. The 1972 Building Code was in force when the wall was built. Although no load bearing figures were specified, the Code stressed that building works should be of stout construction. Thus section 2 of the Code stated that the purpose of the Code was to provide for safety, health and public welfare through structural strength and stability. Section 8(1) stated that all matters not covered by the Code should conform with generally accepted good practice. Section 54(1) stated that any stairway should be guarded on each side by a securely fixed screen. Section 55 stated that any external area to which any person habitually had access should have a balustrade, parapet or railing of such extent, construction and material as to afford reasonable safety for any person using it.
56. Mr Pachai, while not accepting that the guard wall does not comply with current standards, submits that its adequacy should be judged by the standards of the time when it was built. In that regard, Mr Pereira gave evidence that the construction of the guard wall was typical for the 1970s. He stated that a building inspector must have signed off on the wall – otherwise a certificate that the building was fit for occupancy would not have been granted. However Mr Lang stated that in his view the guard wall would not have satisfied the requirements even of the 1972 Code.
57. During Hurricane Fabian, which was a category 2 hurricane, the inner guard wall both on the staircase and on another, similar, staircase on the other side of the building were blown down. However the outer guard wall on both staircases remained standing. Mr Rothwell submits that the collapse of the

inner guard walls should have put the Owners on inquiry that the outer guard walls were not safe. Mr Pachai submits that, on the contrary, the fact that the outer guard walls withstood hurricane force winds is compelling evidence that they were safe.

58. Mr Lang, whom it will be recalled is the expert witness for Ms Minors, gave evidence as to the stresses that would be imposed on a wall with the dimensions of the guard wall – ie 6 foot x 3 foot x 3 ¼ inches – if a static 200 pound force was applied horizontally near the top of the wall. Applying a mathematical analysis he concluded that they would exceed the stresses permissible by the British Standard by more than a factor of 5. He concluded that such a guard wall would not satisfy the requirements of the 1998 Code and that a horizontal load of perhaps 40 to 50 pounds might have caused it to collapse.
59. However this analysis took no account of the individual characteristics of the guard wall other than its measurements. For instance it did not differentiate between a well-built wall and a badly built wall. Without empirical evidence, I am cautious about accepting that a guard wall of these dimensions is by definition non-compliant with the 1998 Code. Just as I am cautious about applying a mathematical model to an empirical reality, namely this particular guard wall, against which it has not been tested.
60. A characteristic of this particular guard wall, for instance, was that it had withstood a category two hurricane. Mr Lang estimated that such a hurricane would have applied a load of perhaps 50 to 60 pounds per square foot, which would have been a cumulative force of 900 pounds against a 6 foot by 3 foot wall – although this figure would have to be adjusted downwards to take account of the fact that the guard wall was built of blocks designed so that they had holes in them. He stated that the cumulative force of the hurricane winds was therefore much higher than the 1998 Code requirement that a guard wall withstand 200 pounds at a particular point.

61. Both parties place reliance on their respective versions of how the guard wall collapsed.
62. Mr Rothwell submits that the guard wall yielded to light or moderate force – certainly less than 200 pounds. Although he does not put it in quite this way, in effect he submits that its collapse is a case of *res ipsa loquitur*.
63. Mr Pachai, on the other hand, submits that Mr Douglas forcefully pushed Mr Webb against the guard wall, which collapsed under the combined weight of both men. Mr Douglas accepted that both today and at the date of the incident he weighed more than 200 pounds. Mr Webb did not give evidence as to his weight but I accept Mr Pachai’s estimate that he weighed around 150 pounds. There was no evidence that his weight had changed much since the incident. Thus, Mr Pachai submits, the guard wall was subject to a dynamic load of some 350 pounds.
64. He relies on the statement in Mr Lang’s report that stresses imposed by dynamic (ie moving) loads are in excess of those imposed by static loads. Hence, Mr Lang states, if a body weighing about 250 pounds were to impact a guard wall at speed the overturning effect on the wall would be higher than the impact of the “*Code required*” static load of 200 pounds.
65. There were a number of witnesses to the confrontation between Mr Webb and Mr Douglas. It is helpful to start with the 2 men themselves. As the participants, they are particularly well placed to describe what happened. Mr Webb gave evidence for the Owners and Mr Douglas gave evidence for Ms Minors.
66. Mr Webb described it thus. He said that Mr Douglas was running like a madman towards him. Mr Douglas put his hands on Mr Webb and they were wrestling, grabbing each other by the neck area. They were standing alongside each other on the step. Mr Webb was on the side of the wall that collapsed, about one foot away from it. They were both standing upright. Mr Douglas pushed him. Mr Webb’s lower back hit the wall and the wall just gave way. Mr Douglas was following through on the push and there

was no opportunity for Mr Webb to regain his balance. Mr Webb was still holding on to Mr Douglas so as to try and catch his balance. Mr Douglas couldn't avoid falling because Mr Webb still had hold of him. Thus it was that both men fell off the staircase.

67. This account was broadly consistent with the account that Mr Webb gave in his police witness statement, which was taken on 2<sup>nd</sup> December 2008. There he stated that Mr Douglas "*football tackled*" him and pushed him into the wall.
68. Mr Douglas said in evidence that he walked up the steps towards Mr Webb. They were grabbing each other by the clothes at their chest and throat. They were facing each other dead centre. Mr Webb changed his position and the wall fell. He grabbed Mr Douglas to catch his balance, and both men fell off the staircase to the ground. Mr Webb had his back to the wall: it looked as if he just back and the wall just fell. Mr Douglas disagreed that he "*football tackled*" Mr Webb but accepted that they had grappled with each other.
69. In assessing Mr Douglas' evidence, I bear in mind his close connection to Ms Minors. I also bear in mind that, when giving evidence about his assault upon Ms Hollis, he tried to play down the seriousness of his actions.
70. Of the other witnesses, Mr Allen, who was called on behalf of Ms Minors, fell within both camps. He said that he had known both the families involved since he was a child but that they were not blood relations. His intervention to try and protect Ms Hollis when she was being assaulted by Mr Douglas suggests that he is a man of impressive moral character. I regard his evidence as independent. He said that Mr Webb was on the stairs and that Mr Douglas followed him at a brisk walk. They clashed. It was more like a clash than a fight. As soon as they clashed the wall went. They were locked in a struggle. They were both adjacent to the wall and fell with it.
71. Ms Minors called several other witnesses to the incident. Andre Berkley ("Mr Berkley"), had known the Douglas family for many years. He said that

there was a scuffle but that the 2 men weren't actually locked together. He didn't know who attacked who first: they were both attacking each other. They both leaned against the wall and the wall fell over.

72. Richard Douglas was Mr Douglas' uncle. He said that he wasn't glued to the whole situation on a blow by blow basis. Mr Douglas followed Mr Webb up the stairs. They were grappling with each other at a 90 degree angle to the wall. They were not locked in a struggle, but were reaching for one another, trying to hit one another, "*shadow boxing*". Mr Webb was leaning against the wall, trying to balance himself. Mr Douglas was coming towards him. Then the wall gave way. Richard Douglas did not recall whether Mr Douglas and Mr Webb fell, or whether they managed to catch themselves and remain on the steps.
73. Robyn Douglas was Mr Douglas' cousin. Her recollection of the incident was limited. She saw Mr Webb and Mr Douglas fighting. By "*fighting*" she meant that they were arguing with a little shoving. She couldn't recall who was facing the wall and didn't remember if they were locked in a struggle. They were shoving each other but she didn't see any blows.
74. Ms Minors gave evidence. She said that Mr Douglas got a grip of Mr Webb's clothing around the neck and vice versa. Mr Webb turned to try and get his balance. He had his back to the wall – then the wall went down. "*It wasn't nothing hard. No blow. No nothing.*" Mr Douglas didn't cause the wall to fall down – it was Mr Webb doing no more than leaning against the wall who caused it to fall down.
75. Ms Lambert gave evidence for the Owners. She said that Mr Webb went up the steps and that Mr Douglas followed him at a fast pace. They were scuffling like they were about to fight. Mr Douglas slipped or tripped backwards on the wall as they were scuffling. The way he slipped backwards, and the pressure and the impact, caused the wall to fall.
76. Mr Webb's witness statement was dated 21<sup>st</sup> June 2012 and Ms Lambert's was dated 7<sup>th</sup> February 2011. The wording of both witness statements is



almost identical and generally accords more closely with Ms Lambert's oral evidence than Mr Webb's. I therefore find that Mr Webb's oral evidence reflects his recollection of events more accurately than his statement.

77. It is not surprising that different witnesses remember the same event in slightly different ways. As well as the considerations affecting credibility mentioned earlier, I bear in mind that these events happened 5 years ago, and that memories fade and can be distorted over time.

### **Conclusions**

78. I find that the guard wall was not unsafe. The fact that it withstood Hurricane Fabian is cogent evidence of that. Even if the guard wall was unsafe, its having withstood a category 2 hurricane meant that the Owners were entitled to assume that it was safe.
79. I also find that the guard wall collapsed because Mr Douglas, while grappling with Mr Webb, pushed against Mr Webb with sufficient force that the body weight of both men fell against it. This would have been a dynamic load of some 350 pounds. I do not accept that the 1998 Code sets the standard by which the safety of a guard wall built in the 1970s is to be judged. But I note that such a load is considerably greater than the static load of 200 pounds that the 1998 Code requires a guard wall to bear.
80. Thus, even if the guard wall was unsafe and the Owners ought to have known that, I find that the actions of Mr Douglas were a paradigm case of a deliberate, violent and unforeseeable act. As such, they were an intervening cause sufficient to relieve the Owners of any responsibility that they might otherwise have had for Ms Minors' injuries.

**Whether Ms Minors was present on the premises as a visitor or alternatively as a trespasser? If she was present as a visitor, whether her conduct gave rise to the defence at common law of *ex turpi causa*?**

**Caselaw**

81. The concept of a visitor encompasses the common law concepts of both an invitee and a licensee. An invitee must be on the land for some purpose for which he and the proprietor have a joint interest. A licensee is a person whom the proprietor has not in any way invited, but he has either expressly permitted him to use his lands or, knowledge of his presence more or less habitual having been brought home to him, he has then either given permission or shown no practical anxiety to stop his further frequenting the lands. The trespasser is he who goes on the land without invitation of any sort and whose presence is either unknown to the proprietor or, if known, is practically objected to. See Addie v Dumbreck [1929] AC 358 HL at 371, *per* Viscount Dunedin.
82. An invitation or licence may be subject to implied terms. “*When you invite a person into your house to use the staircase you do not invite him to slide down the bannisters.*” See The Calgarth [1927] P 93 at 110, *per* Scrutton LJ. The civil and criminal law both adopt the same approach. A person is a trespasser if he enters the premises of another knowing that, or being reckless whether, he is entering in excess of the permission that has been given him to enter. Provided the facts are known to him which enable him to realise that he is acting in excess of that permission or acting recklessly as to whether he exceeds it. See R v Jones [1976] 1 WLR 672 CA at 675 D - E, applying Hillen and Pettigrew v ICI (Alkali) Ltd [1936] AC 65 HL and R v Collins [1973] QB 100 CA.
83. Out of a base or immoral claim, no action lies. This is expressed by the Latin maxim *ex turpi causa non oritur actio*. For the defence to apply, the facts that give rise to the claim must be inextricably linked to the plaintiff’s bad behaviour. Where that behaviour is criminal, the criminality must be of a certain level of seriousness. Generally, a crime punishable with

imprisonment would qualify but a relatively trivial offence would not. See Ming v Simmons [2006] Bda LR 64 SC at paras 25 and 26, *per* Kawaley J (as he then was), applying Vellino v Chief Constable of Greater Manchester Police [2002] 1 WLR 237 CA.

### **Issues and evidence**

84. It is not disputed that No 63 and No 65 were part of a close knit community and that people used to come and go between these properties quite freely.
85. However Mr Pachai submits that Ms Minors exceeded the terms of her licence to visit No 63 by inciting Mr Douglas to attack Mr Webb, and that she was therefore present on the premises as a trespasser. Further or alternatively, he submits that the incitement was a criminal act sufficient to found an *ex turpi causa* defence.
86. Ms Minors denies this. Her evidence was that when she saw Mr Douglas and Mr Webb outside Mr Webb's apartment she yelled, "*C'mon Jermal, let's go. It is not worth it*" and "*Stop, stop, it's not worth it, let's go*". She said that she went towards the steps to pull Mr Douglas away. This is consistent with a police note of a conversation with her on 12<sup>th</sup> March 2008, in which she said that went to try and calm her boyfriend down, although the notes were not written up into a witness statement.
87. Ms Minor's account of what she said is supported by the evidence of Mr Berkley, Richard Douglas and Mr Douglas.
88. As against this, Mr Webb gave oral evidence that when he was outside his apartment with Mr Douglas, Ms Minors was saying "*Shut up Tajmal, you talk too much*". When he went round to the steps Ms Minors said, "*Look, Jamal has gone round the steps to the corner*". That is when Mr Douglas came round and attacked him. Ms Minors said, "*You need to get him, he talks too much*". However in his police statement Mr Webb simply said that

when he went round the side of the house next to the stairs he heard Ms Minors shout, *“He’s over there”*.

89. Ms Lambert said in evidence that she heard Ms Minors shout to Mr Douglas, *“You need to slap him, he’s running his mouth, he’s the reason Kimberley’s here, I don’t know why he’s helping her anyway, he knows that no-one wants her round here, she’s causing problems and trouble”* and things of that nature. Ms Lambert gave a similar although not identical account in her witness statement of what Ms Minors said, and stated that she stood by that account.
90. To help me assess the credibility of these competing accounts I turn to an incident that took place earlier that afternoon, namely the altercation between Ms Minors and Ms Hollis.
91. Ms Minors acknowledged in her witness statement that there was an argument between the 2 women, although she stated that she did not strike Ms Hollis or get into a physical fight with her. When cross-examined, she maintained this position but said that she threw a school bag at Ms Hollis and took the keys out of Ms Hollis’ bike and threw them into the grass.
92. Ms Hollis said in her written statement that Ms Minors struck her and that they began to fight each other. Ms Minors’ children, who were present, began crying, at which the women stopped fighting but continued arguing.
93. Ms Lambert gave oral evidence supporting Ms Hollis’ account. She said that the women were fighting and pulling each other’s hair. A man came who broke it up – either Mr Allen or Javon Douglas. It was broken up because the children started crying – the women saw that and then stopped.
94. Mr Allen gave evidence that sometime during the day when he was at home he heard a lot of noise coming from No 65. He went out to see what was happening and saw that Ms Minors and Ms Hollis were physically fighting. He said that he broke up the fight.

## Conclusions

95. Of all the factual issues before me, this was the most difficult to resolve. I accept Mr Allen's account that he broke up a fight between Ms Minors and Ms Hollis. Thus I reject Ms Minors' account that there was no fight between them. It would be difficult for a participant in a fight to forget or be mistaken about whether it had occurred. This makes it more difficult for me to accept Ms Minors' account of what she later said to Mr Douglas.
96. I am satisfied that Ms Minors was at least partly to blame for the altercation with Ms Hollis. This would be consistent with her egging on Mr Douglas to attack Mr Webb, who together with Ms Lambert had given Ms Hollis shelter.
97. I approach the evidence of the witnesses who corroborate Ms Minors' account with caution on account of their personal ties to her and/or Mr Douglas.
98. By the same token, I also approach the evidence of Mr Webb and Ms Lambert with caution. Mr Webb did not appear to me have a very clear recollection of what Ms Minors said. This was understandable as his attention would have been focussed on Mr Douglas.
99. Ms Lambert was very clear in her evidence about what Ms Minors said. Her account of the incident between Ms Minors and Ms Hollis was in part at least corroborated by Mr Allen. But her recollection of events was not always accurate, notably her statement that it was not Mr Webb but Mr Douglas who fell against the guard rail. Moreover, my sense of her evidence was that there was no love lost between her on the one hand and Mr Douglas and Ms Minors on the other. I take that into account.
100. I conclude that what Ms Minors shouted to Mr Douglas might well have included words hostile to Mr Webb. But I am not satisfied as to the substance of those words. Richard Douglas stated in evidence that although what happened on the night of 9<sup>th</sup> October 2007 was something out of the

ordinary, people used to argue loudly in the neighbourhood. I accept that. It may be that Ms Minors did not more than express a vociferous point of view. In the circumstances, I accept her case that she was a visitor to the premises.

101. Even taking the Owners' case at its highest, I am not satisfied that Ms Minors' alleged actions would amount to criminal conduct. If they did, it would not be sufficiently serious to give rise to a defence of *ex turpi causa*.

### **Decision**

102. The questions before me are decided thus:

- (1) Ms Minors was present on the premises as a visitor.
- (2) Her conduct does not give rise to a defence of *ex turpi causa*.
- (3) However, the Owners were not in breach of their common duty of care towards her.

103. I therefore give judgment for the Owners.

104. I shall hear the parties as to costs.

Dated this 20<sup>th</sup> day of December 2012 \_\_\_\_\_

Hellman J