Levitt v Euro Building & Maintenance Contractors Limited (1) Dual Oliva Limited (2) [2019] EWHC 2926 (QB)

1. A claim relating to an unlawful trespass to the Claimant's person that occurred on 26 October 2014. During the course of their work, three sub-contractors engaged on a construction site by First Defendant, namely the Claimant, Kieran Fowler and Alan Fowler, became involved in an argument concerning their work. The incident started as verbal argument on a scaffold and culminated a few minutes later (off the scaffold) with Kieran Fowler striking the Claimant violently over the head with a scaffolding pole. As a result, the Claimant sustained a right-sided subdural haemorrhage, a subarachnoid haemorrhage, and extensive skull fractures. Following the incident Kieran Fowler was convicted of causing Grievous Bodily Harm and sentenced to 12 years in prison. The Claimant's case was that the First Defendant were vicariously liable for the actions of Kieran Fowler. The Second Defendant was the insurer of the First Defendant.
2. The Defendants defended the claim on the following bases: (1) that they were not vicariously liable for the assault perpetrated by Kieran Fowler; (2) that the maxim of ex turpi causa applied; and (3) that (in the alternative) the Claimant's conduct amounted to contributory fault.
3. In a detailed Judgment in relation to liability only, which focused on the application of tests identified in both Cox v Ministry of Justice [2016] UKSC 10; [2016] A.C. 660 and Mohamud v WM Morrison Supermarkets [2016] UKSC 16; [2016] A.C. 677, HHJ Freedman (sitting as a Deputy High Court Judge), found for the Claimant. In so doing HHJ Freedman found that on the facts
    1. The five criteria identified by Lord Phillips in Various Claimants v Catholic Child Welfare Society [2012] UKSC 56; [2013] 2 A.C. 1 (commonly referred to as the 'Christian Brothers case') as explained in Cox (supra.), were satisfied. More particularly, the relationship between the First Defendant and Kieran Fowler was closely akin to that of employer and employee (para. 38 of the Judgment). Accordingly, the First Defendant could, in principle, be vicariously liable for the actions of Kieran Fowler.
    2. The two tests identified by the Supreme Court in Mohamud was satisfied. The conduct of Kieran Fowler was proximate to the "field of activities" that had been entrusted to him (para. 80 of the Judgment). The reasoning being that: (1) the assault was by one (quasi) employee on another (quasi) employee; (2) the assault occurred during working hours at a site where the Defendants were engaged; (3) the background to the assault was an argument about work and the requirement for work materials; (4) the assault occurred within minutes of the initial argument there being (as I have found) an unbroken sequence of events; and (5) the weapon which was used was work equipment. Further, there was a "sufficient connection" between the position in which Kieran Fowler was engaged and his wrongful conduct (para. 88 of the Judgment). More particularly, the use of a scaffolding pole by Kieran Fowler to strike the Claimant over the head, this was the end point, in an unbroken series of events which emanated from the original argument on the scaffold concerning work or work materials. In reaching his conclusion the Judge carried out a careful review of the earlier authorities preceding this decision in Mohamud, including Mattis v Pollock (T/A Flamingo's Nightclub) [2003] EWCA Civ 887; Weddall v Barchester Healthcare Ltd and Wallbank v Wallbank Fox Designs Ltd [2012] EWCA Civ 25, Graham v Commercial Bodyworks Ltd [2015] EWCA Civ 47; and Bellman v Northampton Recruitment Limited [2018] EWCA Civ 2214
    3. That the maxim of ex turpi causa was not engaged. The circumstances of the whole incident required consideration. The Claimant had not started the physical violence (even though he may have initially responded to Kieran Fowler in a somewhat belligerent way). The Claimant's actions after the initial argument on the scaffold, which involved chasing Kieran Fowler, uttering certain threats and then engaging in some kind of fight with Alan Fowler probably constituted an offence of affray. However, as the Claimant had himself been the victim of a serious assault (he had probably been struck with a brick whilst on the scaffold), it was certainly arguable that his conduct should not be categorised as being worthy of condemnation by the courts. Further, and in any event, the chain of causation was broken by the subsequent act of Kieran Fowler in striking the Claimant over the head with a scaffolding pole (the decision of Edis J in Flint v Tittensor & Anor [2015] EWHC 466 (QB) considered).
4. The argument of contributory fault was not pursued by the Defendants, it being accepted that the Court was

bound by the decision of the Court of Appeal in Co-Operative Group (CWS) Ltd v Pritchard [2011] EWCA Civ 329 [2012] Q.B. 320. However, the Defendants preserved the right to argue the matter on appeal.

James acted for the successful Claimant.

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