Neutral Citation Number: [2019] EWHC 2926 (QB)

Case No: HQ17P03906

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/11/2019

Before :

HIS HONOUR JUDGE JEREMY FREEDMAN
(SITTING AS A DEPUTY JUDGE OF THE HIGH COURT)

- -

Between :

STUART LEVITT	**Claimant**
- and -	
(1) EURO BUILDING & MAINTENANCE CONTRACTORS LIMITED **(2) DUAL OLIVA LIMITED**	**Defendants**

- -

- -

Mr James Sullivan (instructed by **Osborne Morris and Morgan**) for the **Claimant**
Mr Julian Matthews (instructed by **Kennedys Law LLP**) for the **Defendant**

Hearing dates: **22, 23, 24 July 2019**

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

....

HHJ JEREMY FREEDMAN

HHJ Jeremy Freedman:

Introduction

1. On 26 October 2014, the Claimant sustained serious head injuries as a result of a work colleague, Kieran Fowler, striking him on the head with a scaffolding pole. The assault occurred at the Redhouse Park construction site in Newport Pagnell, Buckinghamshire ('the site'). Arising out of this incident, Kieran Fowler was convicted of causing Grievous Bodily Harm and was sentenced to 12 years' imprisonment.

2. The Claimant and Kieran Fowler were, at the material time, working on the site pursuant to a contract of services with the 1st Defendant. The 2nd Defendant is the insurer of the 1st Defendant. Since the 1st and 2nd Defendants have a common interest in these proceedings and they are represented by the same solicitors and counsel, for convenience, I shall refer to the 1st and 2nd Defendants as 'the Defendants'.

3. The cause of action relied upon by the Claimant is unlawful trespass to the person. It is the Claimant's contention that the Defendants should be held liable for the Tort committed by Kieran Fowler. Pursuant to the order of Master Thornett, I have heard a trial on liability as a preliminary issue.

4. There are essentially two broad issues which have to be determined:

    i) Are the Defendants vicariously liable for the assault perpetrated by Kieran Fowler on the Claimant?

    ii) If so, nevertheless, are the Defendants entitled to rely on the defence of "ex turpi causa non oritur actio" ('ex turpi causa')?

    (I should record that the Defendants, quite properly, concede that, as a matter of Law, they are not entitled to pursue allegations of Contributory Negligence.)

5. Self-evidently, before determining these issues, it is necessary to make factual findings as to:

    i) The circumstances of the assault;

    ii) The actions of both the Claimant and Kieran Fowler (and any other relevant person);

    iii) The nature of the relationship between Kieran Fowler and the Defendants.

Factual enquiry

6. My findings must, of course, be based on the totality of the evidence. But I have only heard live evidence from five witnesses: (1) the Claimant (2) the Claimant's witness, Mr Neil Dolan (3) the Defendant's witnesses, Mr Mihail Cititor, Mr Christopher Davies and Mr Andrew Emery.

7. Other evidence, in the form of witness statements from Mr Sam Robet on behalf of the Claimant, and from Mr John Neeson on behalf of the Defendants, was adduced by way of Civil Evidence Act Notices. Obviously, such evidence has not been tested and,

therefore, I need to be cautious about how much weight can be given to it (although the statement of John Neeson is of limited value, in any event).

8. I have also been provided with the statements obtained by Thames Valley Police in the course of their criminal investigation, as well as the 'Occurrence Report'. Within the Police papers, there are also transcripts of the police interviews with Kieran Fowler and his father, Alan Fowler (who was also charged with an offence of causing grievous bodily harm but acquitted by the Jury). Additionally, I have been provided with transcripts of the evidence adduced orally in the criminal trial, coupled with the judge's summing up to the jury.

9. It is legitimate to attach some weight to these statements and to the 'Occurrence Report', but where the matters contained therein have not been subject to cross-examination in the criminal trial, I must again proceed with caution. As regards to the interviews of the two Fowlers, although both were cross-examined before the Jury, I must have, at the forefront of my mind, that both were facing very serious criminal charges and the (understandable) desire to be acquitted of such matters will unnecessarily have influenced both what they said to the police in interview and what was said by them at the trial. It follows that I must scrutinise very carefully anything said by the Fowlers and look, in particular, to see if there is any independent support for what they say before allowing any of the evidence to inform my findings of fact.

10. There is a further point to be made: those who have been involved in Criminal Trials concerning charges of Assault and Affray and other similar charges will be acutely aware that many apparently, independent witnesses will give very different and conflicting accounts so that, very often, it is not always easy to discern a coherent picture. Such is the case in this Civil Trial, rendering it virtually impossible to resolve all of the conflicts in the evidence. Nevertheless, and despite the various inconsistencies, it is my task to make findings of fact, on the balance of probabilities, in relation to the central matters which go to the issues identified at paragraph 5 above.

11. With those qualifications in mind, I now turn to the agreed or incontrovertible facts. The main contractors on site were Ben Bailey. Ben Bailey had engaged the services of the Defendants to do bricklaying and scaffolding work. The Defendants had between 160 to 200 tradesmen working for them in a self-employed capacity. The majority of the tradesmen were bricklayers but there were also others who worked in the capacity of labourers/hod-carriers. Kieran Fowler was a hod-carrier whilst his father, Alan Fowler, and the Claimant were both bricklayers. They tended to work in small teams or gangs with one hod-carrier to a couple of bricklayers. The Defendants, through their supervisors, would assign gangs to various parts of the site. The main contractors were responsible for the provision of materials on the site as well as the forklift trucks which were required for the movement of materials. The responsibility for the distribution of the materials on the site rested with the Defendants.

12. The work on the site was behind schedule. In the weeks leading up to the incident, there had been a 'push' to try and complete the project. This necessitated an unusually high number of bricklayers on the site over the weekend of 25/26 October 2014. The main contractors were paying very generous daily rates to attract as many bricklayers as possible onto the site. Mr Emery (a Director of the Defendants) said that the main contractors were willing to pay the men on the site even if, some of the time, there was no work for them to do. Generally, the Defendants only provided one supervisor on the

site but, over this weekend, because of the high volume of bricklayers, there were two supervisors present.

13. The Claimant had worked for the Defendants for approximately six months, based predominantly on a housing estate in Buckingham. The first occasion upon which he had worked at this site was on Saturday, 25 October 2014. His recollection was that there were about fifteen bricklayers on site. He was instructed by the site foreman to work on a multi-storey block of flats. On each level of the building, there were loading bays. Fork-lift trucks would place the bricks and mortar ('muck') on the loading bay. The hod-carrier would take materials to the bricklayers, as and when required. On the Saturday, the Claimant worked on level 2 on the front of the block of flats.

14. He worked with, amongst others, Neil Dolan. The gang's labourer was Kieran Fowler. It appears that the expectation was that the works started on the Saturday would be completed on the Sunday. It was Mr Dolan's evidence that he saw the Claimant working at the same location as they had been working on the Saturday.

15. Against that background, I turn to the lead up to the incident. It appears to be accepted, all round, that the Claimant, having arrived on the site shortly before 8am, was in search of bricks and muck to enable him to start the day's work. To that end, he sought out Kieran Fowler. Such is confirmed by the following pieces of evidence:

    i) The Defendants' witness, Mr Christopher Davies said that the Claimant asked him *"what's loaded out next?"* to which Mr Davies replied that he did not know but that he should go and see Kieran Fowler. According to Mr Davies that is precisely what the Claimant did.

    ii) In a statement to Thames Valley police, approximately three hours after the incident, Neil Dolan stated that the Claimant had said to him something to the effect *"I'll sort a hod-carrier/labourer to sort out bricks and muck"*. In his witness statement, Mr Dolan confirmed that it was obviously sensible for the Claimant to approach Kieran Fowler as he had been helping the gang on the Saturday.

    iii) Both Kieran and Alan Fowler, in the course of their police interviews and in the course of the criminal trial, gave similar evidence to the effect that the Claimant had approached them on the scaffold and enquired whether there was any work available for him.

16. What transpired when the Claimant approached the Fowlers is somewhat more contentious. The Claimant himself cannot shed any light on matters, having no recollection whatsoever of the whole incident. What is incontrovertible is that there was some kind of argument involving the Claimant and the Fowlers. The Defendants place heavy reliance on the evidence of Christopher Davies who, in his witness statement, said that he heard Kieran Fowler saying words to the effect, *"there is no need to get all lairy, mate"*. He went on to say that the Claimant replied aggressively and thereby started an argument. His previous dealings with the Claimant suggested that the Claimant had an 'attitude problem'. He also recalled Alan Fowler saying "*right, I've had enough of this…*". It is right to observe that in his oral evidence, Mr Davies was unable to assist as to what the Claimant had said, but he was generally aware that matters were escalating.

17. On the totality of the evidence, I am satisfied that there was an argument on the scaffolding involving the Fowlers and the Claimant; and that the subject matter was the lack of materials/work available to the Claimant. In the end, it is probably of marginal, if any, relevance as to who started the argument but I think it likely that the Claimant became somewhat aggressive once he was told that there were no materials available to him. In respect of the latter, it was not only the evidence of Mr Davies and the Fowlers but also a contemporaneous statement made by Catalin Potoroaca to the police in which he said that Alan Fowler had told him that there had been an argument over muck.

18. It is equally incontrovertible that the verbal argument escalated into a physical encounter on the scaffolding. It seems to me probable that it was the Claimant's aggressive attitude which initially provoked the violence. On the other hand, there is no evidence that the Claimant himself assaulted either of the Fowlers. In stark contrast, there is compelling evidence that the Claimant himself was struck by one or other of the Fowlers. Neil Dolan in oral testimony described the attack on the Claimant as being "*two on one*". He was unable to say how the fight began but he was very clear that the Claimant's nose was split open. He said as much in his contemporaneous witness statement to the police in which he described Kieran Fowler as holding a broken brick in his hand. His evidence was to similar effect at the criminal trial where he described the Fowlers attacking the Claimant and Kieran Fowler holding half a brick in his hand. Chris Davies also accepted that the Claimant must have been hit in the nose or face within a short time of Alan Fowler descending the scaffolding. It should be noted that Mr Ctitor who apparently saw the men coming off the scaffold did not see any blood on the Claimant's face but, given the balance of the evidence, I think that this is attributable to a lapse of memory. This is likely to be so not just because of Mr Dolan's and Mr Davies' evidence but also Sam Robet describes seeing a lot of blood around the Claimant's nose.

19. The picture becomes somewhat more confused once they have left the scaffolding. As it seems to me, however, what is clear is that initially the Claimant chased Kieran Fowler. It is equally clear that the Claimant made certain threats.

20. Mr Dolan's recollection is that the Claimant ran after Kieran Fowler and said words to the effect "*I'll fight you on the ground with no tools".* Catalin Potoroaca in his witness statement recalls the Claimant shouting *"I'm going to kill you".* At the criminal trial, Mr Dolan did not demur when it was suggested these were the words spoken by the Claimant. Mr Dolan also accepted that as the Claimant started to chase Kieran Fowler, he may well have ripped his jumper off.

21. I find as a fact that as they left the scaffolding, the Claimant did chase after Kieran Fowler and that he made threats, probably by way of retaliation having suffered a bloody nose. It is clear that the Claimant was intent on having a fight with Kieran Fowler. In the event, however, he did not catch up with Kieran Fowler. What he did do was then turn around and approach Alan Fowler.

22. As to what occurred between the Claimant and Alan Fowler prior to the Claimant being struck by Kieran Fowler is the subject of many differing and conflicting accounts. Mr Dolan has remained adamant throughout that no punches were exchanged as between the Claimant and Alan Fowler. The most that he would concede was a brief scuffle over a matter of seconds. But in his contemporaneous witness statement to the police, he did

say that he could clearly see the Claimant and Alan Fowler on the ground, albeit that they were not fighting. In cross-examination, at the criminal trial, he said they may have locked up but there was no throwing of punches. He maintained that he had a "birds-eye view" of what was happening.

23. Neil Dolan's evidence is to be contrasted with the evidence of a number of other apparent eye-witnesses. Mr Ctitor who gave oral evidence before me, maintained that the Claimant had struck Alan Fowler, but he was unable to say whether there was one or several punches. In his contemporaneous statement, he gave evidence of only one punch. He said he could clearly see what the Claimant was doing but Alan Fowler had his back to him. In re-examination he said they were fighting with each other. Mr Sullivan points out that the reliability of the evidence of Michael Ctitor is questionable given that he was 30 metres away and that he failed to see blood on the Claimant's face.

24. On the other hand, what Mr Ctitor says is largely borne out by evidence of other eye-witnesses. Daniel Goode, in his witness statement, says that he saw the Claimant throw two or three punches at Alan Fowler's face. Catalin Potoroaca recalls the Claimant running at Alan Fowler with his fists raised and throwing a punch at Alan Fowler which connected with his face. Jamie Glennon gave a similar account in his witness statement to the police, although in slightly different terms.

25. It seems to me that the weight of the evidence is in favour of the Claimant punching Alan Fowler before he himself was struck. I gained the impression that it was a relatively brief encounter, with only one of two punches being thrown, possibly some retaliation on the part of Alan Fowler. I come to this conclusion despite the evidence of Mr Dolan. Whilst generally I think that Mr Dolan gave reliable, if somewhat overstated, evidence in relation to the incident, I am driven to the conclusion that he was simply mistaken as to whether the Claimant fought with Alan Fowler.

26. As to the assault which is the subject matter of this claim, there is broad agreement in relation to what occurred. Summarising the evidence, Kieran Fowler used a scaffolding pole to strike the back of the Claimant's head with considerable force. The assault occurred at a time when the Claimant was scuffling with Alan Fowler. Alan Fowler, in his initial comments to the police, put it this way; *"I was having a scrap with him over work and then my son came and walloped him over the head with a scaffold bar".* As to from where Kieran Fowler obtained the scaffolding pole, it is unclear; there is some suggestion that he was armed with the scaffolding pole when he left the scaffolding and came down to ground level. In the event, it does not matter much at what point he equipped himself with a scaffolding pole. The fact is that he used a scaffolding pole to cause serious injury to the Claimant.

27. I need also to consider the likely duration of the whole incident. Neil Dolan considers it no more than five minutes form the time when he spoke to the Claimant and the Claimant being struck on the head. Daniel Goode thought the whole incident lasted about a minute from the time when something occurred on the scaffolding and the Claimant being hit with a scaffolding pole. Jamie Glennon thought the whole incident lasted about three or four minutes. Catalin Potoroaca broadly agreed, as did Alan Fowler, who said the whole incident lasted a maximum of two minutes.

28. It is impossible to be precise as to the duration of the incident, nor is it necessary to be so for the purposes of the findings which I have to make in this case. Looking at the

matter in the round, my impression is that the incident lasted much less than five minutes and was probably in the order of three minutes or so.

29. There is a further matter which requires consideration at this stage. In his opening written argument, Mr Matthews submitted that there were effectively two incidents. He says that the evidence supports the proposition that after the scuffle on the scaffolding, matters came to a head. He relies, in particular, on the evidence from Mr Dolan who said that once the fight had broken up, he thought it was all over and that everybody would go back to work. Mr Matthews argues that it was only the actions of the Claimant which provoked the 'second' incident which then led to him being struck on the head with a scaffolding pole. Specifically, he says that it was the Claimant who was intent upon retribution against Kieran Fowler so that he chased him, making threats. It was then as a result of the Claimant assaulting Alan Fowler that Kieran Fowler felt the need to come to his father's defence, albeit that it is of course accepted that what Kieran Fowler did went far beyond what was permissible or justified. In short, it is said that if the Claimant had not pursued Kieran Fowler and if he had not assaulted Alan Fowler then he would not have been attacked with the scaffolding pole.

30. In my judgment, it is wholly artificial to seek to break up this incident into two separate events. It seems to me that the evidence strongly supports a continuum, without any, or any, appreciable break. To put it another way, what occurred ultimately is part and parcel of the original skirmish.

31. In the light of all the above, it is perhaps convenient, at this stage, to summarise my findings of fact, as follows:

    i. The Claimant approached the Fowlers on the scaffolding because he wanted materials to start the day's work.

    ii. His reaction to being told that there were no materials and/or work available was somewhat belligerent.

    iii. A verbal argument ensued which culminated in the Claimant being struck on the nose with half a brick by Kieran Fowler.

    iv. The Claimant gave chase to Kieran Flower at ground level whilst making threats of violence.

    v. The Claimant gave up the chase and then confronted by Alan Fowler; he probably threw the first punch, then a scuffle occurred.

    vi. As Alan Fowler and the Claimant were scuffling with each other, Kieran Fowler struck the Claimant on the back of the head with the scaffolding pole using very considerable force.

    vii. It was an uninterrupted incident of approximately two/three minutes' duration.

The Nature of the Relationship Between the Defendants and Kieran Fowler

32. Kieran Fowler (and the Claimant) were not employed by the Defendants. They were what is known in the trade as 'Labour Only Subcontractors'. As Mr Emery told me, this is very common in the construction industry. The workers do not acquire employment

rights and they can be given notice at any time. They are also free to work for other employers. Mr Matthews also points out that they had no involvement in the organisation of the work or its location; and they had no management responsibilities.

33. In these circumstances, it is submitted on behalf of the Defendants that the relationship between Kieran Fowler and the Defendants was far removed from that of employer/employee. Further, it is said that this is a highly material consideration when the Court comes to consider the question of vicarious liability.

34. On behalf of the Claimant, it is submitted that the relationship was akin to that of employer/employee. Mr Sullivan invites scrutiny of the job description provided by the Defendants for a labourer. In particular, it is said that the "purpose of job" is "to undertake all activities as required by the Supervisor". Under the section of "Principle (sic) Duties" the following are noted:

> “(i) To move the associated materials on behalf of the company bricklayer as directed in each individual contract.
>
> (ii) To carry out duties as directed by your bricklayer or site supervisor.
>
> …
>
> (v) Comply with the company safety systems.
>
> (vi) Comply with the company quality systems.”

35. Given the terms of the contract, it is submitted that Kieran Fowler was effectively under the control of the Defendants: he had to work where he was instructed and he was answerable to the bricklayers or site supervisors.

36. It is apposite to cite what Lord Reed said in *Cox v Ministry of Justice* [2016] UKSC10 at paragraph 29:

> “…by focusing on the activities carried out by the Defendant and their attendant risks, it directs attention to the issues which are likely to be relevant in the context of modern workplaces, where worker’s may in reality be part of the workplace of an organisation without having a contract of employment with it.”

37. It is also helpful to have regard to the observations of Irwin LJ in *Barclays Bank PLC v Various Claimants* [2018] EWCA civ 1670:

> “Changes in the structures of employment, and of contracts for the provision of services, are widespread. Operations intrinsic to a business enterprise are routinely performed by independent contractors, over long periods, accompanied by precise obligations and high levels of control. Such patterns are evident in widely different fields of enterprise, from construction, to manufacture, to the services sector.”

38. With those observations in mind, and having regard to the *de facto* position which existed as between the contractors and the Defendants, I unhesitatingly come to the conclusion that the relationship between Kieran Fowler and the Defendants was closely akin to that of employer and employee. Accordingly, when I come to consider whether vicarious liability should attach in this case, I draw no or no material distinction between a contract of service on the one hand and a contract for services on the other hand.

The Law Relating to the Vicarious Liability

39. The *locus classicus* is the Supreme Court decision in *Various Claimants v Catholic Child Welfare Society and Others* [2012] UKSC56 (*Christian Brothers*). Lord Phillips identified five criteria that need to be considered, at paragraph 35 of his judgment:

> "The relationship that gives rise to vicarious liability is in the vast majority of cases that of employer and employee under a contract of employment. The employer will be vicariously liable when the employee commits a tort in the course of his employment. There is no difficulty in identifying a number of policy reasons that usually make it fair, just and reasonable to impose vicarious liability on the employer when these criteria are satisfied: (i) the employer is more likely to have the means to compensate the victim than the employee and can be expected to have insured against that liability; (ii) the tort will have been committed as a result of activity being taken by the employee on behalf of the employer; (iii) the employee's activity is likely to be part of the business activity of the employer; (iv) the employer, by employing the employee to carry on the activity will have created the risk of the tort committed by the employee; (iv) the employee will, to a greater of lesser degree be under the control of the employer."

40. I have already made it clear that the relationship that existed between the defendants and Kieran Fowler is scarcely to be distinguished from that of employer and employee but it is worth citing what Lord Phillips says at para 47:

> "At para 35 I have identified those incidents of the relationship between employer and employee that make it fair, just and reasonable to impose vicarious liability on a defendant. Where the defendant and the tortfeasor are not bound by a contract of employment, but their relationship has the same incidents, that relationship can properly give rise to vicarious liability on the ground that it is 'akin to that between an employer and an employee'".

41. Following on from the *Christian Brothers* case, the Supreme Court gave two complimentary judgements:

Cox (*supra)* and *Mohamud v WM Morrison Supermarkets [2016]* UKSC 16. At paragraph 2 of his judgment in *Cox* Lord Reed said:

> "The scope of vicarious liability depends upon the answers to two questions. First, what sort of relationship has to exist between an individual and a defendant before the defendant can be made vicariously liable in tort for the conduct of that individual? Secondly, in what manner does the conduct of that individual have to be related to that relationship, in order for vicarious liability to be imposed on the defendant?"

Although it was recognised that the two questions were interconnected, it was made it clear that *Cox* was concerned with the first question and that *Mohamud* was concerned with the second question.

42. The facts of *Cox* are not without interest. The claimant was employed as a catering manager at HMP Swansea. On the occasion of the accident, she was moving supplies with the help of prisoners when a bag of rice was dropped spilling its contents on the floor. The claimant instructed the prisoners to cease working until the rice was cleaned up. One prisoner ignored her instruction. As he attempted to carry two sacks of rice, he lost his balance and dropped one of the sacks onto the claimant's back. It was accepted that the prisoner was negligent. The issue was whether the defendant should be held vicariously liable for that negligence.

43. In coming to the unanimous conclusion that vicarious liability should attach, the Supreme Court affirmed the approach adopted in the *Christian Brothers* case. Accordingly, in this case, I am constrained to apply the five criteria identified by Lord Phillips in the *Christian Brothers* case.

44. Having applied those criteria, the Court is then required to consider whether there is sufficient connection between the job and the employee's wrongful conduct to make it right for the employer to be held liable: see *Mohamud*. Lord Toulson held that there should be consideration of two matters:

    i) What functions or "field of activities" have been entrusted to the tortfeasor i.e. what was the nature of his job;

    ii) Whether there was sufficient connection between the position in which he was employed and his wrongful conduct such as to make it right, as a matter of social justice, for that defendant to be held liable.

45. Mr Sullivan is right to stress that the Court is required to apply a two stage test as propounded in *Cox* and *Mohamud*. There is inevitably a degree of overlap but that does not permit conflation of the two separate tests. I tend to agree with Mr Sullivan that Mr Matthews' closing submissions do at times appear to conflate the two stage test.

46. A large number of other authorities were also cited to me (and I shall refer to some of them in due course as being illustrative of how the tests should be applied) but for the purposes of setting out the principles to be applied, at this, stage it is sufficient to have regard to the *Christian Brothers*, *Cox* and *Mohamud.*

Stage One: Application of the five criteria

47. In *Cox*, Lord Reed said that the five factors mentioned by Lord Phillips were not all equally significant. He considered that the first factor which relates to the financial means of the employer was unlikely to be of *independent significance* in most cases. Equally, he considered that the fifth factor, namely the question of control was unlikely to be of *independence significance* in most cases, assuming that the defendant was in a position to direct what the tortfeasor did, albeit not how he did it. The other three factors were thought to be of similar importance but necessarily inter– related.

48. Notwithstanding the observations of Lord Reed, it is appropriate to consider each of the five criteria in turn:

Financial means

49. The Defendants are a large construction company and have insurance cover. They are clearly more likely to be able to compensate the Claimant than Kieran Fowler who is currently serving a 12 year term in prison. It is also of note, as Mr Sullivan points out that the Defendants did not require sub-contractors to have their own insurance. Mr Emery confirmed that this was a policy decision, the purpose of which was to keep insurance costs to a minimum and to allow the Defendants to deal with the administration.

The tort was committed as a result of the activity being undertaken by the employee on behalf of the defendant.

50. The activity is not the tortious conduct per se but rather it relates to the duties undertaken by Kieran Fowler as a hod carrier/ labourer. As it seems to me, the relevant considerations are:

    i) The incident occurred on the Defendants' site

    ii) Kieran Fowler was under the control of the Defendants.

    iii) It occurred at a time when Kieran Fowler was carrying out his duties as a hod carrier.

    iv) The dispute between the Claimant and Kieran Fowler (as I have found) arose because of an argument about work materials.

51. I am satisfied, therefore, that the tort occurred as a result of an activity carried out by Kieran Fowler on behalf of the Defendants. In considering this criterion, it is irrelevant that violent conduct was not part of the activities undertaken by the Defendants.

The employee's activity was part of the business activity of the employer.

52. As Lord Reed observed, there is a significant cross – over between this third criterion and the second criterion. But, manifestly, at the point in time when the violence erupted, Kieran Fowler was engaged in activities on behalf of the Defendants which were integral to the Defendants' business.

Whether the defendant by engaging Kieran Fowler created the risk of the tort.

53. At this point, it is perhaps useful to consider briefly the case of *Barclays Bank Plc v Various Claimants* [2018] EWCA Civ 1670. The facts were unusual. Barclays Bank engaged the services of a GP, Dr Bates to conduct medical examinations and assessments for employees and prospective employees. During the course of such examinations, Dr Bates sexually assaulted a large number of females.

The Court of Appeal concluded that the Judge had correctly applied the two stage test as propounded in *Cox* and *Mohamud*. The conclusion was that all the five criteria laid down in the *Christian Brothers* case were satisfied and that, in relation to stage two, it was clearly the case that the medical examinations were sufficiently closely connected with the relationship between Dr Bates and Barclays Bank.

54. In considering the fourth criterion, Irwin LJ made it abundantly clear that such was not concerned with the negligence creation of a risk or with exposure to a foreseeable risk of injury:

> "53 in my view, the Judge was also correct in holding that the risk of the tort arose from the arrangements made by the appellant. It is not necessary for me to repeat the factual findings made by the Judge. However, it may be helpful to add a word about the approach to this criterion
>
> "54 It must be borne in mind (as the Judge herself made clear in paragraph 47) that vicarious liability concerns the liability of an innocent party, or at least a party assumed to be " innocent" for present purposes, since a party may be negligent at the same time as being liable vicariously. It follows that the requirement under criterion (iv) does not need to amount to negligence, since it would then be redundant to approach the matters as one of vicarious liability. This must qualify the meaning of risk in this context. In my view, the Judge was right to conclude that the criterion is satisfied if it is the potential defendant's acts which put the claimant in a position of risk".

55. It follows that the consideration of criterion (iv) does not require the Court to ask whether there was any measure which the defendant could have taken so as to avoid the harm which occurred. The question of fault is not a relevant consideration. That is more particularly so given that in this case, the tort relied upon is one of trespass which is actionable per se.

56. Further, in so far as it is suggested by the Defendants that there needs to be some trust reposed by the employer in the tortfeasor, that is plainly not correct: the question of *trust* simply does not feature in the *Christian Brothers* criteria.

57. Applying criterion (iv) to the instant case, in my Judgment, it is satisfied once it is shown that the Defendants brought Kieran Fowler and the Claimant together in circumstances which then gave rise to the violence. To put it another way, the risk of the tort arose from the arrangements made by the defendants because Kieran Fowler committed a serious criminal offence in the course of his work, having become involved with the Claimant in an argument about work materials. It is also the case that the

violence was inflicted with the use of work materials, a scaffolding pole. The violent assault was not a predictable or foreseeable outcome but it arose from a *work situation*.

Whether Kieran Fowler was under the control of the Defendants.

58. I have already found as a fact that the relationship which existed between Kieran Fowler and the Defendants was a quasi employer/employee relationship. But, and for the sake of completeness, I make it clear why I have concluded that Kieran Fowler was under the control of the Defendants, as follows:

i) The Defendants were able to direct the location where sub-contractors worked and for what period or periods.

ii) Once on site the sub-contractors worked under the direction of a site foreman who was either employed or engaged by the Defendants. The site foreman would instruct the sub-contractors as to what task they were required to perform and where they were to work on site.

iii) The Defendants were responsible for organising and distributing the bricks and mortar which Kieran Fowler then provided for use by the brick layers.

iv) The Defendants were entitled to require the sub-contractors to undergo specific training.

v) The Defendants were in a position to terminate any contracts of service of any sub-contractor if they deemed it appropriate to do so.

59. In these circumstances, I have no doubt whatsoever that the fifth criterion is satisfied.

60. Accordingly, without hesitation, I conclude that all of the *Christian Brothers* criteria are made out in this case. The consequence of that is that the Court is able to conclude that the relationship between Kieran Fowler and the defendants, in principle, may be capable of giving rise to the imposition of vicarious liability. Whether, in fact, vicarious liability should attach depends entirely upon the findings which are made in relation to stage two.

Stage Two: the conduct in question.

'Field of activities'

61. The expression "*field of activities"* was used by Lord Cullen in *Central Motors (Glasgow) Ltd v Cessnock Garage and Motor Co.* [1925] SC 796 in the context of a claim involving a dishonest employee. In *Mohamud*, Lord Toulson said this, at paragraph 36:

> "The expression 'within the field of activities' assigned to the employee is helpful. It conjures a wider range of conduct than acts done in furtherance of his employment."

It is, of course, the case of *Mohamud* which dictates that there be an analysis of what functions or '*field of activities*' had been entrusted to the tortfeasor.

62. The facts of *Mohamud* are not without interest. The claimant called at the petrol station of one of the defendant's supermarkets and asked an employee of the defendant if he could print off some documents. The employee refused the request in an offensive manner. As the claimant walked towards his car, the employee followed him and proceeded to subject him to a serious physical attack. The judge held that the defendant was not vicariously liable for the assault because the employee's actions had been purely for reasons of his own and beyond the scope of his employment. The Court of Appeal agreed. The Supreme Court allowed the appeal on the basis that the job of the employee had been to attend to customers and to respond to their enquiries; and since there had been an unbroken sequence of events between his response to the claimant's initial enquiry and his following him on to the forecourt and ordering him never to return, which he had reinforced by violence, the employee's conduct, albeit a gross abuse of his position, had been in connection with the job which had been entrusted to him. Accordingly, there was sufficient connection between the employee's job and his wrongful conduct to hold the defendant vicariously liable for the assault.

63. It is instructive to consider a few other authorities (some of which fall on one side of the line and some of which fall on the other side of the line) before deciding whether the assault in this case was committed at a time when Kieron Fowler was carrying out duties related to the field of activities entrusted to him. A case which failed the test was *Weddall v Portchester Healthcare Limited* [2012] EWCA Civ 25. This was a Court of Appeal decision heard at the same time as the case of *Wallbank v Fox Designs Limited*, which fell on the other side of the line. In *Weddall*, the claimant worked at a care home operated by the defendant. In order to organise the replacement of an employee on the night shift, he telephoned another employee, Mr Marsh, for assistance. Mr Marsh, who was drunk at the time, refused the offer of an extra shift. Some 20 minutes later, he attended the care home and assaulted the claimant. There was a history of "bad blood". At first instance, it was held that vicarious liability was not established and that Mr Marsh had been acting on a frolic of his own. The Court of Appeal held that the judge's reasoning had been correct. In particular, the attendance at the care home some 20 minutes after the original conversation was found to be an independent venture, separate and distinct from his employment (see the judgment of Pill LJ at paragraphs 44-46). It should also be borne in mind that at the time of the assault, Mr Marsh was not working a shift; he was drunk; and the apparent reason for the assault was because Mr Marsh did not like the claimant.

64. *Wallbank* also involved an assault. In that case, the claimant was the director of the defendant company. He complained that an employee, Mr Brown, had only loaded one piece of furniture. He told him "to come on", the intention being to encourage him to load more furniture, whereupon Mr Brown assaulted the claimant. The Court of Appeal overturned the decision of the trial judge that there was no vicarious liability. Pill LJ emphasised that the assault perpetrated by Mr Brown was closely related to the employment in time and space, and it was a spontaneous and, almost instantaneous, reaction to an instruction (see paragraph 52). At the conclusion of that paragraph he said:

> "Recent authorities…have demonstrated the need to take a broad view of the nature of employment and what is reasonably incidental to the employee's duties under it."

65. At paragraph 54 he observed:

> "The possibility of friction is inherent in any employment relationship but particularly one in a factory, even a small factory, where instant instructions and quick reactions are required. Frustrations which lead to a reaction involving some violence are predictable. The risk of an over-robust reaction to an instruction is a risk created by the employment. It may be reasonably incidental to the employment rather than unrelated to or independent of it."

66. For completeness, at paragraph 56, he stated:

> "A broad view must be taken of the nature of the employment when considering violence used by an employee…"

67. Some assistance is also to be derived from the case of *Graham v Commercial Bodyworks Limited* [2015] EWCA Civ 47. In that case, the defendant operated a bodywork repair shop. An employee, Mr Wilkinson, used a cigarette lighter in the vicinity of the claimant after deliberately sprinkling his overalls with an inflammable thinning agent. In consequence, the claimant's overalls caught fire, causing him to sustain serious injuries. There was evidence that prior to the incident the claimant and Mr Wilkinson, had been "mucking around"; and that the whole incident appeared to be part of a prank. The Court of Appeal upheld the decision at first instance. At paragraph 16 of his judgment, Longmore LJ observed:

> "The United Kingdom authorities tend to resolve themselves into two groups. On the one hand there are cases in which the use of reasonable force and the existence of friction is inherent in the nature of the employment; thus a nightclub owner may be vicariously liable for injuries caused by force used by a bouncer in the course of his duties and a rugby club owner may be vicariously liable for injuries caused by a punch-up during or in the immediate aftermath of a game…"

68. At paragraph 18, he categorised the second group of cases as being those:

> "in which the nature of the employment is not such as to require the exercise of some force or to involve the kind of friction inherent in an employment relationship. These cases arise from intentional acts at the workplace (whether horseplay or rather more serious conduct) and do not usually give rise to vicatious liability."

69. The one other authority which requires consideration in relation to this aspect of the case is *Bellman v Northampton Recruitment Limited* [2018] EWCA Civ 2214, not least because the defendants place very heavy reliance on the observations of Irwin LJ. That case involved assault by the managing director of the defendant company on the sales manager, the claimant. The assault occurred at the end of a Christmas party which took place in a hotel. Much alcohol had been consumed. The managing director, who was the directing mind and in overall charge of the company, became annoyed at the discussion amongst the employees. In particular there had been questions about the employment and appointment of a new employee. The questioning of his authority

provoked him to assault the claimant, causing him serious injury. The claim failed at first instance on the grounds that there was insufficient connection between the position in which the managing director was employed and the assault for the defendant to be held vicariously liable.

70. On appeal, the decision was reversed on the grounds that, as a directing mind and will of a relatively small company, the managing director's authority was very wide and that, at the time of the assault, he was purporting to act as managing director of the company, exercising his authority over his employees. Despite the time and the place at which the assault occurred, he was nevertheless using his dominant position, in a supervisory role, to assert his authority over the staff who were present at the party. In such circumstances, the Court of Appeal concluded there was sufficient connection between the managing director's field of activities and the assault to render it just that the company should be vicariously liable for his actions.

71. Although the leading judgment was given by Asplin LJ, Mr Matthews strongly argues that the observations of Irwin LJ are of critical importance in the context of the instant case. It is necessary to cite in full paragraphs 38-40 of Irwin LJ's judgment:

> "38. The critical reasons why it seems to me that this very experienced judge was wrong are those expressed by Asplin LJ in paras 27-29 above. In my view the "field of activity" of Mr Major [the managing director] was almost unrestricted in relation to the affairs of NR and exercised at almost any time. I consider the judge was right that the drinking session at the hotel was separate from the firm's Christmas party. What was crucial here was that the discussions about work became an exercise in laying down the law by Mr Major, indeed an explicit assertion of his authority, vehemently and crudely expressed by him, with the intention of quelling dissent. That exercise of authority was something he was entitled to carry out if he chose to do so, and, however unwise it may have been to do so in such circumstances, it did arise from the 'field of activity' assigned to him.
>
> 39. It cannot of course be the test that there must be actual authority to commit the tort complained of. This case arose because of the way in which Mr Major chose to exert his authority, indeed his dominance as the only real decision-maker in the company. Hence there is liability.
>
> 40. I do emphasise that this combination of circumstances will arise very rarely. Liability will not arise merely because there is an argument about matters between colleagues which leads to an assault, even when one colleague is markedly more senior than the other. This case is emphatically not authority for the proposition that employers become insurers for violent or other tortious acts by their employees."

72. Understandably, Mr Matthews seeks to emphasise the last two sentences of Irwin LJ's judgment; and to argue that they have particular application to the instant case.

73. However, since Irwin LJ makes specific reference to what is said by Asplin LJ in her judgment at paragraphs 27-29, it is necessary to see what precisely she does say in order to put in context the observations of Irwin LJ:

> "27 Even if Mr Major had taken off his managerial hat when he first arrived at the hotel, it seems to me that he chose to don it once more and to re-engage his wide remit as managing director and to misuse his position when his managerial decisions were challenged. He purported to exercise control over his staff by 'summoning' them and expounding the extent and scope of his authority. In the light of the breadth of his field of activities, NR's around-the-clock business and Mr Major's authority to do things 'his way' it seems to me that NR's employees who took part in the drinking session can have been in no doubt at that stage, that Mr Major was purporting to exercise managerial control over them. Given the context in which the drinks occurred, it seems to me that the nature of the exchange outside and inside the hotel lobby was naturally an assertion or a re-assertion of that managerial role. There is no suggestion in the judgment, nor were there any submissions made to us to the effect that Mr Major's behaviour arose as a result of something personal. He delivered a lecture about his managerial authority in relation to NR as a whole, as a result of a challenge to that authority.
>
> 28 The facts as found are a very long way from the examples given by the judge of a social round of golf between colleagues during which conversation turns to work: see para 77. The judge's example is based on a different premise. All participants are equal and attend as casual friends and golfers. One can readily see that in such circumstances, even if such discussions turn to work and a golfer who happens to be a more senior employee assaults another golfer who is a junior colleague, looked at objectively, they have all attended qua social golfers. The participants in the drinking session on the other hand attend the Christmas party qua staff and managing director. As I have already mentioned, just because the drinking session was unscheduled and voluntary, I do not consider that their roles changed, or if they did, that on the facts of this case, the role of managing director was not re-engaged.
>
> 29 The position in this case is more closely analogous with that in *Mohamud…* It was Mr Major's job to take all managerial decisions and to enforce his authority, his remit was wide, and he had ability to decide when and where he could work. He followed up on the discussion about NR in the coming year and the challenge to his managerial decisions with a lecture and blows just as, in *Mohamud,* Mr Khan followed up on what had been said earlier when he left his kiosk and confronted a customer on the forecourt. In just the same way Mr Major's

lecture, followed up by blows, was not personal. He was purporting to act about NR's business: see *Mohamud* at para 47."

74. It seems to me that there is much force in Mr Sullivan's submission that the observations of Irwin LJ at para 40 of his judgment were made in the light of the examples given by Asplin LJ at para 28 of her judgment, namely incidents where assaults occurred in social circumstances and where both the assailant and the claimant were attending as guests, even though there may be a disparity in seniority and even though discussions may have turned to work. Looked at in that context, it seems to me that what Irwin LJ was at pains to say was that there are circumstances where vicarious liability will not attach for assaults on employees, particularly where such torts occur outside of the workplace and where discussions in relation to work may only be incidental to the activity then being undertaken. At all events, and with due respect, it must be correct that *Bellman* is not authority for the proposition that employers will always be liable for the violent acts of their employees: as ever, context is everything.

75. I turn then to the question as to whether, at the time of the assault, Kieran Fowler was doing acts which were related to the field of activities entrusted to him by the Defendants. In seeking to persuade me that this question should be answered in the negative, Mr Mathews makes a number of points. First, he says that Kieran Fowler's perverse conduct was exceptional. Secondly, he points out that there was no history of violence at the Defendant's previous work places. Both propositions appear to be correct. However, their relevance is highly debateable: the concept of foreseeability simply does not arise here. As Mr Sullivan points out, none of the authorities appear to suggest that the fact that the conduct may be regarded as *exceptional* has any bearing on whether the *Mohamud* test is met. Indeed, it can be properly said that the conduct which occurred in, for example, *Barclays* was truly *exceptional* but the claim still succeeded.

76. Further, Mr Matthews seeks to distinguish both the cases of *Wallbank* and *Mohamud*. He argues that the conduct in *Wallbank* was directly related to the manner of the giving of the instruction and was an instant reaction to it. He says that there was economic and time pressure which was the precursor to the assault. Equally, he says that *Mohamud* was *"a classic case of performing an authorised and expected duty of the employment in an unauthorised manner. The actions were thus clearly within the field of activities…"*. He contrasts those scenarios with the violence in the instant case which he says was not work related at all.

77. Generally, Mr Matthews submits that the incident that occurred here did not arise out of friction inherent in the work place; and that there was nothing done by the Defendants that provided the backdrop for such friction to arise. He submits that *Graham* was a stronger case than the instant one because conduct was within the workplace and the employer had the means and opportunity to stop the horseplay between the two employees and yet no liability attached. It does seem to me that in making this submission, Mr Matthews strays into the questions of foreseeability and fault which, as I have already observed, have no part to play in considering vicarious liability. This is more particularly so in relation to an assault or trespass.

78. Generally, Mr Matthews submits that if this claim is made good, it would essentially amount to an imposition of strict liability, in that any fight between employees on any building site would make contractors liable.

79. I disagree. There will be violent episodes on a building site or in a factory – for example where the lead up to the assault relates to wholly personal matters such as a domestic argument– which do not fall within the field of activities entrusted to the tortfeasor. Each case is necessarily fact sensitive but I stress that if there is to be a finding in favour of the Claimant it by no means follows that the corollary is that every assault which occurs in, or is connected with, a work place involving two employees will attract vicarious liability.

80. To my mind, in determining whether what occurred fell within the field of activities entrusted to Kieran Fowler, the salient matters are as follows:

 i) the assault was by one (quasi) employee on another (quasi) employee

 ii) the assault occurred during working hours at a site where the Defendants were engaged

 iii) the background to the assault was an argument about work and the requirement for work materials

 iv) the assault occurred within minutes of the initial argument there being (as I have found) an unbroken sequence of events

 v) the weapon which was used was work equipment

81. The attitude of, and the aggressive tone in which the Claimant spoke to the Fowlers may have provoked the initial violence. In my view, however, that is not a good or sufficient reason for excluding the vicious assault inflicted on the Claimant from the field of activities entrusted to Kieran Fowler.

82. In my judgment, this case is to be distinguished from *Graham* which involved horseplay. It is much closer to the case of *Wallbank* where Pill LJ spoke about friction and over-reaction in the workplace: this is what occurred here because the Claimant was annoyed that there was no work for him.

83. I am satisfied therefore that the field of activities test is met in this case.

Sufficient Connection

84. The issue is whether there was *sufficient connection* between the activities in which Kieran Fowler was engaged and the assault which he perpetrated such as to make it fair, just and reasonable to make these Defendants to be held responsible. It seems to me that many of the observations made in relation to the first part of the stage 2 test apply with equal force in relation to the question of *sufficient connection*. Looking at the authorities, the focus needs to be on whether, at the time of the assault, the tortfeasor's conduct can still properly be referable to his 'field of activities', having regard to questions of time and place.

85. Here, the critical features are those set out at paragraph 80 above. To my mind, it is highly relevant that the assault occurred within a few minutes of the argument about work materials; and that the assault was the culmination of an unbroken sequence of events.

86. In relation to the latter, it is helpful to refer to *Mattis v Pollock (T/A Flamingo's Nightclub)* [2003] EWCA Civ 887. In that case, a bouncer was involved in a fight in the nightclub which involved the Claimant and other customers. The doorman then left the club, returned to his flat and armed himself with a knife. He went back to the club and stabbed the Claimant who at that time was outside the club. The Court of Appeal reversed the decision of HHJ Seymour QC, finding that the sufficient connection test was met. At paragraph 32, Judge LJ stated:

> "this incident certainly developed in stages, at each of which it might have petered out. However, in our judgment, Judge Seymour QC posed the question for the decision too narrowly. The stabbing of Mr Mattis represented the unfortunate, and virtual culmination of the unpleasant incident which had started within the club, and could not fairly and justly be treated in isolation from earlier events, or as a separate distinct incident."

It seems to me that those observations are highly apposite in the context of this case.

87. In *Mohamud*, similar observations were made. Where Mr Khan, having responded to the Claimant's request for assistance in an abusive way and then followed him onto the forecourt then preceded to assault him. Lord Toulson, at para 47, said that the violent assault was part of an unbroken sequence of events. He said that it was incorrect to regard Mr Khan metaphorically having taken off his uniform from the moment he stepped behind the counter and pursued the Claimant onto the forecourt. Accordingly, the Supreme Court found that the *'sufficient connection'* test was met.

88. Equally, in this case, when Kieran Fowler used the scaffolding pole to smash the Claimant over the head, this was the end point, in an unbroken series of events which emanated from the original argument on the scaffolding concerning the work or work materials. As Mr Sullivan correctly observed, the fact that the assault committed by Kieran Fowler was of extreme violence and a wholly disproportionate and irrational reaction to what had occurred moments previously, does not preclude the imposition of vicarious liability.

89. Subject, therefore, to the defence of *ex turpi causa* as discussed below, I find that the Defendants are vicariously liable for the acts of Kieran Fowler in assaulting the Claimant.

Ex Turpi Causa

90. The leading case on *ex turpi causa* remains the decision of the House of Lords in *Gray v Thames Trains Ltd* [2009] UKHL 33. In *Gray* the claimant had suffered from PTSD after being injured in a railway accident caused by the Defendant's negligence. Subsequently, he killed a man and was convicted of manslaughter by reason of diminished responsibility. It was accepted that he would not have a committed the homicide but for his PTSD. He sought damages from the Defendant for loss of earnings, loss of liberty, damages, reputation and feelings of guilt and remorse. The claim failed. The House of Lords held that a civil court would not award damages to compensate a claimant for an injury or disadvantage which the criminal courts had imposed on him by way of punishment for a criminal act for which he was responsible.

91. This was said to be the narrow manifestation of the *ex turpi causa* principle. Plainly, that is of no application in this case. However, Lord Hoffman went on to discuss the wider version of the e*x turpi causa* principle which, effectively, precludes the recovery of damages where the harm is the consequence of the claimant's own criminal conduct. Lord Hoffman recognised that this may create problems in relation to causation but at paragraph 54 he concluded that the ordinary test of causation should be applied:

> "This distinction, between causing something and merely providing the occasion for someone else to cause something, is one with which we are very familiar with in the law of torts. It is the same principle by which the law normally holds that even though damage would not have occurred but for a tortious act, the Defendant is not liable if the immediate cause was the deliberate act of another individual… it might be better to avoid metaphors like "inextricably linked" or "integral part" and to treat the question as simply one of causation. Can one say that, although damage would not have happened but for the tortious conduct of the Defendant, it was caused by the criminal act of the Claimant?… or is the position that although damage would have not happened without the criminal act of the Claimant, it was caused by the tortious act of the Defendant…"

92. More recently, the Supreme Court has provided some guidance as to the application of the principle in *Patel v Mirza* [2016] UKSC 42. That was not a claim for personal injuries but rather a claim for enforcement of a debt. The Supreme Court explained that the essential rationale of the doctrine of *ex turpi causa* is that it is contrary to the public interest to enforce a claim if to do so would be harmful to the integrity of the legal system. In determining whether the public interest would be harmed by permitting the claim, the courts should consider (a) the underlying purpose of the prohibition which has been transgressed and whether that purpose would be enhanced by denial of the claim, (b) any other relevant public policy on which the denial of the claim would have an impact and (c) whether denial of the claim would be a proportionate response to the illegality, bearing in mind that punishment is a matter for the criminal courts. It seems to me that the third matter, in particular, namely whether denial of the claim would be a proportionate response to the illegality does fall to be considered in this case.

93. There are a number of cases where the criminal conduct of the defendant has engaged *ex turpi causa;* and, equally, a number of cases where although the claimant has been guilty of criminal behaviour, the Defence of *ex turpi causa* has not been upheld. It is not necessary nor helpful to trawl through all of the various cases because, inevitably, they are very fact specific.

94. That said, I do think some assistance is to be derived from the judgment of Edis J in *Flint v Tittensor & Anor* [2015] EWHC 466 (QB). This was a case of a claimant suffering serious injuries as a result of a car being driven at him. The build-up to this incident had involved the claimant pestering the defendant's girlfriend in a drunken and confrontational manner. There ensued a verbal shouting match. The claimant then proceeded to damage the defendant's expensive new car. The defendant's response was

to drive forwards, hit the claimant and force him onto the bonnet. He then swerved in order to tip the claimant off the bonnet.

95. In rejecting the plea of *ex turpi causa*, Edis J at paragraph 55 stated:

> "The proper approach to causation is in essence to determine whether the injuries were caused by the criminal conduct of the claimant himself, or that of a partner in crime acting within the foreseeable scope of the joint enterprise. He is to be taken to have caused the consequences of his own acts, or those of accomplices who are doing things which he has agreed should be done. In joint crimes of violence where the two parties are by agreement fighting each other unlawfully, the foreseeable consequences of that activity cannot found a claim. A claimant cannot recover for injuries caused by the unlawful conduct of others responding to him with violence or using reasonable force to arrest him: they have a defence of self-defence. He cannot recover either for the consequences which are foreseeable in the course of the kind of confrontation which he has agreed to take part in. That is the public policy defence. However, I hold that where he sustains injuries not in that way, but because a third party voluntarily commits a different kind of serious crime against him, his conduct does not in law cause an injury for the purpose of the particular rule of causation applicable to this defence. If Mr Titteonsor [the defendant] had pulled out a knife and stabbed him Mr Flint for damaging his car, this would, for the purposes of this causation rule, break the chain of causation between the damage to the car and the injuries to Mr Flint. Using the car as I found he did is comparable, for causation purposes, to the use of a knife. To hold otherwise would be to go behind another important principle of law which is those that commit crime are held responsible for their own actions. The conduct of others may mitigate the penalty which flows from that responsibility but does not diminish the responsibility itself."

96. It is therefore necessary, first, to analyse what, if any, criminal conduct may be laid at the door of the Claimant. On the scaffolding, there was a verbal altercation with abusive language being used. I am unpersuaded, that, at this stage the Claimant himself was guilty of any criminal conduct. I have made it clear, however, that I am satisfied that he was the victim of an assault in that, probably, a half brick was used to cause injury to his nose. Accordingly, and in so far it is suggested that the Claimant instigated the violence, this is contrary to my findings. The Claimant's actions thereafter which involved chasing Mr Fowler, uttering certain threats and then engaging in some kind of fight with Alan Fowler probably constituted an offence of Affray contrary to S.3 Public Order Act 1986. Although I have no doubt that, at any criminal trial, it would have been argued that S.4 of the Act would have been a more appropriate charge i.e. using threatening abusive or insulting words behaviour.

97. Given that immediately prior to giving chase to Kieran Fowler, the Claimant himself being the victim of a serious assault, it is certainly arguable that his conduct should not be categorised as being *worthy of condemnation by the courts*. Similar considerations arguably apply in relation to the scuffle with Alan Fowler, even if it were the he threw the first punch.

98. But, even if I am wrong in my assessment that the Claimant's conduct was not worthy of condemnation, I am entirely satisfied that the chain of causation was broken by the subsequent act of Kieran Fowler in striking the Claimant over the head with a scaffolding pole. I am equally satisfied that what Kieran Fowler did was a wholly disproportionate response to the altercation on the scaffolding, to the threat made by the Claimant when giving chase and to any punches thrown at Alan Fowler. I agree with Mr Sullivan that any criminal activity on behalf of the claimant was incidental to the violent assault perpetrated by Kieran Fowler. Moreover, in so far as Kieran Fowler felt the need to come to the rescue of his father, he could have readily done so without using a weapon and without striking the Claimant on the head with a weapon. His use of the scaffolding pole to strike the Claimant forcibly on the head can properly be characterised as wholly disproportionate.

Conclusion

99. It is my opinion, therefore, that the defence of *ex turpi causa* is not engaged in this case.

100. I find the claim is proved and that there shall be judgment for the Claimant with damages to be assessed.

101. Finally, I wish to pay tribute to counsel for their most helpful written and oral arguments, both in relation to the factual circumstances of the case and the legal issues.