OUTER HOUSE, COURT OF SESSION

[2013] CSOH 168

OPINION (NO.2) OF LORD JONES

in the cause

FRANCES MCLAUGHLIN

as guardian of

JOHN RENNIE

Pursuer;

A417/13

against

(FIRST) PAULINE MORRISON

First Defender:

and

(SECOND) ESURE SERVICES LIMITED

Second Defender:

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Pursuer: Maguire QC; L. Milligan; Euan Mackenzie; Balfour + Manson LLP

Second Defender: Murphy QC; Dunlop QC; R Pugh; Simpson & Marwick

25 October 2013

Introduction

[1] This is an action of damages proceeding under the provisions of chapter 42A of the Rules of the Court of Session, in which the sum sued for is £8,000,000. It is brought by the pursuer as the guardian of John Rennie ("Mr Rennie"), by virtue of an order made under the Adults with Incapacity (Scotland) Act 2000. The pursuer avers that Mr Rennie was injured on or about 22 May 2010, when he was standing in Royston Road, Glasgow. Suddenly and without warning, it is averred, the first defender drove a car at him at speed, hitting him and knocking him to the ground. On 19 July 2011, the first defender was convicted of assault to severe injury, permanent disfigurement, permanent impairment and to the danger of Mr Rennie's life. According to the pursuer's averments, Mr Rennie sustained a serious brain injury as a result of which he is immobile, and cognitively impaired. He requires full-time care. The second defender is convened in terms of regulation 3 of the European Communities (Rights against Insurers) Regulations 2002. The pursuer avers that the second defender is directly liable to make reparation to her to the same extent as the first defender.

[2] The case came before me on 11 July 2013 on the pursuer's motion for decree in absence against the first defender, who had not entered appearance, and for summary decree against the second defender, under the provisions of Rule of Court 21.2. The pursuer also seeks an interim payment from the second defender under the provisions of Rule of Court 43. Parties were agreed as to the tests which the court should apply in

determining whether it might (i) pronounce summary decree and (ii) ordain a defender to make an interim payment of damages.

Summary Decree

[3] So far as is relevant to this application, Rule of Court 21.2 provides as follows:

"**21.2**.-(1) Subject to paragraphs (2) to (5) of this rule, a pursuer may, at any time after a defender has lodged defences while the action is depending before the court, apply by motion for summary decree against that defender on the ground that there is no defence to the action, or a part of it, disclosed in the defences.

(2) In applying for summary decree, the pursuer may move the court -

(a) to grant decree in terms of all or any of the conclusions of the summons;

(b) to pronounce an interlocutor sustaining or repelling a plea-in-law; or

(c) to dispose of the whole or a part of the subject-matter of the action.

...

(4) On a motion under paragraph (1), the court may -

(a) if satisfied that there is no defence to the action disclosed or to any part of it to which the motion relates, grant the motion for summary decree in whole or in part, as the case may be; or

(b) ordain any party, or a partner, director, officer or office-bearer of, any party -

(i) to produce any relevant document or article; or

(ii) to lodge an affidavit in support of any assertion of fact made in the pleadings or at the bar."

[4] Having regard to the provisions which I have quoted, it is clear that the court may look beyond the pleadings in determining whether or not there is a defence to the action. In *Frimokar (UK) Lt.* v *Mobile Technical Plant (International) Ltd* 1990 SLT 180, Lord Caplan expressed the following views, which I adopt:

"In my view Rule of Court 89B [the predecessor of Rule 21.2] is largely aimed at the dilatory defence and the court is in effect given the power to inquire into the defenders' capacity to present a defence which raises a real issue before allowing the normal protracted procedures of litigation to take their course. The summary decree hearing is different from a debate on preliminary pleas where the relevancy of a defence is tested purely on the pleadings. A hearing in a summary decree motion is more far reaching because the Rules of Court specifically admit material extraneous to the pleadings such as affidavits or productions. Thus the court is concerned not only to test the relevancy of the defence but the authenticity of the defence. However the reverse aspect of the matter is that the court is not confined to the pleadings as they stand at a particular time in testing whether or not there is a plausible defence. The defenders' counsel is right in suggesting that if the court considered that there would be scope for improving a defence by amendment or addition to the pleadings then in terms of the Rules of Court it could be difficult to be satisfied that there is no defence. The court is looking to see if the defenders can present a genuine issue not to test the articulation of that issue. However, I do not agree with the defenders' counsel if she is suggesting that this leaves it open to a defender who cannot at a particular time explain what the defence is to crave the indulgence of the court in case at a later stage the defender can think of something different or better. The question of the defence must be tested at the time when the motion is decided and it is for the defender, before that stage, to be in a position to satisfy the court that there is the framework of a defence available. Of course I am not suggesting that in a

suitable case the court might not continue the motion to enable a defender to produce further information, but basically the defender must be able to demonstrate the defence which the court is being asked to assess and if the defence cannot be shown it will not do to say that something else may emerge later. Subject to what I have said however I would agree with counsel for the pursuers that it is not a reason for refusing a motion for summary decree simply that the questions raised are difficult."

[5] In *Henderson v 3052775 Nova Scotia 2006 SC (HL) 85, the appellate committee, whose opinion was delivered by Lord Rodger of Earlsferry, said this:*

"[14] ... what the pursuer is entitled to seek is summary decree. The very description 'summary' decree indicates that the procedure is intended to be used where the matter can be determined in a summary fashion, without there being any need for a prolonged examination of matters of fact or law. Of course, in practice motions of this kind are likely to take longer than more routine motions: we were told, for instance, that the hearing before the Lord Ordinary had taken the greater part of a day, while the hearing before the Extra Division had taken about a morning. The length of the hearing is likely to depend on such factors as the amount of material to be considered, its nature and how much of it is in dispute.

[15] Rule 21.2 applies where the court is satisfied that there is no defence to the action disclosed in the defences. One reason why a court may be so satisfied is because the defences, taken pro veritate, are legally irrelevant. In such a case the court may sustain the pursuer's plea to the relevancy of the defences and grant decree de plano. But, as Lord Prosser recognised in *P & M Sinclair* v *Bamber Gray Partnership* (p 207), a motion for summary decree is not intended to replace a hearing on the procedure roll which is designed for the disposal of legal questions requiring more detailed and extensive legal debate. A motion for summary decree will be appropriate where the pursuer anticipates being able to satisfy the court, without the need for any prolonged legal debate, that there is no defence to the whole or part of the action because the defender's averments are irrelevant.

...

[19] In our view, therefore, a judge who is considering a motion for summary decree is entitled to proceed not merely on what is said in the defences, but on the basis of any facts which can be clarified, from documents, articles and affidavits, without trespassing on the role of the proof judge in resolving factual disputes after hearing the evidence. The judge can grant summary decree if he is satisfied, first, that there is no issue raised by the defender which can be properly resolved only at proof and, secondly, that, on the facts which have been clarified in this way, the defender has no defence to all, or any part, of the action. In other words, before he grants summary decree, the judge has to be satisfied that, even if the defender succeeds in proving the substance of his defence as it has been clarified, his case must fail. So, if the judge can say no more than that the defender is unlikely to succeed at proof, summary decree will not be appropriate: it is only appropriate where the judge can properly be satisfied on the available material that the defender is bound to fail and so there is nothing of relevance to be decided in a proof."

[6] The relevant test was expressed rather differently in *Cowie* v *Atlantic Drilling Co Ltd* 1995 SC 288, in which the Lord President (Hope), delivering the opinion of the court, said that it would be "enough for the pursuer (if) he (would) almost certainly succeed on one of his cases of fault." In my view, the "bound to fail" test and "almost certainly succeed" test should be regarded as two sides of the same coin.

[7] It is accepted by the second defender that the first defender was convicted as averred by the pursuer. In the circumstances, it might have been thought unlikely that the second defender could successfully defend this action on the merits. The motion for summary decree was resisted, however, in reliance on the following averments:

"Explained and averred that the accident occurred in the vicinity of premises known as the Ranza Bar. The licensee of the premises was the first defender's uncle. Shortly prior to the accident a group of individuals had been involved in an attack on the premises. Stones and other items were thrown at the premises. The

group of individuals had arrived in two cars, a Volkswagen Golf and a Landrover Discovery. Following upon an initial attack on the premises by the occupants of the Volkswagen, one of the occupants was shot. Thereafter, the Landrover Discovery had been brought to a halt in the offside lane of the eastbound carriageway of Royston Road, close to the Ranza Bar. Mr Rennie was a known associate of the occupants of the vehicle. He had alighted from the vehicle. After Mr Rennie had alighted, the Volkswagen pulled up in the offside lane of the eastbound carriageway. At the time of the accident, he was standing at the nearside front window of the Volkswagen. He was engaged in conversation with the occupants of the vehicle. Mr Rennie was at the locus of the accident to engage in criminal conduct. In particular, he was at the locus in order to involve himself in the attack on the premises."

In response to the pursuer's averment that the claim is based on fault at common law, the second defender avers, among other things: "*Ex turpi causa non oritur actio".*

The defence of *ex turpi causa non oritur actio*

[8] In support of her submission that the second defender's attempt to invoke the *ex turpi causa* rule must fail, Miss Maguire QC referred me to a number of Scottish and English authorities. The earliest of the Scottish authorities that she cited was *Winnik v Dick (Winnik) 1984 SC 48*. I found that case of limited assistance, because the conduct of the pursuer that the defender founded on in his attempt to avoid liability was participation in a joint criminal enterprise. In this case, the alleged criminal conduct of Mr Rennie was not undertaken jointly with the first defender: her criminal conduct was quite separate from his. In his opinion in *Winnik*, however, Lord Hunter expressed the view that a personal injury claim may be "defeated by application of the brocard *ex turpi causa non oritur actio"*, thus achieving in a Scottish court *"*a result the same as that reached in several cases in other jurisdictions, to which we were referred." (Page 54)

[9] The next Scottish case in the chronology, *Weir* v *Wyper*, 1992 SLT 579 (*Weir*), also concerned a defence based on joint criminal enterprise. The pursuer sued for damages in respect of injuries which she averred she had sustained when the defender lost control of the car that he was driving and in which she was the front seat passenger. The defender averred that: he did not have a full driving licence at the relevant time; the pursuer knew that; she knew that he was not being supervised by a driver who held a full licence; she nonetheless asked him to drive her home. In the foregoing circumstances, it was averred, the pursuer and defender were engaged in the course of a common criminal activity. The case came before Lord Coulsfield on the procedure roll. Counsel for the defender contended that Scots law had adopted a firm rule that participation in any type of criminal conduct, however minor, disables an injured party from recovering damages from another joint participant. The Lord Ordinary rejected that argument, holding that the authorities indicated that the question is "one depending on the particular facts and circumstances", and he allowed a proof before answer. In doing so, his Lordship expressed the opinion that his view was consistent with certain Australian and English decisions to which he had been referred. (Pages 581-2)

[10] In neither *Winnik* nor *Weir* was an attempt made to identify any principle underlying the policy. Lord Hunter in the former case noted that the defender had argued that the pursuer's claim was defeated:

"either because in law one joint participant would not in such circumstances be held to owe a duty of care to the other joint participant or because on grounds of public policy the Court would not countenance nor adjudicate on a claim by one such joint participant against another." (Page 54)

His Lordship expressed himself unable to see any reason why a Scottish court should not apply one or other or both of these principles.

[11] In *Weir*, Lord Coulsfield quoted from one Scottish and one English authority (*Lindsay* v *Poole* 1984 SLT 269; *Pitts* v *Hunt* [1991] 1 QB 24 ("*Pitts"))* in which it was suggested that there may be circumstances in which the claimant's participation in a joint criminal enterprise precludes the court from finding that the alleged wrongdoer owed him a duty of care.

[12] In *Currie* v *Clamp's Executor* 2002 SLT 196 ("*Currie*"), the pursuer had been a passenger in a car and was injured in an accident in which the driver died. In an action of damages, the vehicle's insurers argued that, at the material time, the deceased owed no duty of care to the pursuer because the pursuer was committing a criminal offence, a contravention of section 178(1)(b) of the Road Traffic Act 1998, in that he allowed himself to be carried in the vehicle knowing that it had been taken, and was being driven by the deceased without the consent of the owner. After proof, the Lord Ordinary (Clarke) held that the deceased owed the pursuer a duty of care and that the pursuer was not disabled from recovering damages for the injuries caused by breach of that duty. In his discussion of the issue that he had to determine, the Lord Ordinary considered a number of authorities, including *Winnik*, *Weir* and *Pitts.* Of the last of these, his Lordship said this:

"That was a case which was relatively extreme on its facts. The plaintiff and a friend had spent the evening drinking at a disco before setting off on the friend's motorcycle. The plaintiff was aware that the motorcyclist was neither licensed to ride a motorcycle nor insured. It was found that, moreover, on the journey, the plaintiff had encouraged the cyclist to ride in a fast, reckless and hazardous manner, with the purpose of frightening members of the public. This conduct eventually led to a collision with an oncoming car in which the plaintiff was severely injured. It was held that in the circumstances the plaintiff could not recover. ... In his judgment, in that case, Beldam LJ, after a full examination of the earlier authorities, including *Winnik* v *Dick* and certain Australian authorities, said at [1991] 1 QB**,** p 46, that: 'On the facts found by the judge in this case the plaintiff was playing a full and active part in encouraging the young rider to commit offences which, if a death other than that of the young rider himself had occurred, would have amounted to manslaughter. And not just manslaughter by gross negligence, on the judge's findings. It would have been manslaughter by the commission of a dangerous act either done with the intention of frightening other road users or when both the plaintiff and the young rider were aware, or but for a self-induced intoxication would have been aware, that it was likely to do so, and nevertheless they went on and did the act regardless of the consequences.'

His Lordship continued: 'Thus on the findings made by the judge in this case I would hold that the plaintiff is precluded on grounds of public policy from recovering compensation for the injuries which he sustained in the course of the very serious offences in which he was participating. On a question on which, as Bingham L.J. said in *Saunders* v *Edwards* [1987] 1 WLR 1116, 1134, the courts have tended to adopt a pragmatic approach, I do not believe that it is desirable to go further in an attempt to categorise the degree of seriousness involved in offences which will preclude recovery of compensation.' The policy of the law in adopting such a pragmatic approach is, as Beldam LJ said at p 45, one of 'seeking where possible to see that genuine wrongs were righted so long as the court did not thereby promote or countenance a nefarious object or bargain which it was bound to condemn'.

As described by Balcombe LJ in *Pitts* v *Hunt* at p 49, this pragmatic approach involves considering 'what would have been the cause of action had there been no joint illegal enterprise - that is, the tort of negligence based on the breach of a duty of care owed by the deceased to the plaintiff - and then to consider whether the circumstances of the particular case are such as to preclude the existence of that cause of action'."

[13] The Lord Ordinary concluded that, applying a pragmatic approach to the facts of the case before him, the deceased owed the pursuer a duty of care and that, accordingly, the pursuer was not disqualified from recovering damages for the injuries caused to him by breach of that duty of care. That was because either the pursuer was not engaged in any criminal activity, or alternatively, at the worst for him, his conduct involved a very minor breach of the statutory provision relied on by the defender.

[14] In *Ashmore* v *Rock Steady Security Ltd* 2006 SLT 206 ("*Ashmore*"), the pursuer sought damages from a security company, for severe head injuries sustained when a member of door staff at a club physically manhandled him away from the door and struck him, causing him to fall backwards and strike his head violently on the pavement. It was agreed that the pursuer's injuries and their consequences were caused by the actions of the doorman who had been acting in the course of his employment with the defenders. At the

material time, the pursuer had been persistently trying to regain entry to the club against the wishes of the door staff. The defenders submitted that: (i) a successful plea of self-defence had been made out, the doorman having acted lawfully in response to a vicious attack by the pursuer, namely a headbutt, to which a single punch could not be described as disproportionate or excessive; and (ii) if the plea of self-defence were unsuccessful, they were still entitled to be assoilzied by application of the *ex turpi causa* rule.

[15] After proof, The Lord Ordinary (Emslie) said this:

"[37] In a careful and well presented submission, counsel for the defenders maintained that even if his clients' plea of self-defence was rejected, they were still entitled to be assoilzied by application of the maxim *ex turpi causa non oritur actio*. This reflected an established judicial determination both north and south of the border, on public policy grounds, to deny any civil recovery to a party whose claim was, in substance, founded on his own illegal or immoral conduct. While every case must be judged on its own particular facts and circumstances, the maxim had frequently been applied to claims of damages for common law negligence and also for deliberate assault. By way of illustration, some claimants had failed on the ground that their injuries were a direct result of active participation in a common criminal enterprise. Others had failed where, individually or with others, they had deliberately embarked on a course of serious criminal violence before 'getting more than they bargained for' at the hands of the intended victim.

...

[44] In my opinion the maxim *ex turpi causa non oritur actio* has no application in the circumstances of the present case. In reaching this conclusion, I emphatically reject the attempt by junior counsel for the pursuer to persuade me that, under the law of Scotland, the maxim is not available in cases where the pursuer has been guilty of some form of assault. It may be that the recent decisions to which I was referred all concern joint participation by the pursuer in some common criminal enterprise with the defender, but I am not at all confident that the defenders' citation of authority in this area was complete. For instance, this court is familiar with cases in which conviction of the pursuer for assault amounting to culpable homicide has been held, on public policy grounds, to bar claims arising on the death of the deceased: cf *Burns* v *Secretary of State for Social Services; Paterson, Petr*. More importantly, I was not referred to any Scottish case in which the court suggested that joint participation in a criminal enterprise was the only situation in which the maxim might be applied so as to defeat a delictual claim. This is hardly surprising, because the maxim expresses a broad principle of the common law by which serious abuses of process may be checked, and I can see no obvious reason why the categories of case in which the court may deem such action appropriate should ever be regarded as closed. I am therefore not prepared to countenance the pursuer's suggested limitation on the powers of the court in this connection.

[45] However, for reasons similar to those which have led me to reject the defenders' plea of self-defence, I do not consider that it would be appropriate to apply the maxim *ex turpi causa non oritur actio* in this instance. In particular, I have declined to hold it proved that the pursuer deliberately and with evil intent headbutted Moncrieff in the moments before the punch in question was delivered. On that basis, the pursuer stands exonerated of any unlawful act capable of bringing the maxim into play, and it is relevant to note that no criminal charge was ever laid against him in that context. Even if I were wrong on that score, however, it seems to me that any headbutt by the pursuer was minor and incidental to the continuing physical confrontation for which Moncrieff must bear primary responsibility. It was in no way comparable to the serious criminal violence which was in issue in the cases of *Murphy*, *Clunis* and *Cross*. In addition, it was not a considered or premeditated act of a kind liable to give rise to public concern, but merely the reaction of a very drunk man on the spur of the moment. Perhaps the closest of the authorities to which I was referred is *Lane*, where the court refused to apply the maxim on account of the relatively trivial nature of any illegality on the part of the plaintiff. In all the circumstances, I am unable to accept that there are any considerations of public policy sufficient to deprive the present pursuer of a valuable cause of action in respect of serious injuries sustained."

[16] In the course of argument, Miss Maguire referred me to the English cases of *Delaney* v *Pickett* 2012 1 WLR 2149 ("*Delaney*") and *Joyce O'Brien* [2013] Lloyd's Rep IR 523 ("*Joyce*"). These were both cases in which joint criminal enterprise was pleaded. In *Joyce,* with which Miss Maguire opened the *ex turpi causa* chapter of her contentions, Elias LJ, with whom Rafferty LJ and Ryder J agreed, set himself the task of considering "the authorities establishing the relevant principles of law when a claimant seeks to recover damages for injuries sustained in the course of criminal behaviour". (Paragraph 3) "Whilst widely recognised that the *ex turpi causa* principle will often apply to deny the claimant the right to damages in [joint criminal enterprise] cases, the jurisprudential basis for reaching that conclusion was a matter of some dispute". (Paragraph 5)

[17] In seeking to resolve that dispute, Elias LJ began with an analysis of the authorities on joint criminal enterprise. Since, as I have explained, that is not the factual basis of the plea in this case, I can pass over that analysis, and address that part of Elias LJ's judgment which deals with *ex turpi causa* where it is alleged that the claimant was engaged in criminal activity, separate from any wrongful conduct on the part of the defender.

[18] The judge opened consideration of that topic with the observation that the principle developed in the joint enterprise cases "can be seen as merely one specific application of a wider principle that a man cannot recover compensation where his cause of action is based on his own criminal or immoral act." (Paragraph 21) Of cases in which the criminal act which is said to bar recovery was that of the claimant, Elias LJ noted that the authoritative statement of the relevant principles for determining when the doctrine will apply is to be found in the speech of Lord Hoffmann, with whom Lords Phillips, Scott and Rodger agreed, in *Gray* v *Thames Trains Ltd* [2009] 1 AC 1319 ("*Gray*").

[19] In that case, the claimant was a passenger on the train involved in the Ladbroke Grove rail crash, and suffered post-traumatic stress disorder. He alleged that his condition had been caused by the accident. Whilst suffering from that disorder, he killed a man. His plea of guilty to manslaughter on the ground of diminished responsibility was accepted and he was ordered to be detained in a hospital under the relevant provisions of the Mental Health Act 1983. The claimant brought an action in negligence against the train operator and the company responsible for the rail infrastructure. He sought damages for, among other things, loss of earnings after his detention, loss of liberty, damage to reputation, and for feelings of guilt and remorse consequent on the killing, all of which he claimed had resulted from the post-traumatic stress disorder caused by the defendants. He also sought an indemnity against any claim that might be brought against him by dependants of the man he had killed. The defendants admitted negligence, but sought to rely on the maxim *ex turpi causa non oritur actio*, contending that public policy precluded the recovery of losses arising out of the manslaughter.

[20] Notwithstanding that his PTSD had been caused by the accident, the claimant's action failed. The appellate committee held that "a civil court will not award damages to compensate a claimant for an injury or disadvantage which the criminal courts of the same jurisdiction have imposed on him by way of punishment for a criminal act for which he was responsible." Lord Hoffmann described that as "the narrow form" of the *ex turpi causa* principle. The view was expressed that the principle can be analysed in terms of the *ex turpi causa* rule, since the plaintiff cannot even begin to mount his claim without founding on his own criminal activity. (Lord Hoffman, paragraph 69)

[21] In *Joyce*, having set out the background to *Gray*, Elias LJ continued:

"23 Lord Hoffmann distinguished that aspect [the narrow form] from what he termed the 'wider version' of the *ex turpi* concept which enunciates the principle that 'you cannot recover for damages which is the consequence of your own criminal act'. He observed that the wider version: 'differs from the narrower version in at least two respects: first, it cannot, as it seems to me, be justified on the grounds of inconsistency in the same way as the narrower rule. Instead the wider rule has to be justified on the ground that it is offensive to public notions of the fair distribution of resources that a Claimant should be compensated

(usually out of public funds) for the consequences of his own criminal conduct. Secondly, the wider rule may raise problems of causation, which cannot arise in connection with the narrower rule. The sentence of the court is plainly a consequence of the criminality for which the Claimant was responsible. But other forms of damage may give rise to questions about whether they can properly be said to have been caused by his criminal conduct (para 51).'

24 He then concluded that the ordinary test of causation should be adopted when determining whether the *ex turpi* rule should apply (para 54). '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 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 the damage would not have happened but for the tortious conduct of the defendant, it was caused by the criminal act of the Claimant? (*Vellino* v *Chief Constable of the Greater Manchester Police* [2002] 1 WLR 218 ["*Vellino*"]). Or is the position that although the damage would not have happened without the criminal act of the Claimant, it was caused by the tortious act of the Defendant? (*Revill* v *Newbery* [1996] QB 567 ["*Revill*"])'"

[22] To understand the implication of Lord Hoffman's rhetorical questions, it is necessary to know that recovery was denied in *Vellino*, because the claimant's injuries were caused by his own unlawful act of jumping out of a window to evade capture by the police, rather than by any claimed negligence on the part of the police. In *Revill,* the plaintiff did recover, because his unlawful act was burglary, which put him in the defendant's property where he was injured by the defendant's negligent discharge of a shotgun.

Submissions of parties

[23] Miss Maguire's submissions on the second defender's *ex turpi causa* defence were short and to the point. There is no evidence, she argued, that Mr Rennie was involved directly in the attack on the Ranza Bar, nor does the second defender aver that he was. It is averred only that he "was at the locus of the accident to engage in criminal conduct". The accident happened, however, after the attack had ended. For that reason, Miss Maguire contended, the averment that "he was at the locus in order to involve himself in the attack on the premises" made no sense. In any event, it is not averred that Mr Rennie did anything, far less commit a criminal act. In that regard, I was invited to view CCTV footage of events in and around the bar at the material time. My attention was invited, also, to a number of productions, numbers 6/7 and 6/9 to 6/12 of process which, said Miss Maguire, vouched Mr Rennie's good character. Further, I was informed, the detective constable who compiled the DVD for the first defender's trial had been approached by solicitors acting for the second defender and had told them that there was nothing to show that Mr Rennie was involved in the attack. In any event, even if Mr Rennie had been involved, Miss Maguire's submission was that the public policy which the *ex turpi causa* rule enunciated is that a claimant should not benefit from his or her own criminality. Under reference to *Gray, Delaney* and *Joyce*, she submitted that the test to be applied is one of causation.

[24] Central to Mr Murphy QC's submissions in reply was the proposition that the court should be slow to reach a final view on the pursuer's motion for summary decree at a time when the pleadings have not been finalised. Normally, in my view, a defender should not expect that line of argument to carry much weight, given that, faced with a motion for summary decree, it falls to the defender to adjust his pleadings and to produce such evidence as is available to assist him in demonstrating to the court that there is a real defence to the action. As Mr Murphy developed his submissions, however, it became clear to me that there may have been more in the second defender's *ex turpi causa* defence than the pleadings disclosed. In short, he argued that, properly understood, it could be inferred from the DVD footage and other evidence that Mr Rennie was part of a mob that had set out to attack the Ranza Bar and its occupants and that the injuries which he suffered were a direct consequence of his membership of that mob.

[25] In the circumstances, and mindful that the action was proceeding under chapter 42A of the Rules of Court, I appointed the pursuer to lodge an open record by 18 July, allowed parties a period of adjustment

thereafter until 5 September 2013, and continued the motions until 12 September 2013.

[26] By the time the court reconvened, the second defender had added a number of averments. On 12 September, the second defender was represented by Mr Dunlop QC, who was the nominated senior counsel in the case, but who had not been available to appear on 11 July. It was explained to me that the second defender wished to add further averments, in addition to those that had been added by adjustment prior to 5 September. Miss Maguire objected to its doing so but acknowledged that, given the flexibility of the summary decree procedure, I would be entitled to consider such further averments in deciding whether or not the second defender had a defence that could succeed. The relevant parts of second defender's adjusted answers, together with the proposed additional averments, now read as follows (the proposed averments being shown in italics):

"Explained and averred that:

(i) The accident occurred in the vicinity of premises known as the Ranza Bar. The Ranza Bar is located on Royston Road, Glasgow. It is close to the Blackhill and Germiston areas of Glasgow. The Blackhill and Germiston areas of Glasgow are utilised by organised criminals to run criminal enterprises. In the Blackhill area of the city, one criminal enterprise is run by the M family; in the Germiston area one criminal enterprise is run by the B family. These criminal enterprises are often involved in rivalry with each other. Such rivalry can, at times, be seriously violent. The first defender is part of the M family that operates the criminal enterprise in the Blackhill area. The Ranza Bar is frequented by a number of members of that enterprise. The licensee of the premises was, at the material time, the first defender's uncle.

(ii) The first defender had previously been involved in a violent incident at the hands of the criminal enterprise run by the B family. That had occurred in around April or May 2008 in the Wee Glen pub in Forge Street, Glasgow. Her father, JM, was badly beaten and stabbed. The first defender had sought to defend her father. Her father is heavily involved in the criminal enterprise run by his family.

(iii) Prior to May 2010 there had been tension between the criminal enterprises run by the M and B families. As a result, police presence in the area had been increased.

(iv) Shortly prior to the material incident, a group of individuals had (as detailed further below) been involved in an attack on the Ranza Bar. The individuals involved in the attack on the bar were associated with the criminal enterprise run by the B family. They included JB, GB and CB - the three brothers involved heavily in the criminal enterprise. Stones and other items were thrown at the premises. The group of individuals carrying out the attack had (as further detailed below) arrived in two cars, a Volkswagen Golf and a Landrover Discovery. The Landrover Discovery was regularly used by the B criminal enterprise. It had previously been held by police investigating another criminal incident. In particular, it was held as part of the inquiry into the killing of KC. KC had been killed by men associated with the criminal enterprise run by the B family. His killing was part of an incident whereby members of the B criminal enterprise fought with members of a rival criminal enterprise (operated by the D family), with which KC was associated. As part of the same incident, the Landrover Discovery had been involved in the running down of another man, A B. The Landrover Discovery had, at the time of the material accident, recently been returned to its owners. KC was related by marriage to the first defender. She was aware of the circumstances of his murder and the surrounding incidents. In particular, she was aware of the involvement of the Landrover Discovery, as condescended upon.

(v) Members of the B criminal enterprise met up at premises within the Germiston area of Glasgow. In particular, they met at a carwash at the top of Fulton Street, Glasgow; and at JB's father's house. John Rennie was an associate of the B criminal enterprise, and regularly met with the members of the criminal enterprise at both of those locations.

(vi) On 22 May 2010, shortly prior to the attack on the Ranza Bar, the Landrover Discovery associated with the B criminal enterprise was in the area of the Ranza Bar. It was being driven by GB, *with John Rennie as a*

passenger. The Landrover and its occupants had been circling the area of the Ranza Bar for the purposes of assisting the occupants of the Volkswagen in a planned attack on the Ranza Bar. The Landrover has (*sic*) repeatedly driven past the Ranza Bar. It had been noticed by the first defender. The first defender heard GB threaten her from the Landrover. The Landrover had also been noticed by ED, an associate of the M criminal enterprise. Having noticed the Landrover Discovery, ED ran toward the Ranza Bar. The attack commenced when the occupants of the Volkswagen Golf were decanted outside the bar. They were MM, CB, PMM and JB. They threw items at the bar and shouted abuse, *in an attempt to goad the occupants of the bar to exit same, whereupon they would be attacked. They were all associates of, and acting in concert with, the occupants of the Landrover - including John Rennie.*

(vii) During the initial attack on the premises by the occupants of the Volkswagen JB was shot. He was shot *in the leg* by ED. Following the shooting, JB was picked up in the Volkswagen Golf.

(viii) After the shooting, the Landrover Discovery driven by GB was brought to a halt in the offside lane of the eastbound carriageway of Royston Road, close to the Ranza Bar. Mr Rennie was a known associate of the occupants of the vehicle. He had alighted from the Landrover. After Mr Rennie had alighted, the Volkswagen pulled up in the offside lane of the eastbound carriageway. Mr Rennie stood at the nearside front window of the Volkswagen. He was engaged in conversation with the occupants of the vehicle, which included JB. *It is believed and averred that they were discussing the repercussions of the shooting of JB*. It was as he was standing there that Mr Rennie was struck by the vehicle driven by the first defender.

(ix) Mr Rennie was at the locus of the accident to engage in criminal conduct. In particular, he was at the locus in order to involve himself in the attack on the premises. *In attending at the locus, he was acting in concert with the occupants of the Landrover and those of the Volkswagen. All of those individuals were at the material time involved in the criminal acts of breaching the peace and conspiring to attack the Ranza Bar and persons within.*

(x) At the time Mr Rennie was struck, the first defender was trying to make her way to the Ranza Bar. She perceived that as a place of safety."

[27] At the adjourned hearing, Mr Dunlop advanced the following four propositions:

i The defence of ex *turpi causa* is grounded in public policy.

ii The case law establishes that public policy may deprive a person who is injured in the course of involving himself in serious crime from asserting a claim in damages.

iii The assessment of the defence is fact sensitive and, therefore, is far better determined on the basis of evidence as opposed to pleadings, which inevitably lack the richness of detail available after proof. It is a common occurrence that what is available in precognition may acquire an entirely different hue when evidence is given in court.

iv Summary decree should only be granted if it is virtually certain that the defence will fail. This is not such a case.

[28] Dealing with the evidence which had been produced on behalf of the pursuer to establish that Mr Rennie was of good character, Mr Dunlop advised me that an investigator acting for the second defender had obtained from the police a "robust rejection" of that assertion. Their view was that Mr Rennie associated with criminals. The Landrover was associated with criminals, and Mr Rennie was in the Landrover. There were, submitted Mr Dunlop, eleven core points in the defence. They were as follows:

i Mr Rennie was an associate of an organised criminal gang.

ii The incident in which Mr Rennie was injured occurred in the course of an orchestrated attack unleashed by members of that gang against premises and persons connected with a rival gang.

iii The attack involved persons in two vehicles, the Landrover and the Golf, which were attending at and encircling the premises.

iv Mr Rennie was one of the occupants of the Landrover and he was there for the purpose of participating in the attack.

v The Landrover had a history of involvement in serious crime.

vi The Landrover and its occupants had been circling the area for the purposes of assisting the occupants of the Volkswagen in the attack.

vii Threats had been issued by the occupants of the Landrover.

viii An attack was carried out by the occupants of the Volkswagen and in the course of that attack one of the attackers was shot.

ix The response of the Landrover to the shooting was not to leave the scene, but to stop opposite the premises. Mr Rennie decanted from the Landrover and spoke with the occupants of the Volkswagen which, by then, included the attacker who had been shot.

x The second defender offered proof by inference that Mr Rennie was discussing the repercussions of the shooting.

xi The second defender offered to prove that Mr Rennie was present in order to engage in serious criminal conduct involving an attack on premises and the persons within.

Having regard to these matters, submitted Mr Dunlop, it cannot be said that the defence of *ex turpi causa* will necessarily fail.

[29] In support of that last assertion, Mr Dunlop invited my attention to *Murphy* v *Culhane* [1997] QB 94, ("*Murphy*"). The plaintiff was the widow of Timothy Murphy. She claimed damages, alleging that the defendant had assaulted and beaten the deceased by hitting him on the head with a plank, that the assault was unlawful and that she intended to adduce evidence the defendant had pleaded guilty to the manslaughter of the deceased. Those averments were admitted in the defence. It was also admitted that, by reason of the assault, the deceased was killed. The defendant alleged that the assault occurred during and as part of a criminal affray which was initiated by the deceased and others with the joint criminal intent of assaulting and beating the defendant. Liability in respect of the deceased's death was denied and the defendant relied upon the *ex turpi causa* rule, and/or *volenti non fit injuria*. The Court of Appeal held that the defendant was potentially entitled to rely on the *ex turpi causa* rule and remitted it for trial. The facts of *Murphy*, argued Mr Dunlop, are similar to the facts of this case, and the *ex turpi causa* question should be decided after proof.

[30] I was also referred to the case of *Cross* v *Kirkby*, CA, 18 February 2000, unreported. The claimant was an anti-hunt activist. With his partner, he was committed to disrupting the meets of his local hunt. The defendant was a farmer. On the day of the incident that gave rise to the claim, the hunt was riding over one of the defendant's farms. During the morning, the claimant and his partner had twice been removed from the defendant's land. On the first occasion, the claimant was escorted off the land. As he was going, the claimant threatened that the next time it would not be just "girly slaps". On the second occasion when he was being removed by two men from a field, he seized one of them by the throat and pushed the other over. Not long afterwards, the claimant noticed the defendant attempting to walk the claimant's partner off the land. She was resisting and bit the defendant. She eventually agreed to go towards a car which was parked nearby. At that moment, the claimant ran up and attacked the defendant. The claimant's partner produced an iron bar from

the car, and the claimant armed himself with a baseball bat. He was angry, almost hysterical. He banged the baseball bat on the ground, splitting the bat. He shouted: "You're ******* dead, Kirkby" and jabbed him in the chest and in the throat with the bat. The defendant started to walk away but the claimant persisted. To ward off the blows of the bat, the defendant turned and grappled with the claimant. Wrestling the bat from him, he hit the claimant a single blow on the side of the head. The blow caused a linear fracture of the claimant's skull and subdural bleeding. The claimant sued for damages for the injuries he had sustained. In his defence, the defendant relied on the *ex turpi causa* rule. After trial, the judge gave judgment for the claimant, rejecting the argument that the claimant's own criminal and unlawful actions precluded him from recovering damages. That decision was reversed on appeal. In his judgment, with which Otton J agreed, Beldam LJ said this:

"76. I do not believe that there is any general principle that the claimant must either plead, give evidence of or rely on his own illegality for the principle to apply. Such a technical approach is entirely absent from Lord Mansfield's exposition of the principle. I would, however, accept that for the principle to operate the claim made by the claimant must arise out of criminal or illegal conduct on his part. In this context "arise out of" clearly denotes a causal connection with the conduct, a view which is implicit in such different cases as Lane v Holloway and the recent case to which we were referred in this court, Standard and Chartered Bank v Pakistan National Shipping Corporation & Ors, Court of Appeal transcript, Friday 3rd December, 1999. In my view the principle applies when the claimant's claim is so closely connected or inextricably bound up with his own criminal or illegal conduct that the court could not permit him to recover without appearing to condone that conduct.

77. In truth, it is not possible to generalise. The variety of cases and circumstances is such that there will always be cases which fall on one side or the other of the appropriate line. I have no doubt that in this case the court ought not to have turned a blind eye to the criminal conduct of the claimant. He was guilty of several serious criminal offences. He had committed an offence of having an offensive weapon in a public place contrary to the Prevention of Crime Act 1953, an offence carrying a maximum term of imprisonment of two years. He had committed the offence of affray under the Public Order Act 1986 with a maximum sentence of three years. He had assaulted the defendant causing him actual bodily harm and he had made a threat to kill which, even on the assumption that he did not intend the defendant to believe he would carry it out, nevertheless amounted to a further offence under the Public Order Act.

78. Although Mr Matheson QC argued valiantly that the claimant's claim did not arise out of his own criminal acts, in my view the argument is untenable. He had not only continued to assault the defendant with the baseball bat when the defendant was plainly seeking to avoid any confrontation, he had in the judge's words "goaded the defendant into seeking to defend himself". The judge found that at the time the blow was struck it was struck in self-defence, that is to say though heavier than the judge thought objectively necessary, he was seeking to protect himself from the claimant's attack. The claimant's injury in respect of which he brought his action originated and arose (oritur) from the claimant's own criminal conduct. In my view in the circumstances of this case the court ought not to countenance a claim for damages so founded. I would allow the appeal."

[31] In this case, said Mr Dunlop, the second defender offers to prove that Mr Rennie was in the vicinity of the Ranza Bar for the purpose of attacking it and its occupants, and he referred me to the adjusted pleadings and the proposed additional pleadings that I have set out in paragraph 27 of this opinion. Moreover, after Mr Rennie was hit by the first defender's car, the occupants of the Volkswagen tended to him until the police arrived, at which point they left the scene. In the circumstances, the *ex turpi causa* defence may well succeed.

[32] In reply, Miss Maguire characterised the decision in *Murphy* as "out of date". The law had been developed in *Delaney* and *Joyce*. The immediate cause of Mr Rennie's injuries was the first defender's driving. Miss Maguire referred me to the following passage in the judgment of Lord Denning M R. at page 98 of the report in *Murphy*:

"There are two cases which seem to show that, in a civil action for damages for assault, damages are not to be reduced because the plaintiff was himself guilty of provocation. Provocation, it was said, can be used to wipe out the element of exemplary damages but not to reduce the actual figure of pecuniary damages. It was so said by the High Court of Australia in 1962 in *Fontin* v. *Katapodis* (1962) 108 C.L.R. 177 and followed by this court in 1968 in *Lane* v. *Holloway* [1968] 1 Q.B. 379. But those were cases where the conduct of the injured man was trivial - and the conduct of the defendant was savage - entirely out of proportion to the occasion. So much so that the defendant could fairly be regarded as solely responsible for the damage done. I do not think they can or should be applied where the injured man, by his own conduct, can fairly be regarded as partly responsible for the damage he suffered. So far as general principle is concerned, I would like to repeat what I said in the later case of *Gray* v. *Ban* [1971] 2 Q.B. 554, 569: "In an action for assault, in awarding damages, the judge or jury can take into account, not only circumstances which go to aggravate damages, but also those which go to mitigate them." That is the principle I prefer rather than the earlier cases."

[33] Having regard to what the second defender offers to prove in this case, argued Miss Maguire, what Mr Rennie did was trivial. He was merely present at the scene. What the first defender did was hugely out of proportion. The case of *Murphy* is, therefore, supportive of the pursuer's position. On what she described as "the principle of proportionality", Miss Maguire referred me to passages in the judgment of Beldam J in *Cross* in which his Lordship addressed that topic:

"53. When the judge referred to the proportionality of each party's behaviour towards the other in the context of assaults, the cases to which he referred were not based on a simple comparison between the force used by the parties. Rather the question was whether one of the parties whose illegal conduct might be regarded as trivial should be precluded from recovering damages resulting from an aggravated assault in retaliation.

54. As Lord Denning made clear in Lane v Holloway (supra), the claimant had only aimed a punch at the defendant because he thought he himself might be struck. It had been argued that no action lay because it was an unlawful fight and that both of them were concerned in illegality and that therefore there could be no cause of action in respect of the injury suffered by the claimant. Lord Denning thought that even if the fight started by being unlawful, one of them could sue the other for damages if the subsequent injury was inflicted by a weapon or savage blow out of all proportion to the occasion.

55. Lord Salmon, then Salmon LJ, said:

'To say in circumstances such as those that *ex turpi causa non oritur actio* is a defence seems to me to be quite absurd. Academically of course one can see the argument, but one must look at it, I think, from a practical point of view. To say that this old gentleman was engaged jointly with the defendant in a criminal venture is a step which, like the judge, I feel wholly unable to take.'

56. Winn LJ put it even more trenchantly: 'I do not, having regard to those findings, regard what happened as a fight to which the plaintiff consented, to which he was volens. I regard it as a case where this young man went down to thrash the other, older man.'

57. The case was therefore one in which any illegality on the claimant's part was regarded as trivial and not as a cause of, or connected with, the assault for which he was claiming damages. To that extent the court was prepared to disregard any illegality in the conduct of the claimant. Barnes v Nayer went on a similar principle. Murphy v Culhane (supra) was, however, an entirely different case and showed that the court would not overlook criminal conduct which if proved was serious and which was connected with the act of the defendant sufficiently closely for it to be said that any injury inflicted by the defendant 'arose out of the claimant's own behaviour'."

[34] Miss Maguire also directed my attention to *Lane v Holloway [1968] 1 QB 379, a decision of the Court of Appeal*. The claimant was a man of 64. He had insulted the wife of the defendant, a man aged 23. An argument between the two men ensued. The claimant threw a punch at the defendant, who hit the claimant

hard in the eye, causing a severe wound. The claimant sued for damages for assault, and the defendant relied on the *ex turpi causa* and *volenti* defences. The county court judge rejected the *ex turpi causa* and *volenti* defences, but held that the actions of the claimant had, to a substantial extent, brought the injuries upon himself and so reduced the damages very considerably. His decision was appealed, and the defendant's arguments in support of the *ex turpi causa* and *volenti* defences were renewed. Lord Denning rejected those in respect of the *ex turpi causa* defence in the following terms:

"The first question is: Was there an assault by Mr. Holloway for which damages are recoverable in a civil court? I am quite clearly of opinion that there was. It has been argued before us that no action lies because this was an unlawful fight: that both of them were concerned in illegality; and therefore there can be no cause of action in respect of it. Ex turpi causa oritur non actio. To that I entirely demur. Even if the fight started by being unlawful, I think that one of them can sue the other for damages for a subsequent injury if it was inflicted by a weapon or savage blow out of all proportion to the occasion. I agree that in an ordinary fight with fists there is no cause of action to either of them for any injury suffered. The reason is that each of the participants in a fight voluntarily takes upon himself the risk of incidental injuries to himself. Volenti non fit injuria. But he does not take on himself the risk of a savage blow out of all proportion to the occasion. The man who strikes a blow of such severity is liable in damages unless he can prove accident or self-defence.

In this case the judge found that 'with a young man of 23 and a man of 64, whom he knows to be somewhat infirm, the young man cannot plead a challenge seriously: nor is he entitled to go and strike him because of an insult hurled at his wife.'

I quite agree. Mr Holloway in anger went much too far. He gave a blow out of proportion to the occasion for which he must answer in damages."

[35] Finally, on the *ex turpi causa* point, Miss Maguire took me to certain passages in *Revill.* At pages 578 to 580 of the report, Evans LJ said this:

"The present case is one where, on the judge's findings, the defendant used greater violence than was justified in lawful self-defence and was negligent even by reference to the standard of care to be expected from the reasonable man placed in the situation in which he found himself. The judge also found, applying the usual standards of responsibility and fault which govern the defence of contributory negligence, that the plaintiff himself was two-thirds responsible for the injuries which he sustained. These fortunately were less serious than might have been feared, if not foreseen.

The finding of negligence is challenged by Mr Escott Cox in his attractive submissions in support of this appeal. I agree with Neill L.J. for the reasons which he gives that the finding is entirely justified in the circumstances of this case. The finding implies that the defendant used violence towards the plaintiff which exceeded the reasonable limits permitted by lawful self-defence.

His second contention is that the defendant has a complete defence by the application of the rule of law expressed only in the Latin phrase ex turpi causa non oritur actio. The limits of the rule in cases concerned with the ownership or possession of property, where one party seeks to enforce or take advantage of an illegal transaction, were considered and reestablished by the House of Lords in *Tinsley v. Milligan* [1994] 1 A.C. 340. The dissenting speech of Lord Goff of Chieveley referred to recent authorities, not cases decided by the House of Lords, which have considered whether and how the rule applies where the action is brought in tort rather than in a contractual or property context: see p. 361. Such cases give rise to different considerations from those where an illegal transaction is involved.

The present case can also be distinguished from the "criminal enterprise" type of case exemplified by *Pitts v. Hunt* [1991] 1 Q.B. 24. The issue here is whether the plaintiff in a personal injury claim for damages for negligence is debarred from making any recovery where he was a trespasser and engaged in criminal activities when the injury was suffered. Any broad test of causation is satisfied almost by definition in such a

case, because he would not have sustained the injury caused by the defendant unless he had been where he was and acting as he was at the relevant time.

These are the factors of fault and responsibility which are taken into account when assessing the issue of contributory negligence pursuant to section 1 of the Law Reform (Contributory Negligence) Act 1945. So the question whether there is a complete defence will only have practical relevance in relation to that proportion of the liability which as between the plaintiff and the defendant it is adjudged that the defendant should bear.

This does not mean that the rule cannot apply, because the underlying principle is that there is a public interest which requires that the wrongdoer should not benefit from his crime or other offence. But it would mean, if it does apply in circumstances such as these, that the trespasser who was also a criminal was effectively an outlaw, who was debarred by the law from recovering compensation for any injury which he might sustain. This same consideration also prompts the thought that it is one thing to deny to a plaintiff any fruits from his illegal conduct, but different and more far-reaching to deprive him even of compensation for injury which he suffers and which otherwise he is entitled to recover at law.

It is abundantly clear, in my judgment, that the trespasser/criminal is not an outlaw, and it is noteworthy that even the old common law authorities recognised the existence of some duty towards trespassers, even though the duty was limited and strictly defined and was much less onerous than the common law duty of care. See for example the passages from *Robert Addie & Sons (Collieries) Ltd. v. Dumbreck* [1929] A.C. 358 which Neill L.J. has quoted. I note also that the Law Commission Report discussed, in paragraphs 31-35, the extent of the occupier's duty towards trespassers in the context of "Other possible limitations upon the duty of care." It is not suggested that no duty of any sort is owed to the trespasser, and it follows that the law recognises that the plaintiff has some rights, however limited, which the law does recognise and protect.

This is sufficient, in my judgment, to answer the defendant's contention that there is a rule or principle of law which relieves him of all liability or which conversely deprives the plaintiff of any right to recover damages in the present case. Such a rule would make it unnecessary to consider the precise scope of the defendant's duty towards the plaintiff or to apply the rules of contributory negligence. The claim would fail in any event. That clearly is not the law."

At page 580, Millett LJ said:

"For centuries the common law has permitted reasonable force to be used in defence of the person or property. Violence may be returned with necessary violence. But the force used must not exceed the limits of what is reasonable in the circumstances. Changes in society and in social perceptions have meant that what might have been considered reasonable at one time would no longer be so regarded; but the principle remains the same. The assailant or intruder may be met with reasonable force but no more; the use of excessive violence against him is an actionable wrong.

It follows, in my opinion, that there is no place for the doctrine ex turpi causa non oritur actio in this context. If the doctrine applied, any claim by the assailant or trespasser would be barred no matter how excessive or unreasonable the force used against him.

I agree that, for the reasons given by Neill L.J., the judge was entitled to find that the defendant's conduct was not reasonable. It was clearly dangerous and bordered on reckless. I would dismiss the appeal."

Discussion

[36] It is clear from the Scottish decisions which were cited in argument that our *ex turpi causa* jurisprudence has developed over recent years in line with that of England and Wales. In *Winnik*, for example, as I have noted in paragraph 9 of this opinion, Lord Hunter recorded that the defender's *ex turpi causa* plea was based on the proposition either that one joint participant in a criminal enterprise would not be held to owe a duty of care to the other joint participant or because, on grounds of public policy, the court would not countenance

nor adjudicate on a claim by one such joint participant against the other. His Lordship could see "no reason why a Scottish Court should not, on the basis of one or other or both of these principles, arrive in appropriate circumstances at a result the same as that reached in several cases in other jurisdictions, to which we were referred." It can be seen from Lord Hunter's citation of authority that those other jurisdictions were Australia and England and Wales. His Lordship noticed that, in a recent Outer House case, the Lord Ordinary had applied the first of the two principles after considering English and Australian decisions bearing on the matter. In *Weir*, Lord Coulsfield expressed the opinion that his view on the issue that he had to determine was "consistent with the Australian and English cases to which (he) was referred". (Page 582A) In *Currie,* Lord Clarke was content to follow English precedent. In *Ashmore*, as is recorded in paragraph 16 above, Lord Emslie rejected the submission that, in the case of individual criminal activity, Scots law had not developed as it had in England and Wales.

[37] Having regard to the influence that English decisions have had on the development of the *ex turpi causa* jurisprudence in Scots law in recent years, I would have been inclined to be guided by the reasoning of Lord Hoffman in identifying the conditions necessary for the application of the *ex turpi causa* rule, in a case of this type, to deny a pursuer compensation to which he or she would otherwise be entitled, unless there were compelling reasons why I should not. Neither Mr Murphy nor Mr Dunlop sought to argue that I should not follow the approach identified in *Gray*. I propose to do so, not only because it was not contended that I should do otherwise, but also because it appears to be grounded in a principle which was adopted in Scotland at least a century ago.

[38] In its judgment in *Gray*, the Court of Appeal noted that the *ex turpi causa* principle "derives originally from the judgment of Lord Mansfield in *Holman* v *Johnson* (1775) 1 Cowp 341 at page 343". His Lordship said this:

"The objection, that a contract is immoral or illegal as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice, as between him and the plaintiff, by accident, if I may so say. The principle of public policy is this; ex dolo malo non oritur actio. No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise ex turpi causa, or the transgression of a positive law of this country, there the court says he has no right to be assisted. It is upon that ground the court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So if the plaintiff and defendant were to change sides, and the defendant was to bring his action against the plaintiff, the latter would then have the advantage of it; for where both are equally in fault, potior est conditio defendentis. The question therefore is, 'whether, in this case, the plaintiff's demand is founded upon the ground of any immoral act or contract, or upon the ground of his being guilty of any thing which is prohibited by a positive law of this country'."

That principle was either part of, or was adopted into Scots law by, at the latest, 1914. (See *Farmers Mart Ltd* v *Milne* 1914 SC (HL) 84; 1914; *Munro* v *Rothfield* 1920 SC 118)

[39] In *Gray*, at paragraph 30, Lord Hoffman noticed that the *ex turpi causa* "tag" had been invoked to deny a remedy in a wide variety of situations and said that much time had been spent in argument "examining diverse cases and discussing whether the conditions under which the courts had held the maxim applicable in some other kind of case were satisfied in this one." His Lordship had found the discussion unhelpful, he said, for the following reasons:

"30 ... The maxim ex turpi causa expresses not so much a principle as a policy. Furthermore, that policy is not based upon a single justification but on a group of reasons, which vary in different situations. For example, as Beldam LJ pointed out in in *Cross* v *Kirkby* [2000] CA Transcript No 321, para 74, in cases in which the court is concerned with the application of the maxim to property or contractual rights between two

people who were both parties to an unlawful transaction: 'it faces the dilemma that by denying relief on the ground of illegality to one party, it appears to confer an unjustified benefit illegally obtained on the other.'

31 In cases of that kind, the courts have evolved varying rules to deal with the dilemma: compare the approach of the House of Lords in *Tinsley* v *Milligan* [1994] 1 AC 340 [a property dispute] with that of the High Court of Australia in *Nelson* v *Nelson* (1995) 184 CLR 538 [in which the issue was the consequence of unlawful behaviour and in which *Tinsley* was not followed]. But the problem to which Beldam LJ drew attention does not arise in this case. The questions of fairness and policy are different and the content of the rule is different. One cannot simply extrapolate rules applicable to a different kind of situation."

[40] It was in the context of these considerations that Lord Hoffman identified the conditions necessary for the application of the *ex turpi causa* rule in a case where it is contended that an injured claimant should be denied a remedy on account of his own criminality, as opposed to the case where the claimant was party to a joint criminal enterprise in the course of which he was injured by the negligence of another party to the enterprise. As I have noted in paragraph 22 of this opinion, his Lordship held that, in the former type of case, of which this is one, "the ordinary test of causation should be adopted". That respectfully seems to me to be consistent with the notion that: "No court will lend its aid to a man who founds his cause of action upon an [i.e. his own] immoral or ... illegal act."

[41] I turn now to the circumstances of this case. I am doubtful as to whether the second defender's averments to the effect that Mr Rennie was (i) party to a conspiracy to attack the Ranza Bar and the persons within and that he was (ii) acting in concert with the occupants of the Volkswagen in the attack on the bar are legitimate inferences that can be drawn from the averments of primary fact. Assuming, for the purposes of this opinion, however, that the second defender were able to prove its averments as adjusted and as proposed, in my judgment the *ex turpi causa* defence would be bound to fail. The attack on the bar by the occupants of the Volkswagen was just that, an attack on the building with stones and other items. Whilst the intention may have been to goad the occupants to come out so that they could be attacked, there was, in fact, no attack on any person, and the episode came to an end when JB was shot. I was informed during the course of the discussion that the first defender was not in the bar at the time of the attack, but was in a nearby shop. She was not assaulted by Mr Rennie, or by anyone else. There is no question of the first defender's having acted in defence of herself or anyone else. It is not averred that she was or felt under threat. I note that the second defender offers to prove that, at the time Mr Rennie was struck, the first defender was trying to make her way to the Ranza Bar, which she "perceived (to be) a place of safety". Against that background, the first defender took it upon herself to assault Mr Rennie with a car, with the severe consequences that I have outlined. In the circumstances as averred by the second defender, the cause of Mr Rennie's injuries was the assault on him, not any criminal activity on his part. To adopt the distinction drawn by Lord Hoffman between the facts of *Vellino* and the facts of *Revill*, it cannot be said that, although the damage would not have happened but for the alleged illegal conduct of the first defender, it was caused by the criminal act of Mr Rennie. (*Vellino*) The position is, rather, that although the damage would not have happened without the alleged criminal act of Mr Rennie, it was caused by the illegal act of the first defender. (*Revill*)

[42] The cases relied on by the second defender do not, in my view, assist it on the facts.

[43] In *Murphy* the plaintiff averred:

"... on or about September 19, 1974 ... the defendant assaulted and beat the deceased by striking him on the head with a plank ... The said assault was unlawful. The plaintiff intends to adduce evidence ... that the defendant was on April 25, 1975, convicted on his own plea of guilty ... of manslaughter of the deceased. The plaintiff says that the said conviction is relevant to the issues of: (a) whether or not the defendant assaulted the deceased and (b) whether the assault was lawful or otherwise."

[44] The defendant admitted these averments. In accordance with the requirements of English pleadings, he averred no more than the following:

"(the) assault occurred during and as part of a criminal affray which was initiated by the deceased and others who had together come to 20 Grove Place on the occasion in question with the joint criminal intent of assaulting and beating the defendant ..."

[45] In holding that the decision of the judge at first instance, giving judgment to plaintiff, should be reversed, Lord Denning MR said: "In this case we do not know the true facts ... It seems to me that this is clearly a case where the facts should be investigated before any judgment is given."

[46] It is important to notice that, in *Murphy*, the defendant's case was that (i) the deceased and others were at the scene to assault the defendant and (ii) the assault by the defendant took place as he was being assaulted. There was, however, no detail given of what happened at the material time. On these scanty averments, the defendant would have been entitled to lead evidence to establish that the deceased was killed by the plaintiff while he was attempting to defend himself, and thus persuade the court that the injuries sustained by the deceased was the consequence of his own unlawful conduct, as was done in *Cross*. By contrast in this case, the second defender has pleaded the facts on which it seeks to rely, fully and in detail. It has had the opportunity of supplementing its pleadings by producing relevant documents or affidavits, but has not done so. It is clear to me that the second defender has mustered all of the facts that it can in support of its *ex turpi causa* plea. In my opinion, it is unnecessary to go to proof for the purpose of determining whether the second defender has an *ex turpi causa* defence.

[47] In *Cross*, the *ex turpi causa* issue was very much bound up with the finding that, at the material time, the defendant was acting in self-defence. The Court of Appeal held that the claim was untenable. Beldam LJ, with whom Otton LJ agreed, said this:

"The claimant's injury in respect of which he brought his action originated and arose (oritur) from the claimant's own criminal conduct. In my view in the circumstances of this case the court ought not to countenance a claim for damages so founded." (Paragraph 78)

Judge LJ expressed this view: "I find it very hard to accept that a fair-minded cross-section of the community would conclude that Mr Kirkby had acted unlawfully." In this case, the jury found that the first defender had acted unlawfully.

[48] I reach the view that the *ex turpi causa* defence is bound to fail on a consideration of causation alone, and without reference to the "disproportion" argument advanced by Miss Maguire. In my judgment, an analysis of the cases on which she relied discloses that each was decided on what was, ultimately, the court's view on the issue of causation.

[49] As has been seen, in *Cross*, the judge at first instance found in fact that the claimant had been acting in self-defence when he struck the defendant, and Beldam LJ expressed the issue to be determined as one of causation.

[50] In *Lane*, Mr Holloway's defence failed, because his attack was "out of proportion to the occasion". To understand the significance of that finding, it is important to bear in mind that the *ex turpi causa* argument proceeded on the hypothesis that the claimant and defendant were voluntarily engaged in fighting each other when the claimant was injured. In characterising the defendant's conduct as "out of proportion", Lord Denning was distinguishing between "an ordinary fight with fists" which was unlawful, and in respect of which no cause of action could arise, and the "savage blow" which the defendant had delivered. In my judgment, the court's decision can better be seen as based on causation - the injury was caused by the defendant's savage blow - not on any balance struck between the violence offered by the plaintiff and that inflicted by the defendant.

[51] In *Revill*, Millett LJ determined the *ex turpi causa* issue by reference to the ingredients of a classic self-defence plea:

"The assailant or intruder may be met with reasonable force but no more; the use of excessive violence against him is an actionable wrong."

[52] For the foregoing reasons, I have no difficulty in holding myself satisfied on the available material that the second defender is bound to fail in its defence and that, therefore, there is nothing of relevance to be decided in a proof.

Interim Damages

[53] At the hearing on 11 July, Mr Murphy's opposition to the pursuer's motion for interim damages, should I get that far, was as to the amount sought. Miss Maguire had explained that it was intended that Mr Rennie should be discharged from hospital, and funds would be required to provide him with accommodation that is suitable for his needs. Mr Murphy responded by pointing to what he contended was the absence of evidence that it was in the interests of Mr Rennie to be discharged from hospital or that he would be discharged.

[54] By the time when the case came before me again in September, Mr Rennie had been discharged from hospital. In a report, dated 2 September 2013 (number 6/21 of process), Lynn Lodge, senior case manager with Case Management Services Ltd, expresses the view that Mr Rennie's current accommodation is unsuitable for him because it is too small and he is unable to access the bathroom. The bathroom is not adapted and is too small to be converted into a wet floor shower room. Given Mr Rennie's health care needs and his susceptibility to infection, Ms Lodge recommends that he move to more suitable accommodation, with an adapted bathroom, carer's room and space to store equipment, preferably all on one level. Mr Rennie has no access to a vehicle and Ms Lodge supports his family's wish to buy an adapted vehicle to enable him to access community resources and to go out socially, meeting friends and family. Mr Rennie is cared for by family members, with the help of the district nursing team who visit once a week. It is clear from Ms Lodge's report that the family members are finding it hard to cope, and she suggests that a case manager be appointed to liaise with the social worker, district nurses and suppliers and assist the pursuer with recruiting and training a team to help with Mr Rennie's care. The case manager would also work with the family to identify suitable accommodation and arrange for any adaptations to be carried out.

[55] I am conscious that the court has a wide discretion in determining the amount of interim damages that it might award, taking a conservative and moderate approach. (*Nisbet* v *Marley Roof Tile Co Ltd* 1988 SC 29) Mr Dunlop urged me to restrict any award to £250,000, on the view that the pursuer could return to court to seek a further award, if necessary. In my view, the figure sought by the pursuer in this application does not exceed a reasonable proportion of the damages likely to be awarded after proof.

[56] I should point out that, whilst Rule of Court 43.11 makes reference to contributory negligence as a matter relevant to the determination of an application for interim payment of damages, and although there is an averment in the defences to the effect that Mr Rennie materially contributed to his own loss, injury and damage, no submission was advanced in support of that averment, and I take it to have been department from, at least for the purposes of the interim damages argument.

Decree in absence

[57] Mr Dunlop moved me not to pronounce decree in absence against the first defender, on the view that such decree would be for the whole sum sued for, and that the second defender would be bound to indemnify the first defender to that extent. He referred me to the terms of section 151 of the Road Traffic Act 1988, and to *Gurtner* v *Circuit [1968] 2 QB 587*. I did not understand Miss Maguire to offer any opposition to Mr Dunlop's motion, and there appeared to me to be force in his submission, although the matter was not fully argued. Having regard to the terms of Rule of Court 19.1(4), however, which was not referred to during the hearing, I do not appear to have discretion to refuse a motion for decree in absence, provided that the requirements of Rule 19.1 have been met.

Decision

[58] It follows from what I have said so far that I shall grant summary decree against the second defender in favour of the pursuer, and I shall pronounce an interlocutor ordaining the second defender to make payment to the pursuer of the sum specified in the motion. In view of my reservations about whether I have discretion to refuse decree in absence in the circumstances of this case, I shall put the case out by order to give parties an opportunity to address me further on the matter. In the meantime, the second defender may be in a position to take practical steps to avoid any problem for it which may arise if I were to pronounce decree in absence.