Neutral Citation [2016] IEHC 767

THE HIGH COURT

[2013 No. 1397 P]

BETWEEN

DONNACHA SHAUGHNESSY

PLAINTIFF

AND

MARTIN NOHILLY

ALAN NOHILLY

DEFENDANTS

JUDGMENT of Mr. Justice Bernard J. Barton delivered on the 21st day of December, 2016.

1. This is an action brought by the Plaintiff against the Defendants in trespass to the person and in negligence for damages for personal injuries and loss arising as a result of an alleged assault and battery which occurred on the 15th October, 2010, at or about the Shambles, Tuam, Co. Galway.

2. A full Defence has been delivered to the Plaintiff's claim. That an incident took place on the date at or near the place in question is not in issue, however, the Defendants plead that it was they and a member of their family who were assaulted by the Plaintiff in response to which they acted in self defence and in defence of others using no more force than was reasonable. In addition, the Defendants seek to meet the claim on the grounds that the Plaintiff was guilty of negligence, including contributory negligence, and by way of defence founded on the maxim Ex *Turpi Causa Non Oritur Actio*.

Background

3. Having considered all of the evidence I am quite satisfied that the "incident", as it is described in the Defence, was an affray in which the Plaintiff, the Defendants and other individuals were involved. There was an almost complete conflict of evidence between the parties as to the circumstances as well as the reasons for and the causes of the affray, moreover, each side called into question the credibility and character of the other.

4. I had an opportunity to observe the demeanour of the parties as they gave their evidence. The accounts given by them of what, why, when and where the events in question happened were, perhaps understandably in some respects, self serving and partisan; for reasons which appear later in this judgment none of them impressed as witnesses upon whose evidence alone the Court could rely.

5. In these circumstances I consider it necessary to a full understanding of the matters in question that they are placed in context and that features of the principal events common to the parties at the centre of the proceedings should be identified.

Locus in quo

6. Circular Road bisects Vicar Street on the northwest side of which it proceeds in the shape of a horseshoe before rejoining Vicar Street. This horseshoe shaped part of Circular Road is known as the Shambles and is habitually used as a car park. A Google map of the Shambles and adjoining streets was admitted in evidence. Just outside a building in the Shambles which makes up the corner of the Circular Road where it rejoins Vicar Street is a single storey public toilet above and to the right of which, on the wall of the building, is a sign which reads "The Sportsman's Inn". It was in the vicinity of this location and close to a restaurant also located in the Shambles, and then known as Lorenzo's, that the affray commenced.

7. There are a number of shop premises located in the corner building. The first of these, which faces onto Vicar Street, is 'Aidan's Menswear' opposite to which is 'The Spice of Life'. It was in this area, shortly after the affray had ended, that the Plaintiff was found by the police lying up against a wall and unable to stand. Approximately 100 to 150 metres to the north of the Shambles there is a junction between Vicar Street and the Dublin Road; a Supermac's restaurant occupies the northeast corner.

8. Traffic proceeding along Vicar Street turning right onto and continuing along the Dublin Road may in due course turn right onto Circular Road the eastern exit of which intersects with Vicar Street before going on to form the Shambles as previously described. This route was referred to in evidence as "going around the block".

9. Tuam railway station (now disused) is located some distance down Vicar Street south of the Shambles. Shortly after 5.30 pm on the evening of the affray the Plaintiff and some friends went to a carnival which was being held on grounds adjacent to the old railway buildings. The group left the carnival around 9.30 pm and walked up Vicar Street to the vicinity of Supermac's. In the course of this journey an interaction of an abusive nature occurred between some members of the group and Prionsias McComiskey when a car driven by his then girlfriend Charlene Nohilly, in which he was a passenger, drove past. Prionsias McComiskey and some of the group were shortly afterwards to become involved in the affray. Whether the Plaintiff and other members of this group or Prionsias McComiskey initiated what developed into the affray is one of the questions in issue.

10. Finally, it was agreed between the parties that:

(i) the distance from the Defendants' home in Cummer to the 'Shambles' is 9.5 km;

(ii) the road passes through an area known as the 'Rusheens', and,

(iii) the distance from the 'Rusheens' to the 'Shambles' is 6 km.

Dramatis Personae

The Defendants:

11. The first Defendant is a farmer and car dismantler who resides on a family farm at Cummer, Co. Galway. Himself, his wife, their daughter Charlene and their son Alan, the second Defendant, live in a farmhouse on the lands adjacent to which is another dwelling

occupied by another son of the first Defendant, Martin Nohilly Junior. It was suggested in the course of the Trial that he too was present and participated in the affray but I am not satisfied on the evidence that this was so.

12. Both Defendants were charged with serious criminal offences arising from the affray. Their trial on those charges, which took place in early 2012, collapsed; a new trial, which has since been listed from time to time, has yet to take place.

13. The first Defendant was convicted of a criminal offence in 1999. He appealed and was given a suspended sentence. The second Defendant is also facing other criminal charges, unrelated to those arising from the affray, which he denies. Neither of the Defendants called the Gardaí for assistance at the time of the affray or reported it afterwards nor did either subsequently seek to have the Plaintiff held criminally or civilly responsible for the actions alleged against him in the Defence delivered in these proceedings.

The Plaintiff
14. The Plaintiff was born on 16th September, 1991, and resides at 11 Black Acre, Tuam, Co. Galway. This is the address of the family home where he resides with his parents. The medical notes and records discovered by the Plaintiff and introduced into evidence establish that he has a propensity to exhibit violent behaviour, particularly under the influence of alcohol; in this regard entries for 1st January, 2012, 21st June, 2014, and 24th February, 2015, refer. The Plaintiff accepted that he had on one occasion been placed on a juvenile liaison scheme and that he had also been the subject matter of a public order offence in early 2014.

15. In relation to his propensity to violence the Defendants called Darren Keogh as a witness. He gave evidence that on the 15th August 2016, he had been struck by the Plaintiff on the side of his head with a bottle as a result of which he sustained injuries including a laceration which had bled profusely.

16. As to that his evidence was that he had made a complaint to the Gardaí some two months prior to the trial in these proceedings. However, it transpired that the Plaintiff has never been approached by the Gardaí in connection the complaint. Moreover, and notwithstanding his injuries, he accepted that he had yet to attend a doctor in respect of those. Furthermore, it also transpired that he had been asked by the second Defendant, whom he knew, to give evidence on behalf of the Defence. His explanation for a conversation with the second Defendant about the Plaintiff and the alleged assault was less than convincing and having had an opportunity to observe his demeanour while he gave his evidence I am not at all satisfied that he is a reliable witness.

17. In the course of the Plaintiff's cross examination he was asked whether he knew an individual by the name of Newell and whether or not he had invited him to fight for money. The Plaintiff denied that he knew such a person and rejected the suggestion that he had issued an invitation to fight for money.

18. Mr. Newell was called as a witness on behalf of the Defendants. He gave evidence that following a hurling match on 22nd August, 2016, he had been spat at by the Plaintiff and that on 28th August, he had invited the witness to fight him for money.

19. A page from Mr. Newell's Facebook account, dated 28th August, 2016, was subsequently admitted in evidence. The page contained two entries under the Plaintiff's name each of which was accompanied by a photographic image of the Plaintiff; the second of these entries stated "I hear ur a good fighter will u fight for a few quid". I accept that evidence.

20. During the course of the trial two heavily set individuals came into Court and occupied two front row seats on the side of the Courtroom facing the Plaintiff; they were plainly visible to him and to the Court. The Plaintiff instructed his counsel, Mr. Madden, S.C., that he considered the presence of these individuals was designed to intimidate him. When Mr. Madden brought this matter to the attention of the Court and explained the reasons why he was doing so the individuals concerned immediately got up and left.

21. While recognising that the presence and departure of these individuals could have been entirely innocent and co-incidental, this event occurred during a fiercely fought and controversial case where the parties called into question the credibility and character of the other thus making it more likely an event capable of bearing the sinister purpose suggested by Counsel.

The significance of these distances is relevant to the determination of some of the questions in issue.

The 'Hood Rats'
22. Shortly after the affray ended the Gardaí attended at the Shambles and Vicar Street. Garda Costello was one of the investigating officers. He gave evidence, which the Court accepts, that the 'Hood Rats' were a gang of older teenagers in Tuam who regularly engaged in disorderly conduct which sometimes involved attacks on people at random and late at night. In his opinion any teenager in Tuam aged 18 or 19 at the time would have known about this particular gang; the name "Hood Rats" applied to the gang because its members all wore hoodie sweatshirts, often with the hoods drawn up over their heads.

23. The Plaintiff denied that he knew of or was a member of the 'Hood Rats'. While I reject as highly unlikely his evidence that he did not know of the gang and although there was evidence on behalf of the Defence that several of those involved in the affray identified themselves as 'Hood Rats', I am not satisfied that the evidence supports a conclusion that the Plaintiff was actually a member of the gang.

Charlene Nohilly
24. Charlene Nohilly was born on the 7th October, 1993. She is the daughter of the first and the sister of the second Defendant. In October, 2010 she was living in the family home. She left school at sixteen and embarked on an agricultural college course in Mount Bellow; the course generally required her to work at home on the family farm. She was unhappy at school and had been the victim of bullying. On her evidence she had had a texting relationship with an individual identified as Alfie O'Mahony.

25. That relationship had a totally unsavoury ending; subsequently both he and others subjected Charlene Nohilly to threatening behaviour which caused her distress and upset; she lost weight became depressed and had to seek treatment from her GP. The effects of the abusive and bullying behaviour caused her parents and her brothers to become particularly protective towards her. A number of stratagems were employed to reduce or avoid unwelcome contact. One of these involved changing the sim card on her mobile; another was to avoid socialising in Tuam. I was impressed by the evidence which Charlene Nohilly gave in regard to these matters and having had an opportunity to observe her demeanour as she did so I am satisfied that it is truthful evidence and may be relied upon by the Court.

26. Against this background the Plaintiff fairly accepted the proposition put to him that if she was being attacked or was under threat that it would have been understandable that the Defendants, her father and brother, would come to her aid. For reasons which follow later I am satisfied that this was the most likely explanation for the arrival and participation of the Defendants in the affray.

Proinsias McComiskey
27. Proinsias McComiskey was born on the 11th May, 1990. A few months prior to 15th October, 2010, he had become involved in a relationship with Charlene Nohilly. He and Charlene had got on well together and they remained friends until approximately two months after the events giving rise to these proceedings when he emigrated ultimately settling in New Zealand.

28. He emigrated because he was unable to find employment as a construction worker when the construction industry collapsed following the global financial crisis. He did not make a complaint against the Plaintiff or anyone else involved in the affray nor did he give evidence at the trial, however, he was interviewed by the Gardaí in connection with complaints made by the Plaintiff, Eanna Donnellan, and Paul Cahill on foot of which the Defendants where charged with certain offences pursuant to the Criminal Justice Public Order Act 1994 and the Non-Fatal Offences Against the Person Act 1997.

29. Notes which were taken by the Gardaí in the course of their interview with Prionsias McComiskey were admitted in evidence. The interview took place on the 16th November, 2010; significantly, in my view, he was still in a relationship with Charlene Nohilly at that time and so remained until he emigrated.

30. Evidence was given that the Nohilly's were hostile towards Alfie O'Mahoney because of the effects which his behaviour, including the threats made by him, had had on Charlene Nohilly and that this was known to Prionsias McComiskey, Eanna Donnellan, the Plaintiff and others. The Plaintiff accepted that he and Alfie O'Mahony were friends and had been in one another's company on the evening of the affray.

Eanna Donnellan
31. He was a friend of the Plaintiff, was centrally involved in the affray and was interviewed by the Gardaí. A statement of the evidence to be giving by him in the criminal proceedings was introduced into evidence during the cross examination of the Plaintiff. Although he was called to the witness box, another witness was then interposed; he was not subsequently called to give evidence. In these circumstances the Defendants invited the Court to draw an adverse inference, namely, that he would not have corroborated the evidence given by the Plaintiff.

Garda Ian Kelly
32. Garda Ian Kelly was accompanied by Garda Declan Costello to the scene shortly after the end of the affray. A statement of the evidence to be given by him in the criminal proceedings was admitted in evidence although the Plaintiff had asserted that he had previously given false evidence about the Defendants. He was not called as a witness in this case.

33. In the course of these proceedings I made an order directing the production of telephone records relating to calls made or purported to have been made by Charlene Nohilly to the first Defendant on the 15th October, 2010. The Plaintiff's solicitors had sought the same records on foot of a letter dated 23rd July, 2012, a date after the collapse of the first trial and before the retrial was first listed. That request proved fruitless. Vodafone declined to furnish any records without a Court order. By the time the Order was made it transpired that the records of calls on the date in question had long since been disposed of.

The Plaintiff's Case
34. Having worked out in a gym the Plaintiff met up with a few friends in a park at approximately 5 pm. There were eight or nine people in the group which included Paul Cahill, Donnellan, Niall Quinn and Alfie O'Mahoney. On his evidence Plaintiff had consumed two or three cans of cider before he and the group moved on to the carnival which was being held in the grounds near the old railway buildings. Between 9.30 pm and 10 pm the Plaintiff and some of his friends, including Eanna Donnellan, Niall Quinn and Paul Cahill, left the carnival and walked the whole way up Vicar Street to Supermac's where Paul Cahill met his girlfriend. On the way up Vicar Street a car owned by Charlene Nohilly and driven by Proinsias McComiskey passed them; as it did so he shouted something abusive and drove on. (The Plaintiff subsequently accepted that he may have been mistaken about the identity of the driver).

35. The Plaintiff and Eanna Donnellan walked back down Vicar Street from the direction of Supermac's to Lorenzo's take away in the Shambles. Just as they turned into the Shambles, and were passing the public toilet, Proinsias McComiskey jumped out of Charlene Nohilly's car and attacked them. The Plaintiff says that he was struck a number of blows to the head with a baton by Proinsias McComiskey and that as he attempted to get away by running into Vicar Street he was knocked to the ground by the first Defendant in the vicinity of 'Aiden's Menswear'.

36. He tried to get up but was knocked across the street; altogether he was hit five or six times by the first Defendant with a bat to the right hand side of his body including to his right knee which he described as the worst blow following which he was beaten by the second Defendant with a hurley. At that stage a girl who had been with him earlier in the evening came down the road and stood in the way of the attack. The Gardaí were called and he was subsequently brought to hospital where he was admitted.

37. The Plaintiff did not know Charlene Nohilly personally but he had seen her walking around town with Alfie O'Mahoney some months prior to the affray. Whilst he had heard of the Defendants he didn't know them personally but was aware of talk around the town that they were intent on beating up his friend Alfie O'Mahoney. As far as the Plaintiff was concerned he had no personal dealings with nor did he know why Proinsias McComiskey and the Nohillys would want to attack him other than because he was friendly with Alfie O'Mahony a former boyfriend of Charlene Nohilly. The attack was unprovoked.

The Defendant's case
38. The Defendant's case is that at around 10 pm Charlene Nohilly and Proinsias McComiskey left the Nohilly household to go into Tuam to get a large number of takeaway meals for the family. This involved ordering and collecting meals from Supermac's and from Lorenzo's in the Shambles. A group of seven or eight people, including the Plaintiff and Eanna Donnellan, shouted abuse at them when they attempted to come and collect the takeaway from Supermac's. Eanna Donnellan threw something at the car. Charlene Nohilly drove on and phoned her father giving him an account of what had occurred. He told her to forget about collecting the takeaway from Supermac's and to go and get the takeaway from Lorenzos. He told her that he would come in and collect the takeaway from Supermac's. She did as she was asked and drove around the block into the Shambles where she parked near Lorenzos.

39. She had just come to a stop when the Plaintiff and Eanna Donnellan came around the corner from Vicar Street. They came over to the passenger side of her car and called on Proinsias McComiskey to get out. Although she begged him to stay where he was, he got out when the door of the car was kicked by the assailants. This behaviour frightened Charlene Nohilly who once again phoned her father. At that stage the Defendants were passing the 'Rusheens' on their way into Tuam.

40. Charlene Nohilly gave her father an account of what was happening; she was in a distressed state and begged him to come quickly. When the Defendants arrived at the scene Charlene Nohilly, who by then had also become involved in the affray, had been pulled by her hair to the ground by the Plaintiff; there were also a number of individuals fighting with Prionsias McComiskey. The

second Defendant went to break up the fight; he struck a number of individuals with his fists.

41. The first Defendant went to the assistance of his daughter and in the process pulled one of the assailants away by grabbing his jumper at the back. He also grabbed a number of individuals to stop them getting involved in the fight. Neither of the Defendants had weapons of any sort nor did either of them strike the Plaintiff with a weapon. In so far as they were physically involved in a physical way that was in defence of themselves, their daughter and her boyfriend. The Plaintiff and Eanna Donnellan were joined by others who also started to fight with Prionsias McComiskey and the Defendants; some of these individuals identified themselves as 'Hood Rats.

42. The most serious injury sustained by the Plaintiff was a dislocated fracture of his right knee. The Defendants contend that this was most likely inflicted by Proinsias McComiskey. He struck the Plaintiff all over his body with a bat whereas the Defendants were unarmed and could not possibly be responsible for that injury in particular.

43. Significantly, in my view, it was not suggested that any individuals, apart from the Defendants and Prionsias McComiskey, were involved in fighting with or were responsible for striking the Plaintiff. In a broad sense the cases made by the parties involve two scenarios which are that:

(i) The Plaintiff and others were the subject of an intended and concerted but unprovoked attack by the Defendants and Prionsias McComiskey; or

(ii) Prionsias McComiskey and Charlene Nohilly were attacked by the Plaintiff and others which in turn provoked a response by Prionsias McComiskey and Defendants which involved the defence of themselves and Charlene Nohilly.

Events common to the parties; corroborative and circumstantial evidence
44. Although there was a complete conflict between the parties concerning as well as the reasons for and the initiation of the affray, many features of the events were common to both cases in addition to which there was corroborative and circumstantial evidence which was of assistance to the Court in reaching a determination on the issues and which maybe summarised as follows.

45. Garda Declan Costello and Garda Ian Kelly attended at the scene shortly after the affray. They found the Plaintiff lying up against a wall on Vicar Street near the premises 'Spice of Life'. He had a very severe injury to his right knee. It appeared to Garda Kelly that the Plaintiff had suffered a dislocation of the kneecap as a result of which he was unable to stand.

46. Although he had been hit a number of times whilst he was in the Shambles as a result of which he had fallen to the ground, the Plaintiff's evidence was that he was able to get up and that having done so he had been able to run from the Shambles into Vicar Street to try to get away from his attackers. He made it to 'Aidan's Menswear' where he was hit by the first Defendant with a bat, was knocked across the Street and once again fell to the ground where the second Defendant hit him a number of times with a hurley.

47. Following the affray the Plaintiff was taken to hospital where he was admitted under the care of Mr. Ken Karr, Consultant Orthopaedic Surgeon. Mr. Karr prepared medical reports which were admitted and he also gave evidence at the trial. The most serious injury was a displaced fracture of the right patella which necessitated surgical treatment. An open reduction and internal fixation was carried out by Mr. Karr on the 16th October, 2010.

Conclusion as to where the Plaintiff sustained his injuries
48. Having due regard to the medical evidence I am satisfied that whatever injuries the Plaintiff sustained as a result of blows delivered by Proinsias McComiskey they did not include a fracture of the right patella. If the Plaintiff had sustained a displaced fracture of his right patella at that stage it is, in my view, highly improbable that he would have been able to get up and run from the Shambles into Vicar Street where he was found by the Gardaí disabled to the point of being unable to stand. The undisputed evidence of the Gardaí concerning the Plaintiff's inability to stand when they found him in Vicar Street is explained by the medical evidence.

49. On the medical evidence and the evidence of the Gardaí, which I accept, it is highly likely that the blow or blows which resulted in a displaced fracture of the Plaintiff's right patella occurred while he was in Vicar Street, moreover, I am satisfied that the nature of that injury is consistent with a heavy blow or blows from an instrument such as a piece of timber, a bat or a hurley.

50. On his evidence, apart from pulling one or two individuals away from his daughter and preventing anyone else from getting at her, the first Defendant had no involvement in the affray at all. The second Defendant accepts that he was involved in the affray and exchanged blows with a number of individuals; he accepts that he may have kicked the Plaintiff in the back when he was on the ground. On their evidence neither Defendant was armed nor did either follow the Plaintiff into Vicar Street. I cannot accept that evidence. It is significant that although there was Defence evidence that other individuals, some of whom identified themselves as 'Hood Rats, joined the affray there was no evidence that anyone other than the Defendants and Prionsias McComiskey were involved in an altercation with the Plaintiff nor was it suggested that anyone else was responsible for his injuries.

Reasons for and Initiation of the Affray
51. A feature of the events leading up to the affray which is common to the case on both sides is the occurrence of an interaction which arose when Charlene Nohilly drove her car past a group of individuals which included the Plaintiff, Eanna Donnellan and Alfie O'Mahony .

52. According to the notes of the Garda interview with Prionsias McComiskey, when he and Charlene Nohilly drove past the group to go to Supermac's, Donnellan called him out and proceeded to throw something at the car, possibly a coin or a stone. Charlene Nohilly told the Gardaí that as she drove past members of the group started roaring and that Alfie O'Mahoney spat at the car.

53. The Plaintiff and Eanna Donnellan made statements in which they say that as the car drove past Prionsias McComiskey stuck his head out of the window and shouted something abusive at them. Whichever version is correct, whoever was responsible and whatever was said it is clear that an antagonistic interaction occurred as the car drove by the group.

Place where the affray commenced
54. Another feature of the events involved in the affray common to the evidence given on both sides concerns the positioning of the Plaintiff, Eanna Donnellan and Prionsias McComiskey at the passenger side of Charlene Nohilly's car.

55. The Plaintiff's evidence was that Prionsias McComiskey jumped out of the car with a pale coloured baton with which he was struck a number of blows as a result of which he fell to the ground near the passenger side door of the car.

56. In his statement Eanna Donnellan says that he witnessed this attack and responded by slamming the passenger door against Prionsias McComiskey in attempt to stop him hitting the Plaintiff.

57. Prionsias McComiskey's interview notes contain a description of what happened. He told the Gardaí that as he opened the door of the car Eanna Donnellan and another person who was with him (most likely the Plaintiff) started kicking the door in on him. This account partly corroborates what is contained in Eanna Donnellan's statement. However, there was evidence that the door was damaged externally and was subsequently repaired by a Mr. Sean Walsh of Cruaghwell, County Galway, at the cost of €450. That the door was forced against Prionsias McComiskey in one way or the other is also a feature common to both sides; whether by reason of the door being slammed or being kicked is, however, in issue.

Reason for the attack
58. The explanation proffered by the Plaintiff as to why he thought he had been attacked by Prionsias McComiskey and the Defendants was that he had been hanging around with Alfie O'Mahony, the former boyfriend of Charlene Nohilly. The attack on him was unprovoked and what the Defendants told the Gardaí and had pleaded in their Defence was a concoction.

59. There was a suggestion made on his behalf that a trap had been set for him by the Defendants and Prionsias McComiskey because they considered him and others, including Alfie O'Mahony, to be responsible for the effects which the threatening behaviour had had on Charlene Nohilly. The suggestion that a trap had been laid was hotly disputed. However, of some significance is the answer given by Prionsias McComiskey to the Gardaí when asked as to why he thought he had been attacked. He thought it was because he was going out with Alfie O'Mahony's former girlfriend, Charlene Nohilly.

60. The previous relationship between Charlene Nohilly and Alfie O'Mahony, whom the Plaintiff admits was a friend who had been in his company that evening and the relationship between Charlene Nohilly and McComiskey extant at the time of the affray is another feature common to the explanations offered. On either explanation the previous relationship with Alfie O'Mahony, the consequences for Charlene Nohilly of the abusive behaviour which followed when it ended and her ongoing relationship with Prionsias McComiskey at the time is central to the reason for the occurrence of the affray.

61. Contrary to the suggestion that the Defendants had set a trap for the Plaintiff their evidence was that they responded to a plea for help and had gone to the defence of Charlene Nohilly and in the circumstances that they encountered her boyfriend who was being attacked.

Conclusions
62. Insofar as it was suggested that the initial reason for the first Defendant's journey into town was to collect takeaways from the Supermac's I consider that to be unlikely. The second Defendant gave evidence that after the first telephone call the first Defendant came out into the yard and asked him to come quickly. He did so and jumped into the first Defendant's car where he was given an account of what had happened when his sister had driven past the group.

63. His understanding of the account was that something had been thrown at his sister's car and that she had been hit. I consider the presence of the second Defendant in the first Defendant's car to be much more consistent with a response to the account which was given to him than with a journey for the purposes of collecting a takeaway from Supermac's.

64. As stated earlier I was impressed with the forthright manner in which Charlene Nohilly gave her evidence; I am satisfied that the consequences which flowed from the ending of her relationship such as it was with Alfie O'Mahoney and the subsequent threatening behaviour to which she was subjected ultimately necessitated medical treatment and resulted in her family becoming very protective of her; strategies were developed to shield her from unwelcome communications including withdrawal from socialising in Tuam and changing sim cards on her mobile phone.

65. The fact that she had been subjected to abusive behaviour from Alfie O'Mahoney and others and that she was going out with Prionsias McComiskey, is, on my view of the evidence, a much more likely explanation for the interaction which occurred as she drove past the group on her way to Supermac's and for the initiation of the affray in the Shambles rather than the explanation offered by the Plaintiff that he was the victim of an unprovoked attack by Prionsias McComiskey and the Defendants because he was hanging around with Alfie O'Mahoney.

66. There were a number of inconsistencies between the evidence given by the Plaintiff and the statement of his evidence given for the purposes of the criminal proceedings. His answers to questions concerning his medical history arising from his medical notes and records, which had been admitted, were less than convincing.

67. The Plaintiff had a subsequent accident in December, 2010 as a result of which he again fractured his right knee. He gave an account of that accident in evidence which was different to the account recorded in the notes but which when put to him he accepted as being correct, namely that he had fallen when his father had pushed him in a temper. However, he was not prepared to admit the accuracy of a hospital note made the day after the affray to the effect that he had consumed five pints. His evidence was that he had consumed two or three drinks at most. His explanation for the entry was that the nurse must have been tired or had made a mistake.

68. The Plaintiff rejected any suggestion that he'd been party to an invitation to fight Mr. Newell for money or that he knew Mr. Newell. At the end of the trial Mr. Newell's facebook page was admitted in evidence. This corroborated Mr. Newell's evidence that there had been a communication between them involving an invitation to fight for money. The entry is dated the 28th August, 2016.

69. I accept the evidence of Charlene Nohilly that the affray was initiated by the Plaintiff and Eanna Donnellan when they entered the Shambles and came over to her car. I reject as unlikely the evidence of the Plaintiff that the affray commenced when Prionsias McComiskey jumped out of Charlene Nohilly's car, bat in hand, and engaged in an unprovoked attack.

70. I am satisfied, on the balance of probabilities, that the affray commenced when the Plaintiff and Eanna Donnellan came over to Charlene Nohilly's car, called on Prionsias McComiskey to get out and that in the process the passenger door was kicked causing damage that was subsequently repaired. On the evidence this is more likely and consistent with damage repair than with the door being slammed by Donnellan in on Prionsias McComiskey to stop the Plaintiff being struck.

71. That Prionsias McComiskey grabbed what has variously been described as a piece of timber or a baton as he was getting out of the car and that he used this to defend himself against the blows of Eanna Donnellan and the Plaintiff and that he struck the Plaintiff in the process causing him to fall to the ground is not in question. I am also satisfied on the evidence that what happened next was that the Plaintiff having had enough of the altercation proceeded to run out of the Shambles into Vicar Street.

72. There was conflicting evidence as to the period of time involved between the beginning and the end of the affray with estimates ranging from less than a minute to half an hour.

73. The significance of the time involved is that if the affray started and finished within a few minutes it would have been a physical impossibility for the Defendants to drive from the 'Rusheens' into the Shambles within that time. The first Defendant owns and was driving a turbo charged Lexus. If the Defendants received a telephone call from Charlene Nohilly in a distressed state asking for their help while they were passing the 'Rusheens' it is highly likely that the vehicle would have been driven, and I am satisfied was driven, at speed and that they would have been able to travel the six km involved within 10 minutes depending on traffic and traffic lights.

74. I accept Charlene Nohilly's evidence that she made a telephone call to her father and that she gave an account of what had happened when she had driven past the group on her way to Supermac's; it is highly likely that there would have been and the Court finds that there was an immediate response by the Defendants who drove into town.

75. It would have taken a few minutes for Charlene Nohilly to drive from the vicinity of Supermac's around the block and back into the Shambles during which time the Defendants had left their home some 9.5 km distant. When the exchange of blows commenced and Prionsias McComiskey got out of the car, Charlene Nohilly phoned her father. I find that when she made that call the Defendants were already passing the 'Rusheens.

76. On the Plaintiff's evidence, having been involved in the affray from the outset, it was not until he ran away into Vicar Street that he first encountered the Defendants. In my view, the delayed arrival and subsequent involvement of the Defendants in the affray is consistent with the time it would have taken them to travel from the 'Rusheens' to the Shambles.

77. On their evidence the Defendants abandoned the car at the entrance to the Shambles in a way which ultimately caused traffic to back up. That action is more likely consistent with a father and son answering the distress calls for help from Charlene Nohilly than with a carefully conceived plan to set a trap for the 'Hood Rats' or anyone else associated with them.

78. The question remains as to whether the Defendants were involved in what amounted to a vicious beating of the Plaintiff as he sought to escape from the Shambles.

79. There are a number of matters arising from the evidence given by and on behalf of the Defendants which gives rise to concern about the veracity of certain aspects of that evidence and to which I now turn.

80. The second Defendant accepted that he was involved in a physical altercation with a number of individuals in the course of the affray and that he may well have kicked a person now identified as the Plaintiff in the back. He denied that he was armed with a hurley or any other kind of weapon or that he used it to strike the Plaintiff or anyone else. I reject that evidence.

81. According to Prionsias McComiskey's interview notes he didn't see the Defendants being involved in the affray, however, he saw the second Defendant holding what he described as a stick which he described as being like the handle of a yard brush. Eanna Donnellan in his statement of evidence identified the second Defendant as being the person who hit him several times with a hurley.

82. The first Defendant told the Gardaí that the affray lasted about fifteen minutes and that some of those involved ran off towards Supermac's. One individual was described as lying on the ground up towards the exit. (from the Shambles onto Vicar Street). Their evidence was that after the affray ended they left the area and that when they got home there was no discussion about what had just happened; they had tea and had all got back to normal. I find that to be highly unlikely and do not accept that evidence. In this regard although not repeated the evidence she gave, Charlene Nohilly told the Gardaí during interview that she had spoken to her mother when she got home and that there had also been a family discussion that evening which included Prionsias McComiskey and the Defendants.

83. The first Defendant gave evidence that while he accepted Prionsias McComiskey was present at the scene, he did not see him. I don't find that credible. In the account which she gave to the investigating Gardaí, Charlene Nohilly described a number of individuals crowding in around the Defendants and hitting them. This is inconsistent with the evidence of the first Defendant that he stayed with Charlene Nohilly at the car and with the evidence of the second Defendant's that the first Defendant had no involvement in the affray.

84. In the course of his evidence the second Defendant described Prionsias McComiskey as a truthful person. Given his significant involvement in the affray and his opinion as to the truthfulness of Prionsias McComiskey and having regard to what both Prionsias McComiskey and Eanna Donnellan told the Gardaí, I reject the second Defendant's evidence that he was unarmed, moreover, I find that the stick which Prionsias McComiskey said he saw the second Defendant holding was in all likelihood a hurley which he used to strike the Plaintiff.

85. On the Defendant's evidence a number of individuals ran into Vicar Street. The Plaintiff said he ran out of the Shambles into Vicar Street in order to get away. Eanna Donnellan and Prionsias McComiskey ended up fighting in the Shambles down near Lorenzos. There was no evidence given or suggestion made by the Defendants that the Plaintiff was involved in a physical confrontation with another third party. The only evidence of a physical confrontation involving the Plaintiff is with Prionsias McComiskey and the Defendants, accordingly, and having due regard to the conclusions already reached concerning the disabling affect of the knee injury on mobility and the place where he was found by the Gardaí and the fact that Prionsias McComiskey ended up fighting with Eanna Donnellan near Lorenzo's, I am satisfied that the individuals whom the Plaintiff encountered as he ran from the Shambles were in all likelihood the Defendants.

86. I am not satisfied that the evidence of the Defendants can be relied upon, moreover, having regard to the circumstantial and corroborative evidence, the findings made and the conclusions reached, I consider it highly probable and understandable in circumstances where they were responding to calls from Charlene Nohilly, towards whom they had become very protective and whom they knew to be in a distressed state, that when the Defendants arrived at the Shambles and witnessed an affray in which they knew that she was in some way embroiled, that they were armed and that it was they who inflicted the injuries sustained by the Plaintiff in Vicar Street.

Submissions

87. Written and oral submissions were made on behalf of the parties; these have been read and considered by the Court and will not be summarised here. Suffice it to say that in so far as matters of law are concerned the case made on behalf of the Defendants comes under the following headings:

(i.) The defence of the use of force in defence of oneself or another person;

(ii.) The principle of *ex turpi causa non oritur actio*;

(iii.) The consequences in relation to the assessment of damages, if any, of the failure on the part of the Plaintiff in permitting a claim against a concurrent wrongdoer, Mr McComiskey, to become statute barred.

(iv.) The consequences of any finding that the Plaintiff's injuries were inflicted in Vicar Street rather than the Shambles, being the *locus in quo* pleaded by the Plaintiff.

(v.) The consequences of the Plaintiff's failure to call a witness to corroborate his evidence. I shall deal in the first instance with this question.

88. It was submitted by the Defendants that, in reaching a determination on the facts and resolving the conflict of evidence between the parties, the Court should draw an adverse inference from the failure on the part of the Plaintiff to call Eanna Donnellan as witness. In this regard the Defendants rely upon the decisions in *Whelan v. AIB* [2014] 2 I.R. 199 and *Bergin v. Walsh & othrs* [2015] IEHC 594. The Plaintiff submitted that the facts and circumstances of the case did not admit the drawing of such an inference.

89. The adverse inference which the Court has been invited to draw is that Eanna Donnellan, who was present throughout the events with which these proceedings are concerned, would not have given evidence corroborative of the evidence given by the Plaintiff.

90. There was some dispute in the course of oral submissions as to why Eanna Donnellan was not in fact called as a witness. There was a question raised in the course of argument at the close of the case as to whether more than one schedule of witnesses had been served by the Plaintiff and if there were several, whether one of these had not included Eanna Donnellan on foot of which an entirely understandable objection had been taken by Counsel for the Defendant's to his being called to give evidence. I do not consider it necessary to resolve that matter since I am quite satisfied that a schedule did exist on which Eanna Donnellan's name appeared, moreover, I am also satisfied that he was present in Court and was called to the witness box to give evidence on behalf of the Plaintiff when another witness was interposed.

91. Eanna Donnellan's statement of the evidence to be given by him in the criminal proceedings against the Defendants was handed into the Court by the Defendants without objection during the cross examination of the Plaintiff who was then cross examined on matters contained in it.

92. In these circumstances I do not accept the submission made on behalf of the Defendants that what was relevant in determining the issue was that he was not called and in particular that no distinction was to be drawn between a situation where the witnesses was not present in Court nor called and a situation where the witness was present and was called but another witness was interposed.

93. The law on the question which arises for consideration here can be succinctly stated thus: If there is a reason to explain the absence of the witness which satisfies the Court then an adverse inference which might otherwise arise from the absence may not be drawn. See *Fyffes PLC v. DCC PLC* [2009] 2 I.R. 417 at p. 507 and *Whelan v. AIB* [2014] 2 I.R. 199.

94. In the circumstances of this case, and apart altogether from any disagreement as to whether or not Eanna Donnellan did or did not appear on a schedule of witnesses served on behalf of the Plaintiff, once his statement was introduced into evidence, handed into the Court to be read without objection and used to cross examine him, the Plaintiff is, in my view, perfectly entitled to rest on that should he so decide and so he did.

Permitting proceedings to become statute barred

95. It was submitted on behalf of the Defendants that Prionsias McComiskey was a concurrent wrongdoer against whom the Plaintiff had failed to institute proceedings either in negligence or for assault and battery within the relevant limitation periods, namely (a) two years from the accrual of the cause of action in respect of negligence and breach of duty pursuant to s. 3 of the Statute of Limitations (Amendment) Act 1991 as amended by s.7 of the Civil Liability and Courts Act 2004, and, (b) six years in the case of the accrual of the cause of action in respect of trespass to the person under s. 11 (2) (a) of the Statute of Limitations Act 1957 .

96. Having failed to institute proceeding in respect of either cause of action the Defendants submit that for the purposes of determining contributory negligence under s. 34 of the Civil Liability Act 1961,(the Civil Liability Act), the Plaintiff should be identified with and made responsible for the acts of Prionsias McComiskey pursuant to s. 35 (1) (i) of that Act.

97. The Plaintiff gave evidence that he sought to make Prionsias McComiskey civilly and criminally responsible but that had proved not to be possible because he had emigrated to New Zealand. I took it from this that no protective writ was ever issued. In any event it was submitted on behalf of the Plaintiff that Prionsias McComiskey and the Defendants were not concurrent wrongdoers and the Defendants never sought to join him as a third party.

98. Section 34 of the Civil Liability Act, provides for the apportionment of liability in the case of contributory negligence. Section 35 (1) (i) provides for the purposes of determining contributory negligence that

> *"where the plaintiff's damage was caused by concurrent wrongdoers and the plaintiff's claim against one wrongdoer has become barred by the Statute of Limitations or any other limitation enactment, the plaintiff shall be deemed to be responsible for the acts of such wrongdoer;"*

99. Chapter 1 of the Civil Liability Act provides for the liability of concurrent wrongdoers. Section 11 (1) defines persons who are concurrent wrongdoers:

> *"(1) For the purpose of this Part, two or more persons are concurrent wrongdoers when both or all are wrongdoers and are responsible to a third person (in this Part called the injured person or the plaintiff) for the same damage, whether or not judgment has been recovered against some or all of them.*
>
> *(2) Without prejudice to the generality of subsection (1) of this section—*
>
> *(a) persons may become concurrent wrongdoers as a result of vicarious liability of one for another, breach of joint duty, conspiracy, concerted action to a common end or independent acts causing the same damage;*

(b) the wrong on the part of one or both may be a tort, breach of contract or breach of trust, or any combination of them;

(c) it is immaterial whether the acts constituting concurrent wrongs are contemporaneous or successive.

100. It is apparent on the face of the provision that it is an essential requirement for the purposes of s. 35 (1) (i) that the damage suffered by the plaintiff "…*was caused by concurrent wrongdoers…"*.

101. There can be no doubt on the evidence but that the Plaintiff was struck several times by Mr. Prionsias McComiskey with a piece of timber shortly after the initiation of the affray. In her interview notes with the Gardaí Charlene Nohilly described Prionsias McComiskey knocking the Plaintiff to the ground and hitting him forcibly five or six times with a piece of timber from the stomach downwards.

102. The Plaintiff told the gardaí that he had been hit a number of blows to the head as a result of which he fell to the ground and that at that stage he sustained a number of blows to his right side, on his back, legs and on the back of his head. Prionsias McComiskey told the Gardaí he had hit the Plaintiff at shoulder level. The Plaintiff confirmed in evidence that he feared for his life and that having got up he ran from the Shambles into Vicar Street. That the Plaintiff sustained injuries to his shoulder, back, legs and the back of his head is not in question on these descriptions of what happened to him in so far as they concern the actions of Proinsias McComiskey. The question, however, is whether these injuries and the injuries which he sustained at the hands of the Defendants in Vicar Street constitute "…*the same damage*…"

103. In circumstances where the damage may have been caused by the acts of any one of several wrongdoers or as a result of a combination of wrongdoers where it is possible that each act whether simultaneous or successive could have caused the same damage, even if to a different degree, then the tortfeasors are concurrent wrongdoers. See *Lindsay v. Finnerty, Kelly & the MIBI* [2011] IEHC 403.

104. Subject to the provisions of ss. 14, 38 and 46, s. 12 of the Civil Liability Act provides that concurrent wrongdoers are each liable for the whole of the damage in respect of which they are concurrent wrongdoers.

105. Where the acts or omissions of two or more tortfeasors cause independent and different damage each is liable solely for the damage caused by that tortfeasor. The decision in *McCarron v. O'Brien and Bradley and McCarron v. MIBI* (Unreported, High Court, Butler J., 7th November, 2001), which is known to the Court, illustrates the point. The plaintiff was a cyclist hit by a car driven by the first Defendant on a dark country road. Minutes later, having regained his feet, the Plaintiff was hit by another car the driver of which remained unidentified and untraced. As a result of that collision the Plaintiff was thrown across the road and ended up lying on the opposite carriageway where he was struck by a motor car driven by third Defendant. The Plaintiff suffered multiple very serious identifiable and different injuries as a result of each collision. Butler J. held that the drivers were not concurrent wrongdoers and apportioned damages in respect of the injuries and loss attributable as a matter of probability to each driver.

106. Where independent items of damage of the same kind are caused by two or more wrongdoers who are not concurrent wrongdoers, and therefore not liable for the whole of the damage suffered by the Plaintiff, the extent of the liability of each for the damage caused maybe apportioned to the wrongdoer concerned . Section 12 (2) of the Civil Liability Act provides: *"Where the actions of two or more persons who are not concurrent wrongdoers cause independent items of damage of the same kind to a third person or one of their number, the court may apportion liability between such persons in such manner as may be justified by the probabilities of the case, or where the plaintiff is at fault may similarly reduce his damages; and if the proper proportions cannot be determined the damages may be apportioned or divided equally."*

Conclusion
107. Having found that the Plaintiff was able to get up and run from the Shambles into Vicar Street notwithstanding the blows delivered by Prionsias McComiskey and that it was a result of a blow or blows delivered by one or other or both of the Defendants in Vicar Street which resulted in the most serious of the Plaintiff's injuries, a displaced fracture of the right patella, the Court finds that Prionsias McComiskey and the Defendants are not concurrent wrongdoers in respect of that injury.

108. As to the remainder of the injuries, given the nature and location of the blows to his body I am satisfied that a combination or anyone of the several blows delivered by Prionsias McComiskey and the Defendants caused those injuries. Having regard to the provisions of s. 11 (2) (a) and (c) of the Civil Liability Act I am satisfied that the Defendants were involved in a concerted action to a common end and that it is immaterial for present purposes that the blows delivered by them succeeded those delivered by Prionsias McComiskey, accordingly, in respect of those injuries the Court finds that Prionsias McComiskey and the Defendants are concurrent wrongdoers.

Apportionment
109. Having regard to the descriptions of the beating of the Plaintiff by Prionsias McComiskey and the Defendants and to the medical evidence so far as it goes in connection with the injuries in respect of which they are concurrent wrongdoers, the Court considers it appropriate in the circumstances that responsibility should be apportioned equally between them.

Identity
110. It follows from the forgoing and having regard to the fact that the Plaintiff's causes of action against Prionsias McComiskey for the injuries and loss in respect of which he is a concurrent wrongdoer have become statute barred, that for the purposes of these proceedings the Court deems the Plaintiff responsible for and is to be identified with the actions of Prionsias McComiskey under s. 35 (1) (i) of the Act.

Assault and Battery; self defence and defence of another
111. Counsel on behalf of the Defendants, Mr. Kiely S.C. submitted that with regard to the defence of self defence and the defence of others that the Defendants did no more than was permitted by law in the circumstances of the case the circumstances being those where a father went to the aid of his daughter and a brother to the aid of his sister whom both knew was in some way embroiled in a violent physical attack on her boyfriend and as a result of which she was in a frightened and desperate state.

112. It was submitted on behalf of the Plaintiff that the amount of force used by the Defendants in responding to the situation was disproportionate and excessive and went far beyond what was permissible. Prionsias McComiskey and the Defendants were armed with implements which they used with excessive force to beat unarmed individuals including the Plaintiff.

113. Commenting on the defence in *Dullaghan v. Hillen* [1957] I.R. Jur. Rep 10 His Honour Judge Fawsitt stated:

> *"When one is wrongfully assaulted it is lawful to repel force by force, provided that no unnecessary violence is used. How much force and what kind is reasonable and proper to use, in the circumstances, is a question of fact. Resistance must not exceed the bounds of mere defence and prevention or…the force used in defence must be not more than commensurate with that which provoked it."*

114. The adage that each case must be decided on its own facts and circumstances is particularly apposite in an action involving assault and battery. It was submitted on behalf of the Defendants that where there is a risk of serious personal violence considerable force may be used by a person in defence of himself or another provided that the actions taken do not constitute reckless disregard for the safety of the assailant. See *Ross v. Curtis* (Unreported, High Court, Barr J., 3rd February, 1989).

115. It was also submitted that in considering the defence of self defence the defendant's state of mind was relevant. In all the circumstances given the situation which confronted the Defendants at the time of the actions taken by them which they honestly thought to be necessary in the anguish of the moment the question or test was whether the Defendants believed on reasonable grounds that it was necessary in self defence to do what they did. See *New South Wales v. McMaster* [2016] 328 ALR 309 and *Cross v. Kirk*by [2000] EWCA Civ. 426.

116. Whatever about the actions of Prionsias McComiskey who used a baton to defend himself when he was attacked by Eanna Donnellan and the Plaintiff, I am satisfied that by the time the Plaintiff encountered the Defendants in Vicar Street he was fleeing the affray in the Shambles and was no longer a threat to Charlene Nohilly or to Prionsias McComiskey. He was at all times unarmed and I am satisfied that by the time he entered Vicar Street that the Defendants were not under threat of attack from him or otherwise in a position where it was necessary to defend themselves. Whatever occurred or might be said about the affray or any involvement in it which occurred around the car in the Shambles, the actions of the Defendants in Vicar Street could not have been grounded on nor could they have held a reasonable belief in the heat of the moment that what they did there was necessary either in defence of themselves or others including Charlene Nohilly and Prionsias McComiskey.

Conclusion
117. I accept the submissions made by the Plaintiff that even if it could be said that it was employed in self defence, the force used in the circumstances, involving as it the Defendants striking the unarmed Plaintiff with weapons, was both disproportionate and excessive. In my judgment the events which happened in Vicar Street were more consistent with an act of retribution than with self defence or defence of others and constituted an assault and battery.

Consequences of a finding that the Assault and Battery occurred in Vicar Street
118. The case pleaded by the Plaintiff was that the assault and battery occurred "…at or about the Shambles, Tuam, County Galway." Having given evidence and sworn an affidavit of verification in the course of the proceedings it was submitted on behalf of the Defendants that the Plaintiff was confined by this pleading to the events which occurred in the Shambles. The consequences of a finding by the Court that the events in respect of which he brings these proceedings occurred in Vicar Street were, it was argued, that those events were extraneous to the case pleaded and on foot of which the Plaintiff could not recover against the Defendants. Had the Plaintiff wanted to make a case against the Defendants arising out of events in Vicar Street then it was necessary that such be expressly pleaded. The Plaintiff argued that there was no merit in the submission and that the description of the locus in the pleadings was sufficiently wide to include Vicar Street as it was in the immediate vicinity of the Shambles.

119. When used in conjunction with all manner of identified topographical features premises and places the phrase "at or about" or "in or about" means the immediate location as well as the vicinity of the feature, premises or place. That the vicinity of an identified place or dwelling house could be an extensive area see *Re: Labron* (29 S.J. 147) where Kay J. held that a residuary bequest of personal property "in or about" a dwelling house included personal property on the 40 acres of land in the vicinity of the house.

Conclusion
120. I accept the submission of the Plaintiff and find that the use of the phrase "at or about" in conjunction with the Shambles, Tuam, County Galway, includes property or places in the vicinity of the Shambles and therefore sufficient to encompass within the proceedings the events which occurred in Vicar Street.

Ex turpi causa non oritur actio
121. Under the old common law it was a defence to an action for damages if the cause of action was founded upon an immoral or illegal act of the Plaintiff. In *Holman v. Johnson* (1775) 1 COWP. 341 Lord Mansfield commenting on the defence stated "*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 then 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."* See also *Wasson v. Chief Constable, Royal Ulster Constabulary* [1987] N.I. 420 at p 433 *et seq*.

122. This broad statement of the law has long since been refined in terms of application though where applicable can and does result in the proceedings being dismissed. The defence based on the maxim *ex turpi causa* is founded on public policy and so in an appropriate case the Court itself may raise the issue even if it is not expressly pleaded by the defendant. See *Anderson v. Cooke* [2005] 2 I.R. 607 at p 615. The onus of proof rests on the defendant. Even where the defence is established it does not follow that public policy requires the proceedings be dismissed rather the contrary is the case the requirement being that the suit should be entertained and decided on its merits. See *Cakebread v. Hopping Brothers (Whetstone) Ltd* [1947] Q.B. 641 at p 654, where in the context of the Factories Act 1937, it was held that such a defence would be inconsistent with the policy intention of Parliament expressed in the Act. See also *Anderson v. Cook and Carr v. Olas and another* [2012] IEHC 59. As was observed by the President in *Anderson*, the maxim in modern times is more likely to have application in circumstances such as that of joint illegal activity.

123. Whatever about the effectiveness of the maxim as a defence at common law prior to 1961 it is clear that the provisions of s. 57 of the Civil Liability Act are relevant to developments in the law which have occurred since that provision was enacted and which provides:

> *"(1) It shall not be a defence in an action of tort merely to show that the plaintiff is in breach of the civil or criminal law."*

124. The Plaintiff places particular reliance on this provision and submits that on the facts and in the circumstances of this case the maxim *ex turpi causa* has no application, accordingly there is no basis for the defence. In this regard it was argued that the Plaintiff was never questioned, arrested or charged with any offence nor was there any allegation or complaint of wrongdoing made against him or against Eanna Donnellan arising form the affray; no breach of the civil or criminal law was established by the Defendants.

125. Having regard to the provisions of Article 40.3.2 of the Constitution it was argued that the Plaintiff was entitled to the protection of the law in relation to any assault to his person and was entitled to maintain a claim for compensation in respect of any consequent injuries, if any, sustained as a result of that assault. Even in circumstances where the Plaintiff initiated the affray, and therefore provoked what followed so as to give rise to the defence being pleaded, it could not operate to defeat or otherwise provide a defence to the claim which arose as a result of the assault and battery which the Defendants visited on the Plaintiff.

126. It is quite clear from decisions such as *Anderson and Cooke* and *Carr v. Olas* that s. 57 (1) of the Civil Liability Act modified, but did not abolish the defence based on the Maxim of *ex turpi causa.*

127. In *The People v. Barns* [2007] 3 I.R. 130 the Court of Criminal Appeal held that insofar as the common law had permitted the householder to kill a burglar merely because he was such, this rule had not survived the enactment of the Constitution in view of the State's obligation under Article 40.3.2 to protect the life of all citizens. Similarly a rule of tort law which permitted a defendant to avoid tortious liability merely because the victim of the tort involved had committed an unlawful act would not be consistent with the duty of the State under that Article to vindicate the person. As was observed by Hogan J. in *Carr* the common law must, where necessary, be remoded and refashioned in order to reflect and accommodate itself to the precepts and values of the Constitution and that it is against these that the provision in s. 57 of the Civil Liability Act is to be considered.

128. In *Hackett v. Calla Associates Ltd* [2004] IEHC 336 Peart J. considered that the modern day *ex turpi causa* principle is confined to those cases where the conduct of the Plaintiff had been "*so egregious that he ought not to be allowed recover damages for an injury sustained which results from that behaviour*".

129. Even without the benefit of the precepts and principles deriving from Article 40.3.2 of the Constitution it is clear from the decisions in other common law jurisdictions that a complete bar to recovery by way of defence on the basis of the maxim *ex turpa causa* should only be permitted in very limited circumstances. See *Wasson v. Chief Constable, Royal Ulster Constabulary* [1987] N. I. 420 and *Hall v. Herbert* [1993] 2 S.C.R. 159.

130. The basis and exercise of the power to bar recovery in tort on the ground of the Plaintiff's immoral or illegal conduct is founded in the duty of the Court to preserve the integrity of the legal system; the exercise of that power should be confined to circumstances in any given case where concern for that matter arises. In the context of a civil suit for damages such would arise in circumstances where the party bringing the proceedings, if permitted to recover would, in effect, profit from illegal or wrongful conduct. However, as MacLachlin J. in her judgment in Hall stated:

> *"It follows … as a general rule, the ex turpi causa principle will not operate in tort to deny damages for personal injury, since tort suits will generally be based on a claim for compensation, and will not seek damages as profit for illegal or immoral acts."*

131. The decision in Wasson, illustrates the point. The plaintiff had been a participant in a serious riot as a result of which he was subsequently charged with and convicted of riotous behaviour. In the course of the riot a police officer fired a plastic baton round which struck the plaintiff in the head causing him serious injury in respect of which he issued proceedings against the Chief Constable for damages for assault and battery. The defence raised was similar in several respects to the defence in this case, namely that the force used was reasonable was in self defence, defence of other police officers and that the plaintiff was guilty of contributory negligence. Hutton J., held that the defendant had failed to discharge the onus of proof to establish that the firing of the baton round was justified in self defence or in defence of other police officers or in the prevention of crime or that the use of such force was reasonable in the circumstances but held the plaintiff to be guilty of contributory negligence to a high degree of fault, namely, 50 %.

Conclusion
132. While the events which occurred in the Shambles cannot be ignored or disassociated from what happened to the Plaintiff in Vicar Street, having regard to the findings already made and to the authorities relied upon, it would be wholly wrong to bar the Plaintiff's claim on the basis of this particular plea. Instead, it seems to me that in the circumstances of this case the approach adopted in *Wasson,* in *Hackett*, and in *Gammell v. William Doyle trading as Lee's Public House & Anor* [2009] IEHC 416 commends itself and is appropriate; accordingly, this aspect of the defence should be dealt with by way of and as a matter of contributory negligence on the part of the Plaintiff.

Contributory negligence
133. The initiation of the affray by the Plaintiff and Eanna Donnellan provoked a chain reaction which ended in the assault and battery of the Plaintiff in Vicar Street. The initiation of the affray by the Plaintiff and Eanna Donnelan was intentional, deliberate and led to the consequences which gave rise to these proceedings for which in my judgment the Plaintiff must share responsibility.

134. Whatever may have been the law before the passing of the Civil Liability Act, there is no rule of law that contributory cannot be relied upon as a defence in an action for trespass to the person. The definition of "wrong" in s. 2 (1) of that Act includes a crime and a wrong which is intentional, accordingly, it follows from the provisions of s. 34 of the Act, that, in appropriate circumstances, the Court may find a plaintiff guilty of contributory negligence in an action brought for assault and battery.

135. In determining the reduction in the Plaintiff's damages attributable to contributory negligence the criterion to be adopted is that of blameworthiness and not that of causation. See *Iarnród Éireann v. Ireland* [1996] 2 ILRM 500 (SC). The Court is not concerned with the causative potency of the causative contributions of the Defendants on the one hand and the Plaintiff on the other to the injuries and loss rather it is the blameworthiness of the causative contributions to the happening of the event giving rise to the injuries and loss which is the basis for the apportionment, the blameworthiness being measured by reference to what a reasonable man or woman would have done in the circumstances.

136. Nothing in the initiation or participation in the affray by the Plaintiff excuses the actions of the Defendants, however, in the circumstances of this case the Plaintiff must carry, to a significant extent, the blame for what ultimately led to the unlawful use of force by the Defendants which resulted in his injuries. In weighing the degrees of fault to be apportioned on the basis of the blameworthiness of their respective contributions to the damage the fact that the Plaintiff was in the process of extricating himself from the affray at the time when he encountered the Defendants, who were intent on striking him, has to be taken into consideration, accordingly, the Court will apportion fault to the extent of 40% against the plaintiff and will reduce the damages to be awarded accordingly.

The Injuries
137. The Plaintiff suffered multiple soft tissue injuries in addition to a displaced fracture of his right patella. The emergency department notes of the 16th October, 2010, relating to the Plaintiff's admission and treatment in UCH hospital show that in addition

to the complaints of pain swelling and pain referable to the main injury to the knee, tenderness and pain was noted over the left shoulder in the region of the left acromio clavicular joint, over the thoracic vertebrae at T7, T8 and T9. He also had a one inch laceration in his scalp around which there was some swelling and tenderness. There was no loss of consciousness, headache, visual disturbance, nausea, vomiting, neck or lower back pain recorded.

138. The Plaintiff came under the care of Mr. Karr, Consultant Orthopaedic Surgeon who carried out an open reduction and internal fixation of the displaced fracture of the right patella. The Plaintiff was discharged on crutches with his right leg placed in a plaster of Paris cast. The laceration to the scalp was closed with steri strips and healed uneventfully. Initially, his left shoulder was very sore with limitation of shoulder movement for a number of days. After removal of the cast his leg was placed in a brace which he said was worn for a number of months though he wasn't sure how long his leg was in a cast.

139. The Plaintiff re fractured his right knee on the 4th December, 2010, when he fell in the course of a row with his father during which had been pushed. The right knee began to swell immediately; further surgery was required. This involved a repeat open reduction and internal fixation with revision of the previous internal fixation. The operation was carried out on the 6th December, 2010, at UCH by Mr. Karr. The Plaintiff was mobilised on crutches and discharged on the 7th December, 2010, with his right leg again in a plaster of Paris cast. He was reviewed on the 15th December, 2010, and again on the12th January, 2011. At that stage the cast was removed. The surgical wound was healing satisfactorily and the Plaintiff was referred for physiotherapy. A review on the 2nd February, 2011, showed some prominence of the metalwork.

140. On the 11th March, 2011, the Plaintiff presented with a two week history of pain and swelling around his right knee. He was again readmitted to UCH in Galway. Because of the amount of swelling around the anterior aspect of the right knee a decision was made to proceed with the removal of the metalwork and exploration of the platella fracture. At surgery it was found that the fracture site was not healing. The Plaintiff was again treated with immobilisation post operatively and then mobilised on crutches. He was reviewed on the 23rd March, 2011. The operation wound was healing well and repeat x-rays reported the fracture healing as satisfactory. Further review on the 27th April, 2011, showed the Plaintiff improving with a better range of motion of the knee with a full range of motion being achieved by May, 2011 though with wasting of the quadriceps muscle.

141. When the Plaintiff was reviewed on the 15th August, 2012, it was noted that there was some persistent wasting of the quadriceps muscle. He was not reported as having any significant pain at that stage and he was able to straight leg raise with full flexion in the knee. The Plaintiff did complain that prolonged sitting, such as sitting in a car trying to drive long distances or trying to kneel caused him difficulty. He told Mr. Karr at that time that he was limping and that he still had some pain over the anterior aspect of the knee. Repeat x-rays taken in August, 2012 showed that the fracture had united. There is permanent scarring from the surgeries to the knee. The Plaintiff also told Mr. Karr that he could not pay field sports such as football or hurling because of his knee injury.

142. Mr. Karr gave evidence that the displaced fracture suffered by the Plaintiff as a result of the assault and battery was very serious and that the Plaintiff has a risk of developing post traumatic arthritis in the platella femoral joint. X-rays taken following a further injury to the knee on the 23rd September, 2015, showed that the fracture had united although with a slight irregularity of the articular surface of the platella.

143. Vocationally, the Plaintiff gave evidence that he was unable to fulfil his ambition to join the army because of his knee injury, however, on cross examination he accepted that he had not in fact made an application to join the army because at the time the defence forces were not recruiting though he couldn't join now because of the knee injury still continues to be painful. He accepted that he had had another accident involving the same knee of which Mr Karr was not aware in September, 2015 when he fell on a kerb. His evidence was that he would be unable to climb a ladder but would be able to do what he described as semi construction type of work.

144. The Plaintiff accepted that he was able to undertake the relatively heavy manual work which was captured on surveillance video that was shown to the Court. This video displayed the ability by the Plaintiff to bend his knees, pull a trolley up a ramp and generally undertake what appeared to be comparatively heavy manual work.

145. Having regard to the subsequent injuries sustained by the Plaintiff to his right knee and the prognosis that the Plaintiff does have a risk of developing post traumatic arthritis in the patella femoral joint, a question arose as to the contributory effect on prognosis in particular of the subsequent accidents, including the re fracture of the right patella on the 4th December, 2010.

146. Mr. Karr was unable to quantify in percentage terms the relative contributions, however, whilst acknowledging that the re fracturing of the right patella in December 2010 would not have helped he was quite definite when pressed that the original displaced fracture was the more serious injury the consequence of which was a risk of post traumatic arthritis in the patella femoral joint developing at some stage in the future; If that were to develop there was a possibility that the Plaintiff might require further reconstructive surgery. He could put the matter no further than that.

147. The soft tissue injuries resolved in a comparatively short period of time and the Plaintiff made very little of them at the trial. Dr. Cahill, his GP, prepared a medical legal report dated the 28th June, 2012, at which stage the main complaint related to the right knee. The Plaintiff did complain of some intermittent left shoulder pain occurring once every two weeks; generally if he lay on his left side in bed at night; clinical examination of the shoulder showed a full range of movements and no tenderness was elicited. There was a one inch scar noted at the back of the scalp above the hairline which was not cosmetically disfiguring and again the Plaintiff made nothing of it at trial.

Conclusion.

148. It is quite clear from viewing the surveillance evidence that the Plaintiff is able to engage in comparatively heavy manual work and that he appears to be able to do so without restriction notwithstanding the nature of the injuries sustained to the right knee. The soft tissue injury to the right shoulder has evidently fully recovered. The soft tissue injuries, such as they were, are all in the past and the only ongoing sequelae which remain are an ongoing complaint of pain in the knee and the risk that the Plaintiff may develop post traumatic arthritis in the platella femoral joint at some indefinite point in the future.

149. Having regard to the conclusions reached by the Court in relation to liability and apportionment, the Court will assess damages separately in respect of the soft tissue injuries and in respect of the fracture injury to the right patella. It is necessary to exclude from the assessment process the pain and suffering as well as any other consequence attributable to the subsequent accidents. I accept the medical evidence of Mr. Karr and applying the well settled principles of tort law to the assessment of general damages in respect of the injuries for which the Defendants and Prionsias McComiskey are concurrent wrongdoers, and having had regard to the revised Book of Quantum, the Court considers that a fair and reasonable sum to compensate the Plaintiff for pain and suffering

consistent with the soft tissue injuries sustained is €15,000.

150. In relation to the right knee injury caused by the assault and battery, which principally involved a displaced fracture of the right patella carrying with it a definite risk of the development at some point in the future of post traumatic arthritis in the femoral joint, the Court considers that a fair and reasonable sum commensurate with those injuries to compensate the Plaintiff for pain and suffering to date is €35,000 and in respect of future pain and suffering the sum of €15,000, making in aggregate a total of €65,000 for general damages which will be reduced in accordance with the respective apportionments already determined; the Court will so order.

151. Having due regard to the terms of this judgment I will discuss with Counsel the final form of the orders to be made.