Neutral Citation no. [2007] NIQB 121 | Ref: **HIGF5756**

Judgment: approved by the Court for handing down (subject to editorial corrections)* | Delivered: **7/3/07**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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Between:

WAYNE BOYLAN

Plaintiff;

-and-

KIERAN GALLAGHER t/a THE DUKE BAR

First Defendant;

_____

HIGGINS J.

[1] The plaintiff's claim is for damages for injuries sustained at the entrance to premises known as The Duke Bar, Duke Street, Warrenpoint on Sunday 30 November 2003. The plaintiff was born on 12 August 1981. He is now aged 25 years of age and was at the relevant time 22 years of age. He claimed he was working at that time as a plasterer in the Republic of Ireland. On 30 November 2003 the plaintiff went to the Duke Bar around 6pm having watched a football match at his girlfriend's house. The Duke Bar is owned by Kieran Gallagher who purchased it around June 2003, some five months earlier. Prior to that date Kieran Gallagher, who is a trained chef, ran the restaurant on the first floor of the premises. On 30 November 2003 he was working in the restaurant but made occasional visits to the bar on the ground floor where his brother Aidan was then the barman. Many of the circumstances leading up to and after the injury sustained by the plaintiff were in dispute between the plaintiff on one hand and the Gallagher brothers on the other. What was not in dispute was the mechanism of the injury. As the front door of the premises was being closed, the fingers of the plaintiff's left hand were caught between the edge of the door and the door jamb. He sustained a traumatic amputation of the tips of his ring and middle fingers and a crush laceration of the index finger. The amputated tips were found in the porch of the premises and placed with ice in a plastic bag. The plaintiff

was taken to the Daisy Hill Hospital in Newry. He was later transferred to the Ulster Hospital where the distal bones of the middle and ring fingers were trimmed back and the fingers sutured. The fingers have been shortened close to the distal interphalangeal joint. This is a serious and significant injury for any person, particularly a young man with limited employment opportunities. He has ongoing painful sensations in the tips of the fingers and striking or tapping the stumps on objects causes him pain. He has not worked since and believes he is unlikely to work again either as a plasterer or a labourer. He is embarrassed at the state of his hand and rarely exposes it, preferring to hide it in his pocket whenever he can.

[2] In November 2003 the plaintiff claimed he was residing with his mother in Drumintee, County Armagh. He said he was staying with his girlfriend in Warrenpoint over the weekend that he was injured. Previously he had lived for 20 years in Warrenpoint and remained a frequent visitor to the Duke Bar. Entrance to the Duke Bar is gained by passing through the front door (painted blue) and then through two double swing doors and then through another single door into the bar beyond, which can be seen in photograph 3. The front door is a solid wooden door 1 ¾" thick (44 mm) and three feet one inch wide. The double doors are five feet eight inches from the front door and together they create a porch or vestibule.

[3] The exact time at which the plaintiff arrived in the bar is not known. However around 7 pm he was observed talking to the barmaid in the function room bar. He was trying to cadge free drink from her. Later he was observed interfering with a lady's handbag. He was asked to leave several times and said he was doing so but did not. He moved around different company in the bar. He was drinking vodka and had probably been drinking prior to arriving in the bar. A blood sample taken from him in hospital gave a reading of 245 mg/dl. He claimed that he only drank eight or nine vodkas but it is clear this was a considerable underestimate. Around 11pm he became involved in an altercation with a man named Crilly. He slapped Crilly on the face and Crilly put him to the floor either with a punch or a push. As a result the two Gallagher brothers arrived at the scene and requested him a number of times to leave. He did not respond and together they marched him towards the entrance. In the hallway he put up a violent struggle and at one point placed his feet up against the wall in an effort to prevent his removal from the premises. However the brothers pulled him away and dragged him to the front door and out onto the street.

[4] The emergence of the brothers and the plaintiff onto Duke Street and events thereafter at the front door and on the pavement, were recorded on a CCTV camera located on a tree at the edge of the pavement opposite the front window. A 24 hour time clock was operating on the CCTV camera and a time is recorded on the video recording in hours, minutes and seconds. The CCTV camera takes a still picture every two seconds and when the recording is

played it, nonetheless, gives a sense of movement. A video of the recorded events was available and was played a number of times to the court and was also available for the court to view in private. The camera recorded events between 23. 16. 22, when the plaintiff was brought out of the premises, and 23.28.05, when Constable O'Neill arrived at the front door. The plaintiff identified the point in time at which his fingers were injured, as 23.17.29.

[5] The plaintiff disputed the events that led to his expulsion from the bar. He claimed that he had done nothing wrong and that he was trying to explain that he was innocent, when he was bundled out of the premises. He continued to protest his innocence outside. He had no recollection of being brought through the inner double doors. He said he was standing inside the porch at the edge of the door when he was pushed out onto the street. When he was on the street the door was partly open and he put his left foot onto the step and his left hand on to the door. He said he was still trying to explain what had happened in the bar. He said he was just holding on to the door with his left hand, just trying to get his point across that it was not his fault. He described the door as being more open than shown in photograph 5, as his foot was on the step and his hand on the door and he could see both Gallaghers. He said they were shouting to get away from the door and as they were shouting the door just slammed closed. When the door was slammed his left hand was round the edge of the door, but his fingers were not trapped. He was able to take his hand out and discovered the tips of two of his fingers were torn off. He said he realised straight away that he was injured. He was in severe pain. He could not remember his frame of mind from then and described himself as drunk when it happened. He remembered going over to the window to show his hand and fingers to those inside. He remembered they would not open the door and he started kicking it. He remembered kicking the window of the bar and it shattered. He remembered Malachy Burns coming out of the bar and telling him to move on. Burns then went back into the bar and closed the door. He remembered Crilly coming out and walked over to him and he told him about his fingers. He remembered Brian Burns coming from across the street and trying to take him away from the premises. He described himself as delirious with the shock of losing the tips of his fingers and seeing the blood. He had no recollection of being chased from the pavement shortly after he was put out.

[6] The video recording, albeit comprised of two second frames, discloses a different sequence of events. At 23.16.27 the Gallaghers can be seen bringing the plaintiff out backwards with his feet dragging behind him. At 16.29 all three are standing on the pavement. The Gallaghers then back off towards the front door. There is much gesticulating and evidently shouting. Some of the gesticulating by the Gallaghers throughout is consistent with them pointing in the direction the plaintiff should go and with attempts to calm him down. On the way back to the front door Kieran Gallagher retrieves a glass from the front window sill and by 16.43 both Gallaghers are in the porch and the

plaintiff has moved to within a few feet of the front door. By 16.49 the Gallaghers are well into the porch and the plaintiff is standing in the porch. At 16.59 the plaintiff is backing out with one foot still on the doorstep and the other half way back to the ground. At 17.01 the plaintiff is standing on the pavement facing the front door and the two Gallaghers are in the doorway. The plaintiff then moves closer to the doorway and then away again. He then advances again towards the door and then retreats and then advances again. The Gallaghers remain in the doorway often gesticulating as if indicating to the plaintiff to go away or keep his distance. At 17.25 the door is still open and the plaintiff has advanced to about five feet from the doorstep and the Gallaghers have retreated into the porch though the arm of one of them is visible. At 17.27 the door is still fully open and the plaintiff has advanced to about one foot from the doorstep. The Gallaghers have retreated further inside. At 17.29 the door is about 80 or 85% closed and the plaintiff has his right hand on or at the left hand side of the door and his left hand is on his left hip with the arm bent. At 17.31 the door is closed and the plaintiff is two thirds of the width of the pavement from the front door. He is facing it and appears to be striding purposely towards it. At 17.33 the plaintiff is now close to the door and facing it with his right foot raised as if about to kick it. A 17.35 the plaintiff is in the middle of the pavement opposite the window with his back to it and his left hand under his right arm pit. At 17.37 the plaintiff has turned and is facing the window. At 17.39 he is up at the window and at 17.41 he is to the left of the window. At 17.45 the plaintiff is on the pavement running towards the door. At 17.47 the door is open and the two Gallaghers are in the doorway and one of them is stepping out onto the pavement. At 17.49 Mr McDevitt comes out of the bar and checks the area and returns to the premises. There is no sign of the Gallaghers or the plaintiff. It would appear that this is when they chased him. At 18.03 the Gallaghers return stand on the pavement looking towards the road. At 18.13 the plaintiff has returned and is walking towards the Gallaghers and one of them is pointing towards the window. The Gallaghers return to the entrance and the plaintiff moves closer to it. At 18.23 he appears to be grappling with the Gallaghers at the doorway. At 18.25 the plaintiff is two thirds the width of the pavement from the front door and then moves to about two feet from the door. Mr McDevitt and friend then exit the premises and proceed in opposite directions. At 18.39 the door is still open and the plaintiff is standing about two feet from it and there is no sign of anyone in the entrance. At 18.49 the door is still open and the plaintiff is standing at the entrance with his left hand outstretched into the entrance. He is in roughly the same position at 18.51 and at 18.53 the door has closed and the plaintiff is moving away from the door. At 18.59 the door is closed and the plaintiff is on the pavement facing it. At 19.01 the door is open and one of the Gallaghers is on the pavement (as if going to give chase) and the plaintiff is on the pavement turned away from the bar. The Gallaghers then return to the bar and door is closed. Between 19.13 and 21.00 the plaintiff is observed kicking, preparing to kick or having kicked the front door. At 19.47 Mr McDevitt returns from the left and goes up to the plaintiff

and is clearly telling him to go away. At 21.35 and 37 the plaintiff is observed at the window with his left arm raised and his left hand crooked at a right angle as if he was shielding his eyes from the lights above the window in order to see into the bar (the plaintiff alleged he was showing his injured fingers to those present and seeking medical assistance). At 21.24 the front door opens and the plaintiff is observed with his left hand raised as if showing it to someone. At 21.32 Malachy Burns comes out of the front door and tries to persuade him to leave. He then leaves for a short time and returns. At 23.26 he is at the window with his hand raised then he goes away and returns and walks up and down the pavement. At 26.38 the plaintiff is back at the front door talking to a man who is in the doorway. At 22.46 the plaintiff shows Malachy Burns his hand. At 22.56 Malachy Burns returns to the bar At 26.52 the plaintiff breaks a second window. At 27.29 he is back at the window with his leg raised as if kicking at the window. At 27.53 he walks away and 28.05 Constable O'Neil appears to the front door.

[7] The plaintiff's case was that he was injured at 23.17.29. Neither of the Gallagher brothers saw his injured hand yet they were at close quarters with him at critical times. More significantly Mr McDevitt spoke to him on two occasions after 23.17.29 to tell him to move on. He was close to him yet his evidence was that he saw no injury at those times nor did the plaintiff complain to him about any injury. The last time Mr McDevitt spoke to him was shortly after 23.19.53. The medical evidence was agreed. There is no evidence as to when blood would have appeared. Constable O'Neill said the blood was visible to him from a distance of about fifty yards, though this was later on. It was the extremity of the fingers that were amputated and as every child knows fingers bleed easily and readily. Blood would have flowed very shortly after the injuries were sustained, even if, unlikely as it would seem, the plaintiff was unaware that he had lost the tips of two fingers until some time later. With the exception of the occasion when the plaintiff put his left hand under his right armpit, his body language and actions up to 19.53 do not appear to be consistent with those of a person who had just lost the tips of two fingers. By contrast after 21.19 the conduct and body language of the plaintiff is more consistent with that of a person with an injury to his hand. At 23.17.29 the plaintiff is standing with his right hand against the door with his left hand on his left hip and the door is about 85% closed. Two seconds later he is two thirds the width of the pavement away from the front door and striding purposely towards it. If the door was being closed quickly at 17.29 there was insufficient time for the plaintiff to move his left hand from his hip and place his fingers at the edge of the door to be caught by it in the last split second of closing and, incidentally, to be striding purposely towards the door from the far side of the pavement at 17.31.

[8] Therefore the plaintiff has failed to prove on the balance of probabilities that he sustained the injuries to his fingers at 23.17.29, but must

have sustained them later and when he was at or attacking the door. I will consider what was occurring at 23.17.29 later in this judgment.

[9] There does not appear to be in the video, after 23.17.29, an obvious occasion when the door was being closed with the plaintiff at the door and in a position whereby he could have sustained injury to his fingers, except perhaps at 23.18 49 to 53. There are quite a number of occasions when the plaintiff is attacking the door with his feet. It was the evidence of the Gallaghers that the kicking of the door caused a loud noise to be heard in the bar and created a good deal of disquiet amongst the customers. They said that on occasions they opened the door a short distance to see what the plaintiff was doing and closed it again quickly. While this is not visible on the video I accept their evidence that this did happen and must have occurred within some or one of the two second periods that are not recorded.

[10] The Gallaghers were cross-examined and agreed that the plaintiff was outside pushing the door and that they were on the inside resisting and that they exerted more force and were able to slam the door shut. In the case of Kieran Gallagher it was put to him that this occurred about 23.17.29 but he denied that the plaintiff was injured at that time. In the case of Aidan Gallagher it was suggested that this occurred before the kicking of the door commenced but he said the injury was some time after the chase and before the plaintiff held his injured hand up at the window. The video recording around 23.17.29 does not suggest that such pushing of the door by the plaintiff with resistance by the Gallaghers occurred at that time. It is unlikely to have occurred in the very short duration between 23.27.29 when the plaintiff has his left hand on his hip and the door is 85% across the entrance and the door being closed. The two second CCTV still photograph did not record everything that was happening and this has to be borne in mind. Such an incident could have occurred later and not been recorded.

[11] The plaintiff was intoxicated to a significant degree. He was drunk on licensed premises and continued to be permitted to drink on those premises. I accept that Kieran Gallagher did not serve him alcohol and that Aidan Gallagher did not do so knowingly. The plaintiff probably obtained alcohol on the premises through other customers. His behaviour on this occasion was discreditable. He abused a customer, refused to leave the premises when requested to do so and tried to get back in. He threatened Aidan Gallagher and tried to give the appearance that he had a weapon in his outer garment. He attacked the door many times and broke two windows. The cost of repair of the windows was £465.67. After he was detained by the police he was abusive to them and even suggested that they had injured his fingers and was generally uncooperative. However none of these matters relating to how the licensed premises were run or, more particularly, the conduct of the plaintiff, before or after he sustained the injury, are determinative of the issues in this case.

[12] It was the evidence of Mr J B Sheils the consulting engineer called on behalf of the plaintiff that significant closing force rather than normal closing force would have been involved to amputate the tips of two fingers and some bone, though he thought it impossible to be specific about the force involved. He considered the nip point was where the door when closed met the part of the door jamb painted purple and white and visible in photograph 6. At the nip or impact the fingers would not have been visible to someone inside the premises. It is clear that as the door closed the view of the entrance would have diminished for those on the inside. It is equally clear that the plaintiff's fingers were not round the door frame as the door moved through the latter part of its closing sector. The plaintiff's hand was either on the door with his fingers at the edge on the outside or he put his fingers into the gap between the door and door jamb very shortly before the gap closed.

[13] The plaintiff's claim was set out in the amended Statement of Claim in the following terms –

> "3. On 1st December 2003, the Plaintiff was a lawful visitor to the said licensed premises when by reason of the negligence, assault, battery and trespass to his person by servants and agents of the Defendant, the Plaintiff sustained severe personal injuries, loss and damage as hereinafter appears.
>
> PARTICULARS OF ASSAULT, BATTERY AND TRESPASS TO THE PERSON
>
> (a) Using unreasonable force to eject the Plaintiff from the premises;
>
> (b) Slamming the door of the premises closed on the Plaintiff's fingers thereby causing severe damage to the index, middle and ring fingers including amputation of the tips of the middle and ring fingers.
>
> PARTICULARS OF NEGLIGENCE
>
> (a) Slamming a front door closed on the Plaintiff's left hand;
>
> (b) Failing to have any or adequate regard to the safety of the Plaintiff;
>
> (c) Failing to exercise any or adequate care;

(d) With knowledge that the Plaintiff was intoxicated having been served alcohol throughout the evening in the Defendant's premises, failing to exercise any or adequate care, skill or competence when ejecting him from the premises;

(e) With knowledge that the Plaintiff was at the front door of the premises trying to explain his conduct and was resting his left hand on or about the door, slamming the door closed, thereby causing severe injury to the Plaintiff's left hand.

The Plaintiff will further rely on proof of the negligence, assault, battery and trespass to his person upon such other facts as are within the knowledge of the Defendant and which may be given in evidence by the Defendant and his witnesses."

The defence pleaded was in the following terms -

"2. The Defendant denies that on the 1st December 2003 or at any other time material to this Action, the Plaintiff was a lawful visitor to his licensed premises, The Duke Restaurant, Warrenpoint, when by reason of the negligence, assault, battery and trespass to the person by the Defendant or his servants or agents, the Plaintiff was thereby injured and sustained loss and damage either in the manner or for the reasons or with the consequences alleged or at all.

3. The Defendant denies each and every allegations whether of fact, negligence, assault, battery and trespass to the person as set out in paragraph 3 of the Statement of Claim as if the same were herein set out seriatim and each specifically denied.

4. If, which is denied, the Defendant or his servants or agents did the acts complained of the Defendant denies that he did the same intentionally as alleged in the Statement of Claim or at all. If any injuries were received, which is not admitted, this occurred when the Plaintiff was being ejected, with reasonable force, from the Defendant's premises or may have occurred when the Plaintiff returned to

> those premises to inflict damage on the premises by way of kicking the door and breaking windows. The Defendant counterclaims against the Plaintiff on the basis of his negligence, interference and damage to the Defendant's property particulars of which hereinafter appear."

[14] The defence also alleged contributory negligence and counterclaimed for the damage to the front window in the sum of £460.00.

[15] Various conflicts in the evidence emerged. Generally I preferred the evidence of the Gallagher brothers to that of the plaintiff. Mr McDevitt was a straight forward witness with no real reason to favour either side, though he is a customer of the Gallaghers and knows them now quite well. Where his evidence conflicted with that of the plaintiff, I preferred his evidence. The significance of his evidence was that he did not see the injured hand or any blood and the plaintiff made no complaint to him about an injury to his hand. He came out at 23.17 49 to check if the disturbance was over. He returned to the premises and then emerged at 23.18.29 with his friend. He returned again at 23.19.47 and then proceeded to give the plaintiff advice to go away or to go home. Between 23.19.53 and 23.20.55 the plaintiff attacked the door on a number of occasions. Whichever time the plaintiff sustained his injury it is evident it was after he had been ejected from the premises and when he was either trying to get back in or attacking the door.

[16] The plaintiff's claim was presented in battery and negligence. It was submitted by Mr B Fee QC that battery was not limited to deliberate touching but could be committed negligently. Therefore the real issue in the case was whether either or both of the Gallaghers were negligent on this occasion. Mr Fee QC summarised his case in these terms. With knowledge that a customer is intoxicated, a publican who is ejecting the customer from his premises, owes that customer a duty of care to ensure that, in ejecting him from the premises or in preventing him from returning by closing the door, he is not injured and that it was reasonably foreseeable that such an intoxicated customer may sustain an injury or would do something 'daft' and be injured. It was not necessary that it was foreseeable that the plaintiff would injure his hand in the nip of the door simply that he might be injured. The defendant was sufficiently proximate to the plaintiff in the events that occurred to owe him a duty of care. Mr Fee QC relied on a passage from the opinion of Lord Bridge in Caparo Industries plc v Dickman 1990 2 AC 605 at 617/8 in which he said -

> "What emerges is that, in addition to the foreseeability of damage, necessary ingredients in any situation giving rise to a duty of care are that there

> should exist between the party owing the duty and the party to whom it is owed a relationship characterised by the law as one of 'proximity' or 'neighbourhood' and that the situation should be one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope on the one party for the benefit of the other."

[17] As the learned editors of Clerk and Lindsell on Torts said at paragraph 8-16 19th edition –

> "The criterion of reasonable foreseeability focuses on the knowledge that someone in the defendant's position would be expected to possess. The greater the awareness of the potential for harm, the more likely it is that this criterion will be satisfied."

[18] It was submitted by Mr S Quinn QC that in order to establish battery the plaintiff had to show a deliberate touching and that negligence or recklessness was insufficient. Furthermore he submitted that no duty of care was owed to the plaintiff. He was the author of his own misfortune in circumstances in which he had consumed more alcohol than was good for him. Even a child would know not to put his hand in or near the nip of a door. He submitted that a reasonable standard of behaviour was expected from customers in public houses even if they were intoxicated and the plaintiff had acted outside those boundaries. This was a simple case of the publican closing the door on an aggressive customer who was trying to gain admission despite the express wishes of the publican that he should not do so. It was submitted that if a duty of care was owed to the plaintiff, the defendant was entitled to use reasonable force against a customer behaving aggressively. Mr Fee QC relied on Jebson v Ministry of Defence 2000 1 WLR 2055 to support his contention that there was no general rule excluding plaintiffs who were intoxicated from claiming compensation. The facts and decision of the Court of Appeal when allowing the plaintiff's appeal but subject to 75% contributory negligence, are adequately set out in the headnote.

> "The claimant was one of a group of soldiers who were taken from a military camp to a nearby town for a recreational evening organised by the company commander. The transport provided was an Army lorry. The men sat in the back, which had canvas sides and a open space above the tailgate. The roof was rigid for half its length but canvas was stretched over a frame at the rear. Only the driver was on duty,

and neither he nor the senior passenger, who was in the cab, had any view of what was happening in the back of the lorry. Most of the party spent three hours drinking before the return journey, by which time most were drunk. No one had been appointed as formally in charge, and neither of the non-commissioned officers travelling with the soldiers provided supervision. On the return journey while the lorry was moving, the claimant tried to climb from the tailgate on to the canvas roof, lost his footing and fell into the road. He suffered serious injuries and brought an action in negligence against the Ministry of Defence. The judge found that it was reasonably foreseeable that some of the soldiers would return drunk, move about and even sit on the tailgate, injuring themselves, and that the defendant was in breach of its duty to supervise the soldiers, but dismissed the action on the ground that it was not foreseeable that a soldier would try to climb on the roof. If liability had been established the judge would have assessed contributory negligence at 75 per cent."

On appeal by the claimant:--

> "Held, allowing the appeal, that the defendants owed a duty of care as carriers to the passengers carried in the lorry to take all due care to carry them safely as far as reasonable care and forethought could attain that end, as well as a duty to provide a lorry fit to carry passengers safely in the ordinary way, together with a careful driver; that, although an adult was not ordinarily entitled to rely on his own drunkenness to establish a duty on others to take special care for his safety, there was no invariable rule to that effect, and it was not fair and reasonable to apply it in circumstances where an obligation of care was assumed or impliedly undertaken in respect of a person who it was appreciated was likely to be drunk; that, in providing transport for the evening out, the defendants should have expressly anticipated that the soldiers would return in high spirits and inebriated; that the defendants were, accordingly, under a particular duty to ensure that the transport provided was reasonably safe to avoid the possibility of injury from rowdy behaviour in the back of the lorry; that, in view of the large space above the tailgate and the

> inability of the driver to see into the back, the defendants were in breach of that duty by failing to provide supervision; that it was foreseeable that injury, whether slight or serious, would occur as a result of the drunken and rowdy behaviour of the passengers, including that someone would fall from the vehicle; and that the claimant's injury came within the scope of the defendant's duty of care, but that, as the claimant was in large part responsible for his own injuries, the judge's finding of 75 per cent. contributory negligence was appropriate."

[19] Potter LJ, who gave the judgment of the court, concluded that standing on the tailgate to try and climb on to the roof was within a genus of behaviour which was foreseeable and thus the injury came within the scope of the duty of care. He then said at paragraph 28 –

> "28 In coming to this conclusion I have gained little assistance from the facts of other cases. Nor do I think that, as urged by Mr. Jay, the court should be hesitant to apply in this case principles enunciated in Hughes v. Lord Advocate [1963] A.C. 837 (in relation to an inanimate object which could act unpredictably) and in Jolley's case (in relation to children, who are notoriously unpredictable in their behaviour and unwitting of the possible dangers when playing with alluring but dangerous objects). I accept that an adult is generally to be treated as appreciative of the dangers created by his own actions and thus is likely to be held responsible for those actions when pursuing a dangerous course of conduct. None the less, the law recognises that there may be circumstances where by reason of drunkenness or other factors foreseeably likely to affect an adult's appreciation of danger, he may act in a childish or reckless fashion, and that in appropriate circumstances there may exist a duty on others to make allowance for those actions and to take precautions for the perpetrator's safety. I consider this to be just such a case, and would reverse the finding of the judge so far as issue (2) is concerned."

[20] I am quite satisfied that neither of the Gallagher brothers, whether acting jointly or singly, intentionally closed the door on the plaintiff's fingers, knowing that his fingers were on or around the door frame or in the vicinity of the nip edge. Therefore the plaintiff's cases whether in battery or otherwise

is grounded in negligence and all the elements of negligence have to be proved. It is sufficient to refer to the discussion in Clerk and Lindsell on Torts (19th edition) at 1.04, 8.02 and 15.04 and to assume that negligent battery (as a form of trespass) has survived.

[21] I have already observed that the plaintiff was injured after he was ejected from the public house and when he was trying to re-enter or when attacking the door. In the latter instance the plaintiff was committing an unlawful act. In so far as the plaintiff's claim may be founded on one of those unlawful acts, public policy should prevent his claim for compensation being successful. The maxim 'ex turpi causa non oritur actio' applies. See also Holman v Johnson 1775 1 Cowp. 341 at 342 where Lord Mansfield CJ said –

> "No court will lend its aid to a man who founds his cause of action upon an immoral or illegal act."

[22] Modern approval for this public policy approach can be found in Sacco v Chief Constable of South Wales Constabulary and Others (unreported decision of Court of Appeal in England and Wales). The application of the maxim was considered again in Pitts v Hunt 1991 1 QB 24. In that case the plaintiff was a passenger on a motor cycle which was involved in a collision with another vehicle. The driver was killed and the plaintiff seriously injured and he brought an action against the driver's estate. Both the driver and the plaintiff had been drinking together that evening, the driver was uninsured and unlicensed and the plaintiff was aware of that. He encouraged the driver to drive recklessly in the course of which the collision occurred. The Court of Appeal upheld the trial judge's dismissal of the claim. Dillon LJ dismissed the appeal on the ground that the claim arose directly ex turpi causa. Balcombe LJ held that it was impossible to gauge the standard of care where both parties were engaged in a joint criminal enterprise whereas Beldam LJ held that the plaintiff's claim should not succeed on grounds of public policy. A slight variation of the approach taken by Beldam LJ is to be found in Thackwell v Barclays Bank Plc 1986 1 AER 676 in which Hutchinson J dismissed a claim on the ground that it would be an affront to the public conscience for the plaintiff's action to succeed.

[23] The owner of property is entitled to defend it provided he uses no more force than is reasonable in the circumstances. Thus a publican who has ejected a drunken customer who had assaulted another customer, is entitled to defend his premises and his other customers and their custom, by preventing such a drunken customer re-entering the premises and to do so by closing the door, if needs be forcefully, where the drunken customer is seeking to force or talk his way back in, against the publican's stated wish, provided his actions are adjudged reasonable in the circumstances. A person who has been ejected from premises and who tries to re-enter is a trespasser or a person who is attempting to trespass. At common law no duty was owed

to trespassers. An occupier was only liable to a trespasser if he did some act with the deliberate intention of doing harm to the trespasser or with reckless disregard of the presence of the trespasser – see Robert Addie and Sons (Collieries) Ltd v Dumbreck, supra. The harshness of this rule was ameliorated by the doctrine of allurement in the case of young children. The mere fact that a person is engaged in criminal or unlawful conduct when he is injured, is no bar to an action for negligence provided the constituents necessary to prove that tort are present. A clear example is to be found in Revill v Newbery 1996 1 QB 567 in which the plaintiff was shot by the defendant while the plaintiff was attempting to steal from the defendant's premises. The trial judge rejected the defence of ex turpi causa. The Court of Appeal held that the trial judge was entitled to find that the defendant, in firing a shotgun through a hole in a door, was negligent by reference to the standard of care to be expected from a reasonable man placed in the situation in which he found himself. The case is of interest for another reason. The plaintiff was a trespasser. The claim was brought in trespass to the person, negligence and/or breach of the duty of care under section 1 of the Occupier's Liability Act 1984. It was held that the duty imposed by section 1 was a duty imposed on the defendant as occupier. In considering whether the defendant in that case was liable to the plaintiff the fact that he was an occupier was irrelevant and the case fell to be determined on the ordinary principles of negligence at common law. However in determining the scope of the duty owed at common law to a trespasser the court was entitled to consider the provisions of section 1 of the Occupier's Liability Act 1984 and to decide the case on lines similar to a case brought under that section. Thus the duty of care was to take such care as is reasonable in all the circumstances of the case to see that the trespasser does not suffer injury on the premises by reason of the danger concerned (see section 1(4)). Similar provisions to the Occupier's Liability Act 1984 are to be found in Northern Ireland in the Occupier's Liability (NI) Order 1987. The provisions of the 1984 Act and the 1987 Order refer to non-visitors. The duty of care owed to non-visitors is to be found in Article 3 (3) and (4) of the 1984 Order which provides -

> "(3) An occupier of premises owes a duty to another (not being his visitor) in respect of any such risk as is referred to in paragraph (1) if –
>
> (*a*) he is aware of the danger or has reasonable grounds to believe that it exists;
>
> (*b*) he knows or has reasonable grounds to believe that the other is in the vicinity of the danger concerned or that he may come into the vicinity of the danger (in either case, whether the other has lawful authority for being in that vicinity or not); and

> (*c*) the risk is one against which, in all the circumstances of the case, he may reasonably be expected to offer the other some protection.
>
> (4) Where, by virtue of this Article, an occupier of premises owes a duty to another in respect of such a risk, the duty is to take such care as is reasonable in all the circumstances of the case to see that he does not suffer injury on the premises by reason of the danger concerned."

[24] In Revil's case the danger was the shotgun that was about to be discharged. In this case the danger must be the slamming door, though there must be a distinction between the degree to which a slamming door and loaded shotgun present a danger to those in the vicinity. Thus the question whether the defendant owed a duty to the plaintiff at common law (adopting the principles derived from the 1987 Order) is whether the defendant or his brother or both of them a) were aware of or had reasonable grounds to believe that the slamming door was a danger, b) knew or had reasonable grounds to be believe that plaintiff was in the vicinity of the danger or that he might come into the vicinity of the danger and c) that the risk of the plaintiff suffering injury was one against which, in all the circumstances of the case, the defendant or his brother or both of them may reasonably be expected to offer the plaintiff some protection against that risk. If the defendant did owe a duty of care, did he or his brother or both of them take such care as is reasonable in all the circumstances to see that the plaintiff did not suffer injury by reason of the slamming of the door.

[25] These questions require to be answered in the undoubted context of a plaintiff either attacking the door of the premises or attempting to gain entry to the premises when he was aware that he was not welcome. I do not consider that the defendant or his brother were aware or had reasonable grounds to believe that the slamming of the door was a danger, either when the plaintiff was trying to push in or attacking the door. They were dealing with a man who was aggressive and drunk and who had been, rightly, evicted from the premises. Their contact with him was over a short period of time in a highly charged atmosphere, which was of the plaintiff's making. If, contrary to my view, they were aware or had reasonable grounds for believing that the slamming of the door was a danger, they were aware that the plaintiff was in the vicinity of it when trying to get in or that he might come into the vicinity of it when attacking the door. On that basis was the risk of the plaintiff suffering injury one against which, in all the circumstances, they ought reasonably to be expected to offer the plaintiff some protection against that risk. Here the circumstances are critical. In one set of circumstances the plaintiff was trying to gain entrance, having been put

out. He had used threatening language and behaved aggressively. In the other he was physically attacking the building. In neither case do I consider that the defendant or his brother ought reasonably to be expected to offer the plaintiff some degree of protection against the risk of injury. What could they have done? Letting him in was not an option. Closing the door was the obvious solution, when he was trying to get in. Opening and closing the door when the plaintiff was attacking it, to see what he was doing was entirely reasonable. If, contrary to my view, the plaintiff or his brother did owe a duty of care to the plaintiff, they did take such care as was reasonable, in the all the circumstances, where a drunk and aggressive man was trying to gain entry or attacking the premises, to see that the plaintiff did not suffer injury. This is a very different scenario to that of a man with a loaded shotgun discharging it through a hole in a door, when a burglar was in the vicinity. The plaintiff's case was that he was injured when he was pushing the door to try to gain entry at 11.27.29. I am not satisfied that was the occasion when he was injured. The alternative considered by the court, but not pursued by the plaintiff, was that he was injured when he was physically attacking the door by kicking it or between attacks when the door was opened by the defendant. In none of those situations do I consider the defendant owed a duty of care to the plaintiff or if he was owed a duty of care, was the defendant in breach of it. The defendant was entitled to defend himself and his premises against the plaintiff who was drunk, aggressive and threatening. Therefore I am not satisfied the plaintiff has established his case against the defendant either in negligence or in trespass. Regrettably the plaintiff was the author of his own misfortune and his case is dismissed.

[26] There will be judgment for the defendant in the claim and judgment for the defendants in the counterclaim in the sum of £465.67 with costs, in respect of the window breakages which the plaintiff admitted.