

Neutral Citation no. [2006] NIQB 2

Ref: **SMIF5461**

*Judgment: approved by the Court for handing down
(subject to editorial corrections)*

Delivered: **13/1/06**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

2003 No. 1347

BETWEEN:

MAXINE DONKIN

Plaintiff;

-and-

COLETTE REID t/a THE WHISKEY HAW

Defendant.

Mr P D Smith QC
Sitting as Deputy Judge of the High Court

[1] The events giving rise to this claim occurred in the early hours of the morning of Sunday 19 March 2000 at a public house called "The Whiskey Haw" in Newtownards, County Down, the plaintiff alleging that she was assaulted there by a bouncer or doorman thereby sustaining injuries, in particular a laceration above her left eye. I summarise below what I consider to be the salient parts of the evidence and then set out my conclusions.

[2] The plaintiff said in evidence that she and a female friend had gone to the Whiskey Haw at about 8.00 pm on the previous evening. They started off in the downstairs bar where they were joined by a third woman. At about 10.30 pm they moved upstairs to another bar. It seems that there was a hen party going on there and the plaintiff and her friends joined in.

[3] She said that she had had about eight drinks, generally Budweiser beers. About 1.15 am bouncers (as she called them, the defence witnesses called them “doormen”) came and asked the plaintiff and one of her friends, Tanya Peggie, to finish their drinks. At this point in time her other friend, Lorraine Dorman, was talking to other people.

[4] The plaintiff said the Peggie had a couple of drinks to finish but a bouncer lifted them and put them on the bar counter. Peggie went to the bar counter and attempted to retrieve them. The bouncer then grabbed Peggie by the hair and went to drag her out of the bar. A bouncer (a different one the plaintiff thought) came over to the plaintiff and she asked him “What was that in aid of?” referring to the grabbing of Peggie by the hair. Her next recollection was sitting in the back of a police vehicle in an injured state. There was blood all over her face and clothes from a cut over her left eye. She had also suffered bruising to her forearms and right elbow and a cut on the back of her head. The police took her to the West Winds Estate where she lived. She did not know what had happened to her until the following night when Lorraine Dorman told her that she had been head butted by a bouncer. He was subsequently identified as Tommy Casson.

[5] In cross-examination the plaintiff admitted that she had been very drunk at the material time. She denied hearing Tanya Peggie becoming very abusive. She also denied attempting to attack one of the bouncers with a heavy glass ashtray by swinging it at him twice or, in the course of doing so, knocking glasses off the bar counter. She could not remember being put out of the premises by another bouncer. She could not remember hitting, kicking or flinging herself at the outside door of the premises but asserted that this was not the kind of thing that she would do. She denied that she had head butted the door as alleged by a member of staff who had observed the plaintiff from nearby fast food premises. It was put to the plaintiff that she was abusive to the police but she said that she could not remember.

[6] The defence produced a video recording which was played to the court. It showed two locations intermittently: One was part of the upstairs bar comprising an area behind the bar counter and a portion of the bar counter; the other was an inside view of an external door of the premises and adjacent stairs which it was common case led down from the upstairs bar.

[7] It was suggested on behalf of the defence that, although the plaintiff could not be identified actively attacking the bouncer with the ashtray, part of the altercation could be seen on the video in the form of an object or objects landing and breaking behind the bar counter and what appeared to be a scuffle on the other side. It was also put to the plaintiff that although she can be seen on the video being escorted downstairs and being put out through the door, there did not appear to be any indication of injury to her forehead or

blood on her face or on her clothes. The plaintiff responded by saying that she thought that she could see blood on her forehead.

[8] Lorraine Sylvia Dorman, the plaintiff's friend, was called as a witness on the plaintiff's behalf. She said that she saw the plaintiff being head butted by a bouncer who she subsequently learned was called Tommy Casson. The plaintiff was escorted downstairs by, she said, three or four bouncers and she had followed her out of the premises. As soon as she got outside Ms Dorman noticed blood on the plaintiff's face. She knocked the door to try and get attention for her friend. There was no response. She admitted kicking the door and shouting. The plaintiff did not kick the door. There was blood all over her. The police arrived and went into the Whiskey Haw, totally avoiding the plaintiff. Ms Dorman said that she went in and spoke to a policeman, asking him to get her friend medical attention and to hear their side of the story. A barmaid said "Put her out" and she was escorted off the premises and put into a police landrover. The plaintiff and Tanya Peggie asked to be taken in the vehicle with her. She told the police that there had been an assault.

[9] In cross-examination Ms Dorman agreed that she did not see what led to Tanya Peggie or the plaintiff being escorted out of the Whiskey Haw. She denied that the only attack or assault was the plaintiff's attempt to strike the bouncer with an ash tray. She admitted kicking the external door from the outside and said that she may have punched it. The plaintiff might have kicked the door a few times but was not punching it or throwing herself at it. It was put to her that when they were approached by the police the plaintiff had been abusive but she said that she did not remember this. It was also put to her that in the landrover she had not mentioned the head butting, but she asserted that she had said that her friend had been head butted. It was also put to her that three members of staff had not seen the alleged head butting, but she maintained that she had.

[10] Only the plaintiff and Ms Dorman were called as plaintiff's witnesses - Tanya Peggie was not called. The defence called four witnesses. The first of them was Emma Jane Wasson who was a full-time waitress and bar attendant at the Whiskey Haw in March 2000 and who was working there on the night in question.

[11] Ms Wasson was in the upstairs bar at the material time and her attention had been attracted by swearing and loud voices coming from 5 or 6 metres or perhaps not even that far away. She saw the plaintiff shouting at Tommy Casson who she described as one of the doormen. The plaintiff was using abusive language. She grabbed a heavy glass ash tray and launched it at Casson twice. The plaintiff tried to hit him with it and he tried to block it with his hand up above his head. On the second occasion the ash tray hit glasses at the end of the bar counter and these smashed on the floor.

According to her, Casson escorted the plaintiff downstairs and out of the building. The plaintiff was very angry and abusive and refused to leave. A lot of force had to be used. As she left there were no marks on her face, no blood on her face or forehead and no blood on her clothing.

[12] Ms Wasson denied that Casson had head butted the plaintiff. In cross-examination she said that she never seen their heads in contact. If they had been, she would probably have seen it but she did not know. She did not think there had been any contact. Everything had happened very quickly. She did not see any injury to the plaintiff. She thought she would have seen blood if there had been any. Ms Wasson agreed that the person shown in the video taking the plaintiff out was not Casson, and that her earlier evidence that he had done so had been incorrect.

[13] In relation to the video, Ms Wasson said that she did not remember a third person being involved in the scuffle and she did not think that a third person was involved in the incident that she had seen.

[14] The next defence witness was Colin John Welsh. At the material time he had been employed as functions manager at the Whiskey Haw. On the evening in question he was in charge in the upstairs bar. He described the plaintiff using abusive language and trying to hit Tommy Casson by swinging a heavy glass ash tray at him. He shielded himself by putting up his arm. The plaintiff was taken to the top of the stairs by Casson and by another doorman (or bouncer) thereafter. Yet another doorman had assisted Casson. The abusive language continued and there was very heavy banging on the external door.

[15] No one had head butted the plaintiff in the bar. There was no mark on the plaintiff when she was being led from the bar. There was no blood on her forehead or face or about the bar. There was no blood on the plaintiff's clothing.

[16] The video was shown in the course of Mr Welsh's evidence-in-chief and he identified a person with a pony tail as Gary Wallace, one of the doormen, who, as well as Casson, had been involved in the scuffle.

[17] Casey Leigh Young was called on behalf of the defence. She was a barmaid in the upstairs bar at the material time. She had served the plaintiff on the night of question. Eventually service stopped and the lights came on and customers headed for the door and left. The bar had nearly cleared when she saw the plaintiff run over to Tommy Casson and try and hit him with a large toughened glass ash tray measuring 30 cms by 30 cms. Initially Casson had had his back to the plaintiff but he must have seen her out of the corner of his eye because he tried to defend himself. As he turned the ash tray came out of the plaintiff's hand, landed on the bar top and caused glasses to smash

on the floor. The plaintiff was very aggressive, using abusive language and shouting at Tommy Casson. He tried to calm the plaintiff down and helped escort her to the top of the stairs. She was shouting and using foul language to the doormen who managed to get the plaintiff out.

[18] Ms Young described going via the downstairs bar to a fast food outlet from where she could see the plaintiff and another girl kicking and banging at the public house door. It was only about 20 feet away.

[19] Ms Young denied that Casson had head butted the plaintiff. When she left the upstairs bar she had no blood on her forehead or face or on her clothing. There was no blood on the floor. She described the plaintiff and her friend running and kicking and punching the door and she appeared almost to head butt it. Ms Young watched for about 10 minutes from the fast food outlet.

[20] In cross-examination Ms Young said that she saw the plaintiff and another girl banging, kicking and throwing themselves at the door. She demonstrated how they threw themselves with their two hands held up in front of them. She said that she definitely saw the plaintiff throwing herself at the door.

[21] The last defence witness was Graham Cromie. In the early hours of the morning of 19 March 2000 he had been on duty as a reserve police constable as part of a public order patrol in a landrover. There had been a call to the Whiskey Haw. On arrival he saw two females punching and kicking a door. The plaintiff was one of them and he noticed blood on her head. He asked her what had happened and she told him to "Fuck off". He asked her what had happened to her head and the plaintiff said "Fuck off, I'll deal with this myself". He offered to call an ambulance but the plaintiff refused this. The plaintiff and two other girls with her were irate and angry. Tanya Peggie alleged that Tommy Casson had caused the injury to the plaintiff's face. Mr Cromie went into the Whiskey Haw and spoke to Casson.

[22] Casson gave what Mr Cromie described as a vague account of what had happened. He produced his notebook and read what he had recorded not long after his visit to the Whiskey Haw. It seems that what Casson told him was that he had been attacked by the plaintiff with an ash tray and that their heads had collided and she received a cut above her left eye.

[23] The plaintiff did not make a complaint and did not want police involvement. There was no complaint from the Whiskey Haw either. The police took the plaintiff and her two friends to the West Winds Estate. Notwithstanding attempts to calm them they kept up constant abuse. No allegation of a head butt was made by the plaintiff or either of her friends at that time.

[24] Mr Cromie said that he had seen the plaintiff kicking and punching the door. In cross-examination he confirmed that the allegation that heads had clashed had come from Casson. Subsequently the plaintiff had made a complaint and he had taken a statement from her.

[25] One thing that is clear beyond peradventure in this case is that on the evening in question the plaintiff was guilty of quite outrageous conduct. I find that she did indeed attack Tommy Casson with an ash tray. Not only this but she was abusive to the staff of the Whiskey Haw and to police who tried to help her. Having been ejected from the bar she attacked the outside door by kicking and hitting at it. Her conduct is deserving not just of censure but of punishment. If it lay in my power to punish her for it, I would punish her. Unfortunately, it does not lie in my power so I must limit myself to condemnation coupled with my commendation of the professional way that Mr Cromie and his police colleagues dealt with and defused a very nasty situation.

[26] However, my findings as to the plaintiff's misconduct do not determine the question of whether she was head butted by Tommy Casson. Furthermore although I am satisfied that Ms Wasson, Mr Welsh and Ms Young were all honest witnesses their evidence is not determinative of this crucial issue either. This is because none of them purported to have seen any contact between the heads of the plaintiff and Casson. Yet, according to Casson's admissions to Reserve Constable Cromie, and I so find, there was not only such contact but also that contact caused a cut above the plaintiff's left eye. Nor does the evidence of the three members of staff establish that that contact was accidental or otherwise innocent. Not having seen it their evidence says nothing as to its character.

[27] This leaves Ms Young's evidence which suggested that the plaintiff may have sustained the injury above her left eye by contact with the outer door in the course of throwing herself at the door after she had been put out. This suggestion received some support from the fact that it is difficult to see any evidence of injury above the plaintiff's left eye on the video film showing her being brought down the stairs and put out through the external door. But, once again, there is a difficulty with what Casson told Reserve Constable Cromie. The cut above the plaintiff's eye to which Casson referred could only have occurred in the upstairs bar. It must have been obvious enough for him to have seen it there. If Ms Young's suggestion is correct the plaintiff would have had to have sustained a further injury to the same point on her head when she was outside the premises. This is not impossible, but I think it very unlikely.

[28] Notwithstanding the puzzle of why there is no clear evidence of blood on the plaintiff's face and none of blood on her clothing as she was on her

way downstairs I find that the plaintiff did sustain her main injury, the cut on her forehead above her left eye, when her head came into contact with Casson's in the upstairs bar. The answer to the puzzle about the blood must, I think, lie in the cut not having bled heavily until the plaintiff began her vigorous altercation with the door, but this altercation did not cause the cut. However, I do not believe that the plaintiff's other injuries were caused in the course of her contact with Casson. To my mind, it is more likely that these were caused by the plaintiff throwing herself about when she was outside the premises.

[29] This brings me to the question of whether the contact between the heads of the plaintiff and Casson was accidental or was caused deliberately by Casson. As I have already said, I have accepted as facts what Casson told Reserve Constable Cromie to the effect that there was a clash of heads and that the result was a cut above the plaintiff's left eye. I have accepted these things because there can be no possible reason that I can think of for Casson inventing them. But what he said was self-serving in the sense that he did not concede that he had acted deliberately or even negligently.

[30] If the contact was indeed accidental I would have expected to have heard oral evidence from Casson or the doorman with the pony tail, Gary Wallace, or both of them. They were best placed to have seen exactly what happened. Neither was called as a witness on behalf of the defence and no explanation as to why they were not called was proffered.

[31] What Casson told Reserve Constable Cromie was hearsay and was admitted in evidence under the Civil Evidence (Northern Ireland) Order 1997. Article 5 is headed "Considerations Relevant to Weighing of Hearsay Evidence". Article 5(1) requires that, in estimating the weight (if any) to be given to hearsay evidence in civil proceedings the court shall have regard to any circumstances from which any inference can reasonably be drawn as to the reliability or otherwise of the evidence. Article 5(3) permits me to have regard to whether it would have been reasonable and practicable for the party by whom the evidence is adduced (in this case the defendant) to have produced the maker of the original statement as a witness and Article 5(3) says that I may have regard to "whether any person involved had any motive to conceal or misrepresent matters".

[32] In my judgment Casson would have had a motive to conceal or misrepresent what really happened and I have come to the conclusion that he did so. I find that Lorraine Dorman's allegation that Casson head butted the plaintiff to be true and, therefore, the plaintiff's allegation that she was assaulted to be well founded.

[33] I record that no attempt was made on behalf of the defence to justify the head butting on the basis that it was reasonably necessary to enable

Casson to defend himself. In my opinion, what happened was that faced by a determined attack by the plaintiff wielding the heavy ash tray Casson overreacted in the heat of the moment and deliberately head butted her. His reaction may be understandable, but it was wrong and unlawful.

[34] Besides denying the head butting the defence also made the alternative case that the plaintiff was guilty of contributory negligence. The authorities are not unanimous on whether contributory negligence can arise in a claim of trespass to the person (which this is) (see Clerk and Lindsell on Torts, 18th Edition, para. 3.31 and the fourth supplement thereto). However, in the case of Ward v Chief Constable of the RUC [2000] NI 543 Girvan J reviewed the authorities and concluded that contributory negligence was available as a defence, although whether it would arise or not is matter of fact and degree (at page 550c). I gratefully adopted Girvan J's analysis and his conclusion.

[35] In my opinion the plaintiff was guilty of contributory negligence in this case. The plaintiff's attempt to attack Casson forced him to respond physically. This response was, in the circumstances, more than proportionate but, to adopt the words of Girvan J in Ward's case (at page 550d) the plaintiff did share some responsibility in the ensuing damage to herself thus bringing into play the relevant provisions of the Law Reform (Miscellaneous Provisions) Act (Northern Ireland) 1948. Thus, the plaintiff is entitled to recover damages but with such reduction as the court thinks just and equitable having regard to her share in the responsibility for the damage.

[36] It is not easy to assess what that reduction should be. Had Casson merely been negligent I would have assessed it at more than 50%. But he was not merely negligent. I have found that he deliberately assaulted the plaintiff, albeit in the heat of the moment. While I am conscious of the fact that the plaintiff started the whole incident I also have to take account of the counterveiling consideration that there were two, apparently sober men available to control the plaintiff without deliberately head butting her. In my opinion a split of 50/50 looks about right.

[37] As to the plaintiff's relevant injury, it has produced a disfiguring scar on her forehead which will be permanent. She is now 33 years of age. I assess general damages on full liability at £25,000. Therefore, and not without a great deal of reluctance, I award her £12,500.