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Judgment: approved by the Court for handing down

(subject to editorial corrections)*

Delivered: 26/10/12

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

2009/138519

BETWEEN:

SINEAD McGLINCHEY

Plaintiff;

-and-

LEE McCAUGHAN

Defendant.

MAGUIRE J

[1] In this case the plaintiff, who is now aged 23, sues the defendant in respect of personal injuries which she allegedly received as a result of an accident which occurred on 26 April 2008.

The plaintiff's case

[2] At the date of the accident the plaintiff was aged 19. She says that on that day some of her friends arranged for her and a friend a surprise party. The surprise was in the form of a barbecue at Newferry on the River Bann. The reason for the party was that she and a friend were shortly about to travel to Tenerife where they were going on holiday and perhaps also to work.

[3] On that day the plaintiff, who by occupation is a hairdresser, finished work at 14.30 hours. She says she went into Belfast with her mother and then came home and went out again. A friend of hers, Bridin McErlean drove her from her home at Beatrice Villas, Bellaghy to Newferry. When she arrived around 18.00 to 18.30 hours the barbecue was under way. However, she said that the brother of one of her

friends had organised a boat trip on the river and she and four other girls and two males, one of whom was the defendant, got on board the boat. The boat left the pier or pontoon at Newferry and proceeded northwards along the River Bann towards Portglenone. The defendant was the skipper of the boat. The outward journey, she said, was uneventful, but before the boat reached Portglenone, she said it turned round and began the journey back to Newferry. As the boat made its way back down the river – going in a southerly direction – the plaintiff's evidence was that the driver of the boat began "doing circles".

[4] Throughout the journey the plaintiff said she had been seated in the passenger area on the left hand side of the boat at the rear. She said she did not move from where she was seated but had been holding on to a stanchion of the boat's canopy which was to her immediate left.

[5] As a result of the circles being done by the driver of the boat, the boat, she said, was creating waves and was travelling over its own wake. The disturbance created, she said, caused her to say to the driver that she could not hold on. However the driver laughed and simply said "hold on". The boat driver continued then to do circles. The boat was travelling fast when she said it was passing over or through a wave created by it. It hit something, she thought, causing her to be flung across the boat. She had lost her hold and was propelled from her seat hitting a pole or part of the structure of the boat receiving injuries to her face in the process. After the impact had been sustained the plaintiff could not remember anything further until she reached Antrim Area Hospital.

[6] The plaintiff maintained in evidence that she had not consumed any alcohol that day; she said in cross-examination that she did not see any of her friends drinking; and that she saw no-one "wake boarding" from the boat. When Mr Kennedy QC (for the defendant) put to her that at the outset the boatman, the defendant, had told her to stay in her seat, she denied this. Mr Kennedy said later in the trip the boatman repeated this to her. She also denied this. The witness said that she had not got up from her seat to speak to one of the other girls and that the accident had not happened while she was in the course of this movement. Additionally, the plaintiff said that she did not see any wake boarder falling into the water and she denied that the boat had slowed at the time of the accident. The accident did not happen, she said, at the point when the boat turned to go home. She totally rejected the suggestion that the accident occurred as a result of her losing her balance having stood up to go over to the other side of the boat to speak to a friend.

[7] The plaintiff called two non-expert witnesses in support of her case.

[8] The first was Natasha McAuley. She was on the boat on the trip and was a friend of the plaintiff. She said she had not consumed any alcohol that day. She said there were five girls in total on the boat together with the driver of the boat and a second male called David Brown. In her account no one was wake boarding from

the boat and the defendant was driving the boat. The accident, she said, happened on the boat's return journey to Newferry. The driver, she said, started to "dift" the boat. By this she meant that the driver was turning the boat sharply like a car in the course of a handbrake turn. The boat was driving fast and quickly swung round. The witness was behind the driver's seat. She said she was concerned because she knew a couple of the girls on board were not good swimmers. Because of this, she asked the driver to stop doing as he was doing and to stop the boat altogether. However, she said, the driver refused to do this and simply went on saying "hold on". She said that she did not see the plaintiff going from one side of the boat to another. After the accident she said there was blood everywhere.

[9] Expressly the witness rejected the account put to her by Mr Kennedy on behalf of the defendant. She denied that the plaintiff stood up prior to the accident. Rather she said the plaintiff had been holding on prior to the accident. She said everyone was holding on when the driver began his manoeuvres. She denied that any wake boarding had occurred from the boat and she denied that the driver had told them all to stay in their seats. She said the scenario that the plaintiff had got out of her seat to speak to her when the accident occurred was completely wrong. The witness said that after the accident the defendant kept saying he was insured. When the boat returned to Newferry she said she went to Antrim Area Hospital with the plaintiff.

[10] Two points of interest additionally arose from this witness's evidence. First of all she alleged that the driver had a can of beer/lager in a holder at the front of the boat. However, she denied seeing the driver drink from it. Secondly when it was put to her that Lynn and William Lowry were on the boat she initially said she did not recall but later said Lynn Lowry was not on the boat.

[11] A further non-expert witness called by the plaintiff was Bridin McErlean. She was the person who drove the plaintiff from her house to Newferry. She said she had taken no alcohol. Ms McErlean said she did not go on the boat herself as she was scared of water. She remained at Newferry. Her evidence was that she later saw the boat when it was making its way back to the pontoon. She said she saw the boat come into view at the bend beyond the pontoon. She said it stopped. The boat came in. At that point she took the plaintiff to the hospital in her car.

[12] In cross-examination this witness's account was challenged in an important respect. It was put to her that she had made a written statement about the accident at an earlier stage. She agreed that she had. In the statement, which is undated, she had stated that at the bend she saw the boat circling "uncontrollably". This had been omitted from her oral evidence to the court. There was no real explanation as to why this occurred.

[13] The plaintiff called Mr Lawrence McGill a chartered consultant engineer. He indicated that he was not a person with qualifications in respect of boats but that he himself had a boat. He had in April 2012 (quite some time after the accident)

inspected the boat. By this stage it had been sold to a third party. The boat was a Tigé R22. It was 6½ metres in length. The seats for passengers were cushioned. He said such a boat does not have hand grips but that a person might hold on to the bracket for the canopy in bad weather. As he put it: "In practice it can be used but that is not (the bracket's) purpose". If water came over the bracket it would get wet and slippy and be harder to hold onto. The hull of the boat, he opined, would create stability but if the boat was circling in the manner described by the plaintiff, he thought the boat would be crossing its own wake and that there would be impacts with the waves thereby created, though the extent of the impact would depend on the size of the waves and the speed of the boat. He noted that some boats were designed especially to go through their own wake by a cutting action but that this was not such a boat. In cross-examination Mr McGill accepted that the boat was fine for wake boarding and had capacity for 14 or so persons. Mr McGill also indicated that if going in a straight line the wake should not affect the boat's passage.

The defendant's case

[14] The defendant gave evidence. He was at the material time the owner of the boat and had used it on the River Bann for several years prior to the accident. The defendant said he had an Irish Waterways Advanced Boat Driving Certificate though this was not produced to the court. The defendant said that he used the boat for "wake boarding" which is a sport not dissimilar to water-skiing.

[15] The defendant's account was that on the day of the accident he had been out on the river wake boarding since around midday. He was, he said, with a man called David Brown. Both were wearing wetsuits and when one was driving the boat the other was wake boarding from the rear of the boat. It was Mr Brown who had arranged for the plaintiff and her friends to go on the river on the boat that evening. The defendant's evidence was that prior to picking up the plaintiff's party, apart from Mr Brown, two others were on the boat, a David and Lynn Lowry.

[16] The defendant said that he picked up the girls at the Newferry jetty, on the Bellaghy side of the river. The boat then set off going northwards towards Portglenone. At one point the defendant said that Mr Brown was in the boat when the girls were picked up but at another time he said he had left Mr Brown in the water, following a wake board, and had picked him up again when he was going northward.

[17] On the outward journey the defendant said he told the girls to stay in their seats. He said the girls were having a good time. He said he realised they had been drinking but in his evidence he did not describe them as intoxicated. He later told Mr Bentley QC (for the plaintiff) that he was on the issue of drink speaking generally about the girls and that he could not say whether the plaintiff had been drinking or not.

[18] Immediately prior to the accident he said that Mr Brown had been wake boarding and had fallen off into the water. He steered the boat slowly around in a circle to pick him up. At this time the girls, he said, were "carrying on" and swapping seats, going from side to side. This was despite his repeated warnings to them to stay in their seats. In the course of his manoeuvre to pick Mr Brown up, he said, the accident occurred.

[19] The defendant ascribed the plaintiff's injuries to her unruliness on the boat and to her attempt to swap seats with one of her friends. He said he heard the plaintiff screaming just before she sustained her injuries.

[20] The defendant denied that he had consumed alcohol while in charge of the boat but did say he had a drink in the holder near the steering wheel. The drink was not, however, an alcoholic drink. It was an energy drink called "Relentless".

[21] In cross-examination by Mr Bentley the defendant denied that he had been showing off to the girls and was doing this by making circles or spinning or turning the boat sharply. He said there were other boats about on the river and he kept to his side of the river. He denied the plaintiff's case that there was no wake boarding going on during the trip and he denied the evidence given on behalf of the plaintiff that there were just the girls and Mr Brown and him on the boat. He said it would have been obvious to anyone on the boat that the wake boarding was taking place. He said all the girls were giggling and laughing. He accepted that he had not stopped the boat due to the behaviour of the girls even though he was in charge of the safety of the passengers including those who could not swim. After the accident the defendant was adamant that he did not say anything to any of the girls about him being insured. The defendant stated that the fact of a passenger standing up or moving seats was not in itself an occasion of danger and that this had happened often in his experience without accident or incident.

[22] In support of the defendant's case Lyn Lowry gave evidence. She was the defendant's sister. It was her evidence that she and her husband were on board the boat that afternoon and early evening. They were not engaged in wake boarding themselves but she recalled David Brown and the plaintiff were wake boarding prior to the girls being picked up and, she thought, afterwards. Mrs Lowry was critical of the girls. They were "giggling, laughing and swapping seats". This was despite being told by the defendant to stay in their seats. She said the driver, the defendant, got angry with them. The girls were "really noisy". In particular, she said the plaintiff had got out of her seat and went forward when the accident occurred. At this point the boat was turning round to begin the journey home. A slow turn was being made, she said, when the accident occurred. Mrs Lowry denied that the boat was being driven in circles. Indeed, she said she had never seen boats around the River Bann do this.

[23] The final witness to give evidence was a consultant engineering called by the defendant, a Mr David Mills. On the basis of what he was told by the defendant, he

said the accident occurred about two miles north of Newferry. He said the boat was specially designed for wake boarding and was one of the best of its kind for this sport. Where a wake boarder fell into the water he said the boat would be brought round slowly to pick him up. It was important the boat did not turn quickly or acutely. In cross-examination, he accepted that standing up in the boat was not dangerous. He further accepted that if the boat did turn quickly or acutely this may create forces which could throw someone from their seat.

Discussion

[24] This is an unusual case where there are radically different versions of events put forward by each side. It is for the plaintiff to establish that her account is in substance true on the balance of probabilities. Mr Kennedy QC for the defendant accepted that if the plaintiff's account was believed by the court and the boat was being driven in the manner alleged by her – in circular movements or sharp turns - this would not be defensible in terms of the law of negligence.

[25] On the other hand, Mr Kennedy argued that if the defendant had not been engaged in driving in the manner alleged and had not been doing circles or otherwise manoeuvring the boat by way of sharp or acute turns and particularly if the defendant had, as he claimed, warned the passengers to stay in their seats, there would be no liability on the defendant.

[26] In these circumstances it is necessary for the court to evaluate the evidence which has been summarised above. The court has, of course, taken into account all of the evidence including those matters not referred to in the summary above.

[27] Inevitably in a case like this the court's view is affected by its assessment of witnesses. The court in this regard found the plaintiff to be a straightforward witness. In particular the court accepts her evidence that she had not been drinking at all on that day. There is no evidence to the contrary. The court has considered the medical records in relation to the plaintiff's attendance at hospital and has found no record which indicates that the plaintiff had consumed alcohol on that day. Moreover the court has no reason to disbelieve the plaintiff's account of what she had been doing on that day before travelling to Newferry and getting into the boat.

[28] The plaintiff's account of the accident seems to the court to be entirely believable and the court accepts it. The presence of five or so girls in the boat was by invitation and the court finds it easy to accept that the driver of the boat (a man in his late 20s or early 30s) may have been tempted to show off to the girls by driving the boat in an exciting way. In these circumstances the court appreciates that an accident such as that described by the plaintiff could easily occur. It was common case that the boat lacked grips or handles for passengers. Consequently it was to be expected that passengers would hold on to any handholds available even if they were not intended for this purpose. The plaintiff's account that she was holding on to a stanchion connected to the boat's canopy when she lost her grip due to the acute

movements of the boat and was thrown off her seat, is entirely credible. The plaintiff says that as a result she smashed her face against the pole or bar and the medical evidence suggests that this indeed was so. If the plaintiff had been simply standing up or walking across the boat it is less easy to explain her injuries which appear to be the product of a significant impact.

[29] Whilst it is possible that the plaintiff and her friends may have been excited by the trip and in high spirits the court rejects the notion that these factors, in contrast to the movements of the boat, were the cause of the accident. Specifically the court was not impressed with the account that the girls were swapping seats throughout the journey and that it was in the process of doing so that the accident occurred. Such a cause of the accident seems to the court far from likely.

[30] As regards the plaintiff's witnesses the court found Natasha McAuley's evidence generally corroborative of the plaintiff's account and is prepared to accept it. She too said that she had not been drinking that day and the court finds no reason not to believe her.

[31] Bridin McErlean's evidence was not, in the court's view, reliable. She give the appearance of a witness trying hard to support the plaintiff's case and her inexplicable failure to mention in her evidence that in her earlier statement she said she saw the boat from the shore "spinning uncontrollably" created in the mind of the court the view that her evidence was not to be trusted.

[32] I turn then to the defendant's evidence. The court is of the view that his evidence was unconvincing. His account that he never would have done spins or sharp turns in his boat at any time on the river seems to the court to be hard to believe. As is clear from the photographs of the boat provided to the court, it is sleek and sporty. It is the sort of boat which one might expect a boat owner (at least sometimes) to drive fast and to experiment with. It is also the sort of boat an owner might drive in a manner which would impress passengers whom he was taking on a trip. The court considers that the defendant's evidence that he always drove the boat strictly in accordance with the rules of the river unlikely to be true. In the defendant's account he was faced with having to constantly tell the girls to stay in their seats and he says he did so repeatedly but the court is sceptical about this. The court prefers the account of the plaintiff on this point so that the most in the way of instruction that a passenger may have received was to hold on.

[33] The defendant's says that wake boarding was taking place throughout the journey but this is difficult to reconcile with the version given by the plaintiff and Natasha McAuley, both of whom were clear that this was not happening. It would have been obvious to any of the passengers on the boat if wake boarding had been occurring – they would have been within a few feet of it – and the court can think of no good reason why the girls would lie about this. In contrast, the court can appreciate that the defendant may have wanted to paint a picture of the boat being engaged in on-going sport to the exclusion of the sort of activity the plaintiff alleges.

Mr Brown who was in the defendant's version wake boarding was not called to give evidence so creating a clear evidential gap in the defendant's case.

[34] In addition to the above, the court finds the defendant's account unsatisfactory in a variety of other respects:

(i) The court finds the notion that the girls were intoxicated and were swapping seats and carrying on as described by the defendant hard to sustain or at the very least exaggerated. While it may be that the girls were excited, the allegation that they were travelling across the boat from seat to seat and from one side of the boat to the other does not appear to the court plausible. The girls were new to the experience of the boat and some of them, it seems, were poor swimmers. In these circumstances it is difficult to accept that they would ignore the boat driver's instructions, if indeed given, and acted up in the way alleged. In the defendant's case, it seems to the court the explanation for the alleged behaviour of the girls was that they were intoxicated but, as noted earlier, at least as regards to the two girls who gave evidence there was no evidence that either took any alcohol that day.

(ii) On the subject of the girls' consumption of alcohol it is impossible for the court to overlook the way in which the defendant's defence dealt with this issue. In that document there is repeated reference to the plaintiff being intoxicated and the context for the various references was that she was so intoxicated as to be unable to remain in her seat so causing the accident. Yet, as already noted, when it came to proving any of this there was no proof whatsoever for these particular allegations produced by or on behalf of the defendant. In these circumstances the court is left to wonder why this case was being asserted. The conclusion is difficult to resist that the claims of the plaintiff's intoxication were a smokescreen to cover up for the absence of an otherwise credible defence to the proceedings.

(iii) Another issue which has troubled the court is the defendant's evidence that Mr and Mrs Lowry were at the time of the accident on board the boat. Both the defendant and Mrs Lowry claimed that the two were on board while Natasha McAuley and by inference the Plaintiff (the matter was not put to her in cross examination) who were on board denied this. The court sees no reason why the girls should not be frank about this. The court can, however, discern that the defendant needed to have some form of evidential assistance from someone in the boat other than himself. Mr Brown did not give evidence and nor did Mr Lowry so the key witness became Mrs Lowry. As will be noted below, the court formed a negative view of Mrs Lowry's evidence which appeared to the court to be lacking in any sort of convincing detail.

(iv) The defendant's evidence at times was confused. For example, the defendant gave differing versions of where Mr Brown was when the boat reached the

jetty at Newferry to pick up the girls. At one point the defendant gave the impression that Mr Brown was on board the boat at this time but later he referred to Mr Brown being picked up from the water, where he had been left after some wake boarding, as the boat headed northward.

(v) The defendant's case seemed also to undergo changes as the case progressed. The suggestion put to the plaintiff and her witness in cross examination was that the plaintiff had left her seat to speak to one of the other girls when the accident occurred, but this was not the evidence the defendant or Mrs Lowry gave. By this stage the idea that the plaintiff was "seat swapping" had found expression, an idea not suggested to the plaintiff or Natasha McAuley when they were giving their evidence.

[35] I now turn to the evidence of Mrs Lowry. As noted above, the court did not consider that this witness's account was convincing. On the contrary, on observing Mrs Lowry in the witness box and paying regard to how she gave her evidence the court formed the view she was in court to help the defendant and was giving an account of the girls' behaviour – in general terms - which was intended to serve the defendant's interests. Her account of the occasion when the accident occurred was at odds with the defendant's. The former said that the accident occurred when the boat was turning around to go back to Newferry whereas the latter's account had been that it happened as the boat was turning around to pick up a fallen wake boarder. The court has concluded that it should not rely on this witness's evidence.

<u>The expert witnesses</u>

[36] The court found the evidence of the expert witnesses of limited assistance in this case. It accepts that the boat was made for wake boarding and that it was not deficient because it lacked grip points or hand holes. The court also accepts that persons who were passengers would be likely simply to hold on to those parts of the structure within reach. It accepts that the plaintiff had been holding on to the stanchion of the canopy until she was disturbed.

[37] Both experts seemed to be agreed that if in fact the boat was to be driven in an abrupt manner – whether in circles or in acute turns – this might very well depending on the speed and on the wake and the waves engendered, produce a situation where a passenger could be thrown from his or her seat. The court thinks on the balance of probabilities that this or something very like it in fact occurred in this case with the consequence that the plaintiff received the injuries that she did.

<u>Conclusion on liability</u>

[38] In this case the court accepts as proved on the balance of probabilities the essence of the plaintiff's account. It is satisfied, therefore, that the plaintiff has established liability against the defendant.

[39] There can be no doubt that the defendant, as driver of the boat, had an analogous duty of care to his passengers as that which a driver would have to the passengers in a motor vehicle.

[40] On the facts I find this duty to have been breached by the defendant in the manner in which the boat was driven on this occasion. The driver, the court holds, indulged in unsafe manoeuvres which involved either circling movements of the boat and/or fast changes of direction or acute turns. The result of these unsafe aspects of controlling the boat was that the defendant caused the plaintiff to be thrown from her seated position and so sustain her injuries. I reject the defendant's pleaded case that the plaintiff was guilty of contributory negligence. The court does not consider it necessary to make any finding of fact in relation to the issues of whether the defendant had been consuming alcohol or whether after the accident he had told the girls he was insured.

Quantum

[41] In these circumstances the court goes on to assess the quantum of the plaintiff's claim. It has before it three medical reports on the plaintiff, one from Mr Millar dated 19 April 2011; one from Mr Thompson dated 14 June 2011 and one from Mr Delap dated 4 October 2011.

[42] Without setting out the contents of these reports the court (in line with counsels' analysis) divides up the plaintiff's injuries into three categories. These are:

(i) Scarring injuries to her face.

(ii) Injury to her neck.

(iii) Injury to the septum of her nose.

[43] As regards the scarring injuries the court reminds itself that the plaintiff was aged 19 at the date of the accident. She is a single and attractive girl. There are three main areas of scarring:

(a) To her forehead.

(b) To the bridge of her nose.

(c) To the area below her left nostril.

[44] Mr Millar considered the scarring in his detailed report. He described the three areas of scarring as follows:

(a) The scar to the lower part of the forehead "… there is a cruciate scar with limbs measuring 1.2 cm, 0.7 cm and .6 cm. The scar is pale pink in colour and fine. It was very slightly depressed".

(b) The scar to the bridge of the nose "… a vertical scar … measuring 2 cm in length and up to 0.5 cm in width. It is red in colour and flat and soft, apart from a slightly raised area beside the lower end of the scar".

(c) Lateral part of left side of lip "… several fine pale scars".

[45] By the date of Mr Millar's report he notes that the scars had reached their final condition. The consequence was that:

> "… she is left with very significant scarring on her face particularly on her forehead and nose. The slight contour irregularity on the forehead and also the lower part of the nose would prevent complete cover using makeup …. revisional surgery is unlikely to lead to any significant improvement … she is therefore left with obvious scarring on her face, particularly significant in the case of a young woman."

[46] In the course of the hearing the court twice inspected the plaintiff's face. In doing so on each occasion the court considered that the most significant scar was that to the bridge of her nose.

[47] In reaching its view as to the value to be placed on the scarring the court has taken into account the plaintiff's evidence as to how it embarrasses her and how she keeps seeing it in the mirrors which confront her during her job as a hairdresser.

[48] Having considered the various categories of female scarring set out pages 41-42 of the Guidelines for the Assessment of Personal Injury in Northern Ireland (Third Edition), the court considers that the appropriate award for the scarring in this case is £40,000.

[49] The court can deal with the other two limbs of personal injury more speedily. As to the neck injury it is clear that the plaintiff sustained a musculo-ligamentous injury which caused her pain at a substantial level for 12 months or so but has gradually settled down thereafter. Both counsel offered the view that they valued this aspect of the claim at £7,500 and the court is content to adopt this figure.

[50] Finally it is evident that the plaintiff also sustained in the accident a undisplaced nasal fracture and damage to the septum of the nose. She did not wish to have an operation on her deviated septum and while the medical evidence is that

there is perhaps a 30% reduction in the right nasal airway, this does not cause the plaintiff difficulty.

[51] On this aspect of this case there is also agreement between counsel that the value of this injury was £7,500 and the court is content to adopt this figure.

[52] It follows from the above that the outcome of the case shall be an award by the court that the defendant pay to the plaintiff damages in the sum of £55,000 together with the plaintiff's reasonable costs of the action.