THE HIGH COURT

[2017 No. 6905 P.]

BETWEEN

SIOBHAN KELLETT

PLAINTIFF

AND

RCL CRUISES LIMITED, PANTHER ASSOCIATES LIMITED TRADING AS CRUISE HOLIDAYS AND PANTHER ASSOCIATES LIMITED TRADING AS TOUR AMERICA

DEFENDANTS

JUDGMENT of Mr. Justice Barr delivered on the 6th day of June, 2019

Introduction

1. The essence of this case is as follows: while participating in a cruise on board a ship owned by the first defendant, and while the ship was docked at the island of St. Maarten in the West Indies, the plaintiff and her husband availed of an excursion in a speed boat as part of a ride which was advertised as being a "*White Knuckle Jet Boat Thrill Ride*". The plaintiff had booked this excursion when booking the cruise and had paid a supplement for it. The ride was operated by a company located in Phillipsburg, St. Maarten.

2. While on the ride, the skipper made a 360 degree turn to the starboard side. The plaintiff, who was sitting on the extreme right of the front bench, was lifted out of her seat even though she was holding on to a bar in front of her seat. She fell back into her seat with some force, striking her right elbow against the gunwale on the starboard side of the boat. Subsequent investigations revealed that she had suffered an undisplaced fracture to the lateral epicondyle in her right elbow, with a small focal tear in the area.

3. The plaintiff claims that the first defendant as the provider of the cruise and the second defendant, which was the travel agent through which she had booked the cruise and the excursion, are liable to compensate her in respect of her injuries, loss and damage, pursuant to the provisions of s. 20 of the Package Holidays and Travel Trade Act 1995 (the 1995 Act). In particular, it is the plaintiff's case that the boat which was provided for use on the excursion was in an unsafe and dangerous condition having regard to the vigorous manoeuvres that were going to be undertaken as part of the excursion. It is the plaintiff's case that the following safety features should have been incorporated in the boat: a safety harness or lap belt, a bar along the gunwales on either side of the boat, padding on the gunwales and the plaintiff should have been put sitting in a different part of the boat.

4. The defendants are the cruise line and the travel agent in Dublin through whom the cruise was booked. They were jointly represented at the trial. They filed a full defence to the plaintiff's claim. At the trial, they conceded that they were "organisers" of the package holiday, as defined in the 1995 Act. However, they maintained that as the plaintiff had voluntarily elected to go on an activity, which she knew would involve vigorous manoeuvres done at speed, she could not complain if she happened to injure herself in the course of such activity. They also submitted that they were entitled to rely on the exceptions to the imposition of liability on an organiser provided for in s. 20 (2)(a) and (c) of the 1995 Act. Finally, they alleged that the plaintiff had not discharged the onus of proof of establishing that there had been negligence, or breach of duty on the part of the excursion operator.

The Facts

5. The year 2016, was a special year for the plaintiff and her husband. In that year, the plaintiff turned 50 years of age. It was also their 25th wedding anniversary. To celebrate these milestones, the plaintiff and her husband decided to treat themselves to a special holiday. As part of that vacation, the plaintiff and her husband booked a cruise with the first defendant. They selected a seven day cruise in the West Indies. They flew from Dublin to the United States on Saturday, 2nd April, 2016. On the following day, they boarded the ship, "*Freedom of the Seas*" at Port Canaveral, Florida. In the following days, they cruised to the Bahamas and to the island of St. Thomas. On Thursday, 7th April, 2016, the ship docked at Phillipsburg on the island of St. Maarten.

6. Prior to leaving Ireland, the plaintiff had booked an excursion through the first defendant for her husband and her to go on a White Knuckle Jet Boat Thrill Ride which was to be provided by a company in St. Maarten. The plaintiff paid a supplement of €124.20 for her and her husband to go on the excursion.

7. Prior to booking the excursion, the plaintiff had looked at the website of the company providing the excursion. There, she saw photographs of the ride in progress and there was also a video showing the excursion. On the website, the following description was given of the excursion:

> *"Tour description*
>
> *If your goal for a perfect vacation day involves an adrenaline-infused rush from a water rollercoaster ride then you are in the right place.*
>
> *The only one 'White Knuckle' Jet Boat thrill ride – water rollercoaster on St. Maarten offered to you daily with an hourly departure.*
>
> *When you're aged 5 or higher (minimum height 4ft 2in and up) and enjoy exciting boat rides, then you will love this sort of ride – the kind with 180, 270 and 360 degree spins with sweeping turns, amazing tricks and manoeuvres, such as sideway slides, sashays and as you travel up to 53 miles per hour with a 300 HP jet boat, you'll enjoy approximately 30 minutes of exhilarating action, that will have you involuntarily laughing and 'praying for your life'.*
>
> *And that will knock you silly!*
>
> *It will be your big event of this vacation: thrill jet boat ride! The best adrenaline rushes in St. Maarten."*

8. On the morning in question, the plaintiff and her husband disembarked from the cruise ship and were brought with eight other passengers from the ship, to the offices of the excursion operator at the harbour from where the excursion would begin. They were given the following instructions by the skipper of the boat: they were told to stay seated at all times, they were to hold tightly onto the bar in front of their seat and plant their feet firmly on the floor when he was performing turns on the water, preceding which he

said that he would give a hand signal to alert them that he was about to make a turn, they were told to wear swimming togs or other suitable clothing and to wear the life jackets that were provided for their use.

9. The plaintiff and her husband and the other passengers were then brought down to embark onto the boat. It was a fibreglass speed boat with three bench seats, each of which could accommodate four people. The plaintiff stated that the skipper designated where the various passengers were to sit. This was presumably done to ensure an even distribution of weight. The plaintiff and her husband were directed to sit on the front bench along with the skipper. He sat on the port side, the plaintiff was in the middle and her husband was on the starboard side. The remainder of the passengers occupied the other two benches. The plaintiff stated that they were older than the plaintiff and her husband.

10. The boat proceeded out onto the water and the skipper gave a signal that he was about to make a 360 degree turn to the port side. When he did this, notwithstanding that the plaintiff was holding tightly to the bar in front of her, she lifted out of her seat and moved to her left, with her head striking the skipper's head. He brought the boat to a halt and told the plaintiff to change places with her husband. This meant that she was now sitting on the starboard side of the front bench.

11. Sometime later, the skipper again indicated that he was going to make a 360 degree turn, this time to the starboard side. The plaintiff again planted her feet on the floor of the boat and held tightly to the bar in front of her. However, she again lifted out of her seat. She stated that she came almost completely out of the seat and if she had not continued holding onto the bar, she feared that she would be thrown into the water. She managed to stay holding the bar and came back into her seat with some force. When so doing, her right elbow struck against the starboard gunwale. She experienced immediate severe pain in her right elbow. The plaintiff stated that the skipper and the other passengers were aware that she had injured herself. However, she did not ask to be brought back to shore, as she did not wish to spoil the excursion for the rest of the passengers. The skipper did not do any further 360 degree turns during the remainder of the excursion.

12. When she got ashore, one of the other passengers gave her a painkiller. The skipper's wife also gave her an ice pack to apply to her elbow. When the plaintiff returned to the cruise ship, she enquired about the possibility of having her elbow x-rayed. She was told that that would cost approximately €180. When she explained how the accident had occurred in the course of the excursion, she was then informed that the cruise line would cover the cost of the x-ray. She was told that someone from the Health and Safety Department would make contact with her and that the ship's doctor would see her. The plaintiff stated that no one from Health and Safety ever came to interview her.

13. She was seen by the ship's doctor, who examined the elbow and advised her that in his opinion, she had not fractured her elbow, but had merely sprained and bruised it. The plaintiff stated that she was reassured by this diagnosis. She continued with the cruise and also with the second part of her holiday, which involved spending a few days in Las Vegas. However, she was not able to enjoy the remainder of the holiday, as she experienced constant severe pain in her right elbow.

14. When the pain did not abate, she attended with a physiotherapist when she returned to Ireland. He stated that she should immediately have the elbow x-rayed. This was done in the Mater Hospital and it revealed that she had an undisplaced fracture of the lateral epicondyle of the right elbow. A subsequent MRI scan carried out in November 2016, revealed that she had a small focal tear in the area.

15. In her evidence, the plaintiff stated that, while she had signed up to go on a White Knuckle Jet Boat Thrill Ride, which would involve doing turns and other manoeuvres at considerable speed, she expected that she would be safe while on the excursion. It was her view that there should have been a harness or lap belt to ensure that she could remain seated on the bench and there should have been padding along the gunwales, so as to prevent people injuring themselves should they crash against the side of the boat. In cross examination, she accepted that she had signed up for a vigorous boat ride, but she expected that the boat would be safe for such manoeuvres. She felt that it was unsafe due to the absence of the features outlined above.

Expert Evidence on behalf of the Plaintiff

16. Expert evidence was given on behalf of the plaintiff by Mr. Barry Tennyson, Consulting Engineer. He stated that making a 360 degree turn at speed was a very unusual manoeuvre for a boat to make. As the excursion operator knew that they were going to do such manoeuvres, the obligation rested on them to ensure that the boat was safe for such manoeuvres.

17. Mr. Tennyson stated that it was clearly foreseeable that if the boat was going to be turned 360 degrees at speed, this would require passengers to hold onto the bar in front of them for a prolonged period. Due to the centrifugal force that would be generated by the turn, it was foreseeable that passengers would lift out of the bench seating and would move in the direction in which the boat was turning. As passengers' feet were likely to be wet, they would be likely to slip with the force exerted by the centrifugal force and therefore even if they planted their feet on the hull of the boat, they would not get a foothold or traction.

18. Mr. Tennyson stated that in these circumstances, the excursion operators should have provided a harness or lap belt, or a sidebar for the passengers at the extremities to hold onto and/or should have provided padding to the gunwale on each side of the boat to prevent people injuring themselves, should they come into contact with them. He stated that these were practical and inexpensive safety features which should have been put in place by the excursion operator in light of the manoeuvres which it was intended would be carried out during the excursion.

19. Mr. Tennyson was also critical of the skipper for changing the plaintiff's seating position after the incident during the first turn. He felt that putting her on the extreme starboard side was, in fact, exposing her to more danger. Given the plaintiff's difficulty in remaining seated when the boat was turned at speed, he felt that the skipper should have put the plaintiff in the last row on the boat, where she would have been on a bench with three others, thereby helping to wedge her in place.

20. In cross examination, Mr. Tennyson accepted that he was not aware of any Irish regulations governing such boat trips. Nor was he aware of any local regulations, guidelines or standards applicable in St. Maarten for boats doing such trips. He did not think that there would be any specific regulations or guidelines covering these matters, as doing a 360 degree turn was very unusual.

21. Mr. Tennyson did not accept that using a harness or lap belt would be dangerous in the event of the boat capsizing. He felt that the risk of capsize occurring, was far less than the risk of a person being ejected during a 360 degree turn performed at speed. Also, it would be possible to use quick release seatbelts on the vessel.

22. When asked could he point to any boat where these features had been used, Mr. Tennyson stated that he had been on a boat on the River Thames in England, which had side rails. It did not have any seatbelts or padding, but they were not going to do 360 degree turns. He said that his opinion in this case had been formed following an interview with the plaintiff and from looking at the boats used

on the excursion as set out on the excursion operator's website. He did not feel that he had been materially disadvantaged by reason of the fact that he was not able to examine the boat in question.

The Defendant's Evidence
23. The defendant did not call any evidence on the liability aspects. Their only witness was Mr. James Colville, FRSCI, who gave evidence in relation to the plaintiff's injuries.

The Law
24. The defendants accepted that each of them was an organiser within the meaning of s. 3 of the Package Holidays and Travel Trade Act 1995. It was accepted that the plaintiff was a consumer within the meaning of that Act.

25. The relevant provisions in relation to the liability of an organiser in respect of the defective provision of services by a third party is set out in s. 20 of the 1995 Act. The relevant parts of s. 20 are in the following terms:-

> *"20. (1) The organiser shall be liable to the consumer for the proper performance of the obligations under the contract, irrespective of whether such obligations are to be performed by the organiser, the retailer, or other suppliers of services but this shall not affect any remedy or right of action which the organiser may have against the retailer or those other suppliers of services.*
>
> *(2) The organiser shall be liable to the consumer for any damage caused by the failure to perform the contract or the improper performance of the contract unless the failure or the improper performance is due neither to any fault of the organiser or the retailer nor to that of another supplier of services, because—*
>
> > *(a) the failures which occur in the performance of the contract are attributable to the consumer,*
> >
> > *(b) such failures are attributable to a third party unconnected with the provision of the services contracted for, and are unforeseeable or unavoidable, or*
> >
> > *(c) such failures are due to—*
> >
> > > *(i) force majeure, that is to say, unusual and unforeseeable circumstances beyond the control of the organiser, the retailer or other supplier of services, the consequences of which could not have been avoided even if all due care had been exercised, or*
> > >
> > > *(ii) an event which the organiser, the retailer or the supplier of services, even with all due care, could not foresee or forestall."*

26. The leading Irish case is the decision of the Supreme Court in *Scaife v. Falcon Leisure Group (Overseas) Limited* [2008] 2 I.R. 359. In that case, the plaintiff slipped and fell in a hotel restaurant while on holiday in Spain. There was water on the tiled floor surface. The question arose as to whether the travel agent, as the organiser, was liable for the negligence of the hotel staff in failing to keep the floor surface in a clean and safe condition. In the course of the hearing, the question arose as to whether the issue of negligence had to be determined by having regard to local regulations and standards, or generally accepted standards in this country. Having reviewed the relevant case law, Macken J. delivering the judgment of the court came to the following conclusion:-

> *"The conclusions to be drawn from all of the above cited cases are that, both before and after the coming into force of the Directive and its transposition in national law, the established principle is that the organiser is not an insurer to the customer. The learned High Court judge correctly found that the hotel proprietor was not such an insurer under the legislation. The above cases also establish the principle that the test is not one of strict liability, and in that regard I am satisfied also that the High Court judge's finding, when correctly read, was not that strict liability applied. The final principle clearly established by those cases is that the standard by which the acts in question are to be judged is that of reasonable skill and care, which standard, if not expressed in a contract will be readily implied into it."*

27. Macken J. went on to find that the trial judge in that case had before him evidence that the accident was a wholly foreseeable event on the part of the service supplier, the hotel in Spain, that they had in place a system which could have warned of the hazard and/or prevented the accident, but had not operated that system on the evening in question. In those circumstances, the High Court Judge was entitled to find that the service in question had not been supplied with reasonable skill and care. The court held that he was correct to find for the plaintiff. The appeal was dismissed and the order of the High Court was affirmed.

28. A number of cases in the United Kingdom have looked at the issue as to the standard of care which has to be provided by a service provider in a foreign country. In *Wilson v. Best Travel Limited* [1993] 1 All ER 353, the court had to determine whether there was a breach of duty by the travel agent, due to the fact that the glass doors in a Greek hotel were fitted with ordinary 5mm glass which complied with Greek safety standards, but not with British safety standards, which would have required the use of safety glass in such doors. It should be noted that this case predated the Package Travel, Package Holidays and Package Tours Regulations 1992, which implemented the Directive into English law. Notwithstanding that, the dicta of Phillips J. have been cited with approval in a number of subsequent decisions post 1992. In the course of his judgment, Phillips J. stated as follows at p. 358:-

> *"What is the duty of a tour operator in a situation such as this? Must he refrain from sending holiday makers to any hotel whose characteristics, insofar as safety is concerned, failed to satisfy the standards which apply in this country? I do not believe that his obligations in respect of the safety of his clients can extend this far. Save where uniform international regulations apply, there are bound to be differences in the safety standards applied in respect of the many hazards of modern life between one country and another. All civilised countries attempt to cater for these hazards by imposing mandatory regulations. The duty of care of a tour operator is likely to extend to checking that local safety regulations are complied with. Provided they are, I do not consider that the tour operator owes a duty to boycott a hotel because of the absence of some safety feature which would be found in an English hotel unless the absence of such a feature might lead a reasonable holidaymaker to decline to take a holiday at the hotel in question."*

29. In *Evans v. Kosmar Villa Holidays* [2008] 1 WLR 297, the Court of Appeal had to decide whether there was any duty on the hotel to guard the claimant, who was of full capacity, against the obvious risk of diving into the shallow end of a swimming pool. The court held that the hotel owed no such duty to the plaintiff. That case was decided after the entry into force of the 1992 Regulations. Richards L.J. cited the judgment of Phillips J. in Wilson, and observed as follows at paras. 23 and 24:-

"23. A claim such as that in Wilson v. Best Travel Limited would no doubt be put differently under the 1992 Regulations: since the tour operator is directly liable under those regulations for improper performance of the contract by the hotel even if the hotel is under independent ownership and management, the focus can be on the exercise of reasonable care in the operation of the hotel itself rather than in the selection of the hotel and the offer of accommodation at it. But I do not think that this affects the principle laid down as to the standard to be applied to a hotel abroad, namely that the hotel is required to comply with local safety regulations rather than with British safety standards. That was the approach in Codd v. Thomson Tour Operators Limited (Court of Appeal of 7 July 2000), in which the claimant had been injured while travelling in a lift at a hotel in which he was staying in Majorca. The tour operator accepted that it would be liable (presumably under the 1992 Regulations) if negligence was established against those who were responsible for running and manging the hotel, but the judge found that liability was not established. The Court of Appeal dismissed the claimant's appeal, citing Wilson v. Best Travel Limited for the proposition that there was no requirement for the hotel to comply with British safety standards, and holding that there was no breach of local safety regulations and that there was no negligence by the hotel management either in relation to the maintenance of the lift or in relation to safety procedures.

24. In the present case, there was no evidence to support the pleaded claim of non-compliance with local safety regulations, and that way of putting the case was not pursued at trial. In my view, however, it was still open to the claimant to pursue the claim on the other bases pleaded in the amended particulars of claim. What was said in Wilson v. Best Travel Limited did not purport to be an exhaustive statement of the duty of care, and it does not seem to me that compliance with local safety regulations is necessarily sufficient to fulfil that duty. That was evidently also the view taken in Codd, where the court found there to be compliance with local safety regulations but nevertheless went on to consider other possible breaches of the duty of care."

30. In *Gouldbourn v. Balkan Holidays and Flights Limited* [2010] EWCA Civ. 372, the issue arose as to the standard of care which had to be exercised by a ski instructor when teaching a class of novices. The trial judge had concluded that the instructor's conduct had to be judged against the relevant local standards in Bulgaria. There was no evidence as to the content of such local standards and the claim was accordingly dismissed. In the course of his judgment, Leveson L.J. addressed the issue as to the standards applying both locally and in the UK and which was to be adopted as being the appropriate standard against which to assess the liability of the service provider. He stated as follows at para. 19:-

"19. It is a mistake to seek to construe the judgment of Phillips J. as if it was a statute: see the observations of Richards L.J. in Evans v. Kosmar Villa Holidays plc [2008] 1 WLR 297 at para 24 page 3068 to the effect that the case did not purport to be an exhaustive statement of the duty of care. Nevertheless it does identify a very important signpost to the correct approach to cases of this nature, which will inevitably impact on the way in which organisations from different countries provide services to UK tourists. To require such organisations to adopt a different standard of care for different tourists is quite impracticable. What might be required for American tourists may well be different to that required by a French or Western European tourist, itself different to that required by a Japanese tourist. Neither do I consider that the Regulations impose a duty on English tour operators to require a standard of care to be judged by UK criteria or necessarily western European criteria."

31. The English Court of Appeal returned to this issue in *Lougheed v. On The Beach Limited* [2014] EWCA Civ. 1538. The court held that mere compliance with the local regulations would not exhaust the inquiry as to whether the service operator had provided the service with reasonable skill and care. Tomlinson L.J. stated as follows at para. 16:-

"16. It follows that I cannot accept Mr Huckle's broad submission that local standards are a distraction and not determinative of the issue whether reasonable skill and care has been exercised. I would accept, as is obvious, that mere compliance with locally applicable regulations will not exhaust the enquiry, for the very reason that the locally applicable standards may recognise that such compliance is of itself insufficient. But I reject the suggestion that the English court can, if it finds local standards to be unacceptable, judge performance in that locality by reference to the standards reasonably to be expected of a similar establishment operating in England or Wales. Such an approach is neither sensible nor realistic. It is also precluded by authority."

32. Nevertheless, the learned judge went on to stress the importance of the claimant establishing what were the applicable local regulations in relation to the provision of the service. He stated as follows at para. 27:-

"The judge recognised that standards may not be the same in Spain as in the UK and that there will be cases where the court is unable to draw an inference of want of care without sufficient evidence of Spanish standards. In my judgment this is just such a case, both because of the lack of relevant evidence on a point on which the Claimant bore the evidential burden, and because it was not a proper case in which to draw an inference, without more, of a lack of proper care."

33. In *Kerr v. Thomas Cook Tour Operations Limited* [2015] NIQB 9, the court had to determine whether the travel agent was liable when the plaintiff was attacked by a cat in the grounds of the hotel in which she was staying in Tunisia. The court found as a fact that both the hotel management and the defendant must have known of the presence of a large number of cats in or around the hotel. This was due to the fact that the defendant had carried out monthly health and safety and quality audits at the hotel. The court was satisfied that the person who carried out those audits on behalf of the defendant must have observed the large number of cats in and around the hotel. Maguire J. stated as follows at paras 16 and 17:-

"[16] The court is inclined to think that if a large number of stray cats was roaming

around a hotel this situation would give rise to some obligation on the part of the hotel management to use reasonable skill and care to control them in an appropriate way. The court finds it difficult to accept that the presence of the cats creates no obligation whatsoever on the hotel management. The obligation which arises, moreover, at, at least, a general level, would apply equally, whether the hotel in question is in Tunisia or the United Kingdom or elsewhere. However, this is not the end of the matter. There is still the issue of what is the appropriate standard of care which the court should apply. The court can see that differential standards of care may well exist as between one country and another in relation to a matter of this kind.

[17] In this case there has been no evidence adduced by the Plaintiff which establishes the standard of care which the court should apply. It seems to the court that, unless there is such evidence, the court is unable to conclude that there has been a breach of the obligation. Consequently, with reluctance, the court is forced to conclude that the Plaintiff has

failed to prove her case. While Mr Fee sought to escape this conclusion by arguing that in this area of the case the onus of proving that it had acted with reasonable care and skill should rest with the Defendant, the Court is unable to accept this submission which was unsupported by authority."

34. From the foregoing case law, it is possible to state a number of broad principles. Firstly, the 1995 Act imposes a type of vicarious liability on the organiser as defined in the Act, in respect of negligence and breach of duty on the part of third parties who are engaged to provide accommodation or other services as part of the holiday package.

35. The liability imposed by the 1995 Act is not a strict liability. It is not the case that the organiser is liable under s. 20 unless he can bring himself within one of the exceptions provided for in that section, see *Scaife v. Falcon Leisure*.

36. The plaintiff must establish negligence or breach of duty on the part of the service provider in order to establish liability against the organiser. The negligence on the part of the service provider in the foreign country can be in relation to static conditions, such as the state of the hotel premises, as in *Wilson v. Best Travel Limited*, or can be in respect of casual negligence, which is negligence in the performance of a function, as in *Scaife v. Falcon Leisure.*

37. The difficult question is what standard of care can be expected of the service provider in the foreign country. Much of the English case law has focused on whether it will suffice for the service provider or the organiser to establish that the service provider complied with all relevant local regulations and standards. While there are dicta which suggest that compliance with the applicable local standards will suffice, the preponderance of judicial decisions hold that compliance with local standards is not solely determinative of the issue, because there may be circumstances where the local regulations or standards are shown to be clearly inadequate or outdated, even in the foreign country itself, or they may fly counter to internationally recognised standards.

38. However, these decisions also make it clear that a holiday maker from Ireland, or England, cannot assume that Irish or English standards will apply in the accommodation, or services provided by a third party in a foreign country. It is well to remember the dicta of Tomlinson L.J. in the *Lougheed case*, where he stated as follows at para. 9:-

"Standards of maintenance and cleanliness vary as between countries and continents and indeed what is reasonably to be expected in a five star hotel in a Western European capital differs from what is reasonably to be expected in a safari lodge, however well-appointed. There may perhaps be certain irreducible standards in relation to life-threatening risks, but to expect uniformity of approach on a matter such as the frequency of inspection and cleaning of floor surfaces is unrealistic. An Englishman does not travel abroad in a cocoon."

39. In an effort to answer this difficult question, the law in Ireland would appear to be that stated in the judgment of the Supreme Court in *Scaife v. Falcon Leisure*, where it was pointed out that the organiser is not an insurer to the consumer. Macken J. went on to state that *"the standard by which the acts in question are to be judged is that of reasonable skill and care, which standard, if not expressed in a contract will be readily implied into it"*. To that, one can probably safely add that in general, if it is established that the service provider complied with all relevant local regulations and standards, they and the organiser will not be liable in negligence or breach of contract to the consumer, unless it can be shown that such local standards were patently deficient, or were not in conformity with uniformly applicable international regulations.

40. Finally, one might add that it is possible for a consumer to expect five star service, or service to a standard comparable to that found in first world countries, if there is a stipulation to that effect in his contract with the organiser. So, one could go to Africa and expect a hotel to be of five star European standard, but only if that was a term in his contract with the organiser. If the service provider did not meet these standards, the consumer would have an action for breach of contract. One is really dealing here with a quality defect in the service, which would found an action for breach of contract.

Conclusions

41. To deal with the submissions made by the defendants, they firstly contended that as the plaintiff had voluntarily signed up to go on the excursion, after she had researched it by looking at the excursion operator's website, she clearly knew that it was going to be a boat ride in which vigorous activities would be undertaken. In these circumstances, it was submitted that there had been an exercise by the plaintiff of her free will to sign up to such an adventure. Having done that, she could not then complain if she suffered injury in the course of engaging in a risky activity.

42. In support of that assertion, Mr. O'Callaghan SC referred to the case of *Tomlinson v. Congleton Borough Council* [2003] UKHL 47 . In that case the plaintiff had ignored warning signs at a lake which prohibited swimming . When he dived into the lake he struck his head against a sandbar or other feature on the floor of the lake, causing him to suffer a fracture of his cervical spine, resulting in paralysis. In the judgement of Hoffman L.J., with which the majority of the Law Lords agreed, the following was stated in relation to the issue of free will and autonomy of the individual at common law:

"I think it will be extremely rare for an occupier of land to be under a duty to prevent people from taking risks which are inherent in the activities they freely choose to undertake upon the land. If people want to climb mountains, go hang gliding or swim or dive in ponds or lakes, that is their affair. Of course the landowner may for his own reasons wish to prohibit such activities. He may think that they are a danger or inconvenience to himself or others. Or he may take a paternalist view and prefer people not to undertake risky activities on his land. He is entitled to impose such conditions, as the council did by prohibiting swimming. But the law does not require him to do so."

43. While that was a case dealing with the issue of occupiers' liability, Mr. O'Callaghan SC submitted that the same principle would apply to a person such as the plaintiff, who had voluntarily signed up to participate in a risky activity. He also referred to the judgement of the Supreme Court in *Weir-Rogers v. The S.F. Trust Ltd* [2005] IESC 2. In that case, the plaintiff had gone with some friends for a walk along the top of a cliff. Having rested for some time, when she got up to return to the restaurant with her friends, portion of the edge of the cliff on which she stood gave way, causing her to fall into the sea and suffer serious injuries. Her action against the landowner was unsuccessful. In delivering the judgement of the court, Geoghan J. endorsed the sentiments which had been expressed by Dunedin L.J. in *Hastie v. Magistrates of Edinburgh* (1907) SC 1102, where the learned judge had stated that there were certain risks against which the law in accordance with the dictates of common sense did not give protection, such risks were "just one of the results of the world as we find it". Geoghegan J. went on to state as follows in relation to the risks that are assumed by people who go walking on cliffs:

"I would heartily endorse the sentiments expressed in these passages. The person sitting down near a cliff must be prepared for oddities in the cliff's structure or in the structure of the ground adjacent to the cliff and he or she assumes the inherent risks associated therewith. There could, of course, be something quite exceptionally unusual and dangerous

in the state of a particular piece of ground which would impose a duty on the occupier the effect of which would be that if he did not put up a warning notice he would be treated as having reckless disregard. But this is certainly not such a case."

44. Mr. O'Callaghan SC further submitted that the circumstances in this case were similar to those which pertain when a person elects to participate in a body contact sport. In such circumstances, the participant cannot bring a claim if they receive an injury in the course of a game which involves body contact, such as football or rugby. In support of this submission, he referred to the textbook, *Clerk and Lindsell on Torts,* 22nd edition, paragraph 3-131.

45. I think that the defendants' submission in this regard goes too far. It is certainly true that where a person voluntarily engages in a risky activity, or in a sport that involves some risk of injury, they cannot complain if they receive an injury in the ordinary course of pursuing that activity. However, just because a person signs up to participate in an excursion or activity which involves some risk, it cannot be said that they thereby consent to the excursion operator, or other people engaged in the activity, acting in a negligent fashion towards them. The paragraph which was cited by senior counsel for the defendants in the textbook, supports this proposition. The learned authors expressed their opinion in the following terms:

"In cases involving injury to spectators or competitors at sporting events the courts sometimes speak in terms of assumption of risk. In Wooldridge v. Sumner, for example Diplock L.J. said that a "person attending a game or competition takes the risk of any damage caused to him by any act of a participant done in the course of and for the purposes of the game or competition". This is not an application of volenti non fit injuria. It is correct that in a sport which necessarily involves some physical contact the players can be taken impliedly to consent to those contacts which occur within the ordinary performance of the game. But this consent negatives what would otherwise be a battery for those contacts that can reasonably be expected to occur in the course of the game, and so competitors 'assume the risk of injury' from such contacts in the absence of negligence. This is no more than saying that in the absence of a battery there is no liability for non-negligently inflicted injury, and in this sense everyone assumes the risk of accidental injury when liability depends on the proof of negligence. It is not, however, consent to negligence by other competitors."

46. Accordingly, I am satisfied that the plaintiff is not prevented from alleging that there was negligence on the part of the excursion operators, merely because she signed up to go on the White Knuckle Jet Boat Thrill Ride. While she would be taken to have consented to such injuries as could reasonably be expected might occur in the course of such an activity, she did not consent to any injuries that may have been inflicted upon her as a result of the negligence of the excursion operator.

47. It was further submitted on behalf of the defendants that they were entitled to rely on the exceptions to liability of an organiser, which are provided for in s. 20 (2)(a) and (c) of the 1995 Act. The exception under subparagraph (a) provides that the organiser shall not be liable if the improper performance of the contract was not due to any fault of the organiser or the retailer, nor to that of another supplier of services because the failures which occurred in the performance of the contract were attributable to the consumer. I cannot hold that the injuries which the plaintiff suffered were attributable to any negligence on the part of the plaintiff. She did all that she was instructed to do. She sat in her designated place. She held onto the bar in front of her. She wore the lifejacket which had been provided to her. In such circumstances, if there was an improper performance of the contract, it was not due to any negligence on the part of the plaintiff.

48. The defendants also rely on s. 20 (2)(c) of the 1995 Act. It provides that the organiser shall not be liable for the improper performance of the contract where such failure was due to either force majeure, that is to say unusual and unforeseeable circumstances beyond the control of the organiser, the retailer or other supplier of services, the consequences of which could not have been avoided even if all due care had been exercised, or was due to an event which the organiser, the retailer or the supplier of services, even with all due care, could not foresee or forestall. Again, I do not think that these exceptions apply in this case. Nothing that happened on the day in question could be described as being an event of force majeure.

49. Nor can it be said that if there was a failure to perform the contract or an improper performance of the contract, that was due to an event which neither the organiser, the retailer, or the supplier of services, even with all due care could have foreseen or forestalled. Interpreting that provision in its ordinary and natural meaning, would seem to imply that there must be an event which could not be foreseen or forestalled even with all due care. That would imply that it must be a totally unforeseen or unexpected event. I do not think that the fact of a person lifting out of their seat in the course of making a 360° turn could be seen as a totally unforeseeable event. However, while I am holding that the defendants have not brought themselves within this statutory exception, that does not necessarily imply that there was negligence on the part of either the excursion operator, or the organiser. One must heed the dicta of Tomlinson L.J. in the *Loogheed* case that not everything which is foreseeable is likely. This aspect will be considered further later in the judgement. For the present, it will suffice for me to say that I do not accept that the defendants have established that they come within the exceptions provided for in section 20 (2) of the 1995 Act.

50. Turning to the facts in this case, a consideration of the essential facts must begin with the fact that the plaintiff contracted for what was described as a White Knuckle Jet Boat Thrill Ride. She knew from the tour description on the website that it was going to be an adrenaline-infused rush from a water rollercoaster ride. She knew that the boat was going to do 180, 270 and 360 degree spins with sweeping turns and was going to do "amazing tricks and manoeuvres such as sideway slides, and sashays at speeds of up to 53 miles per hour". She had no doubt but that it was going to be a vigorous ride because the advertising literature promised her that it would have her "involuntarily laughing and praying for her life".

51. The gravamen of the plaintiff's case is that the boat which was provided, while safe in a general seafaring sense, was not safe having regard to the activities which were going to be performed during the excursion and in particular when doing 360 degree turns at speed. The plaintiff maintains that she should have been provided with a harness or lap belt, there should have been a sidebar on the gunwales and there should have been padding on the gunwales. Her engineer, Mr. Tennyson has expressed the opinion that such features would be expected on a boat which was going to be used for such activities.

52. However, Mr. Tennyson could not point to any standards or regulations in St. Maarten, or in Ireland, or elsewhere, which would have mandated the use of such features on a boat used for such activities. The nearest he could come was to say that he had experience of a boat on the River Thames which had sidebars on it. He did not produce any evidence of similar boats anywhere in the world which were used for similar thrill rides, which had such safety features.

53. As the case law makes clear, the onus rests on the plaintiff to establish that the service provider did not provide the service in accordance with local regulations or standards, or in accordance with internationally recognised standards. The plaintiff has not established that the excursion operators failed to comply with the relevant standards applicable in St. Maarten. There was simply no evidence of what those standards might be. There was no evidence of any equivalent Irish standards or regulations. Mr. Tennyson

stated that there were unlikely to be any such regulations, as performing a 360 degree turn at speed, was not something which a boat would normally do.

54. Even leaving aside this deficit in evidence, I am not satisfied that there is substance in the allegations of negligence made against the service provider. In relation to the absence of a harness or lap belt for use by passengers on the boat, I am satisfied that given the risk of capsize, one could not have such restraints in use on a boat, as that could lead to fatalities if the boat were to capsize. While the risk of ejection of a passenger while doing a 360 degree turn may be higher than the risk of capsize, the consequences of a capsizing of the boat with twelve passengers strapped into their seats would be so grave, that one could not advocate their use. Accordingly, I cannot find that there was negligence on the part of the service provider for failure to provide such restraints.

55. In relation to the absence of any sidebar on the gunwales, it seems to me that there are two things of note in this respect. Firstly, the existence of a sidebar would not have prevented the plaintiff's injury, if she came out of her seat and landed again with force. She would just have struck her elbow against the sidebar rather than against the gunwale. Secondly, while it is arguable that a sidebar may have prevented her coming out of her seat in the first place, one must also take into account that passengers, who will range from age five years to those who are quite advanced in years, have to embark and disembark over the gunwales; the provision of a sidebar would constitute a serious trip hazard at each embarkation and disembarkation of the vessel. Furthermore, it seems to me that the provision of a bar in front of each of the bench seats, together with an instruction to hold the bar tightly when the boat was turning, was sufficient precaution against the ejection of a passenger during such manoeuvre. Accordingly, I do not find that the excursion operator was negligent in failing to provide sidebars on the boat.

56. The presence of padding would have prevented, or at least lessened the risk of the plaintiff injuring herself in the way that she did. However, just because a certain precaution would have prevented or lessened a particular accident which occurred, does not mean that the boat owner should have put it there in the first place. If the plaintiff had managed to stay seated on the bench, as she had been instructed and as apparently most of the other passengers of varying ages managed to do during the excursion, she would not have needed padding, as the most that could have happened was that she would have slid over against the gunwale, if she was sitting closest to it when the turn was being made.

57. While it may have been foreseeable that passengers at the extremities of the benches might lift out of their seats and might strike their arm against the gunwales, just because a certain type of injury may be foreseeable, does not mean that there is a duty on another to take steps to prevent that injury occurring. As noted earlier, the mere fact that something is foreseeable, does not mean that it is likely. The duty at common law is only to take reasonable care to prevent those injuries that are likely to occur if reasonable care is not taken. One does not have to take steps to prevent all possible injury, no matter how remote or unlikely it may be. To impose such a duty would in effect, make the person an insurer for the safety of the other person. In *O'Gorman v. Ritz (Clonmel) Ltd*. (1947) Ir Jur Rep 35, Geoghegan J. had to consider whether the owners of a cinema were liable in negligence when a patron stretched her legs out in front of her and beneath the seat in the next row. When the occupant of that seat got up to allow a person to pass, his seat tilted back and cut the plaintiff on her shin. In dismissing the plaintiff's action, Geoghegan J stated as follows:

> *"The defendants are not insurers and it seems to me that the plaintiff seeks a degree of diligence, foresight and precaution to which an ordinary theatre–goer is not entitled. I am satisfied on the particular facts, that to guard against a remote contingency such as that which led to the injuries here would need precautions of a well–nigh fantastic nature, which could not reasonably be expected in the construction or management of a theatre."*

58. The *O'Gorman* case is but one example of the general principles applicable in Irish law. See generally *McMahon and Binchy*, *Law of Torts*, 4th Ed, paras 7.29 – 7.36 and cases therein mentioned. It should also be noted that where the possible injury is of a serious kind, there may be a duty to take precautions against the occurrence of such injury, even though the risk of it occurring is lower than might be the case in respect of other less serious injuries. This is just another way of saying that where the gravity of the threatened injury is high, there may be a duty to prevent the injury occurring, even though the chance of it happening is more remote. Such considerations do not apply in this case.

59. I do not think that the possibility of a passenger coming out of their seat and landing again in such a way as to strike their arm against the gunwale of the boat, was a likely consequence of turning the boat 360 degrees at speed, such as would warrant the boat owner putting padding along the gunwales. Again, no regulation or standard was put before the court, which mandated such a measure being put in place; nor was there any evidence of any such measure being adopted on similar craft undertaking similar manoeuvres elsewhere in the world. In these circumstances, I decline to find that the boat owner was negligent for failing to put padding in place.

60. Finally, in relation to the suggestion that the skipper was negligent in not moving the plaintiff to the last row in the boat after the first incident, it seems to me that as the boat was then at sea, and given that it would have involved the movement of two passengers within the boat, which appears to have been a fibre glass boat of shallow draft, with no walkway at the end of the benches, I am satisfied that it would have been dangerous to undertake such a manoeuvre while at sea. Accordingly, I do not fault the skipper for his action in moving the plaintiff to a different position on the front bench after the first incident.

61. Having looked at the pictures of the boat on the website and in the photo presented to the court by the defendant, I am satisfied that they are a fair representation of the boat used by the plaintiff on the day of her accident. I am further satisfied that the boat was in good seaworthy condition and was safe for the activities which were proposed for the excursion. In the circumstances, it is not necessary for me to determine whether the plaintiff could establish liability in the absence of any evidence as to the applicable standards in St. Maarten. I am satisfied that even if one were to apply standards which may be thought applicable in this jurisdiction, one could still not find that the White Knuckle Jet Boat Thrill Ride was provided without reasonable skill and care as required by the *Scaife* judgment.

62. In this case, the plaintiff signed up for an adrenaline infused boat ride. She was not able to keep herself seated as she had been instructed to do and as a result, she injured herself. Unfortunately, it was simply an injury which occurred in the course of a vigorous activity. I cannot find that it happened as a result of any negligence on the part of the excursion operators in relation to the condition of the boat; therefore, I cannot find that there was any liability on the part of the defendants under the 1995 Act. Accordingly, I dismiss the plaintiff's action against the defendants.