**THE HIGH COURT**

**[2013 No. 9757 P.]**

**BETWEEN**

**MILLIE O'DONNELL**

**PLAINTIFF**

**AND**

**RICHARD COFFEY**

**AND**

**BRIAN CORCORAN**

**DEFENDANTS**

**JUDGMENT of Mr. Justice Hanna delivered on the 7th day of July, 2017.**

1. The plaintiff lives in Clonskeagh Co. Dublin. She was born on 20th October, 1995, and is currently in her final year of studies in University College Dublin. At the time of the accident the subject matter of these proceedings she was still at school. She was a good student both in terms of her studies and in sporting activities. She excelled, in particular, at hockey and played at both county and international level in the U18s category.

2. Her parents owned a cabin cruiser. At the material time, this boat was moored at the marina in Athlone, Co. Westmeath. As is often the case at mooring centres on inland waterways, no less than in coastal areas, a social "scene" exists and friendships develop between families and individuals, both visiting and local.

3. Such is the case with the plaintiff who was then aged sixteen years. On the 14th July, 2012, she was at the marina with her parents. That evening, they were invited to join friends on another boat, "About Time", which was moored nearby, for a social gathering. They made their way there and, when they arrived at that boat and through the evening, a number of other people were present. According to the plaintiff's evidence among them were Ms. Molly Henshaw, Mr. Richard Coffey (the first named defendant), Mr. Robert (also referred to as Rob) Corcoran (the second named defendant's son) and Mr. David Jinx. Others were present some of whom were known to the plaintiff.

4. Some of the company on board had been invited to an 18th birthday party. This party was to take place at a public house some seven or eight kilometres from the marina on Lough Ree. Plans were made between various intending party goers to make their way to the celebration. Among the craft moored nearby was a rigid inflatable boat (RIB), a Caribe 40 HP Yamaha, a fast and powerful vessel. This was owned by the second named defendant but, that evening, Rob Corcoran had possession of the keys and apparent control of this RIB.

5. As there was not enough room in the RIB to accommodate all the people who intended to go to the party, a plan was devised whereby some of the guests would travel up river with a view to collecting another RIB belonging to Ms. Molly Henshaw and navigating it back to the marina to collect the balance of the party group.

6. Robert Corcoran was having a pleasant evening. During its course, he had been drinking alcohol and he decided that he did not wish to pilot the RIB upstream to collect the Henshaw boat. He gave the keys of the Corcoran RIB to the first named defendant. Four people in all made their way to the that RIB. The first named defendant took up the steering and the control. The plaintiff, who was not invited to the party, went along for the "spin" and sat at the bow of the boat facing back towards Mr. Coffey, Mr. Jinx sat beside Mr. Coffey and Mollie Henshaw sat on the tubed edge of the RIB.

7. The RIB proceeded a short distance in the direction of the railway bridge. Mr. Coffey, whose negligent pilotage of the RIB is not disputed, in his account of what occurred, claims that he was startled by a mooring buoy ahead of him. He swerved to avoid this obstacle and the boat then collided with a pillar of the railway bridge. Both the first named defendant and Mr. Jinx were propelled out of the boat. Mr. Jinx was carried away by the tide. Mr. Coffey managed to clamber back into the boat. After the collision, the engine was still running and the propeller was churning away. With commendable foresight, Ms. Henshaw quickly moved to put the boat into neutral gear thereby eliminating that particular lethal hazard. Mr. Jinx who was taken away by the current was rescued by another boat user who, fortunately for all concerned, was nearby and who summoned the emergency services.

8. The plaintiff was "knocked out" after the initial impact but seemed to come around some moments later. However, the plaintiff then deteriorated and became extremely incoherent and ill. She began slipping in and out of consciousness. She was removed by ambulance to hospital in Ballinasloe. During the journey, paramedic staff together with her no doubt distraught mother continually endeavoured to keep her conscious. She received a serious injury to the right side of her head and was put in a neck brace. She was detained in hospital for a total of nine days. She had suffered either an extradural or subdural hematoma. Fortunately, notwithstanding the seriousness of the injury and the potential life altering consequences which threatened, the expert medical care which the plaintiff received in Portiuncula Hospital including networking with medical staff in Beaumont Hospital in Dublin lead to a full recovery and a return to the active life that the plaintiff had hitherto lead albeit over some time and with some interim consequences.

**Material Issues**

9. Oral evidence was given by the plaintiff. She had no recollection of the actual crash. The Court heard from members of An Garda Síochána who attended at the scene. In addition, evidence was given by Hilary O'Donnell, the plaintiff's mother, Molly Henshaw and Eugene Curry, an expert in marine matters.

10. Liability was conceded by the first named defendant. Mr. Coffey gave evidence but Mr. Brian Corcoran did not, nor was any evidence proffered on his behalf. There was no evidence either way to indicate if Brian Corcoran was at the marina that evening or that he was aware of what was happening.

11. At the conclusion of the evidence, Mr. Liam Reidy S.C. on behalf of the second named defendant contended that neither on the evidence nor in law had the second named defendant any case to answer. It was submitted that Mr. Brian Corcoran was the owner of the boat and had no proximity to the actions of Mr. Coffey. There was no evidence that he had knowledge that any person was using

the RIB other than his son. Mr. Coffey was in possession and command of the RIB subject to a standalone gratuitous bailment which was effected by the second named defendant's son in handing over the use of the RIB to Mr. Coffey. At para. 3(j) of the defence the second named defendant says:

> "The first named defendant had control of the boat subject to a stand-alone gratuitous bailment only from the second named defendant and not subject to any relationship or understanding given rise to a relationship of master/servant or principal/agent".

There is no evidence, Mr. Reidy argued, that the second named defendant ever consented to the piloting of the boat by the first named defendant. Neither was there evidence that he knew that this was happening. Mr. Coffey was not Brian Corcoran's servant or agent. He was not vicariously liable for Mr. Coffey's negligent acts.

12. Briefly put, Mr. Aongus O'Brolchain S.C. for the plaintiff argued that Mr. Brian Corcoran was liable for the negligent acts of Mr. Richard Coffey in two respects. Firstly, he was liable because of his son's actions (as agent of the second named defendant) in giving possession and command of the RIB to someone who had consumed intoxicating liquor. The defence does not deny consent by Brian Corcoran to Mr. Coffey's control of the RIB. Secondly, in all the circumstances, Mr. Brian Corcoran stood vicariously liable for the clearly negligent acts of Mr. Coffey. Taking the evidence as a whole, Mr. Coffey was acting as servant or agent of Brian Corcoran. Such should be inferred from the evidence and the failure on the part of Brian Corcoran himself to offer evidence.

**Relevant aspects of the evidence**

13. The personal injury summons recites, at para. 3, that Brian Corcoran, the second named defendant was the owner of the RIB in which the plaintiff was travelling when she was injured. Ownership of the RIB is conceded by that defendant at para. 1(b) of his defence. The defence is verified by Brian Corcoran's affidavit.

14. The circumstances of this case, indicate a range of enquiry not to such extent as might dilute Brian Corcoran's ownership but one which might readily explain or offer insight into the involvement of the second named defendant and such nexus in law as might exist between him, and the first named defendant, Richard Coffey. Central to this is the involvement of Robert Corcoran.

15. The second named defendant, as was his entitlement, chose not to give evidence. Neither did we hear from Robert Corcoran, his son, although Roberts' statement to An Garda Síochána was read in court, in effect, given the status of evidence for practical purposes albeit evidence that was not subjected to query or cross-examination. There was no suggestion that either of the Corcoran's was unavailable or unable to give evidence. Quite the contrary. Indeed, for what it is worth, either or both of them may well have been present in Court during the trial, a fact highlighted more than once by the plaintiff's counsel. So be it. They were not under any obligation to give evidence.

16. During his opening of the case for the plaintiff, Mr. Aongus O'Brolchain, S.C. while clearly identifying the second named defendant as the owner of the boat, nevertheless noted that Robert Corcoran, in the documentation that had already been made available to the parties, was also referred to as the owner of the RIB. Mr. O'Brolchain was clearly and correctly referring to the statements of the various participants in the events of that evening. I shall return to these shortly. Indeed, Mr. O'Brolchain referred to the RIB which the plaintiff et al were intent on collecting to travel on to the party as "Molly's RIB" meaning Molly Henshaw. He clarified this in fact as being her father's RIB and that her father had given her permission to go and retrieve it on the occasion.

17. Both Richard Coffey and Robert Corcoran gave statements to the Gardaí. In his statement, Richard Coffey (who did give evidence) referred to the RIB as "Rob's RIB". He also refers to the Macken boat as "Hugh's motor cruiser" and "Molly Henshaw's RIB". He repeated this form of description in evidence. The plaintiff, in her evidence, also uses the terms "Rob Corcoran's RIB" and to "Molly's RIB". She also mentions the "Macken boat" and the "Macken family boat".

18. These descriptive terms may or may not identify ownership. Equally they may reflect the extensive use of a boat by one party where that the boat is owned by another, for example a parent or guardian. This may be of some assistance in assessing the extent of the permitted or actual control and use of the vessel. It could connote either legal ownership or user to such extent as to give the impression of full time control but not actual legal ownership.

**Issues of Indemnity**

19. At the conclusion of his opening remarks Mr. O'Brolchain briefly referred to the initial correspondence between the plaintiff's solicitors, Messrs. Stephen McKenzie and Co. with both of the named defendants and Yachtsman Euro Marine Underwriters. The initiating letters of claim to the defendants were sent on 30th August, 2012. A response was received from Yachtsman Euro Marine by letter dated 19th September, 2012. This confirmed the existence of an insurance policy in the name of Brian Corcoran, the second named defendant. Thereafter an issue of indemnity arose the details of which are not material. In due course, following threat of a motion for judgments in default of appearance, appearances were entered by solicitors for both defendants.

20. It is important to stress that the presence or absence of an insurance policy in determining issues of liability in tort and in what capacity is a matter of no relevance. The parties come before the Court as equals in the eyes of the law. The fact that a defendant may be what is commonly referred to as "a mark for damages" does not bear one whit on the question of whether he or she is liable in tort. The process of identifying who bears responsibility in law, directly or vicariously, for a tortious injury should not involve measuring the size of a defendant's wallet nor the breath of a defendant's shoulders. The fact that Brian Corcoran was insured does not, per se cause him to be visited with liability for the plaintiff's injuries. Addressing this issue, O'Donnell J. said:

> "I doubt…. the function of vicarious liability is to ensure that liability for a tortious wrong is borne by a defendant with means to compensate the victim. This can I think be said more accurately to be the function, or at least the aspiration, of the plaintiff's lawyer. The function of tort law, and vicarious liability which is part of it, is I think to identify a defendant who can justly be called upon to compensate an injured party." (see *Hickey v. McGowan* [2017] IESE 6 at para. 43).

**The Garda Statements**

21. Members of An Garda Síochána were called to the marina that evening on two occasions. The first such visit, which appears to have taken place between approximately 6:30pm and 7pm, arose as a consequence of rowdy behaviour by certain individuals. The incident involving the plaintiff gave rise to the second attendance by the guards.

22. As part of the investigative process statements were taken from a number of persons. Two of these were read in Court as I have described above and there contents unchallenged. These were the statements of Robert Corcoran and Richard Coffey.

23. Robert Corcoran's statement was made on 4th August, 2012, at Athlone Garda Station, almost exactly three weeks after the accident and over three weeks before the plaintiff's solicitor's letters of claim were dispatched. By the time Rob Corcoran went to Athlone Garda Station, the plaintiff had been discharged from hospital and gone home and the perceived potential catastrophe which had befallen her on the night of the accident had not come to pass.

24. In his statement, Rob Corcoran says, *inter alia*:

> "I recall the 14th July, 2012, a Saturday I was in the town marina on a boat called "About Time" belonging to Gerry Macken. There were twelve of my friends on the boat we were having a few drinks. It was the night of the Summer Fest. We had all intended on going to Terence Hynes 18th birthday party in Lough Ree Inn at Coosan Point, Athlone. I am the owner of Caribe 40 horse power Yamaha RIB motor boat. My RIB wasn't large enough to bring everyone so we decided to collect Molly Henshaw's RIB from Shancurragh, Athlone. We had her Dad's permission to use her RIB. I had a few drinks so I decided not to drive my RIB. I handed the keys to a friend Richard Coffey. Richard is from Blackrock in Dublin. I know him from the Yacht Club in Athlone. Richard wasn't drunk, he had a drink but he was fine. This was 20:30pm on 14/07/12."

25. Near the conclusion of the statement he further observes:

> "The RIB is registered to my Dad Brian Corcoran. It is a family RIB. I think it is insured. I don't know by what company."

26. He qualifies Molly Henshaw's "ownership" with reference to her father's permission. He makes no such qualification with regard to his own RIB. He also refers to "Gerry Macken's boat". Presumably (he was never identified specifically) Gerry Macken is the father of Hugh Macken referred to above. We know that Hugh Macken's father's car was in the vicinity and is referred to in the statement of Richard Coffey.

27. Therefore, of the three vessels that form part of the narrative Rob Corcoran identifies only one, his own RIB, as being owned specifically by himself albeit insured in his father's name and also later referred to as a family rib. This occurs at a remove of some weeks from the incident and at a point in time when, given all of the circumstances including the active involvement of an Garda Síochána, consequences were likely to flow from what had occurred. It is reasonable to infer even in the absence of his evidence that he was fully aware that this was the case.

**Intoxication**

28. The consumption of alcoholic drink prior to attempting to take control of a vessel on the water is a significant issue in this case. This was a social gathering of young people – some adults may or may not have been there. A number of the people present were in their mid to late teenage years. The plaintiff was sixteen years of age at the time. She was not drinking alcohol. Rob Corcoran and Richard Coffey were drinking. Consumption of alcohol was clearly a feature of the party on board. They were both aged around nineteen years at this time.

29. It appears that most of this gathering on board "About Time" were intent on joining the festivities at the 18th birthday party at the pub up river. From this group emerged the posse (including the plaintiff who was not going to the party but was going along for the trip) which sallied out to retrieve Molly Henshaw's RIB.

30. In opening the case, Mr. O'Brolchain did complain about the involvement of alcohol consumption as material to the case although the personal injuries summons contained no specific allegation along these lines against the first named defendant. Much was made, of course, of the apparently reckless manner in which Mr. Coffey skippered the RIB and this much is reflected in the particulars of negligence. The consumption of alcohol by Mr. Coffey, however, was very much to the forefront of the evidence of Mr. Eugene Curran, the marine expert, who was called to give evidence on behalf of the plaintiff.

31. The second named defendant, Brian Corcoran, however, in his defence does not hold back in his allegations of negligence, nay recklessness of the co-defendant. In addition, at para. 3(h)(xviii) he alleges: -

> "Through deliberate or reckless action or by reason of being under the influence of alcohol or a drug or any combination of drugs or drugs and alcohol putting at risk or in endangering the safety, security or seaworthiness of the vessel or the lives or safety of persons on board …"

This, in turn, spawned updated particulars from the plaintiff's solicitors to reflect the centrality of the allegation of the alleged intoxicated state of the first named defendant.

32. Although we did not hear viva voce from either Corcoran père or fils, it is evident from other sources that alcoholic drink was being consumed by a number of young people gathered on "About Time" and among these consumers were Rob Corcoran and Richard Coffey as already noted.

33. It is not comforting to think of a group of teenagers partying and consuming alcohol on a boat, even though moored, on the river. However, such was the case and it is probable that due to excessive consumption of alcohol as well as enjoying what is termed the "craic" Rob Corcoran felt disinclined to pilot his RIB on the mission to retrieve Molly's boat. He surrendered the keys to Mr. Coffey.

34. Richard Coffey admitted in evidence to having consumed "about three bottles". He does not confess to being drunk or incapable of managing the vessel. In his garda statement he states that he is a qualified sailing instructor having a level 2 boat licence. He has operated RIBs and dinghies since the age of thirteen. He asserted to the gardaí that he operated the RIB appropriately at the time and with due regard to the safety of his passengers. He claims that the collision happened because he was briefly unsighted, then suddenly confronted with a mooring buoy. (Molly Henshaw does not recall observing any such buoy). He swerved to avoid the buoy, according to his statements, but was unable to correct the course in sufficient time to avoid colliding with a pillar of the railway bridge.

35. The RIB in question is a rigid hulled inflatable boat, with in this instance, a 40-horsepower engine. Such a vessel is well known for its high degree of performance in terms of manoeuvrability, power and speed.

36. Mr. Coffey admitted to having "about three bottles", we presume of beer, during the course of the two hours or thereabouts spent on the Macken cruiser. Knowing, therefore, that he had consumed alcoholic beverages, one is led to inquire whether this fact might have reflected itself on that evening's events.

**The first named defendant's conduct**

37. Before the ill-fated boat trip, between 6:30 and 7 o'clock pm, it appears that there was something of an incident or altercation on the marina. This led to a visit from the gardaí. This incident is referred to by Richard Coffey in his statement to Garda Turner. The second named defendant describes an altercation involving a group of people from Dublin. Security personnel on the marina summoned the Gardaí. Mr. Coffey did not admit to any involvement in any disturbance to Garda Turner. Garda Turner was the officer in charge of the investigation of the circumstances surrounding the plaintiff's accident. In giving evidence, Garda Turner did not allude to this apparent fracas. The other member in attendance, Garda John Teehan, recalls attending the marina because of a disturbance involving a number of youths. He says he spoke to Mr. Coffey at the time with regard to Mr. Coffey's behaviour. He further stated that he knew Mr. Coffey from a previous incident. This evidence was not challenged in cross-examination. Nor was it contradicted by Mr. Coffey when he had his opportunity to do so when giving evidence. From this it is not unreasonable to infer that before the "About Time" soirée got underway Mr. Coffey's behaviour had attracted the attention of An Garda Siochana to an extent that is not reflected either in his evidence or his statement.

**The evidence of Eugene Curry**
38. The Court heard evidence from Mr. Eugene Curry, a master mariner who dealt with the issue of negligence. He drew from a formidable well of nautical experience in assisting the court. In giving his evidence, he referred, *inter alia*, to the Code of Practice for the Safe Operation of Recreational Craft and the Shannon Navigation Bye-Laws (S.I. No. 80/1992).

39. There was no dispute that the first named defendant was qualified to act as skipper of the RIB. He was licensed to drive these craft having obtained a level 2 power boat licence and had been operating them for a number of years previously including this particular boat. It transpires that Mr. Coffey is a qualified sailing instructor.

40. Mr. Curry identified a number of fundamental safety protocols that were breached as the boat set off in its short and fateful journey. Even in brief summary, these breaches indicate a gross disregard for the most basic consideration of the safety of passengers entrusted to the care of the skipper of such a vessel. Firstly, Mr. Coffey had consumed alcoholic drink beforehand. He said he drank about "three bottles" (presumably of beer – there was no evidence of anything else) before driving the RIB. On water, Mr. Curry tells us, there is "zero-tolerance" of the consumption of any alcohol by a person in command and control of a boat. The owner of the boat ought not to permit this in any circumstances. Mr. Curry declined Mr. Reidy's invitation to speculate what the second named defendant would actually have done had he been there. Secondly, only the plaintiff and Ms. Henshaw were wearing life-jackets. Neither Mr. Coffey nor Mr. Jinx wore any form of buoyancy aid. Thirdly, it appeared that there was no kill-cord on the boat or, at least, if there was, it was not employed by Mr. Coffey. This is mandatory equipment for an outboard engine and is so stipulated in the Code of Practice for the Safe Operation of Leisure Craft. Fourthly, Mr. Coffey piloted the RIB the wrong way up river and did not use the channel which he ought to. Finally, the accident occurred in near-darkness and although it would seem that there were standard navigation lights available on the RIB additional lighting by way of a lantern or marine spotlight may have been necessary given the fact that navigation marks on the river were not lit.

41. Capping the litany of wrongdoing is the fact that the RIB was being driven at an excessive speed at the time of impact. It is probable that in the distance of approximately 230 metres from the Marina to the bridge the RIB had achieved a speed of somewhere around 15 knots which is the equivalent of 28 km per hour. This had been done not only while proceeding up the wrong channel but also in an area where the speed limit was 5 km per hour. The speed of a vessel on impact was amply demonstrated by the damage shown on the garda photographs which demonstrate the collapse on impact of the forward section of the RIB and the complete deflation of the surrounding frame. The damage extends from the prow to the area of the steering gear and clearly demonstrates a most forceful impact with the supporting pillar of the bridge. Indeed, the damage was so severe that the RIB had to be written off.

**Submissions**
42. The first named defendant, having admitted liability, did not offer any written or oral submissions. The defendants exchanged notices claiming indemnity or contribution.

43. For the second named defendant, Mr. Liam Reidy S.C. premised his case on a simple proposition. Brian Corcoran could not be vicarious liable for the negligent acts of Richard Coffey. Richard Coffey was not his employee. Neither was the second defendant carrying out a specific, designated task for or on behalf of the second defendant and for his benefit. He laid emphasis on the remarks of O'Donnell J. in *Hickey v. McGowan* (see above). The fact that Brian Corcoran was the owner of the boat and insured was not good reason to find against him.

44. Mr. Reidy referred to a number of authorities dealing with the issue of contributory negligence. All of these cases bar one were motor car cases. (See *Kelly v. Lombard Co. Ltd.* [1974] I.R. 142; *Hewitt v. Bonvin & Anor*. [1941] K.B. 188; *Morgans v. Launsbury* [1972] A.C. 127 and *Nobert v. Navan* [1981] R.T.R. 457. He also referenced an Australian case, *Scott v. Davis* [2000] 204 C.L.R. 333 which concerned an aeroplane). Where the evidence did not support a master/servant or principal/agent relationship there was no legal nexus between an injured plaintiff and an otherwise innocent owner of a means of transportation.

45. Liability on the part of the owner of a boat where injury occurred to passengers while the same was under the control of a third party whose legal status did not fall within either of the foregoing relationships, did not arise in the absence of intervention by the legislature such as, for example, in road traffic cases. (See s. 118 of the Road Traffic Act 1961). No distinction arose in this case because we were dealing with a boat. Neither did the circumstances surrounding the use of leisure craft alter matters. Mr. Coffey was a bailee and nothing more. He had been given the loan of the chattel. He was not employed nor was he carrying out any task for the benefit of the owner.

46. Mr. Aongus O'Brolchain S.C., for the plaintiff, submitted that Mr. Coffey was the agent of the second named defendant. This status could be inferred from the totality of the evidence and/or was created through the agency of Rob Corcoran. He was thus carrying out a task at the request of the second named defendant and for his benefit. He argued that the transportation of passengers in a boat in these circumstances was not without risk and the incident which occurred was one against which the prudent boat owner should insure, referring to the judgment of Henchy J. in *Moynihan v. Moynihan* [1975] I.R. 192.

47. Given that the first named defendant's negligence was admitted, a central trust of his case rested upon the fact that Richard Coffey was invited to transport the plaintiff in a boat, he having consumed alcoholic drink and/or being intoxicated. There was a foreseeable risk in so doing that injury would occur to passengers and it was negligent to give Mr. Coffey charge and control of the boat.

48. Mr. O'Brolchain also argued that the silence of the second named defendant and his son could and should be weighed against them. What would otherwise be arguably less compelling evidence could, by their silence, be converted into an overwhelming case against them. (see *R. v. Inland Revenue Commissioners ex parte TC Coombs & Company* [1991] 2 AC 283).

**Discussion and conclusions on liability**

49. This case originates in what was a sociable "get-together" at a marina one summer's evening in Athlone attended by young people who inhabit the world of leisure boating. The near catastrophic outcome was far from their minds. Alcohol was consumed. Control of a power boat exchanged hands. In determining negligence and in identifying the culpable party or parties are such circumstances to be treated differently in law to accidents involving, say motorcars? The answer is no. There is no basis in law why boats should be treated differently from any other form of transport in determining issues of liability. Any legal distinction is a matter for intervention by the legislature. The existence of vicarious liability is a matter of evidence and such liability may be divined from inferences arising from the relationship between the owner of the chattel and the person in possession of it.

> "… as a number of their Lordships pointed out in *Morgans v. Launchbury* …, to create a special rule for motor vehicles is a legislative, not a judicial, function. There is no legitimate basis upon which a court, in declaring the common law, can conclude that there is one rule for motor vehicles and a different rule for horse-drawn carriages, railway trains, motor boats, sailing vessels, or aeroplanes. Legislatures may draw, and have drawn, such distinctions, but that illustrates the difference between legislation and judicial development of the principles of the common law …
>
> The principle by which the existence of vicarious liability is to be determined is to be distinguished from evidentiary considerations concerning the facts relevant to the application of the principle. The nature of the chattel in question, or, if it be a motor vehicle, the nature of the motor vehicle, or the nature of the occasion of its use, may be significant for the purpose of drawing inferences as to the relationship between an owner or bailee and a person for whose negligence the owner or bailee is claimed to be responsible …"
>
> Gleeson C.J. (*Scott v. Davis* [2002] CLR 333 at page 340).

50. The fact that the owner of a vehicle consents to another person driving it does not, of itself, create circumstances in which vicarious liability arises.

> "At common law the owner of a motor vehicle was liable for the negligence of the employee or his agent if the agent was driving with the owner's consent and on the owner's business or for the owner's purpose. However, mere consent by the owner did not constitute the driver the employee or agent of the owner, and so the owner would not be liable at common law for the negligence of a person merely permitted to drive the owner's car. The 1961 Act changes that position by regarding, for the purposes of vicarious liability, such a permitted user as the owner's employee". (see *MacMahon and Binchy Law of Torts 4th Edition* at para. 43.104).

The Act referred to is the Road Traffic Act 1961.

51. A person may be held liable for the negligent acts of his servant or agent. Absent the intervention of the Oireachtas, the position at common law in addressing vicarious liability is well described thus by Lord Wilberforce.

> "For I regard it as clear that in order to fix vicarious liability upon the owner of a car in such a case as the present it must be shown that the driver was using it for the owner's purposes, under delegation of a task or duty. The substitution for this clear conception of a vague test based on "interest" or "concern" has nothing in reason or authority to commend it. Every man who gives permission for the use of his chattel may be said to have an interest or concern in its being carefully used, and, in most cases if it is a car, to have an interest or concern in the safety of the driver, but it has never been held that mere permission is enough to establish vicarious liability. And the appearance of the words in certain judgments (*Ormrod v. Crosville Motor Services Ltd*. [1953] 1 W.L.R. 409, per Devlin J.; [1953] 1 W.L.R. 1120, per Denning L.J.) in a negative context (no interest or concern, therefore no agency) is no warrant whatever for transferring them into a positive test. I accept entirely that "agency" in contexts such as these is merely a concept, the meaning and purpose of which is to say, "is vicariously liable," and that either expression reflects a judgment of value – respondeat superior is the law saying that the owner ought to pay. It is this imperative which the common law has endeavoured to work out through the cases. The owner ought to pay, it says, because he has authorised the act, or requested it, or because the actor is carrying out a task or duty delegated, or because he is in control of the actor's conduct. He ought not to pay (on accepted rules) if he has no control over the actor, has not authorised or requested the act, or if the actor is acting wholly for his own purposes. These rules have stood the test of time remarkably well." (*Launchbury v. Morgans* [1973] AC 127 at page 135).

52. In *Hewitt v. Bonville* [1941] KB 188 du Parcq L.J. said at p. 194:

> "It is plain that the appellant's ownership of the car cannot of itself impose any liability upon him. It has long been settled law that where the owner of a carriage or other chattel confides it to another person who is not servant or agent, he is not responsible merely by reason of his ownership for any damage which it may do in that other's hands."

53. Addressing the implications of the filial relationship between the driver and the owner of the car, at p. 196 du Parcq L.J. says:

> "Before us Counsel for the respondent relied on the fact that the driver of the car was the son of the appellant. Although it would be absurd to say that such a relationship is of itself evidence of agency, I agree that when considered in combination with other circumstances it may be in some cases both relevant and significant. If, for instance, a father consents to his young son inviting a guest to the family home, and then permits him to use the father's car for the entertainment or convenience of the guest, it may well be a justifiable conclusion that the son is driving for and on behalf of the father. Ultimately the question is always one of fact."

54. In that case the son of the owner of the car, who is using it for his (the son's) own purposes and not the father's specifically sought permission (from his mother who was authorised to give permission) for its use and he knew that he had to do so. This arose from a previous incident and lead to the setting of a clear boundary to the son's access to and use of the motorcar.

55. As we know, neither the second named defendant nor his son, Robert Corcoran, gave evidence. The lawyers for the second named defendant did not demur from the proposition that they were present and available to give evidence. Such evidence could undoubtedly have addressed issues central to the case. These would include whether or not the second named defendant was present on the evening, whether or not he consented to the RIB being taken by the first named defendant and what, in effect, was the scope of Rob Corcoran's authority over the RIB vis-à-vis his father? It was urged upon me by Mr. O'Brolchain S.C. for the plaintiff that, in the circumstances, such silence should be converted into compelling evidence against the defendant. He relied upon *Reg. v. I.R.C., ex parte Coombs & Co.* (H.L. (E.) 2 AC 283), and, in particular, on the following statement of principle by Lord Lowry at p.

> "In our legal system generally, the silence of one party in fact of the other party's evidence may convert that evidence into proof in relation to matters which are, or are likely to be, within the knowledge of the silent party and about which that party could be expected to give evidence. Thus, depending on the circumstances, a *prima facie* case may become a strong or even an overwhelming case. But, if the silent party's failure to give evidence (or to give the necessary evidence) can be credibly explained, even if not entirely justified, the effect of his silence in favour of the other party, may be either reduced or nullified".

56. Richard Coffey, who admits that the plaintiff's injuries were caused by his negligence, had consumed alcoholic drink. For this reason alone, he should not have been permitted to drive the RIB and this was the uncontradicted evidence of Mr. Curry. For someone to drive a RIB having taken alcohol was in breach of the applicable by laws and in contravention of safe practice on the water, inland and off-shore.

57. No one describes Mr. Coffey as "falling down drunk" or unruly or disruptive. On the other hand, we know he was spoken to earlier in the course of the evening by Garda Teehan in relation to his conduct.

58. Having consumed what, he describes as "about three bottles", he took to the water with passengers in this powerful vessel. Within approximately 230 metres of the departure point, whilst being driven at a grossly excessive speed, this RIB collided with one of the pillars of the railway bridge.

59. It is not unreasonable to surmise that his conduct, accompanied by a catalogue of breaches of fundamental tenets of safety on water was the consequence of his drinking alcohol. The allegation of intoxication levelled against him by the second named defendant's defence, even in the absence of evidence from either of the Corcoran's, is borne out having regard to all of the circumstances. Mr. Coffey should never have been given the keys of the boat. The bailment should never have been created in the first place. It was negligent to do so. In consigning a powerful motor craft to the control and management of a skipper who had consumed alcohol carried with it a foreseeable risk to the safety of passengers who were to be transported on it.

60. It was accepted by the defendants' lawyers that the first named defendant was lawfully in possession and control of the RIB. Richard Coffey could only have taken such lawful possession with the consent, either express or implied, of the owner of same. Bailment is admitted. Consent to the bailment is not denied. Such consent can only be derived from the actual or inferred conduct either of the owner or of his agent, namely his son Robert.

61. It seems to me that to go beyond the parameters of the foregoing proposition would require further evidence. An obvious source of such evidence would be the second named defendant or his son. As was their right, they did not avail of the circumstances to expand upon or elucidate the evidence before the court. The absence of such evidence has consequences in an overall evaluation of matters to be considered by the court.

62. The world of leisure boating, of course, is, on many fronts, very different to that of the intensely regulated and policed use of motor vehicles on the public highway. On the water, however, much depends on the circumstances including the nature of the craft involved and whether persons are being transported as passengers than, for example, as crew. Power boats, such as RIBs, obviously give rise to heightened considerations of passenger safety given the great speeds that they can achieve and the potential dangers that can arise. As well as the person in direct control, the person or persons in a position to authorise carrying passengers in such a vessel owe a duty of care to passengers.

63. It is clear that mere permission to use a boat does not necessarily create a master/servant principle/agent relationship. One has to examine and consider all of the circumstances surrounding the engagement of the skipper. Can the evidence be construed as showing a nexus in law between the first and second named defendant such as would permit Mr. Coffey to be considered the servant or agent of Mr. Brian Corcoran in the circumstances? Assuming the absence of the second named defendant that evening, could Rob Corcoran be considered as sufficiently empowered to bind his father in such a relationship? Does the second named defendant bear liability for letting Mr. Coffey near the RIB in the first place?

64. As regards Rob Corcoran, the fact that he is his father's son does not of itself create an agency between the two of them. Neither, however, does it necessarily rule it out. (see Du Parcq L.J. in *Hewitt*).

65. Absent viva voce evidence from either of the Corcoran's explaining the parameters of the arrangement between them as to the use and disposition of the RIB, a number of factors are clear.

> (a) In his statement to the Gardaí, Rob Corcoran describes himself as the owner of the boat. He elsewhere refers to the fact that it is a family RIB but does not explain what he means by that nor do we have the benefit of his evidence to offer his interpretation.
>
> (b) He identifies the boat as being insured in his father's name.
>
> (c) He demonstrates in his description of Molly Henshaw's involvement and that of her RIB that he is well aware of concepts of ownership and permission.
>
> (d) Notwithstanding the foregoing, he does not indicate that he required any permission to do what he did. Neither does he suggest any curtailment on his power of use or disposition of the boat.
>
> (e) He states that he was aware the first named defendant had been drinking.

66. One must interpret this statement in the light of the fact that it was made some three weeks after this near tragic incident by which time the "dust had settled". Given the circumstances, one is entitled to presume, a measured and careful approach was taken in giving the statement and signing same. In the circumstances, the description of himself as the owner of the boat would be indicative, in the absence of further explanation, or something rather more than a mere, occasional permissive use.

67. We now know that the second named defendant is the owner. We have seen how Rob Corcoran chooses to describe his "engagement" with the RIB in the full knowledge of what is meant by ownership, permission and so forth. It would seem that Rob Corcoran was more than a simple permissive user or bailie of the boat. In my view, and, I repeat, in the absence of further explanation, his authority from his principal, the second named defendant, extended to user without having to seek permission and up

to and including the authority to create a bailment. This was not an unlawful taking of possession by Mr. Coffey. He was a lawfully bailee, albeit gratuitous. It was not argued that Mr. Coffey's possession of the RIB was a consequence of a sub-bailment. His bailment derived from Rob Corcoran whose authority and remit from his father extended, at least, to its' creation.

68. The evidence in this case, however, does not admit to going beyond the foregoing proposition. There is no evidence that the scope of Rob Corcoran's authority from the second named defendant extended to the power to bind the latter, for example, in a master/servant relationship with Mr. Coffey. Therefore, I am not persuaded that the first named defendant was employed by the second named defendant when the accident occurred. Neither am I persuaded that he was carrying out a specific or designated task for the second named defendant and for the second named defendant's benefit.

69. I am satisfied that, at all material times, in placing the RIB under the control of the first named defendant, Rob Corcoran was acting as the lawful agent, either expressly or by implication, of the second named defendant. I am satisfied that the scope of Rob Corcoran's authority extended to the creation of a lawful bailment of the said RIB. I am, further, satisfied that, in all the circumstances taking into account the evidence, the absence of evidence and the matters as pleaded, the second named defendant consented either expressly or by implication to the creation of the said bailment.

70. No evidence has been advanced to contradict or modify the implicit consent of the second named defendant to the creation of the bailment. In my view, the plea of gratuitous bailment contained in the second named defendant's defence taken together with the absence of any denial of consent is sufficient, in the absence of contradictory evidence, to establish consent on the part of the second named defendant.

71. Further, in addition to the foregoing, the surrounding circumstances including what was stated by Rob Corcoran to An Garda Síochána and the disposition of the RIB by him without reference to the second named defendant, both support the proposition that Rob Corcoran was acting within the scope of his authority as agent of the second named defendant. I am persuaded that the case is made out that he probably did act, in the circumstances, in such capacity.

72. I am satisfied on the available evidence, including the Garda statements, the pleadings, the matters of law raised in them and asserted at hearing and inferences which I have drawn there is sufficient evidence for me to make the above finding. Nevertheless, I believe that I can draw further fortification from the views expressed by Lord Lowry in R. *v. Inland Revenue Commissioners ex parte TC Coombs & Company* [1991] 2 AC 383 at 300. The silence of the second named defendant, while not necessarily founding an overwhelming case against the second named defendant, does, nevertheless, substantially underpin a case that the second named defendant must answer.

73. To conclude, in addition to the admitted negligence of the first named defendant, the plaintiff's injury resulted from the negligence of the second named defendant, his servant or agent, in causing or permitted the boat in which the plaintiff was lawfully travelling as a passenger to be skippered by the first named defendant when the first named defendant had consumed alcohol. I am satisfied that such a state of affairs gave rise to a foreseeable risk of injury to the plaintiff and to persons lawfully travelling on the said boat. Accordingly, both defendants are liable in negligence to the plaintiff.

**Injuries and Assessment of Damages**

74. The plaintiff was injured when she hit her right head off the side of the pillar of the bridge. I have already described the surrounding events leading to and following upon her injury. She was taken to the emergency department of Portiuncula Hospital. She was placed in a neck brace. After her admission, she was vomiting and suffering from extremely severe headaches.

75. CT scans revealed a subgaleal hematoma on the right-hand side of her head. There was a small extra-axial hematoma on the right-hand side of the temperal region. This was reported as an extradural hematoma but could well have been a subdural hematoma. The difference is, apparently, of no consequence. What is significant is that the plaintiff suffered a blood clot on the surface of her brain. This was small and did not require any neurosurgical intervention or removal.

76. The plaintiff was managed in Portiuncula Hospital who were in communication with the neurosurgical unit in Beaumont Hospital in Dublin. She was hospitalised for nine days. Upon the discharge from hospital she attended Mr. David O'Brien, Consultant Neurosurgeon at Beaumont Hospital who examined the plaintiff on two occasions. He first saw her on 3rd August, 2012, at which point he reviewed her CT scans and noted that she had suffered a very serious boating accident resulting in a direct trauma to her skull and, in consequence, a blood clot of the surface of her brain. She had a period of post traumatic amnesia. However, there was no indication of seizures of epilepsy. He felt that, even at that short remove from the accident the possibility of these was remote. This position seems to have been borne out over the passage of years since then. Her main residual symptoms were of tiredness and occasional headaches which were momentary in nature and some dizziness when she lay in bed and turned to the right side.

77. Whereas he took an optimistic view as to the future he did strike a slight note of caution with regard to the possibility of neuropsychological consequences which might have become apparent in subsequent years manifesting themselves in possible academic difficulties.

78. Happily, when he reviewed her on 29th January, 2016, some three and half years after her accident, he noted that she had suffered from no post traumatic seizures and that she had experienced no adverse educational setbacks. She was not taking any medications. She was continuing to train and play hockey to a very high provincial and international level. Her neurological examination was normal and he expressed the view that the index accident would not affect her longevity or her job prospects.

79. In evidence, the plaintiff and her mother appear happy that a full recovery has taken place. Obviously, in the aftermath of the accident the plaintiff and her parents were gravely concerned about the possibility of adverse neurological consequences in view of the nature of the injury. However, all seem reassured from the views expressed by Mr. O'Brien.

80. Accordingly, given that the evidence indicates full recovery with no sequelae I proposed to award a composite sum for general damages. Having regard to the significance of the injury and the life-threatening impact upon the plaintiff and the undoubted concern for the possibility, however slight of future manifestation of neuropsychological sequelae up to the present time, it seems to me that an appropriate sum for general damages in this case is € 60,000.00. To this should be added the agreed special damages in the sum of €9,319.86 making a total award of € 69,319.86.

81. I will hear the parties as to costs and the nature of the order to be made particularly in light of the fact that the defendants, having exchanged notices claiming indemnity and contribution, may wish to consider their respective positions in the light of this judgment.