

CANADA / JUDGMENT

Thatcher v. Schell et al.

2005 BCSC 1121

COURT

Supreme Court of British Columbia

DECIDED

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2005 BCSC 1121 Thatcher v. Schell et al

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Thatcher v. Schell et al.,

2005 BCSC 1121

Date: 20050729

Docket: S61518

Registry: Kelowna

Between:

Martin Thatcher

Plaintiff

And

Wayne Schell, Matt Schell, Clare McKenzie,

Wes McKinnon and Lisa Schell

Defendants

Before: The Honourable Madam Justice MacKenzie

Reasons for Judgment

Counsel for the Plaintiff

G.E. Schauble

Counsel for the Defendant

C.R. Penty

Date and Place of Trial:

June 6-10, 2005

Kelowna, B.C.

Introduction

- [1] At approximately 8:30 p.m. on August 27, 2002, on Okanagan Lake, near Peachland, British Columbia, the bow of the 19 foot motorboat operated by the defendant, Mr. Wayne Schell, struck the plaintiff's, Mr. Thatcher's, black 26 foot sailboat at its mid starboard side. The sailboat was positioned across the bow of the motorboat because Mr. Thatcher turned to port in an attempt to avoid the accident. The defendant, Ms. Clare McKenzie, is Mr. Schell's fiancée and was sitting beside him in the front seat of the motorboat.
- [2] Both boats were destroyed in the collision. Mr. Thatcher claims against Mr. Schell and Ms. McKenzie for loss of his boat and damages for personal injury. Mr. Schell counterclaims for loss of his boat and Ms. McKenzie counterclaims against Mr. Thatcher for damages for personal injury. Mr. Thatcher discontinued his claim against Wes MacKinnon and Lisa Schell the day before trial, and is no longer pursuing the claim against Matt Schell.
- [3] Mr. Thatcher was operating his sailboat under power, without its sail. Before the collision, Mr. Thatcher had been proceeding north, parallel to the shore and at trolling speed. He had been watching Mr. Schell's motorboat as it went around the point of Trepanier Creek about 0.6 kilometres from the accident site. He watched it straighten out and proceed south towards him.
- [4] When Mr. Thatcher saw the risk of collision, he did not sound his horn or turn to starboard as required by the Operating Rules established by the Collision Regulations, C.R.C., c. 1416, enacted pursuant to the Canada Shipping Act, R.S.C. 1985, c. S-9. Instead, as mentioned, he turned to port to face the shore. He had just completed that left turn when his starboard side crossed the path of Mr. Schell's boat and the collision occurred. Mr. Thatcher did not sound his horn before the accident because it was not accessible, but says he stood up and shouted at the motorboat.
- [5] Mr. Schell and Ms. McKenzie say the accident happened because they could not see Mr. Thatcher's black, unlit boat on the black water. Not only were there no lights on Mr. Thatcher's boat, but they allege he also made a negligent manoeuvre in turning left (to port) when he knew the collision was imminent. Mr. Schell did not see the sailboat until the last second when it was too late to avoid it. At the same time, Ms. McKenzie yelled at Mr. Schell to watch out.
- [6] Both the plaintiff and the defendants called independent witnesses to testify about the lighting, or lack of it, on Mr. Thatcher's sailboat.

The Issues

- [7] The issues in this case are: (a) whether Mr. Thatcher has proven that Mr. Schell was negligent in the operation of his motorboat and if so, whether it caused the collision; (b) whether Mr. Schell and Ms. McKenzie have proven that Mr. Thatcher was negligent in the operation of his sailboat and if so, whether that negligence caused the accident; or, (c) whether Mr. Thatcher and Mr. Schell were both negligent such that liability is to be apportioned.
- [8] Resolution of these issues requires determinations be made regarding whether Mr. Thatcher's sailboat had any illuminated navigational lights at all and even if it did have some lighting, was it adequate in the circumstances; was Mr. Thatcher negligent in turning towards shore in an attempt to avoid the collision or by failing to sound his horn; was Mr. Schell operating his boat at too high a speed in the circumstances; did Mr. Schell fail to keep a proper lookout; and were Mr. Schell and Ms. McKenzie operating the boat without legal authority. Resolution of these matters depends on findings of both credibility and reliability.

The Evidence

Martin Thatcher:

- [9] Mr. Thatcher is fifty-four years of age and a sheet metal journeyman. He describes the accident as having occurred approximately 60 yards out from the shoreline and 30 yards out from the swim buoys near Beach Avenue and 13th Street in Peachland. Beach Avenue runs parallel to the shoreline of Lake Okanagan.
- [10] Mr. Thatcher testified that at about 4:15 p.m. on August 27, 2002, he went to his boat at Pentowma Marina and did a whole service check as he always does before boating. He checked the battery terminal cables, checked the wiring for water leaks, checked for gas leaks, checked the life jackets and turned on the weather channel. He testified he checked the lights by switching them on the breaker panel and observed them to be on. Mr. Thatcher said his boat had a bow light at the front with a red light on the port side and green light on the starboard side, and a bright white stern light on the starboard side at the rear.
- [11] Mr. Thatcher's boat was a 26 foot McGregor sailboat with a 9.9 h.p. Yamaha motor. It was a little outboard motor mounted on the back. He used the motor for trolling, fishing, bad weather and getting out of harm's way, as well as going in and out. He owned the boat for about a year and a half before the accident.
- [12] Mr. Thatcher was alone when he left the marina and got out on the lake at about 5:15 p.m. He headed south towards Antler Beach where there is good fishing. It is about four kilometres from the marina.

- [13] Mr. Thatcher decided to turn around and head back at around 7:00 p.m. Proceeding north, towards the Marina, he said he turned on his navigation lights when he got near Castle Haymour (a Peachland landmark). It was about 4 kilometres to the accident site from where he said he turned on his navigation lights at Castle Haymour. It was 1 kilometre from the accident site to Trepanier Creek Point and 0.6 kilometres from the accident site to the point at which he first saw the defendant's boat coming out from the point at Trepanier Creek.
- [14] Mr. Thatcher said the course of Mr. Schell's boat made it look first as if it were heading out to the middle of the lake. That is, it headed southeast and then looked as if it made a turn back to shore, made a couple of zigzags and followed the curve of the shore, then headed directly south towards Mr. Thatcher's boat.
- [15] Mr. Thatcher watched the Mr. Schell's motorboat come out from Trepanier Creek Point. He testified he could hear "whooping and hollering" coming from the boat.
- [16] The weather was 20 to 25° with clear visibility and calm waters. There were good lighting conditions as one could see across to the other side of the lake, but it was getting dark, according to Mr. Thatcher.
- [17] Mr. Thatcher estimated the motorboat was travelling approximately 55-65 kilometres per hour as it started to travel parallel with the shoreline. He timed it as about 15 to 20 seconds for the boat to travel 0.6 kilometres from the point where the motorboat straightened out along the beach to the accident site. He said the motorboat did have both bow and stern lights on. He clearly saw the boat.
- [18] Mr. Thatcher testified that he knew there was a problem when he saw the boat straighten out and come along the shoreline, but that 15-20 seconds did not give him time to get out of harm's way and the boat was coming very fast. Mr. Thatcher said he stood up and yelled, "Stop, stop" at the helm, but there was no response.
- [19] It was then that Mr. Thatcher decided to take evasive action by grabbing his tiller handle and attempting to steer the boat "hard to port" into shore. It took quite a long time to get the boat turned and it was this action that left the starboard side of his sailboat exposed to the bow of the motorboat.
- [20] The next thing Mr. Thatcher knew he was under water with the motorboat on top of him. When he reached the surface, he saw one boat fused to the other. The stern of his sailboat was coming towards him and looked as if the motor was still running. He went under water and the propeller grazed the top of his head. He surfaced again and scrambled up the bow of his sailboat and into it. He turned the motor off, heard people screaming, grabbed life jackets and his lantern light because it was dark out. Search and rescue and other boats arrived at the accident scene shortly thereafter.
- [21] Mr. Thatcher was taken to Kelowna General Hospital and spent about two to two and a half hours there.

- [22] As a result of the accident, Mr. Thatcher suffered a sore chest, headaches, cuts to his arms and forehead, bruise on his right shoulder, a sore neck and a sore left hip to tailbone. He attended physiotherapy and took muscle relaxants.
- [23] Mr. Thatcher was off work in September and October as a result of the accident and claims for lost wages, as well as non-pecuniary damages.
- [24] He salvaged his boat the day following the accident and only got scrap for it. His claim for the loss of his boat is \$11,000.00.
- [25] Regarding the issue of lighting, Mr. Thatcher testified that he had running lights on the bow of his boat; consisting of a red light on the port side and a green light on his starboard side. He also says his bright white stern light was on.
- [26] At trial, Mr. Thatcher said he turned on his boat lights at about 7:15 p.m., but that was inconsistent with his evidence at the examination for discovery that he turned his lights on at about 6 p.m. He said at trial that his answer at discovery was incorrect.
- [27] When asked why he jumped up and started yelling when there were lights on the front of his boat, he said he was not taking any chances.
- [28] When further questioned about why he was concerned since the driver of the motorboat would have seen him if indeed his lights were on, Mr. Thatcher responded that Mr. Schell's boat was a 200 h.p. water skiing boat that was moving extremely fast towards him.
- [29] Mr. Thatcher testified that he was an experienced boater who had taken the Canadian Power Squadron Course and was aware of the boating regulations in place at the time. He acknowledged that when confronted with an imminent collision, a boater is required to turn to starboard. He also acknowledged that contrary to those regulations, he instead turned to port (left).
- [30] Mr. Thatcher, however, denied the suggestion put to him that by turning to port instead of starboard as required by the Collision Regulations, he turned directly into the path of Mr. Schell's boat and in so doing, caused the accident. He said he could not grab the throttle to go faster because he could not reach it. His evasive action was to yell and scream and to try to get his boat out of the way. He also denied the suggestion that he could have avoided the collision by maintaining his original position.

The Shore Witnesses:

- [31] Mr. Thatcher called three independent witnesses (the "shore witnesses") regarding whether his sailboat was illuminated prior to the collision.
- [32] The first witness was Mr. Tingstad. He said he saw Mr. Thatcher's sailboat proceeding north, about twice the distance out as the swim buoys. It was trolling along. He said the sailboat had a red bow light on, but that it was not yet dark out. Mr. Tingstad went into his house then heard the crash. He went out again and saw two boats stuck together.

- [33] The second and third witnesses were Mr. and Mrs. Mellow. They were sitting on their porch and saw the accident occur.
- [34] Mrs. Mellow said that before the accident, she saw the sailboat travelling slowly from south to north. She could only see its silhouette but could see it was a sailboat. She said there was a red light on it that she thought was at the front of the boat. She did not recall seeing a stern light.
- [35] Then Mrs. Mellow heard a motorboat coming north to south. It was dark, so she could just see its green light coming along the edge of the lake and then she heard the collision.
- [36] Mr. Mellow testified that he saw the silhouette of the sailboat right out in front of their house and was adamant the bow light was on, though he did not remember its colour. He said it was dark as he continued to watch the sailboat cross in front of their home.
- [37] Mr. Mellow then noticed a light and heard a motorboat. He could not observe or estimate the speed of the motorboat. Shortly after, he heard the collision but did not see it occur. He got up and phoned 911 immediately.
- [38] It is significant that Mr. Mellow was quite definite that there was no beam of light coming from the sailboat out onto the water. His overall impression of the sailboat was of its silhouette.

Other Witnesses:

- [39] Because of the conclusion I have reached on liability, it is not necessary to review the evidence of Mr. Thatcher's family physician, or of Mr. Thatcher's wife, Chris Thatcher.

Wayne Schell:

- [40] Mr. Schell is thirty-two year of age. He and Ms. McKenzie purchased the motorboat and trailer for \$2,300.00 about two weeks before the accident. It was a 19 foot Silverline boat with a 200 horsepower outboard motor.
- [41] Mr. Schell is an experienced boater, having started at age 16. He had been out in the boat three or four times in the two weeks he had owned it. It was in good working order.
- [42] On the day of the accident, he and Ms. McKenzie left their home about 4:30 p.m. to go to Doggy Beach to meet his sister, Lisa Schell, her partner, Wes McKinnon, and their child, Amber. They went to Peachland Marina to rent a kneeboard. They "kneeboarded" for an hour and a half or so, dropped off the kneeboard at 6:30 to 7:00 p.m. and headed back to Doggy Beach. Wayne Schell's father, Matt Schell, joined the party and the family went to visit a friend at Davis Cove, 1 to 2 kilometres north of Trepanier Creek. Along the way, they stopped so Mr. Matt Schell could purchase some beer. He also got some coolers for Ms. McKenzie.

- [43] The group proceeded north to Davis Cove and visited their friend at the dock. Mr. Matt Schell and Wes McKinnon drank beer, but Ms. McKenzie only had one beverage and started a second on the boat. Mr. Schell was not drinking. He described it as a beautiful hot summer day, but said the night came on fast. He agreed the water was flat like glass.
- [44] Mr. Schell was "planing" on the return trip. Planing means going level with the water so that the bottom of the boat was all on top of the water. He did not drive his boat any faster than necessary to keep the boat on plane.
- [45] Mr. Schell denied the "zigzagging" pattern described by Mr. Thatcher. Instead, he said he had to go around the sandbar and correct his direction. He said the boat was 200 to 300 feet out from the shore which was lit up by lights reflecting from the houses and streetlights.
- [46] Mr. Schell was watching out the front of the boat with no distractions. He testified he was paying very close attention because it was dark. He had no problem seeing other boats because they had their lights on. There was little conversation because they were all wet and it was dark. He and Ms. McKenzie were behind the windshield. She was his front passenger. They were not "whooping and hollering" as described by Mr. Thatcher, nor was there other animated conversation ongoing because the outboard motor is loud and it was hard to converse.
- [47] The boat was approximately perpendicular to 13th Street, when suddenly, Ms. McKenzie yelled, "Wayne, look out," and he saw a black boat.
- [48] Mr. Schell testified he initially did not see this boat at all as it had no lights whatsoever. He saw it only at the second when Ms. McKenzie yelled at him. At that point, he grabbed the throttle to reduce his speed and held on to the wheel. There was no time to turn the motorboat to avoid the sailboat. The next thing Mr. Schell knew, he was sitting hanging onto the steering wheel. He turned and saw the back of his boat totally submerged and heard his sister yelling and searching for her young daughter.
- [49] Mr. Schell then stood up and saw Mr. Thatcher on top of the sailboat asking if they needed any life jackets. Mr. Thatcher started throwing them life jackets.
- [50] Mr. Schell then started looking for Ms. McKenzie. He wanted to dive in, but the water was black. A few minutes later, Ms. McKenzie surfaced. He grabbed her and held on at the side of the boat. She was disoriented and in shock.
- [51] Mr. Schell estimated the boat's speed before the collision at approximately 30 kilometres per hour, though he had no speedometer. He estimated the speed of the boat by comparing it to that of the cars along Beach Avenue, which he thought were going about 50 kilometres per hour.
- [52] Mr. Schell confirmed that at no time before the collision did he see any lights on the sailboat.

[53] Mr. Schell also testified that it takes some time to turn a boat to the left or right because the motor and steering is in the back. A boat cannot just, "turn on a dime". In his view, the two boats would not have collided if they had both turned right, or starboard, as the law requires.

[54] Mr. Schell's motorboat was not repairable, and he has not bought a new one even though he loves boating and it was part of his life for years. Ms. McKenzie, who has multiple sclerosis, has been too upset by the accident to resume boating.

Wes McKinnon:

[55] Wes McKinnon was a passenger in Mr. Schell's boat. He supported Mr. Schell's evidence that they were "on plane" prior to the collision. He was not looking forward at the moment of impact because he was looking down at his daughter. Mr. McKinnon candidly admitted he was impaired from drinking beer by the time they left Davis Cove, so his evidence was not of assistance.

Clare McKenzie:

[56] The evidence of Clare McKenzie was important and I accept it without reservation. She testified in a forthright and careful manner, and impressed me as an intelligent and honest person.

[57] Before the collision, Ms. McKenzie was sitting in the front seat with Mr. Schell. She was definitely keeping a lookout at the front of the boat because it was getting dark and she likes to know where they are going. It was already dusk when they rounded the point at Trepanier Creek.

[58] She said the group was not partying on the boat or "whooping and hollering". Nor was the boat speeding. Nothing in the manner of Mr. Schell's driving caused her any concern. She denied that the boat "zig zagged" after it rounded the point at Trepanier Creek. She could only guess how far from the shoreline the boat was and she did not wish to hazard a guess in these circumstances. Because it was dark, you could only see a few feet in front of the boat.

[59] Just before the collision, Ms. McKenzie yelled to Mr. Schell, "Look out". She remembered seeing something big and green, but did not know until she got out of the hospital later that they had hit a boat.

[60] Ms. McKenzie testified that she did not see a boat or any lights in the seconds before the collision and her attention was never diverted from the front of the boat. She did not yell, "There's a boat," because she did not know that is what she saw. Instead, she said, "Wayne, look out". Ms. McKenzie said she yelled at Mr. Schell just before the accident because a big green light suddenly appeared. She demonstrated this by making a circle with her hands about 8 to 10 inches in diameter. She came to believe this was the reflection of Mr. Schell's own green bow light on the sailboat's white deck. I find it also could have been the green starboard running light on Mr. Thatcher's sailboat. However, it was probably, as she

surmises, a reflection of the green bow light of Mr. Schell's own boat reflecting on the sailboat's white deck because Mr. Thatcher's green running light was much too small to have created the round light that Ms. McKenzie described as having appeared from nowhere.

- [61] After she was pulled from the water, Ms. McKenzie was taken to the hospital with injuries I will describe later in these reasons.

Andrew Irwin:

- [62] Andrew Irwin was an independent witness called by the defendants. He knew neither Mr. Schell nor Ms. McKenzie until about a week before the trial. He is 22 years of age and a student who also works at two part-time jobs.
- [63] Starting at approximately 5 p.m. on August 27, 2002, Mr. Irwin, his brother and two friends were wake boarding on Lake Okanagan at the very south end of Peachland. They decided to stop when it got too dark to see the wake. They were in an 18 foot motorboat.
- [64] The group packed up their equipment, turned on the boat's lights and drove north along the west shore of Lake Okanagan. It was quite dark when they got to the Peachland Yacht Club on 8th Street (the accident occurred off 13th Street).
- [65] After Mr. Irwin and his party passed the yacht club, they turned left towards the shore. Shortly after they began that turn, by the street light at the corner of Beach Avenue and 8th Street, Mr. Irwin noticed a mast silhouetted in the street light. He slowed down his boat. The sailboat was heading north along the shore in the same direction Mr. Irwin's boat was initially headed. He said it had no lights on of any kind. Mr. Irwin's boat was close to the dark coloured sailboat and he zipped around behind it. Mr. Irwin testified that had they seen the sailboat earlier, they could have changed their course appropriately. Mr. Irwin was annoyed at the sailboat's lack of lights and shouted at the sailboat operator. He did not get a response. He then pulled into the boat launch beside the yacht club.
- [66] Mr. Irwin's brother went to get the truck and trailer. Mr. Irwin and his two friends started putting away equipment in the truck. Approximately five minutes after they had gone around the dark coloured sailboat, Mr. Irwin heard an incredibly loud noise on the water. He could not see because it was dark. The young men continued loading up their truck and trailer.
- [67] However, when the group saw an ambulance head north along the beach and stop around 13th Street, they were curious. They followed the ambulance down to the beach. There was the first car there. The paramedics asked them to assist by pointing their headlights at the lake. Immediately on learning the noise was a boat collision and of its location, Mr. Irwin concluded it was the unlit sailboat that he had encountered minutes earlier.

- [68] Mr. Irwin did not give a statement to the police because the police told him and his friends in no uncertain terms to leave the shore by the accident. Mr. Irwin's evidence was unearthed because he overheard a conversation about the accident while he was working at a gas station. He was interested in it because he had been at the scene. One of the speakers was Mr. Schell's sister, so he gave her his telephone number.
- [69] When shown the picture of Mr. Thatcher's sailboat, Mr. Irwin said it looked the same size as the one he had encountered on the evening in question, but he just remembered seeing a sailboat with a mast. He did not think there were any other boats out in the Peachland area at the time he saw it.
- [70] When it was suggested to Mr. Irwin that he could not say with certainty that the sailboat he saw was the one involved in the accident, he replied, "I am as sure as you can be without sitting on the sailboat and there were no other sailboats out; I heard the accident".

Credibility and Reliability

- [71] Mr. Thatcher acknowledged that he is required by the boating regulations to display lights on both the front and the rear of his vessel. He maintained that he did turn on his running lights, but there is a suspicious discrepancy between his examination for discovery evidence and his trial evidence about what time he did so. As I said earlier, at discovery, he said he turned them on at 6:00 p.m., whereas at trial, he testified he did so at approximately 7:15 p.m.
- [72] In the circumstances, I do not accept Mr. Thatcher's evidence that he had on all the lights he described on his sailboat. In particular, I do not accept his evidence that his boat had a bright white stern light working and illuminated. I find that Mr. Thatcher panicked, stood up in his boat, yelled, and made the ill advised turn to port that exposed his boat broadside across the path of Mr. Schell's motorboat because he knew his boat was insufficiently lit and not visible.
- [73] Without reservation, I prefer the evidence of Mr. Schell, Ms. McKenzie and Mr. Irwin. I find that Mr. Thatcher's sailboat was either unlit, or, if it did have on its small red/green running lights, that lighting was so deficient that the sailboat was not visible to the defendants, particularly when the sailboat was broadside to them. The sailboat certainly lacked a bright white stern light that Mr. Thatcher said was illuminated.
- [74] In particular, Mr. Irwin's evidence provided strong support for the position of the defendants. Only about five minutes had elapsed between the collision and Mr. Irwin's own negative encounter with a dark, unlit sailboat. I find the dark sailboat Mr. Irwin described was indeed Mr. Thatcher's. I do not accept the plaintiff's submission that Mr. Irwin's time estimates regarding his encounter with the sailboat were only guesses. The lack of lighting on the sailboat annoyed him so much that he shouted to its operator. Mr. Irwin was sure the dark-coloured unlit boat that he had encountered was the same black sailboat involved in the collision. He is correct. As a fair, independent witness, Mr. Irwin provided reliable and

persuasive evidence. He impressed me as a good citizen and a person with integrity who came forward to do the right thing.

- [75] In contrast, I have some reservation about the evidence of the three independent witnesses who testified on behalf of the plaintiff. I do not mean they were dishonest; only that their memories or vision may have been unreliable.
- [76] For example, Mr. Tingstad was mistaken when he testified it was broad daylight when he saw Mr. Thatcher's sailboat as it headed north just before the accident. The preponderance of evidence shows that it was dark.
- [77] The Mellows were honest witnesses who may indeed have seen a light on the sailboat, though Mrs. Mellow stressed that her predominant impression was of the boat's silhouette, and the view from a shore lit by houses and streetlights is very different from that on a black lake at night time. Mrs. Mellow also thought the light on the sailboat was red, and Mr. Mellow did not remember what colour it was.
- [78] But even at its most favourable to Mr. Thatcher, the evidence of all three "shore" witnesses was inconsistent with Mr. Thatcher's own evidence because none of them saw a bright white stern light illuminated on his boat.
- [79] Moreover, assuming the three "shore" witnesses did see a red light on the sailboat, it would have been the small red light on the port side of the bow. This would mean the small green light on the starboard side of the bow would also have been on since the two lights operate from one switch and use the same bulb. But those lights are small, and are not sufficient to alert oncoming boats in dark conditions.
- [80] Thus, I find that the defendants have proven that Mr. Thatcher was negligent by failing to properly and sufficiently light up his sailboat at night and that this negligence caused the accident. It is speculation to say the collision would not have occurred had he turned to starboard as required by the Collision Regulations, but it seems less likely. It seems that, at minimum, less damage would have resulted. Mr. Schell, on the other hand, did not have an opportunity to turn to starboard because he did not see Mr. Thatcher's inadequately lit boat until it was too late to turn.
- [81] I also find that Mr. Thatcher was an unreliable witness who exaggerated his evidence. Resentment and anger distorted his testimony so that it lacked objectivity. He unfairly revised the facts to favour his own interests and to eliminate his own liability for the accident. Mr. Thatcher exaggerated both the speed of the motorboat, and his own injuries. He also inaccurately described the path of the motorboat as "zig-zagging."
- [82] Apart from the fact there is no evidence before me of a speed limit on the lake, Mr. Thatcher's evidence that the motorboat was traveling at 55 to 65 km per hour is unreliable and exaggerated. I do not know how he could determine the speed of a boat that he said was coming straight at him, even if he started to watch it from a distance of half a kilometre. However, his evidence did demonstrate that he saw the lights of the motorboat very clearly.

In addition, Mr. Thatcher said he was afraid of the speed of the motorboat because it had a 200 horsepower motor on it. He simply could not have known that until after the collision.

- [83] Thus, I also find on all the evidence that Mr. Thatcher failed to prove any fault on behalf of the defendant, Mr. Schell. Specifically, he has not proven that the speed of the motorboat was excessive in all the circumstances, or that Mr. Schell failed to keep a careful lookout or did anything wrong in operating his boat. It follows that I allow Mr. Schell's counterclaim against Mr. Thatcher for the loss of the motorboat and Ms. McKenzie's counterclaim for her personal injuries.

Boating Regulations and Case Law

- [84] Counsel have each referred me to certain cases involving boating collisions caused by negligence. They are interesting as examples, but of limited assistance in determining liability in this case because every case depends upon its own peculiar facts.
- [85] Both counsel have also helpfully provided significant detail on the Operating Rules under the Collision Regulations to support their respective positions that the other party failed to obey the Rules in this case.
- [86] As counsel for Mr. Thatcher puts it, the Canada Shipping Act establishes a framework of rules and regulations that incorporates various international conventions in an attempt to govern the conduct of mariners and boaters alike. Significantly, the Collision Regulations require every operator of a vessel to proceed at a safe speed, maintain a constant lookout and to use every available means to avoid a collision. Failure to comply with the regulations and rules can provide evidence of negligence, or support certain findings of negligence.
- [87] Counsel for Mr. Thatcher submits that the defendants are liable for damages for operating the motorboat without legal authority as provided by the Department of Transport Canada, Office of Ship Registration. However, Mr. Schell was not charged with any boating violations at all. More importantly, any licensing requirement is irrelevant because there is no causal nexus between an alleged licensing failure and the collision.
- [88] Turning to the defendant's submissions, it is significant that, as mentioned earlier, Rule 14 of the Operating Rules, which governs power-driven boats that are meeting in a head-on situation, requires that, each vessel shall alter her course to starboard (to the right) so that each shall pass on the port side of the other. This is opposite the direction turned by Mr. Thatcher when he realized Mr. Schell's motor boat was on course to collide with his sailboat. However, this is not a determinative factor because the implementation of the Rule requires that both boats turn to starboard to avoid the collision. In this case, Mr. Schell did not even see Mr. Thatcher's sailboat until it was too late. He could only grab the throttle and frantically try to slow down.

[89] Rule 21(e) is also particularly relevant because it defines the required "all around light" as a light showing an unbroken light over an arc of the horizon on 360 degrees. I have clearly found that Mr. Thatcher's boat, which is subject to the Rule, displayed no such white light, or any light for that matter, on its stern.

[90] Mr. Thatcher's breach of the above Rules alone does not automatically amount to negligence. However, it reinforces my independent finding that he was negligent in failing to have proper and adequate lighting on his sailboat and that this negligence caused the collision.

Damages of Clare McKenzie

Injuries:

[91] As a result of the collision, Ms. McKenzie suffered the following injuries:

- a. chest compression and bruising;
- b. head injury/concussion;
- c. lacerations to left knee and forehead;
- d. neck and back strain;
- e. psychological injuries; and
- f. dental damage.

[92] Ms. McKenzie was hospitalized overnight and released the following morning.

[93] Ms. McKenzie suffers from Multiple Sclerosis. It was aggravated by the physical and psychological stress from the injuries.

[94] Ms. McKenzie's head injury and concussion kept her bed ridden for almost a week. She suffered memory loss and headaches. She was required to take morphine for about a week, then Tylenol.

[95] Ms. McKenzie's bruising to her chest and torso resolved after some months. She could not be specific about how long the discomfort lasted.

[96] She also suffered lacerations just above her right eye and to her left knee. The forehead laceration required stitches and has left a double line scar above her right eye. The left knee laceration resolved without stitches and left no scarring.

[97] Ms. McKenzie's neck and back strain restricted her movement. She does not recall how long the injury persisted, but Dr. McCloskey noted that it remained tender in October, 2002.

- [98] Ms. McKenzie also suffered psychological injuries that she described by saying, "the accident messed with my head". She suffered nightmares which would awaken her suddenly from a deep sleep. She is also unwilling to get into a boat. This has caused some problems in her relationship with Mr. Schell because he is an avid boater. Ms. McKenzie continues to take sleeping pills and anti-depressants, partly due to her Multiple Sclerosis and partly due to the boating accident.
- [99] Ms. McKenzie's most significant injury was to her teeth. Two were seriously damaged and one was knocked out. Her dental damage required almost 14 months treatment by her own dentist and a periodontist. Dr. Faigan, the periodontist, performed surgery by cutting her gums and inserting a titanium post. Two teeth were capped and bridged to other teeth. The total cost of this dental work was \$4,333.00.
- [100] The capped teeth are cold sensitive. Ms. McKenzie does not have the confidence to consume certain hard foods.
- [101] As a result of her injuries, Ms. McKenzie lost income \$3,840.00 in income, less statutory deductions.
- [102] Ms. McKenzie confirmed that she stopped working in November, 2003, as a result of the continued flare up of her Multiple Sclerosis.

Quantum of Damages:

- [103] Ms. McKenzie suffered significant injuries in the collision. Her dental injuries, in particular, required considerable and lengthy work before they were resolved. Ms. McKenzie impressed me as a stoic individual who did not malingering. Because of her pre-existing Multiple Sclerosis, she suffered an inordinate amount of stress as a result of this accident. Having considered all the circumstances and the cases relied upon by counsel, I conclude a fit award for non-pecuniary damages is \$18,000.00.
- [104] Ms. McKenzie is also entitled to \$3,840.00 in lost income, minus statutory deductions, and \$4,333.00 in special damages for the cost of the dental work.
- [105] Mr. Schell only seeks damages for the loss of his boat. He and Ms. McKenzie paid \$2,300.00 for both the boat and its trailer. The costs of each were not isolated, but I conservatively deduct \$700.00 as the value of the trailer. On that basis, I award Mr. Schell \$1,600.00 for the loss of the boat.
- [106] Pre-judgment interest is awarded where appropriate.

Costs:

- [107] As the successful parties, Mr. Schell and Ms. McKenzie will have their costs of the proceedings at Scale 3.

[108] There was no evidence that anyone other than Wayne Schell was operating the boat at the material time and the action against all the defendants is dismissed. In any event, Mr.Thatcher discontinued his action against Wes MacKinnon and Lisa Schell on the day before trial. They will have their costs at Scale 3 up to and including that point.

[109] Matt Schell will also have his costs at Scale 3.

"A.W. MacKenzie, J."

The Honourable Madam Justice A.W. MacKenzie

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