

BRITISH COLUMBIA ADMIRALTY DISTRICT

BETWEEN :

JOHN FOURNIER AND RICHARD } PLAINTIFFS;
CHILDS

AND

THE OWNERS OF THE SHIP } DEFENDANTS.
POINT ELLICE AND OF THE CAR
BARGE P.G.E. NO. 2

1957
Oct. 23,
24, 25
Nov. 12

Shipping—Action for damages through loss of yacht after being in collision with tug and tow—Loss caused by negligence of plaintiffs and improper navigation of yacht—Action dismissed.

The action is brought by the plaintiffs as owners of the yacht *Crosswinds II* which foundered and was lost in the First Narrows near Vancouver, B.C. during the night of September 1, 1956, after being in collision with the tug *Point Ellice* inbound on the course of a voyage from Squamish, B.C. to Vancouver, B.C. and having in tow the railway barge *P.G.E. No. 2*. Plaintiffs seek to recover from defendants the value of the yacht.

Held: That the collision and subsequent loss of the yacht were due to the negligence of the plaintiffs in being in the Narrows at all at that time and under those circumstances, not having ascertained the condition of the tide and failing to keep a lookout aft, and in causing the yacht to suddenly veer to starboard across the bow of the barge.

ACTION to recover damage caused by the loss of plaintiffs' yacht.

The action was tried by the Honourable Mr. Justice Sidney Smith, District Judge in Admiralty for the British Columbia Admiralty District at Vancouver.

J. G. A. Hutcheson, Q.C. for the plaintiffs.
C. C. I. Merritt for the defendants.

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The facts and questions of law raised are stated in the reasons for judgment.

SIDNEY SMITH D.J.A. now (November 12, 1957) delivered the following judgment:

I was impressed with the closing argument of Mr. Merritt. He said that

At about 4 a.m. on September 1, 1956, the Tug *Point Ellice* was approaching First Narrows, Port of Vancouver, B.C., in bound, on the course of a voyage from Squamish, B.C. to Vancouver, B.C., and having in tow the railway barge *P.G.E. No. 2*. The night was dark with skies partly cloudy, and visibility 5 miles or better. The wind was a fresh westerly and the tide was ebbing strongly. The course of the *Point Ellice* approaching the Narrows was North 72° East magnetic, and shaped to pass close in to Prospect Point. Her speed was approximately 6 knots . . . a good lookout was being kept aboard both the tug *Point Ellice* and the barge *P.G.E. No. 2*.

In these circumstances, and when approximately one half mi'e west of the bridge a single white light, which proved to be that of the yacht *Crosswinds II* was observed fine on the port bow. Having ascertained that it was safe to enter the harbour the *Point Ellice* proceeded, with her course shaped to pass close in on the starboard side of the channel. When the *Point Ellice* reached a position where the yacht *Crosswinds II* bore slightly forward of the *Point Ellice's* beam the *Crosswinds II* altered course to starboard, without warning, and closed towards the *Point Ellice* and her tow. The *Point Ellice* altered course hard to starboard, and the barge *P.G.E. No. 2* altered course simultaneously hard to starboard. When the *Crosswinds II* continued to close, the tug *Point Ellice* stopped her engines. Both the tug *Point Ellice* and the barge *P.G.E. No. 2* continued to alter course to starboard until grounding was imminent. The *Crosswinds II* passed astern of the *Point Ellice* and ahead of the *P.G.E. No. 2* striking the starboard towing bridle of the *P.G.E. No. 2* and subsequently the starboard bow of the *P.G.E. No. 2*. The *Crosswinds II* then foundered and was lost, her crew of two hands being rescued by the barge *P.G.E. No. 2*.

I cannot improve upon this narrative which was established in evidence. He pointed out that there were thus in the comparatively narrow and perhaps most travelled portion of the First Narrows, Vancouver Harbour, in a space approximately one half mile long and a quarter of a mile wide four comparatively large ships; and an auxiliary schooner yacht. The ships concerned were the large tug *Point Ellice* (length 96', breadth 20', depth 12', gross tonnage 149 tons), having in tow the railway barge *P.G.E. No. 2* (length 210', breadth 42', depth 10', gross tonnage 812 tons), and the unusually large passenger ferry *Princess of Vancouver* (almost 400' in length and over 5,000 tons gross tonnage), and there was the plaintiffs' yacht *Cross Winds II*, built a year or so ago. Weather conditions were

about the worst found there. It was dark but clear. A maximum ebb tide of about five knots was running and a southwest gale, estimated by the plaintiffs at 50 m.p.h., was blowing outside in the Strait of Georgia though of course only gustily in the Narrows. The yacht was manned by two not very experienced yachtsmen (the younger say 23 years of age, the older about 62). The other vessels were proceeding upon their lawful occasions earning their livelihood as they had done for many years in all states of weather and tide in these waters. That of course is not to say that the yacht had not as much right to be there as did her greater companions provided she obeyed the rules of the road and became no menace to navigation. But this she did not do.

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In view of the valiant submission made by Mr. Hutcheson for the yacht, I did not accept Mr. Merritt's argument at face value. I have taken time, perhaps too much time, for consideration but the conclusion I have reached is definitely for the defendants. I accept the allegations of the tug and the barge and on the whole perhaps it may be just as well not to enlarge upon the matter.

I think it goes without saying that the plaintiffs were negligent. I think they were negligent in being there at all at that time and in those circumstances. The yacht had her jib set, her diesel engine running, and was barely making way against the ebb. Those on board had not even taken the trouble to ascertain the state of the tide in the First Narrows. In fact they were in the middle of the tide rips and in the midst of their difficulties before they realized there was any tide there at all. This is inexcusable; as are her failure to keep a lookout aft—*Bryce v. Canadian Pacific Railway Company*¹, and in the Judicial Committee², and her sudden verging to starboard across the bow of the barge. She had been on a run to Nanaimo but had had to turn back as the wind freshened.

The two plaintiffs were rescued by the seamanship of those on board the tug and barge. By the age-old law of the sea the *Princess of Vancouver* stood by to render assistance. That this was found not to be necessary does not detract in the slightest from its gallantry.

¹ (1907) 13 B.C.R. 96.

² (1909) 15 B.C.R. 510.

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I need not add in conclusion that I reject the evidence given by the plaintiffs and accept the testimony of the defendants. The former was hesitant, inconsistent and unconvincing; the latter was quite the contrary. Nor have I overlooked the *Point Ellice* log entry. But I am satisfied this does not deal with the time of the collision and should not be held against the vessel. It may be permissible for me to add in conclusion that I doubt if evidence has ever been given in this Court more convincingly than that pronounced by Capt. Thos. C. Fairburn, a former Peninsular and Oriental Chief Officer who happened to be signalman in charge of the Lion's Gate Bridge at the relevant times.

The action is dismissed with costs.

Judgment accordingly.