
CANADA / JUDGMENT

R. v. Broadwith

2007 BCSC 1910

COURT

Supreme Court of British Columbia

DECIDED

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2007 BCSC 1910 R. v. Broadwith

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Broadwith,

2007 BCSC 1910

Date: 20071030

Docket: 63338

Registry: Kelowna

Regina

against

Benjamin Paul Broadwith

Before: The Honourable Madam Justice Beames

Oral Reasons for Judgment

October 30, 2007

Counsel for Crown:

J. Dymment

Counsel for Defence:

C. Burnett

A. Baylis (Articled Student)

Date and Place of Hearing:

October 15-19 and 22-26, 2007

Kelowna, B.C.

- [1] THE COURT: On June 8, 2005, Camille Fry died when the houseboat on which she was a passenger capsized. The accused, Benjamin Broadwith, who was the captain of the houseboat at the time it capsized, is charged with criminal negligence causing death and dangerous operation of a vessel causing death.
- [2] In 2002, a business known as Okanagan Wake Tours, owned by Blair Williams and Michael Zaphiris, owned the houseboat in question. The business plan of the partners was to have a charter houseboat company. In order to operate as a charter, the houseboat, which I will normally be referring to today by the name "Quintana Roo", had to be inspected and licensed by Transport Canada. It was a requirement of the licensing authority that the houseboat, when operated as a charter, be captained by a person who was a licensed 60-tonne master captain and a restricted engineer.
- [3] Mr. Williams took the required courses and examination, and the Quintana Roo was modified, upgraded, and then inspected. After inspection and some testing, the houseboat was approved to operate for the 2002 season as a charter, carrying a maximum of 25 passengers and two crew.
- [4] According to Mr. Williams, as a result of additional requirements later imposed by the licensing authority, a decision was made by the business to cease operating the Quintana Roo as a charter houseboat and to start renting it out on what was referred to as a "bare-boat basis". The difference between the two was that on a charter basis, a client would rent the houseboat with crew included, or the business could offer its own tours and take individuals and groups out; whereas on a bare-boat basis, a client could rent the houseboat and either operate it himself, which in fact never happened while Okanagan Wake Tours operated the business, or have a captain and first mate which could be selected from an approved crew list provided by Okanagan Wake Tours.
- [5] As a result of changing to bare-boat rentals, the licensing requirements and restrictions previously imposed by Transport Canada ceased to apply. There was no limit, in law, on the number of passengers the Quintana Roo could carry, nor was there a requirement that anyone who operated the Quintana Roo have any specific training or qualifications.
- [6] In 2004, Mr. Broadwith worked occasionally as the first mate on another houseboat owned by Okanagan Wake Tours called "High Seas III" or sometimes referred to as "Jaws", which was a sister houseboat to the Quintana Roo. In 2005, Mr. Williams asked Mr. Broadwith to captain the Quintana Roo and Mr. Broadwith agreed.
- [7] On June 1, 2005, Mr. Broadwith and two others, one of whom was Ryan Walton, were trained by Mr. Williams to operate the Quintana Roo. The training of all three individuals took a total of three to four hours. As part of the training, Mr. Williams instructed the trainees that the capacity of the Quintana Roo was 30 guests plus two crew, although Mr. Williams, with

all of his training toward a 60-tonne master captain designation, had himself operated the houseboat with as many as 40 to 45 passengers on board. Before this three- to four-hour training session, Mr. Broadwith had no formal training in operating boats, in general, or houseboats, in particular.

- [8] The training also covered the procedure to be used by the captain and the first mate when leaving dock with their guests. The procedure was the same that Mr. Broadwith had experienced as a first mate in 2004. The captain would tell the first mate that they were ready to depart. He would then go to the upper deck to deliver a safety talk to all of the guests. Before the safety talk, the first mate was to ensure that all guests were on the top deck. While the captain gave the safety talk, the first mate would do a head count of all of the guests. The captain would then give the okay to cast off. The first mate would run downstairs, cast off, and then meet the captain back on the houseboat's lower deck to report the head count and to have the captain and the renter sign a waiver form.
- [9] Between June 1 and June 8, Mr. Broadwith captained the Quintana Roo once for an overnight high school graduation party for a small, local, private high school and once for a party of adults. Both of those trips, according to Mr. Broadwith, took place during daylight hours. On each occasion, Mr. Broadwith's first mate was Chris Cameron. The departure procedure was followed in each instance.
- [10] Some days before June 8, 2005, Ryan Walton, who had taken captain's training with Mr. Broadwith, as I said a few minutes ago, approached Mr. Broadwith and asked if he would captain the Quintana Roo while he, that is, Mr. Walton, acted as first mate for a birthday party for an individual named Tyler Ottenbreit. With Mr. Walton at the time of the request was Mr. Walton's roommate, Dustin Martin, who was a friend of Mr. Ottenbreit.
- [11] Mr. Williams spoke by telephone with Mr. Martin, Mr. Ottenbreit, and another unidentified of Mr. Ottenbreit's friends about the rental of the Quintana Roo. He understood that Mr. Ottenbreit was the actual renter of the houseboat for the evening of June 8, 2005, and he took a credit card number from Mr. Ottenbreit as a deposit. In the course of his discussions with Mr. Ottenbreit and Mr. Martin, Mr. Williams advised both men that the maximum allowed capacity of the houseboat was 30 guests plus two crew.
- [12] Prior to June 8, 2005, Mr. Ottenbreit and his friends issued invitations to others to join the houseboat party. Mr. Ottenbreit extended a general invitation to all of his co-workers at Earl's Restaurant by putting a notice on the notice board at work. He also emailed other friends. Other people found out about the party by word of mouth.
- [13] Earlier in the day on June 8, 2005, Mr. Ottenbreit and a sufficient number of his male friends to comprise five or six four-somes golfed. Many then went for dinner. At dinner, a number of Mr. Ottenbreit's friends contributed money towards the cost of the houseboat rental.

- [14] Meanwhile, Mr. Broadwith and Mr. Walton met at the houseboat, which was docked at a marina on the west side of Lake Okanagan, and they travelled across the lake to the dock in front of Rose's Pub in downtown Kelowna, arriving at approximately 9 p.m.
- [15] On the trip over, Mr. Broadwith discovered a couple of maintenance issues which needed to be addressed on arrival at the dock at Rose's Pub and before the trip with the guests took place. Specifically, he discovered a problem with the steering from the helm located on the upper deck, one of two helms on the houseboat, and a need to heat the water in the hot tub on the upper deck.
- [16] On arrival at the dock at Rose's, Mr. Broadwith expected to find the whole of the group intending to take the houseboat trip, to collect the rental money, to load the guests, and to depart. Instead, he was met by two of Mr. Ottenbreit's friends, Chad Guidi and Dione Edwards. They told Mr. Broadwith that they did not have the money for the houseboat rent and they would be collecting it from guests as they arrived. They asked that the front entrance to the houseboat be locked so that they could control who got on the boat and collect money from those people, which Mr. Broadwith and Mr. Walton accommodated. They were told they could only have a total of 30 guests on board. I expressly reject Mr. Edwards' evidence that Mr. Broadwith said that he would try to accommodate more than 30 on the boat "as long as it was not an obscene number". I conclude that Mr. Guidi and Mr. Edwards anticipated, as did Mr. Ottenbreit, in my view, more than 30 attendees.
- [17] On being told that 30 was the capacity, Mr. Guidi and Mr. Edwards persuaded Mr. Broadwith to agree to come and go from the dock area and on each return to have some guests get off and others get on so that all of the party invitees and attendees could be accommodated.
- [18] Mr. Guidi and Mr. Edwards then loaded a keg of beer onto the houseboat and manned the gated entrance at the back (the only accessible entrance to the houseboat). Mr. Broadwith spent the next 40 minutes or so dealing with the maintenance issues to which I have referred.
- [19] Between shortly after 9 p.m. and shortly before 11 p.m., guests arrived at the houseboat and boarded after paying, in most instances, to get on board. The evidence is clear that the majority of guests arrived closer to 11 than to 9.
- [20] Sometime between 10:30 and 11, Mr. Broadwith had a further discussion with Mr. Edwards and Mr. Guidi about getting underway. Mr. Broadwith collected the money for the rental of the houseboat and for his and Mr. Walton's pay, and he agreed that the rental could be extended to end at 1 a.m. instead of midnight. I accept that he was offered, and accepted, an ecstasy pill from Mr. Guidi, which he put in his pocket and did not take.

- [21] On the understanding that Mr. Edwards and Mr. Guidi were going to gather the last of the guests, some of whom had apparently been getting on and off the houseboat, and prepare to leave, Mr. Broadwith started the engine, following the normal procedure he had been taught of using the blower first and then turning on the engine. He then advised Mr. Walton they were getting ready to leave. Mr. Walton proceeded to gather people from the lower deck with the intention of ushering them upstairs.
- [22] Mr. Broadwith proceeded up to the top deck to deliver the safety talk. Mr. Walton started to clear the cabin, realized that there was at least one person in the washroom, and decided to check the front lower deck before clearing the cabin. When he got to the front lower deck of the houseboat, he realized the boat was moving away from the dock. He jumped off the houseboat onto the dock to try to pull the houseboat back to the dock. He then saw two men, whom he was unable to identify but who have been identified by at least one of the witnesses in this trial, pushing the houseboat away from the dock. He shouted to those two men to stop, but they ignored him, deliberately in his view.
- [23] As he was unable to get the houseboat back to the dock, he jumped back on and yelled up to Mr. Broadwith from the front lower deck that the lines had been untied and they had been pushed out.
- [24] Mr. Broadwith had just started the safety speech, or was midway through the safety speech. Mr. Walton ran through the cabin to the back deck and he saw that one of the ropes was in the water. He assumed that it was in the propeller. I find that he ran up the stairs to the top deck, made his way to Mr. Broadwith, where he was seen to talk to him, and told Mr. Broadwith that a rope was in the propeller.
- [25] With the houseboat afloat and in neutral, Mr. Broadwith left the helm and followed Mr. Walton down the stairs. It was quickly determined that the rope was not in the propeller and Mr. Broadwith returned to the helm. The guests, shortly after this or in the midst of this, proceeded to sing happy birthday to Mr. Ottenbreit.
- [26] With Mr. Walton watching at the back of the houseboat and providing directions, Mr. Broadwith made the decision to put the houseboat in reverse and manoeuvre it further away from the dock, intending to travel out onto the lake. Within moments, the houseboat flipped over onto its left-hand side and then completely capsized.
- [27] Ms. Fry, who had been in the bathroom in the cabin of the houseboat, was the only person who was unable to escape from the overturned houseboat, and she drowned. Everyone else was able to swim to shore or was rescued by people aboard other boats in the immediate vicinity, or by witnesses to the incident who were on shore before the houseboat capsized.
- [28] I will pause here to note that on several issues I have preferred the evidence of Mr. Broadwith over the evidence of Mr. Walton. Mr. Walton's evidence at trial in some instances was contradicted by evidence he gave at the preliminary hearing and by evidence or by a statement he gave to the police shortly after the events in question. I also find that Mr.

Broadwith's evidence is more consistent with the events depicted on the DVD marked as Exhibit 5 during the trial, which is an excerpt from a longer video recording of the incident made by a witness who was in a wakeboard boat just behind the Quintana Roo during the events in question. Finally, Mr. Walton seemed to have little specific recollection of some of the events of June 8, 2005, compared with Mr. Broadwith's recollection.

- [29] It is agreed between counsel that on the basis of the evidence that I have heard in this trial, there were 54 passengers and two crew aboard the Quintana Roo when it capsized.
- [30] The Crown called an expert in marine accident investigation, amongst his other qualifications. In the opinion of that expert, Mr. Kenefick, the Quintana Roo capsized due to having been overloaded. It was his opinion that as soon as the houseboat was untied and pushed away from the dock, it was doomed to capsize. Whether the houseboat had been put in gear and driven straight back, turned in reverse, driven straight forward, or left in neutral, it was going to capsize. The only difference was the time it would take for it to capsize.
- [31] Having watched the DVD to which I have referred, Mr. Kenefick testified that the last straw, to use my words, was the turning of the houseboat stern to the right. However, as I said a moment ago, Mr. Kenefick's opinion was clearly that capsize was inevitable even if Mr. Broadwith had not put the boat in reverse and turned it as he did.
- [32] Mr. Broadwith himself testified that had he thought for a moment that there were more than 30 people aboard, he would have either driven forward and beached the houseboat on the boat ramp which was straight ahead or returned it to dock using forward and neutral and presumably turning as necessary. Neither of those two possible scenarios or manoeuvres was put to Mr. Kenefick, and consequently I do not have his opinion as to whether the Quintana Roo could have made it to either shore or to the dock before capsizing.
- [33] The Crown's theory that Mr. Broadwith is guilty of criminal negligence or the lesser offence of dangerous operation of a vessel rests essentially on the premise that Mr. Broadwith either knew or should have known how many people were on board, that he knew or he was wilfully blind to and should have known about indications of instability of the houseboat well before it capsized, and that a reasonably prudent person would not have put the houseboat into reverse and tried to turn it after the houseboat had been put afloat by two of the houseboat party guests.
- [34] For either criminal negligence or dangerous operation of a vessel, the basis of a finding of guilt is negligence, and the question is whether, viewed objectively, the accused exercised an appropriate standard of care. If an accused has fallen below an accepted standard of care, then the question is the extent to which he has fallen below the accepted standard of care.

- [35] Negligent driving or negligent operation of a vessel "can be thought of as a continuum that progresses, or regresses, from momentary lack of attention giving rise to civil responsibility through careless [operation of a vessel, under the Canada Shipping Act,] to dangerous driving" (R. v. Hundal, [1993] 1 S.C.R. 867 at para. 35), and culminating in criminal negligence which is conduct that shows a wanton or reckless disregard for the lives or safety of other persons.
- [36] In terms of the number of people on board the Quintana Roo, Mr. Broadwith testified that he had no idea there were more than 30 on board. It must be remembered that Mr. Broadwith had every reason to expect that all of the guests were on the upper deck during his safety speech, while the evidence, including the DVD, clearly shows that there were passengers (amongst the 54 in total on board at the time of capsizing) who were inside the cabin, on the back lower deck, and at least two of whom were on the dock pushing the boat out into the water. The estimates of the number of people on the upper deck varied from witness to witness, ranging from something in the order of 25 to 60.
- [37] In terms of the signs or symptoms of instability, again, Mr. Broadwith denies having been aware of any. He is not alone in those observations or lack of observations, although certainly some witnesses testified that there was rocking and tilting or listing even before the houseboat was untied.
- [38] I heard from 36 witnesses over the course of this trial. All but six were either on the boat at the time it capsized or watching the boat shortly before, during, and after it capsized, either from the wakeboard boat I referred to earlier or from the shore.
- [39] The evidence from those on the boat and those watching the boat was consistent in some respects and varied in others. I accept that most of the witnesses were doing their best to recall and describe a traumatic and chaotic event. Some were impaired by alcohol and/or drugs in their ability to observe and recall some of the details of the events. As is not uncommon in cases involving a large number of eyewitnesses, perceptions varied significantly.
- [40] What happened on June 8, 2005, was tragic. A young woman lost her life when the Quintana Roo capsized. There is a lot of blame to go around. There are several people with whom I could find fault and who ought to feel guilt, regret, and remorse about what happened that night.
- [41] Having said that, the issue in this trial is whether the Crown has proved beyond a reasonable doubt that Benjamin Broadwith's conduct that night amounted to criminal negligence or dangerous operation of a vessel. His conduct must, in law, be measured objectively and it must be determined where on the continuum I referred to earlier it fell.
- [42] To summarize, I make the following findings of fact.

- [43] In June 2005, there were no government regulations which specified any training or certification for an operator of the Quintana Roo, nor any express limitation on the capacity of the Quintana Roo.
- [44] The training provided to Mr. Broadwith was minimal, although it did include the instruction that the maximum number of guests was to be held at 30.
- [45] The renters of the houseboat and all of the individuals associated with the rental and the party organization had been told and knew that the capacity was 30 guests.
- [46] That instruction or limitation was repeated to the friends of the renter, who took it upon themselves to control entrance of passengers onto the boat.
- [47] Mr. Broadwith, perhaps naively, left the enforcement of the limitation of the number of passengers in the first instance to those two individuals.
- [48] Mr. Broadwith, as he testified and as corroborated by the evidence of Corporal Severesen, was not that night under the influence of alcohol or drugs.
- [49] While the Quintana Roo was at dock, some witnesses made observations that were consistent with some lack of stability of the houseboat, although there were many others, including Mr. Broadwith, who either did not make such observations or who were not concerned about any observations or observed unusual movements of the boat.
- [50] In preparation for departure, Mr. Broadwith followed normal procedure in terms of moving to the top deck to give the safety speech, and he expected Mr. Walton to herd everyone on the boat to the top deck to hear the speech and then for Mr. Walton to conduct a head count while the speech was given.
- [51] Before Mr. Walton was able to get everyone upstairs, and before Mr. Broadwith was able to obtain a head count, two individuals, acting on their own and without any direction from either of the crew of the Quintana Roo, untied the houseboat and pushed it away from the dock.
- [52] At the time of capsizing, there were 54 passengers and two crew on board, but not all of whom were on the top deck and visible to Mr. Broadwith at the time that he was giving his safety talk. I accept that he did not perceive that there were more than 30 passengers aboard and, as I have said, he was not alone in that perception, although clearly some people did a better job of accurately estimating the number of passengers on the Quintana Roo at the time of the capsizing, at least as of the time that they testified at trial.
- [53] Upon finding himself in charge of a houseboat which had been set afloat by others, Mr. Broadwith made what turned out to be a fatal decision to put the vessel in reverse and to, once clear of the docks, turn the boat, which was the last straw leading to the houseboat to capsize at that moment.

- [54] The capsize, as soon as the boat was pushed away from the docks, was essentially inevitable. Whether the houseboat could have made it back to the dock or have been beached on the boat ramp before capsize is speculative.
- [55] Looking at Mr. Broadwith's conduct, in the circumstances as I have found them, I am not satisfied that the Crown has proved beyond a reasonable doubt that that conduct amounted to dangerous operation of a vessel, let alone that it met the requisite test of criminal negligence.
- [56] Therefore, Mr. Broadwith, I find you not guilty of Count 1 and not guilty of Count 2. You are free to go.

Beames J.

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