

55, 1935

CANADIAN  
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No. 24 of 1935.

# In the Privy Council.

## ON APPEAL

FROM THE EXCHEQUER COURT OF CANADA.

BETWEEN

The Steamer " PHILIP T. DODGE " (Defendant) - *Appellant*

AND

DOMINION BRIDGE COMPANY LIMITED,  
DUFRESNE CONSTRUCTION COMPANY  
LIMITED and LA COMPAGNIE DU PONT  
DE GASPE LIMITEE (Plaintiffs) - *Respondents.*

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## Case on behalf of the Appellant.

1. This is an Appeal by the Steamer " Philip T. Dodge " (herein-  
after called " the Appellant ") against the Judgment of the Honourable  
the President of the Exchequer Court of Canada, Mr. Justice Maclean,  
given on the 20th day of June 1934, dismissing the Appeal of the Appellant  
from the Judgment, in favour of the Respondents, of the Local Judge  
in Admiralty for the Admiralty District of Quebec, the Honourable  
Mr. Justice Philippe Demers, given on the 3rd day of January 1934.

RECORD.

20 In the Action the Respondents, who were the Plaintiffs, claimed  
from the Appellant damages caused by a collision on the 6th July 1932  
in which the Appellant, while passing through the Draw of a Bascule  
Bridge in the course of construction across the York River at Gaspé,  
Province of Quebec, struck a Bascule doing considerable damage.  
Mr. Justice Demers decreed that the Respondents were severally entitled  
to the damages prayed for, and condemned the Appellant and her Bail  
to the damages claimed with interest and costs to be assessed by the  
Deputy Registrar with the assistance of Merchants.

The Appellant craves leave to refer to the old helm orders throughout this Case so as to conform to the evidence  
and the Judgments given in the Exchequer Court.

APPELLANT'S CASE.

p. 118. 2. The Respondents, the Dominion Bridge Company Limited, who are bridge builders, were at the material time constructing the bridge under a contract dated the 13th April 1931, with the Respondents the Dufresne Company Limited, who, in their turn, were the general contractors for the building, construction and erection of the bridge under a contract dated the 27th April 1931 with the owners of the bridge, the Respondents p. 121. La Compagnie du Pont de Gaspé Limitee.

No point arises in this Appeal upon the right of the Respondents or any of them to sue the Appellant, and no distinction is made between them.

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3. The issue raised by this Appeal is whether the collision was, as the Appellant contends, an accident in navigation which no ordinary care, caution or maritime skill on the part of those in charge of the " Philip T. Dodge " could have prevented.

In the Statement of Defence, the Appellant pleaded and, before both Divisions of the Exchequer Court, the Appellant contended that the collision was occasioned by the negligence of the Plaintiffs, in that they negligently and wrongfully constructed a badly designed bridge which obstructed the navigation of the Harbour of Gaspé to a greater extent than was necessary for the exercise of their statutory powers, and that the Bridge was wrongfully and illegally erected and was a public nuisance. Both Divisions of the Exchequer Court held against the contention that the Bridge was a public nuisance ; Mr. Justice Demers on the ground that the plans of the Bridge had been duly approved by the Governor-General-in-Council, and the President, on the ground that the issue had not been sufficiently tried out in the Court below. The Appellant does not persist in this Appeal in the contention that the proper statutory sanctions for the erection of the Bridge were not obtained by the Respondents. But the Appellant does still contend, and respectfully submits that it is sufficient for her case so to do, that, by reason of its location and construction, the Bridge constituted so dangerous an impediment to navigation that no ordinary care, caution or maritime skill on the part of those in charge of the " Philip T. Dodge " could have avoided the collision.

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p. 131, l. 10. 4. The " Philip T. Dodge " is a single screw steamship of 5,047 tons gross, and 3,691 tons net register, 400 feet in length over all and 51 feet 7 inches in beam. Her drafts at the time (in ballast) were 9 feet 10 inches forward and 14 feet 9 inches aft. She was bound for the International Paper Company's Mill which is in Gaspé Harbour to the westward of the Bridge, so that she had to pass through the Draw of the Bridge to reach her loading berth. Her Master, who had been in command of her for eleven years, had taken her into Gaspé before, but this was the first occasion he had been into Gaspé since the construction of the Bridge had commenced.

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The Canadian Chart of the locality, No. 217, will be found in the fold of the Record, but a more detailed plan drawn to scale by the Master which was put in evidence at the trial will be found in Exhibit D.6.

5. The Bridge connects Gaspé Village with Gaspé Harbour, a distance of about 770 feet, and runs about north and south. It consists of four spans and a Draw fitted with two Bascules, each capable of being vertically raised for the passage of shipping. An elevation plan of the Bridge will be found in Exhibits P.10 (second Plan) and a larger scale elevation of the Bascules in the same exhibit (first Plan). From these it  
 10 will be seen that the width of the channel between the piers of the Draw is 90 feet, that the height of the top of the Bascules above the water when in the vertical position is 69 feet, and that, when raised, the top of each Bascule overlaps the face of the pier on which it rests by about 5 feet. At the time in question the Northern Bascule only was in place, and was in the vertical position, and the top of the piers of the draw were about 6 feet out  
 of the water. The "Philip T. Dodge" therefore had, at the water line, only about 16 feet on either side of her as she passed through the Draw. This very small clearance is apparent from the photograph, in Exhibit P.3, taken of the same vessel proceeding through the Draw on a subsequent  
 20 occasion.

p. 59, ll. 10  
to 20.

6. In addition to the difficulties to a ship of the beam of the "Philip T. Dodge" caused by this narrow passage, the Bridge was so situated that the approach to and egress from the Draw involved particularly dangerous and difficult navigation to a ship of her length (400 feet).

This is clearly shown by the Master's scale plan in Exhibit D.6. The Draw is so situated that it is not in the centre of the navigable channel between Gaspé Village and Gaspé Harbour, but is considerably to the northward of the position through which vessels normally passed into the harbour before the bridge was constructed. To the eastward of the  
 30 Draw is the Paddy Shoal marked by a light, which projects to the southward across the line of the Draw at a distance of about 1,700 feet from it, and has to be passed on the starboard hand by a vessel entering the Harbour. This necessitates a difficult turning manoeuvre at a short distance from the Draw in order to centre the vessel to pass through it. On the other side of the Draw, about 800 feet to the westward, is Davis Wharf which also projects to the southward across the line of the Draw, so that a vessel of the length of the "Philip T. Dodge" has, immediately her stern is clear of the draw, only her own length in which to turn  
 40 under starboard helm to avoid the Wharf. There were no means of checking the ship by lines out to the Bridge as she passed through, and no booms along the piers or other means of holding her off the structure.

7. The "Philip T. Dodge" arrived inward bound at Gaspé Head at the entrance to Gaspé Bay at midnight on the 5th/6th July 1932.

p. 75, l. 40. The Master had no experience of these difficulties at this time, but he knew that there was a Bridge at Gaspé in the course of construction. He decided therefore to wait at Gaspé Head until daylight and to pass through the Bridge well after High Water (which was, at Gaspé, at 4.11 a.m.) against the ebb tide. There were no qualified Pilots in Gaspé. p. 12. He was able, however, to take on board a local fisherman and proceeded with him at daybreak towards the Harbour. The weather at the time was fine and clear, and the wind north-westerly light.

8. On approaching Paddy Shoal, the Master himself being at the wheel, he reduced to half speed, and, when abeam of the light, at a distance of about 300 feet, to slow. From this point he had to turn to the northward under port helm, and, when about two lengths below the Bridge, centre his vessel under starboard helm for passing through the Draw. The Chief Officer was forward assisting the Master by hand signals to centre the vessel, and the Second Officer was stationed aft. The vessel was thus shaped for the centre of the Draw and entered it at slow ahead making between  $3\frac{1}{2}$  and 4 knots. When, however, about two-thirds of her length had passed through, her stern suddenly swung to the northward. The Master immediately put the helm hard-a-port, but, before she could be checked, her counter struck the Bascule at a point about 26 feet above the water and brought it down. 10

pp. 12 to 15.

pp. 31 to 33.

pp. 15 and 16.

9. From subsequent observations the Master ascertained that the current always sets across the Draw at an angle of from thirty-five to forty-five degrees to the Bridge in a northerly direction, and to this factor he attributed the collision. In this he was confirmed by the Master of another vessel "The Blairspray," who had made careful observations of the set of the current for the purpose of navigating his own ship, and also by the Harbour Master, who had held that position for forty-four years. Evidence, on behalf of the Respondents, was given to the contrary by a Civil Engineer who had made a number of observations in October and November of the same year. His evidence was that the current runs straight through the Draw, but above the Bridge he also found a current inclined to the northward but at a smaller angle. On this point the learned Trial Judge found that there was a northerly current at the Draw, but the learned President attached no importance to it. 30

pp. 16 and 17.

pp. 42 and 43.

pp. 44 and 45.

pp. 75 to 82.

p. 78, ll. 10 and 40.

10. The Writ in this action was issued on the 7th September 1932. In their Statement of Claim delivered on the 28th December 1932, the Respondents charged the Appellant with negligence in the following respects, namely, bad look-out; excessive speed; approaching the bridge on a course too close to the North Bascule; failure by those in charge of her to ascertain local conditions as to the proper navigation through the Draw; failure to take proper or effective helm or engine action. In the Statement 40

p. 1.

p. 2.

p. 5.

of Defence delivered on the 2nd June 1933, the Appellant, after stating the circumstances of the collision, pleaded that the accident was not due to any fault, negligence or bad navigation of those in charge of the "Philip T. Dodge"; that it was caused by circumstances of current over which they had not control; and that it was due to the fault and negligence of the Respondents in the location and construction of the bridge.

11. The evidence was heard by Mr. Justice Demers and a Nautical Assessor on the 17th and 27th November 1933. The most important witnesses called by the Appellant were, from the ship, the Master (Record, pages 11 to 29), Chief Officer (Record pages 30 to 32), and the local fisherman (Record, pages 46 to 49), and, upon the question of current, the Harbour Master (Record, pages 44 to 46) and the Master of the "Blairspray," who had taken particular observations of the current (Record, pages 41 to 44). The Respondents called the Chief Engineer of the Department of Public Works of the Dominion (Record, pages 53 to 57), a number of the engineers concerned in the construction of the Bridge, of whom the most important was the Resident Engineer of the Respondents, the Dominion Bridge Company Limited (Record, pages 58 to 61), a number of witnesses from the shore who saw the collision, and, upon the question of current, the Civil Engineer who had made certain observations of the current in the vicinity of the Bridge (Record, pages 75 to 82).

12. Mr. Justice Demers gave judgment in favour of the Respondents on the 3rd January 1934 (Record, pages 87 to 89). He made no detailed findings of fact as to the circumstances of the collision, but (having decided that the Bridge was not wrongfully and illegally erected) held, in agreement with the advice of the Assessor, that the Appellant was to blame upon the ground that he "should have stopped his ship and made himself acquainted with every condition before entering the gap. If he had ascertained these conditions beforehand he would not have navigated with such speed." The learned Judge made no specific finding as to the speed of the vessel. He also found as a fact that, having entered the gap in the middle, the Master starboarded his helm both for fear of striking Davis Wharf, and in order to counteract the effect of the northerly current on his port bow, which, the learned Judge thought, would push his bow and not his stern to the northward. The learned Judge did not however state specifically whether in his opinion any blame was to be attached to the Master for this helm action.

13. The Appellant's Appeal to the Exchequer Court was heard by the learned President on the 22nd and 23rd May, 1934, and he gave Judgment dismissing the Appeal on the 20th June 1934.

He did not agree with the learned Trial Judge that the Master was to blame for failing to ascertain local conditions before attempting to navigate through the Draw, or for not having on board an experienced pilot.

He attached no importance to the current and considered that, even if it struck to the North, it was not of sufficient consequence to create any serious or added difficulty in the navigation of the Draw.

Mr. Justice Maclean, however, held the Appellant to blame for excessive speed, which, accepting the Appellant's evidence upon this point, he found to be 4 miles per hour. He also found that the collision was occasioned by the Master starboarding his helm while passing through the Draw, which action he found to be due to the excessive speed.

14. It is submitted that the learned President was right in rejecting the view of Mr. Justice Demers that the Master was to blame for failing to ascertain more precisely the local conditions. The Bridge had only recently been under construction, and little local knowledge of its effect on the navigation of these waters could have been acquired. The Master took the precaution, however, of obtaining the only local assistance available, there being no licensed pilots in Gaspe. The Appellant submits that the Master of a ship is not, in the absence of specific warnings, bound to apprehend in navigating through a Bridge for the first time such peculiar and unusual hazards as existed in this case. 10

15. The Appellant respectfully submits, however, that both the learned Judges in the Courts below were wrong in holding that the Appellant was to blame for excessive speed. Both the learned Judges found that, while passing through the Draw, the Master starboarded his helm and Mr. Justice Maclean based his decision that the speed was excessive upon this finding. It is respectfully submitted that there was no evidence to support this finding of fact, no specific charge of negligence in this respect was made by the Plaintiffs in their Statement of Claim, nor was the point made in cross-examination of the ship's witnesses. Further this finding is contrary to all the evidence given of the helm action which was taken at the material time. 20

The Master stated in his evidence that it was when his ship was clear of the Draw that the helm was put hard-a-starboard to clear the obstacles ahead. He also stated explicitly that, when the ship had passed two-thirds of her length through the Draw and the stern suddenly sheered to the northward, the helm was put hard-a-port. The Second Officer, who was stationed aft, actually saw the steering rod in motion for port helm. This evidence was not challenged in cross-examination, and, it is respectfully submitted, is conclusive. If, when the ship was two-thirds of her length through the Draw, her helm was put hard-a-port, the Appellant submits that it is not possible that any subsequent hard-a-starboard helm action could have been taken in time to have any effect on the collision. 30 40

16. The Appellant further submits that, in any event a speed of four knots, especially against an ebb tide, was not excessive in the circumstances.

p. 16, ll. 10  
to 20.

p. 15, l. 30.

p. 34, l. 10,  
and p. 35,  
l. 20.

From 5.55 a.m. when the ship was abeam of Paddy Light, which is some 1,700 feet from the Bridge, the engines had been kept at slow ahead giving only 34 revolutions per minute of the engine, and, as the collision occurred at 6.0 a.m., her average speed over the ground from Paddy Light until she struck the Bridge, must have been less than  $3\frac{1}{2}$  knots. p. 36, l. 30.  
p. 130, l. 34.

The President was influenced in his decision that such a speed was excessive by the facts that, since the accident, the "Philip T. Dodge" had passed fifteen times through the Bridge without mishap, and that her Master had stated in evidence that on those subsequent occasions he took  
 10 "more precautions with his engines." His evidence was, however, that on several of those subsequent occasions he again experienced the greatest difficulty and narrowly escaped another accident. The Appellant respectfully submits however, that the learned President was in this respect determining the matter in the light of subsequent events, and ignoring the Master's justifiable lack of knowledge, on the occasion of his first passage through the Bridge, of the exceptional difficulties which its navigation entails. p. 93, l. 20.  
p. 19, l. 30.  
p. 27, l. 30.

17. The Appellant submits that, upon the evidence, it is established that the Master exercised all the care, caution and maritime  
 20 skill of a competent seaman with the knowledge he had or ought to have had at the time. But further it is respectfully submitted that the true cause of the collision was the cross current at the Draw, of which the Master had and could have had no knowledge, and of which there was ample evidence. The Appellant submits that this explanation of the accident is to be preferred to that of the starboarding of the helm while passing through the Draw, which is contrary to all the evidence. Mr. Justice Demers accepted the Appellant's evidence that this cross-current to the northward existed at the Draw, but considered that it would cant the bow and not the stern to starboard. But the "Philip T. Dodge" was  
 30 in ballast and nearly five feet down by the stern and it is submitted that in such trim her stern and not her bow would be affected.

18. Lastly the Appellant submits that, even if there was no influence of current, the difficulties and dangers of navigation through the Bridge, especially to a Master passing through for the first time, were such that no ordinary care and skill could have avoided the collision. Although it is no longer contended by the Appellant that the Bridge was illegally or wrongfully constructed, the circumstances in which the approval by the Federal Government of its construction were granted, shew, in the Appellant's submission, that the dangers to navigation which it presents  
 40 were not appreciated by the Officials who recommended the approval.

19. The Bridge was not constructed according to the original plans (Exhibits P.10) which were approved by Order in Council P.C. No. 525 of 6th March 1931. This Order recites that these original plans had been p. 113.

p. 126. recommended for approval from the standpoint of navigation by the Chief Engineer of the Department of Public Works on the favourable report of the District Engineer; and that the Department of Marine had no objection. Subsequently however it was decided to alter the proposed position of the Bridge, by swinging the northern end about 50 feet to the westward. This had the effect of placing the piers of the Draw still nearer by about 20 feet to the Wharf. This alteration, which is shown on the plans in Exhibits P.7 and 11, was approved by Order in Council P.C. No. 861 on 21st April 1932. This Order recites that the new site of the bridge was recommended for approval from the standpoint of navigation by the Chief Engineer of the Department of Public Works, but it does not appear from the Order that the approval of the District Engineer or of the Department of Marine had been obtained, although the water lots for the new site of the northern end of the Bridge were secured from the latter Department. 10

It will be seen that none of these plans show any of the obstructions to navigation in the vicinity of the proposed Bridge.

p. 56. 20. The only one of these Officials who gave evidence at the trial was The Chief Engineer of the Department of Public Works. From his evidence it is clear that, at the time he gave his sanction to these plans, he had no other than the ordinary navigation charts of the locality, that he did not know that Davis Wharf overlapped the Draw, and that he himself was not a navigator and had not been to Gaspe. 20

The Appellant submits that, in these circumstances, it is apparent that the approval of the plans of the Bridge by the Federal Government Officials was given without knowledge of most important local conditions and that consequently no presumption that the Bridge was safe for navigation can be drawn from such approval.

21. The learned President of the Exchequer Court was impressed by these circumstances. He said— 30

“ I must say it is difficult for me to comprehend why the  
“ owners of the Bridge were permitted to locate the Draw of  
“ the Bridge precisely where it was located. It appears to be  
“ somewhat out of the course or track heretofore followed by  
“ ships in reaching the upper waters of Gaspe Harbour, and to  
“ where the ‘ Dodge ’ was on this occasion bound. In approaching  
“ the Draw it was more or less necessary, except perhaps to those  
“ well acquainted with the locus, to make the approach on a  
“ somewhat curved course, and not in a straight course, and  
“ then, as I have already pointed out, the Draw was located  
“ but 800 feet in front of a Wharf which was in line with the  
“ course through the centre of the Draw. The plan of the Bridge 40



“ was approved by the Department of Public Works, and the  
 “ Department of Marine, at Ottawa, but the plans and drawing,  
 “ do not show the Davis Wharf on the upper side of the Bridge,  
 “ or the existence of a shoal on the lower side of the Bridge.”

22. The Appellant submits that the Judgment of the Exchequer Court affirming the Judgment of the Local Judge in Admiralty should be set aside and that Judgment be entered for the Appellant with the costs of this Appeal and in the Courts below for the following (among other)

### REASONS.

- 10 BECAUSE the decision of both the Divisions of the Exchequer Court, that the Appellant was to blame for excessive speed, was based upon the finding, of which there was no evidence and which was contrary to all the evidence, that the Master was by reason of such speed induced to starboard his helm while passing through the Draw of the Bridge.
- BECAUSE, in any event, the speed of four knots, which was accepted by the President of the Exchequer Court, was not excessive in the circumstances.
- 20 BECAUSE, apart from the finding, of which there was no evidence, that the Master starboarded his helm while passing through the Draw of the Bridge, there was no ground for holding that the Appellant's speed caused or contributed in any way to the collision.
- BECAUSE, upon the evidence, the cause of the collision was the northerly set of the current across the Draw of the Bridge, which would affect the stern more than the bows of a vessel in the trim of the Appellant at the time.
- 30 BECAUSE the location and construction of the Bridge presented such dangers and difficulties of navigation, especially to the Master of the Appellant who was passing through it for the first time, that no ordinary care and skill on his part could have avoided the collision.
- BECAUSE, upon the evidence, the collision was an accident in navigation which no ordinary care, caution or maritime skill on the part of those in charge of the Appellant could have avoided.
- 40 BECAUSE the judgments of the Local Judge in Admiralty and of the President of the Exchequer Court were ill-founded in fact and were wrong in law.

CYRIL MILLER.

In the Privy Council.

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ON APPEAL

*From the Exchequer Court of Canada.*

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BETWEEN

The Steamer "PHILIP T. DODGE"  
(Defendant) *Appellant*

AND

**DOMINION BRIDGE COMPANY LIMITED,  
DUFRESNE CONSTRUCTION COM-  
PANY LIMITED and LA COMPAGNIE  
DU PONT DE GASPE LIMITEE**  
(Plaintiffs) *Respondents.*

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**Case**

ON BEHALF OF THE APPELLANT.

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