

Privy Council Appeal No. 24 of 1935

The Steamer " Philip T. Dodge " - - - - - *Appellant*

v.

Dominion Bridge Company, Limited, and others - - - - - *Respondents*

FROM

THE EXCHEQUER COURT OF CANADA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF
THE PRIVY COUNCIL, DELIVERED THE 30TH JULY, 1935.

Present at the Hearing:

LORD ATKIN.

LORD TOMLIN.

LORD RUSSELL OF KILLOWEN.

LORD ALNESS.

SIR SIDNEY ROWLATT.

Nautical Assessors:

CAPTAIN H. C. BIRNIE, D.S.O., R.D.

CAPTAIN W. E. CRUMPLIN.

[*Delivered by* LORD ATKIN.]

This is an appeal from the judgment of the President of the Exchequer Court of Canada dismissing an appeal from the Local Judge in Admiralty for Quebec in favour of the plaintiffs, the present respondents. The respondents are the builders and owners of a bridge across the York River at Gaspé in the Province of Quebec. The claim in the action is based upon the allegation that the defendant vessel when passing under the bridge collided with it and carried away one of the bascules owing to the negligent navigation of those on board. Of the fact of the collision and of the damage there is no dispute. The question arises on the issue of negligence. The bridge, which was in the course of construction at the time of the collision, connects Gaspé Harbour with Gaspé Village, running about north and south over a distance of about 770 feet. It consists of four spans and what is called in the proceedings a draw fitted with two bascules which are raised for the passage of ships. On the day in question, 6th July, 1932, the bridge had not been completed: the northern bascule alone had been fitted and was in operation. The defendant vessel, the " Philip T. Dodge ", is a single-screw steamship 5,047 tons gross and 3,691 tons net register, 400 feet in length with a beam 51 feet 7 inches. Her speed is 9½ knots. She was proceeding in ballast to a wharf on the west or upper side of the bridge

lying on the south side of the harbour : her draft was 9 feet 10 inches forward and 14 feet 9 inches aft. Her master had been in command of her for about 11 years, had taken her into Gaspe several times before : but not since the bridge had been constructed. The master had arrived in the vicinity overnight : had anchored for the night, and in the morning taking a local fisherman on board as pilot proceeded to his destination. The tide was about an hour and a half after the flood, and was running out, i.e. against the steamer at one knot. Ten minutes before the accident the ship's engines were put half speed : and in another five minutes at slow. To negotiate the bridge the captain took the wheel himself : he had the chief officer on the bow and the second officer on the poop. The width of the draw was 90 feet : so that on the waterline the vessel had a possible clearance of 20 feet on either side : but the bascule when raised overhung the water slightly, and the margin was in fact slightly less. When about two-thirds of the vessel had emerged from the bridge her starboard quarter came into collision with the bridge and brought down the bascule. According to the captain the "stern swung to the north". The chief officer said "Her stern began to sag towards the north". The second officer, "the ship's stern went right in on the bridge". They all agreed that to avoid collision the captain had ported. They attribute the collision to the effect of a northerly current setting the ship or the ship's stern towards the north side. The ship sustained no serious damage and made her way to the wharf which was her destination.

The plaintiffs commenced the action on 7th September, 1932, and by the statement of claim dated 28th December, 1932, alleged that the collision was caused by the negligent navigation of those on board and gave particulars of negligence under eight heads. The defendants denied negligence, and averred inevitable accident : and alleged that the bridge itself was wrongfully constructed and a public nuisance. The last allegation, though fought at the trial, was not persisted in on appeal. In giving judgment the trial Judge negatived the defendant's attack on the bridge. He then proceeded to discuss "the second point : Was there any negligence to be imputed to the defendant?" He came to the conclusion that the master should have stopped his ship before entering the bridge and made himself acquainted with the conditions. He would not then have navigated with such speed. The Judge found that the master entered the gap in the middle, but for fear of striking Davies wharf 800 feet ahead, he put his helm to starboard and also to counteract the effect of the current to northward. He says that the current striking the bow of a ship to the northward could not push the stern to the northward but to the southward. He therefore pronounced a decree in favour of the plaintiffs.

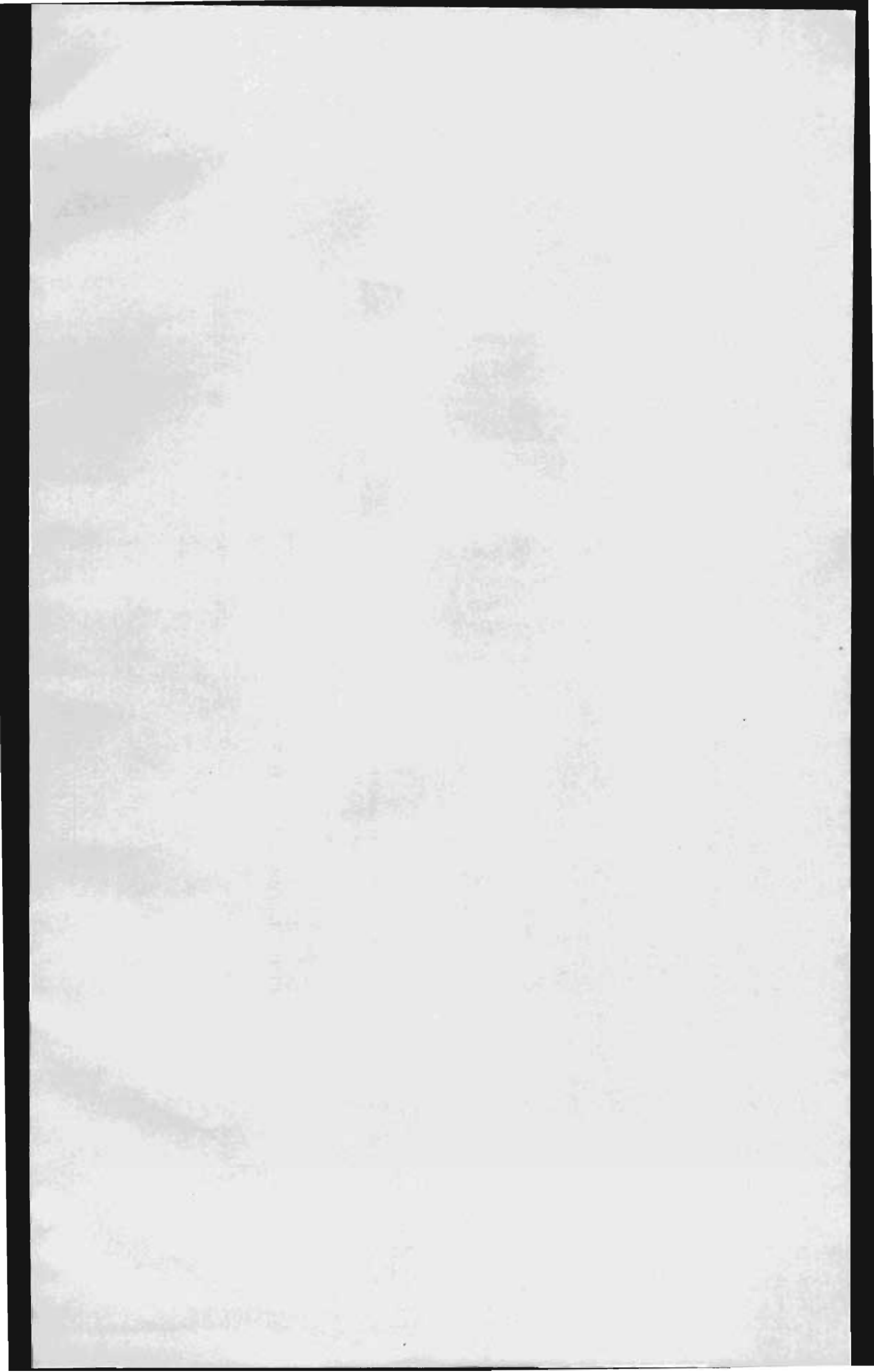
Their Lordships find themselves somewhat embarrassed by the absence in the judgment of those precise findings which are now usually found in all judgments in Admiralty

cases, as to course, speed, state of tide, location of damage and so forth. In particular the learned Judge does not express what he means by "such speed": though he seems to find it excessive. On appeal the President negatived any negligence in not stopping to examine the conditions, a decision with which their Lordships agree. He accepted the ship's speed as four miles per hour, presumably nautical miles: but he finds that speed excessive in view of the fact that the Davies wharf was in line with the ship's course through the draw, and only two ships' lengths away from the western side of the bridge. The President then proceeds:

"When the Dodge was two-thirds through the bridge opening, the master put his helm to starboard, which had the effect of putting the ship's stern to starboard, thus causing, I think, the collision and the damage complained of. This movement, I agree with the learned trial judge, was executed because of fear of coming into collision with the Davies wharf. One can quite understand such a movement, but it was an error, and was, I think, thought to be necessary because of fear, or the imminence, of colliding with the Davies wharf, but that fear or imminence arose, I think, because of the excessive speed of the ship in passing through the bridge draw. Had the speed been reasonably reduced I do not think the liability of contact with the Davies wharf would have been so apparent, and would not have occasioned the fatal order of 'helm to starboard,' and without this I think the Dodge would have passed through the draw without any mishap. And that conclusion as to the speed of the Dodge in passing through the bridge contains the answer to the contentions that the master of the Dodge navigated his ship with reasonable care, and that the accident was inevitable."

It appears therefore that both the trial Judge and the President have found that the collision was due to the negligence of the master in proceeding at an excessive speed of four knots, and while at that speed and while still partly under the bridge negligently starboarding the helm so as to avoid the wharf about 530 feet ahead. The speed alone did no harm, but it was the fatal order of helm to starboard without which no damage would have been done. On this view of the case their Lordships observe that this allegation of negligent helm action was not pleaded, and what is of more importance, that not a single question was addressed in cross-examination to the master or either of the officers or to the fisherman pilot suggesting that any such helm action had been taken. The second officer in the stern had a foot on the runway where the rudder chain and rods pass: and had to move his foot when the helm was ported just before the collision. He as well as other persons on deck could have spoken to the helm action suggested. The officers all spoke to the ship being fairly centred, and spoke only of the porting to avoid the collision. In these circumstances it appears to their Lordships wrong to impute to a navigating officer of experience or indeed to any navigator a specific negligent act of commission, when his opponents, having him in the witness box, have not suggested either to him or to his witnesses that he did the act complained of. For these

reasons inasmuch as the decision is based entirely upon the finding of a specific act of negligence which was not pleaded, and not investigated at the trial, their Lordships are of opinion that the decision below cannot stand. Faced with the difficulty counsel for the respondents argued strenuously before their Lordships that the finding was quite unnecessary. This was a case, he said, where a vessel in full daylight ran into a stationary object as it might have into a vessel at anchor : and in such circumstances there was a presumption in fact of negligence from which the onus was on the defendant to clear himself. He cited the well known cases of *The City of Peking* (1889) 14 App. Cas. 40 and *The Merchant Prince* [1892], p. 179. The answer to this is that such was not the case made in the pleadings or at the trial nor is there a trace of it in the judgments. If the case had been made the evidence might have been added to, and there might well have been further consideration of the effect of the current to northward, the existence of which the trial Judge found, though the President thought it of little importance. Having fought the case on specific allegations of negligence it is too late to invite this Board to decide the case upon a different allegation upon which their Lordships have not the assistance of the findings of either of the Courts in the Dominion. For these reasons the appeal must be allowed, the judgments of the Exchequer Court affirming the decree of the local Judge in Admiralty should be set aside and the action should be dismissed. The plaintiff must pay the costs of the appeal to the Exchequer Court and to His Majesty in Council and the costs of the action, save in so far as they have been increased by the costs of the issue raised by paragraph 21 of the defence, which costs must be paid by the defendants to the plaintiffs with a set-off of costs. Their Lordships will humbly advise His Majesty accordingly.



In the Privy Council.

THE STEAMER "PHILIP T. DODGE"

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DOMINION BRIDGE COMPANY,
LIMITED, AND OTHERS

DELIVERED BY LORD ATKIN.

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