

CASES
 DETERMINED BY THE
EXCHEQUER COURT OF CANADA
 AT FIRST INSTANCE
 AND
 IN THE EXERCISE OF ITS APPELLATE
 JURISDICTION

ON APPEAL FROM THE TORONTO ADMIRALTY DISTRICT

THE NIAGARA, ST. CATHARINES & TORONTO RAILWAY COMPANY (DEFENDANT).....	}	APPELLANT;
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1923
Dec. 1.

AND

THE LAKES & ST. LAWRENCE TRANSIT COMPANY (PLAINTIFF).	}	RESPONDENT.
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Shipping—Canal navigation—Navigable waters—Swing or draw bridges over same—Rules of Board of Railway Commissioners—Validity—Collision—Negligence.

The defendant owned and operated a swing bridge over the Welland Canal. Plaintiff's ship the *L.*, on the night preceding the accident was forced to tie up on account of stormy weather. Next morning, the weather being still stormy with a high gusty wind blowing across the canal, the *L.* cast off, steamed up towards the bridge and attempted to pass through before it was fully opened. When the *L.* was partly through the opening, the swing of the bridge was stopped by a great gust of wind and the bridge was blown back striking the *L.* which had ventured into the gap, causing her considerable damage. Hence the present action. The bridge had been in operation for years, and its brakes had been inspected a few days before and found in perfect condition.

Held: On the facts (reversing the judgment appealed from) that neither the machinery nor the handling of the bridge in any way caused or contributed to the accident, but that the *L.*, in attempting to pass through before the bridge was fully opened, was *per se*, apart from any rules forbidding it, guilty of negligence and of reckless and unseaman-like manoeuvre, which was the sole originating and determining cause of the accident.

2. That under section 22 of the rules and regulations for the guidance and observance of those using and operating canals, the onus is thrown upon the master in charge of any vessel to ascertain for himself, by careful observation, whether the bridge is prepared to allow him to enter or pass; and furthermore that the regulations of the Board of Railway Commissioners of the 30th of April, 1914, passed under sections 30 and 232 of the Railway Act (R.S. 1906, c. 37), governing the opening of railway bridges and providing that a bridge is not so prepared until it is fully opened are valid and binding on vessels passing through the same.

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3. That, the fact that it may have been customary to enter the bridge before the swing was fully opened did not absolve the ship from negligence; such a custom being dangerous and unreasonable could not be the foundation of a claim against another person where an accident had occurred by the injured ship putting the custom into practice.

(*Turgeon v. The King*, 15 Ex. C.R. 331; 51 S.C.R. 588 referred to.)

APPEAL from the judgment of the Local Judge of the Toronto Admiralty District (1) maintaining plaintiff's action.

September 18th, 1923.

Appeal now heard before Honourable Mr. Justice Audette, at Toronto.

D. L. McCarthy, K.C., and *E. J. Reid, K.C.*, for appellant.

S. Casey Wood, K.C. and *G. M. Jarvis* for respondent.

The facts are stated in the reasons for judgment.

AUDETTE J., this 1st of December, 1923, delivered judgment (2).

This is an appeal from the judgment of the Local Judge of the Toronto Admiralty District, pronounced on the 24th day of April, 1923, and condemning the defendant, the appellant herein (1).

The facts of the case are exhaustively set out in the reasons for judgment of the learned trial judge, and I am thereby relieved from the necessity of repeating them here on appeal.

The controversy between the parties—the question submitted for determination—practically resolves itself into the very narrow compass as to whether or not the ship *Lakeport*, at the season in question with a strong gusty wind and gale prevailing, was justified in entering or attempting to pass through the railway bridge over the canal in which she was navigating, before the bridge was fully opened.

Under sec. 22 of the Rules and Regulations for the guidance and observance of those using and operating the canal (Exhibit No. 4), the onus is thrown upon the master in charge of any vessel on approaching any bridge to ascertain for himself, by careful observation, whether the bridge is prepared to allow him to enter or pass, etc.

(1) [1923] Ex. C.R. 202.

(2) Appeal has been taken to the Supreme Court from this judgment.

The directions embodied in these words are not meaningless and placed there for naught. They obviously throw upon the master the duty of carefully ascertaining for himself whether or not the bridge is prepared to let him pass, or whether, in other words, the bridge is fully open.

These directions contained in sec. 22, and more especially those which *duly* cast upon him the duty

to ascertain for himself whether the bridge is prepared to let him pass, would seem also to let in the regulations governing the opening of railway bridges (Exhibit 3), as directed by the regulation hereinafter mentioned, because the bridge is not prepared to allow the vessel to enter until the railway official has opened his bridge in the manner defined in the regulations concerning such matter.

Indeed, by order in council of the 29th June, 1910 (Exhibit No. 4), passed in accordance with sec. 32 of Chapter 115, R.S.C., 1906, as amended by sec. 6, ch. 28, of 8-9 Ed. VII, regulations to govern draw or swing bridges, other than railway bridges, over navigable waters were duly made, approved and published in the *Canada Gazette*, vol. 44, p. 79. (See also Dominion Statutes, 1911, p. cxii.) By section 4 thereof it is, among other things, provided that

no vessel shall pass through the bridge until the swing or draw is fully open.

By sec. 32 of the Act the Governor in Council is given power and authority to make the regulations of the 29th June, 1910, with respect to

(c) the opening and closing of any swing or draw bridge over any navigable water;

and sec. 31 of the Act excludes railway bridges from that class of bridges.

Then, on the 30th April, 1914 (Exhibit No. 3), the Board of Railway Commissioners for Canada, adopted these rules of the 29th June, 1910, and made them applicable to railway bridges, by providing that

no such vessel shall pass through the bridge until the swing or draw is fully open.

These regulations (Exhibit No. 3) are made under the provisions of sections 30 and 232 of the Railway Act, Ch. 37, R.S.C., 1906. By sub-sec. 2 of sec. 232, the Board is given power and jurisdiction to direct when, under what conditions and circumstances, and subject to what precau-

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tions, etc., the bridge shall be operated,—and by the first paragraph of the section it is given jurisdiction in connection with railway bridges carried over any navigable water or canal.

It would seem also that the water of the canal made artificially navigable, must be treated as navigable water, as mentioned in the Act.

Now the *Lakeport*, on the night preceding the accident (the 19th April), had to tie up, because of stormy weather—as it was blowing a terrific hurricane with a western or northwestern wind of a velocity of 70 to 80 miles, and it was raining and snowing. The canal had only been opened on the 17th for the first time that season. The accident occurred on the morning of the 20th when the *Lakeport* cast off and started again in stormy weather, when, as witness Lapointe says, it was blowing a steady gale; it was still blowing a high and gusty wind across the canal,—a blustering heavy wind with flurries, as put by some of the witnesses. The *Lakeport* steamed up and attempted to pass through the bridge before it was fully opened,—in fact it was never fully opened at the time of the accident,—it was only partly opened when, under a great gust of wind it quivered, came back west and struck the *Lakeport* which had ventured into the gap before the bridge had been fully opened. No signal was ever given that the bridge was fully opened,—and it was not necessary, as by sec. 22 above cited, the *onus* was upon the vessel to ascertain for herself if the bridge was prepared to let her pass.

The bridge had been in operation for years; its brakes had been fully inspected a few days before and found in perfect condition; and the bridge when open is safely checked on the eastern shore. Therefore, I am unable to accept the contention that either the machinery or the manoeuvring of the bridge in any way caused or contributed to, the accident. The sole cause of the accident, on the day in question, was the act of the *Lakeport* attempting to pass through the bridge before the same was fully opened, and before ascertaining by herself whether the bridge was prepared to allow her to pass,—the whole for the reasons adverted to herein.

The accident would seem to have been the result of the modern tendency to take chances of danger in order to gain

speed of locomotion,—so especially noticeable in the traffic of automobiles,—and the *Lakeport* must therefore abide by the result of imprudence by those in charge of her.

It has been alleged that it was customary to venture through the bridge before it was fully opened, but a custom which is dangerous and unreasonable cannot be made the foundation of a claim against another person where an accident has occurred by putting the custom into practice. The violation of the Rules and Regulations above referred to and the transgressing of the plain notions of elementary prudence and safety cannot give a vessel any right of action merely because other vessels have shared with her in that violation (1).

It would seem further that the notice to bridge-tenders, under the signature of the Superintendent Engineer, with respect to the use of a red flag, and cited in the judgment appealed from, has no application in the present case, and deals exclusively with the case when the bridge is not to be opened or cannot be opened. Nothing in this notice detracts from the Rules and Regulations above mentioned which remain in full force and effect.

The vessel cannot be relieved or exonerated from the obligation of observing the rules and regulations (Exhibits 3 and 4) formulated with respect to navigation where a bridge has to be passed through, any more than it can transgress the Rules of the Road when travelling in a canal.

Moreover, within the ordinary practice of seamen, due regard must be had, in navigating, to any special circumstances, with the object of avoiding danger, and be always guided by the rules dictated by safety and prudence, avoiding carefully all reckless ventures. The weather was abnormal at the time of the accident, in that it was blowing very hard, and that should have called for extra precaution and prudence.

I have therefore come to the conclusion that it was the act of the *Lakeport* in venturing into the gap, so to speak, that is, in attempting to pass through the bridge before it was fully opened, and without ascertaining by herself if the bridge was prepared to let her pass, that was the originating and determining cause of the accident. That, apart

(1) *Turgeon v. The King*, 15 Ex. C.R. 331; 51 S.C.R. 588.

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from any rules and regulations, *per se* alone, the *Lakeport* by thus recklessly manoeuvring and attempting to pass through the bridge before being opened, in such stormy weather, became guilty of negligence and cannot in any way take advantage of such negligence. That it was under the circumstances of the case against all elementary rules of safety and prudence to attempt to pass before the bridge was opened,—and much more so when it is considered that a high and gusty wind was prevailing in an inclement season.

It must be found that by section 22 of the Regulations, the *onus* was upon the *Lakeport* to ascertain for herself, whether or not the bridge was prepared to let her pass, or whether in other words it was fully open, as provided by Exhibits 3 and 4, which are let in, as above mentioned.

These bridges must be opened for navigation in the manner provided by the Rules and Regulations made under statutory provision; and, there is also, on the other hand, an implied duty and responsibility cast upon any ship to approach these bridges with precaution dictated by safety and prudence.

The accident was the result of the reckless manoeuvring of the ship. She was the victim of her own negligence.

The appeal is allowed with costs, and the action is dismissed with costs.

Appeal allowed.