HAY OR BOURHILL

v.

YOUNG

Lord Thankerton

MY LORDS,

The Appellant is pursuer in an action of reparation, in which she claims damages from the Respondent as executor-dative of the late John Young, in respect of injuries alleged to have been sustained by her owing to the fault of John Young, on the occasion of a collision between a motor-cycle which the latter was riding and a motor car on the nth October, 1938, which resulted in the death of John Young, to whom I will hereafter refer as the cyclist.

After a proof, Lord Robertson assoilzied the Respondent on the ground that the cyclist had not been guilty of any breach of duty to the Appellant, and this decision was affirmed by the Second Division, Lord Justice Clerk Aitchison dissenting.

The facts as to the occurrence of the collision and its relation to the Appellant are comparatively simple. The Appellant, who is a fishwife, was a passenger on a tramway car which was proceeding in the direction of Colinton along the Colinton Road, which may be taken as a south-westerly direction, and which stopped at a stopping-place at a short distance before Colinton Road is joined at right angles by Glenlockhart Road from the south-east, that is, on the near side of the tramcar. The Appellant alighted, and went round the near side and front of the tramcar, in order to lift her fishbasket from the off-side of the driver's platform. Meantime, the cyclist, travelling in the same direction as the tramcar, had come up and, as the Appellant was getting her basket, he passed on the near side of the tramcar and, when mostly across the opening of Glenlockhart Road, his cycle collided with a motor car, which had been travelling in the opposite direction, but had turned across the path of the cycle in order to enter Glenlockhart Road. The cyclist, who was held by the Lord Ordinary to have been travelling at an excessive speed, was thrown on to the street and sustained injuries from which he died. There is no doubt that the Appellant saw and heard nothing of the cyclist until the sound of the noise created by the impact of the two vehicles reached her senses. At that moment she had her back to the driver's platform and the driver was assisting to get the basket on to her back and the broad leather strap

on to her forehead. It may be taken that the distance between the Appellant and the point of impact was between 45 and 50 feet. After the cyclist's body had been removed, the Appellant approached and saw the blood left on the roadway. The injuries alleged to have been sustained by the Appellant are set out in condescendence 4 of the record, as follows: —

> " Condescendence 4.—As an immediate result of the ' violent collision and the extreme shock of the occurrence " in the circumstances explained, the pursuer wrenched and " injured her back and was thrown into a state of terror " and sustained a very severe shock to her nervous system. *"Explained that the Pursuer's terror did not involve any " element of reasonable fear of immediate bodily injury to " herself.* The pursuer was about eight months pregnant at "the time, and gave birth to a child on 18th November, ' 1938, which was still-born owing to the injuries sustained " by the pursuer."

The words italicised were inserted by amendment in the Inner House, after the Lord Ordinary had dismissed the action as irrelevant, and, as the result of the reclaiming motion, the case was sent to proof before answer.

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After the proof, the Lord Ordinary expressed his view that while the Appellant had sustained a nervous shock as the result of hearing the noise of the collision, which disabled her from carrying on her business for some time, she had failed to prove either that the death of the child *in utero* or the injury to her back resulted from the shock or her immediate reaction to the fright of the event. The Respondent does not dispute the finding of the Lord Ordinary that the Appellant had sustained a nervous shock, which affected her business, and this finding is admittedly sufficient to raise the question of liability. At the hearing of the Appeal your Lordships decided to have the argument on liability completed on both sides, before considering the other injuries alleged to have resulted.

While both the Lord Ordinary and Lord Jamieson refer to an apparent inconsistency between the evidence given by the Appellant at the trial, and the averment added by amendment that the Appellant's terror did not involve any element of reasonable fear of immediate bodily injury to herself, the argument of the Appellant before this House was conducted on the footing that the added averment was correct; indeed, the Appellant's argument was that

the shock ensued without any functioning of the brain at all. I am content to consider the question of liability on this footing.

It is clear that, in the law of Scotland, the present action can only be based on negligence, and " it is necessary for the pursuer in " such an action to shew there was a duty owed to him by the " defenders, because a man cannot be charged with negligence if " he has no obligation to exercise diligence "; per Lord Kinnear in *Kemp & Dougall* v. *Darngavil Coal Co. Ltd.*, 1909 S.C. 1314, at page 1319. I may further adopt the words of Lord Johnston in the same case, at page 1327, " the obligee in such a duty must be a " person or of a class definitely ascertained, and so related by " the circumstances to the obligor that the obligor is bound, in the " exercise of ordinary sense, to regard his interest and his safety. " Only the relation must not be too remote, for remoteness must be " held as a general limitation of the doctrine."

My Lords, I doubt whether, in view of the infinite variation of circumstances which may exist, it is possible or profitable to lay down any hard and fast principle, beyond the test of remoteness as applied to the particular case. The Lord Justice Clerk, who dissented, accepted the test of proximity, although it is a little difficult to follow how he made his conclusion satisfy this test. In the observations that I have to make, I shall confine myself to the question of the range of duty of a motor cyclist on the public road towards other passengers on the road; clearly this duty is to drive the cycle with such reasonable care as will avoid the risk of injury to such persons as he can reasonably foresee might be injured by failure to exercise such reasonable care. It is now settled that such injury includes injury by shock, although no direct physical impact or lesion occurs. If then the test of proximity or remoteness is to be applied, I am of opinion that such a test involves that the injury must be within that which the cyclist ought to have reasonably contemplated as the area of potential danger which would arise as the result of his negligence, and the question in the present case is whether the .Appellant was within that area. I am clearly of opinion that she was not, for the following reasons: —

Although admittedly going at an excessive speed, the cyclist had his machine under his control, and this at once distinguishes this case from such cases as those where the motor has been left standing unoccupied and insufficiently braked, and has started off on an uncontrolled career. At the time of the collision with the motor, he was well past the tramcar, and the Appellant was not within the

range of his vision, let alone that the tramcar obstructed any view of her. The risk of the bicycle ricochetting and hitting the Appel-
[3] 3
lant, or of flying glass hitting her, in her position at the time, was so remote, in my opinion, that the cyclist could not reasonably be held bound to have contemplated it, and I differ from the Lord Justice Clerk on this point, but, as already stated, the Appellant's case is not now based on any fear of such possibilities, but merely on the sound of the collision. There is no suggestion that the volume of the noise of the collision afforded any ground for argument, and I am clearly of opinion that, in this case, the shock resulting to the Appellant, situated as she was, was not within the area of potential danger which the cyclist should reasonably have had in view. In my opinion, none of the cases cited presents sufficiently analogous circumstances, such as should control the decision in the present case.

The dictum of Kennedy L.J. in *Dulieu* v. *White & Sons,* (1901) 2 K.B. 669, at p. 675, may well afford a useful test, in appropriate cases, of the area of potential danger, but I am not prepared to accept it as a conclusive test in all cases. That dictum has received considerable acceptance in Scottish cases. There may be circumstances under which it should not be applied, and I prefer to treat each case on its own facts as it arises, with assistance from cases in which the facts are so analogous as to afford guidance.

It would not be right, however, in view of the attention paid to them in argument and in the opinions of the learned Judges, not to refer to three of the English decisions. *In re Polemis and Furness Withy & Co.,* (1921) 3 K.B. 560; in the Court of Appeal the issue only related to the question of damages; Bankes L.J., at p. 571, says, " What a defendant ought to have anticipated as a reason-
" able man is material when the question is whether or not he was
" guilty of negligence, that is) of want of due care according to
" the circumstances. ... In the present case the arbitrators have
" found as a fact that the falling of the plank was due to the negli-
" gence of the defendants' servants. The fire appears to me to have
"been directly caused by the falling of the plank. Under these
" circumstances I consider that it is immaterial that the causing of
" the spark by the falling of the plank could not have been reason-
" ably anticipated." The case is therefore of no assistance here, and I have no occasion to consider whether the principle so laid down as to assessment of damages correctly states the law of England, and, if so, whether the law of Scotland is the same. The same is

true of *Hambrook v. Stokes Brothers,* (1925) 1 K.B. 141, which was the case of a motor lorry left at the top of a steep and narrow street unattended, with the engine running, and without being properly secured, with the consequence that the lorry started off by itself and ran violently down the incline. My noble and learned friend Lord Atkin, then Atkin L.J., at p. 156, says, " I agree that in the present " case the plaintiff must show a breach of duty to her, but this she " shows by the negligence of the defendants in the care of their lorry. ' I am clearly of opinion that the breach of duty to her is admitted "in the pleadings." But there are certain *obiter dicta* on the question of duty, which might be considered too wide, and I reserve any opinion on them. The remaining case is *Owens* v. *Liverpool Corporation,* (1939) I K.B. 394, in which the defendants' tramcar collided with a hearse, damaged it and caused the coffin to be overturned, and mourners were held entitled to recover damages for mental shock, although there was no apprehension, or actual sight, of injury to a human being. While each case must depend on its own circumstances, I have difficulty in seeing that there was any relationship of duty between the parties in that case.

I am therefore of opinion that the Appellant has failed to establish that, at the time of the collision, the cyclist owed any duty to her, and that the Appeal fails. I accordingly move that the Appeal should be dismissed, that the judgment appealed from should be affirmed, and that the Appellant should pay the Respondent's costs of the Appeal.

Lord

Thankerton

Lord Russell of Killowen

Lord Macmillan

Lord Wright

Lord Porter

HAY OR BOURHILL

v-

YOUNG

Lord Russell of Killowen

(READ BY LORD THANKERTON)

MY LORDS,

The pursuer seeks to recover a sum of £1,250 as reparation for injuries alleged to have been sustained by her as the result of a collision between a motor-cycle and a motor car which occurred on the 11th October, 1938, at the junction of Colinton Road and Glenlockhart Road, Edinburgh.

The motor-cycle was ridden by one John Young, who died as a result of the collision, and the action was raised against James Young, his father and executor-dative.

The foundation of the pursuer's claim is fault or negligence alleged against John Young, an allegation which postulates a breach by him of some duty owed by him to the pursuer. Therefore the first essential for the pursuer to establish is the existence of a duty owed to her by John Young of which he committed a breach.

As between John Young and the driver of the motor car, John Young was admittedly negligent in that he was in breach of the duty which he owed to him of not driving, while passing the stationary tramcar, at such a speed as would prevent him from pulling up in time to avoid a collision with any vehicle which might come across the front of the tramcar from Colinton Road into Glenlockhart Road. But it by no means follows that John Young owed any duty to the pursuer. The facts relevant to this question seem to me to be these: —The pursuer was not in any way physically involved in the collision. She had been a passenger in the tramcar which had come from the direction of the city and had stopped some 15 or 16 yards short of the point of collision. She was standing in the road on the off-side of the tramcar (which was at rest), with her back to the driver's platform. The front part of the tramcar was between her and the colliding vehicles. She was frightened by the noise of the collision, but she had no reasonable fear of immediate bodily injury to herself.

In considering whether a person owes to another a duty a breach of which will render him liable to that other in damages for

negligence, it is material to consider what the defendant ought to have contemplated as a reasonable man. This consideration may play a double role. It is relevant in cases of admitted negligence (where the duty and breach are admitted) to the question of remoteness of damage, i.e., to the question of compensation, not to culpability; but it is also relevant in testing the existence of a duty as the foundation of the alleged negligence, i.e., to the question of culpability, not to compensation.

It will be sufficient in this connection to cite two passages from well known judgments. The first is from the judgment of Brett, M.R. in *Heaven* v. *Fender* (11 Q.B.D. 503 at p. 509): —

> " Whenever one person is by circumstances placed in such a position with regard to another that every one of ordinary sense who did think would at once recognize that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger."

[5] 2

The second is from the speech of Lord Atkin in *Donoghue* v. *Stevenson* (1932 AC 562 at p. 580): —

> " You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who then in law is my neighbour? The answer seems to be—persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question."

A man is not liable for negligence in the air; the liability only arises "where there is a duty to take care and where failure in " that duty has caused damage" (see per Lord Macmillan in *Donoghue* v. *Stevenson* (at p. 618). In my opinion such a duty only arises towards those individuals of whom it may be reasonably anticipated that they will be affected by the act which constitutes the alleged breach.

Can it be said that John Young could reasonably have anticipated that a person, situated as was the pursuer, would be affected by his proceeding towards Colinton at the speed at which he was travelling ? I think not.

His road was clear of pedestrians; the pursuer was not within his vision, but was standing behind the solid barrier of the tramcar; his speed in no way endangered her. In these circumstances I am unable to see how he could reasonably anticipate that, if he came into collision with a vehicle coming across the tramcar into

Glenlockhart Road, the resultant noise would cause physical injury by shock to a person standing behind the tramcar. In my opinion he owed no duty to the pursuer, and was therefore not guilty of any negligence in relation to her.

The duty of the driver of a motor vehicle in a highway has often been stated in general terms which if literally interpreted would include persons to whom the driver would obviously owe no duty at all, as for instance, persons using the highway but who having passed the vehicle are well on their way in the opposite direction. I think the true view was correctly expressed by Lord Jamieson in the present case when he said: —" No doubt the duty of a driver " is to use proper care not to cause injury to persons on the highway " or in premises adjoining the highway, but it appears to me that " his duty is limited to persons so placed {hat they may reasonably " be expected to be injured by the omission to take such care."

The pursuer was not in my opinion " so placed "; or (to use the language of Lord Mackay) she has " failed to bring herself into any " relationship to the cyclist which infers a duty of care in driving " owed by him towards her."

On this ground the Interlocutor appealed against should be affirmed, and the Appeal dismissed.

My Lords, we heard a lengthy argument addressed to the questions whether the case of *Hambrook* v. *Stokes* (1925, 1 K.B. 141) was rightly decided; and if so whether the decision was in accordance with the law of Scotland, as expounded in the numerous Scottish decisions cited to us. In the view which I have taken of the present case it is unnecessary to express a final view upon these questions. I will only say that, as at present advised, I see no reason why the laws of the two countries should differ in this respect, and I prefer the dissenting judgment of Sargant LJ. to the decision of the majority in *Hambrook* v. *Stokes.* It was said by counsel for the pursuer that it was impossible to affirm the Interlocutor under appeal without disapproving of the decision in *Hambrook* v. *Stokes. I* do not agree, for the simple reason that in that case the negligence, which was the basis of the claim, was admitted; whereas in the present case we are affirming because John Young was guilty of no negligence in relation to the pursuer.

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Macmillan
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Wright
Lord
Porter

[6]

HAY OR BOURHILL

v.

YOUNG

Lord Macmillan

MY LORDS,

It is established that the pursuer in this action suffered in her health and in her ability to do her work by reason of the shock which she sustained when a motor cycle ridden by the deceased John Young collided with a motor car in her vicinity. The question for decision is whether the Defender as representing the late John Young can be rendered accountable at law for what the pursuer has suffered.

It is no longer necessary to consider whether the infliction of what is called mental shock may constitute an actionable wrong. The crude view that the law should take cognizance only of physical injury resulting from actual impact has been discarded, and it is now well recognised that an action will lie for injury by shock sustained through the medium of the eye or the ear without direct contact. The distinction between mental shock and bodily injury was never a scientific one, for mental shock is presumably in all cases the result of, or at least accompanied by, some physical disturbance in the sufferer's system. And a mental shock may have consequences more serious than those resulting from physical impact. But in the case of mental shock there are elements of greater subtlety than in the case of an ordinary physical injury and these

elements may give rise to debate as to the precise scope of legal liability.

Your Lordships have here to deal with a common law action founded on negligence. The pursuer's plea is that she has " sustained loss, injury and damage through the fault of the said " John Young " and that she is " entitled to reparation therefor out " of his estate." She can recover damages only if she can show that in relation to her the late John Young acted negligently; to establish this she must show that he owed her a duty of care which he failed to observe and that as a result of this failure in duty on his part she suffered as she did. As was said by Lord Kinnear: " A man cannot be charged with negligence if he has no obligation " to exercise diligence." *(Kemp and Dougall* v. *Darngavil Coal Co., Ltd.*, 1909 S.C. 1314 at p. 1319, quoted by Lord Thankerton in *Donoghue* v. *Stevenson* [1932] AC 562 at p. 602.)

In dealing with a case of alleged negligence it is thus necessary to ascertain first what in the circumstances was the duty of the person alleged to be in fault and second to whom that duty was owed.

The late John Young was riding a motor bicycle in an Edinburgh street. What duty then was incumbent upon him? It cannot be better or more succinctly put than it was by Lord Jamieson in the Second Division in the present case when he said that " the duty of a driver is to use proper care not to cause injury " to persons on the highway or in premises adjoining the high- " way." Proper care connotes avoidance of excessive speed, keeping a good look-out, observing traffic rules and signals and so on. Then to whom is the duty owed ? Again I quote and accept Lord Jamieson's words: ' To persons so placed mat they may reason- " ably be expected to be injured by the omission to take such care." The duty to take care is the duty to avoid doing or omitting to do anything the doing or omitting to do which may have as its reasonable and probable consequence injury to others and the duty is owed to those to whom injury may reasonably and probably be anticipated if the duty is not observed.

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There is no absolute standard of what is reasonable and probable; it must depend on circumstances and must always be a question of degree. In the present instance the late John Young was clearly negligent in a question with the occupants of the motor car with which his cycle collided. He was driving at an excessive speed in a public thoroughfare and he ought to have foreseen that

he might consequently collide with any vehicle which he might meet in his course, for such an occurrence may reasonably and probably be expected to ensue from driving at a high speed in a street. But can it be said that lie ought further to have foreseen that his excessive speed, involving the possibility of collision with another vehicle, might cause injury by shock to the pursuer? The pursuer was not within his line of vision, for she was on the other side of a tramway car which was standing Between him and her when he passed and it was not until he had proceeded some distance beyond her that he collided with the motor car. The pursuer did not see the accident and she expressly admits that her " terror " did not involve any element of reasonable fear of immediate " bodily injury to herself." She was hot so placed that there was any reasonable likelihood of her being affected by the deceased's careless driving.

In these circumstances I am of opinion with the majority of the learned Judges of the Second Division that the late John Young was under no duty to the pursuer to foresee that his negligence in driving at an excessive speed and consequently colliding with a motor car might result in injury to the pursuer, for such a result could not reasonably and probably be anticipated. He was therefore not guilty of negligence in a question with the pursuer.

That is sufficient for the disposal of the case and absolves me from considering the question whether injury through mental shock is actionable only when, in the words of Kennedy, J., the shock arises from a reasonable fear of immediate personal injury to oneself *(Dulieu v. White &* Sows [1901] 2 KB 669 at p. 675) which was admittedly not the case in the present instance. It also absolves me from considering whether, if the late John Young neglected any duty which he owed to the pursuer, which, in my opinion, he did not, the injury of which she complains was too remote to entitle her to damages. I shall observe only that the view expressed by Kennedy, J., has in Scotland the support of a substantial body of authority, although it was not accepted by the Court of Appeal in England in *Hambrook v. Stokes Bros.* [1925] 1 K.B. 141, notwithstanding a powerful dissent by Sargant, L.J. This House has not yet been called upon to pronounce on the question either as a matter of Scots Law or as a matter of English Law, and I reserve my opinion upon it. The decision in *Owens v. Liverpool Corporation* [1939] I K.B. 394, if it is the logical consequence of *Hambrook's* case, shows how far-reaching is the principle involved.

On the second point it was argued that once an act is properly characterised as negligent, that is to say, as a breach of a duty of care owed to a particular person, then the party at fault is liable to that person for everything that directly follows from the negligent act whether or not it could have been foreseen as a natural and probable result of the negligent act. For this the case of *In re Polemis and Furness, Withy & Co.* [1921] 3 K.B. 560, was cited. Whether the law there laid down is consonant with the law of England it will be for this House to pronounce when the occasion arises. As at present advised, I doubt if it is the law of Scotland, and I could cite ample authority to the contrary. But again this is not a point which I deem it necessary to discuss now.

I am accordingly for affirming the decision of the Second Division of the Court of Session and dismissing the Appeal.

LordThankerton
Lord Russell of Killowen
Lord Macmillan
Lord Wright
Lord **Porter**

[8]

HAY or BOURHILL

v.

YOUNG

Lord Wright

MY LORDS,

That damage by mental shock may give a cause of action is now well established and is not disputed in this case, but as Phillimore J. pointed out in his admirable judgment in *Dulieu* y. *White*, 1901, 1 K.B. 600, the real difficulty in questions of this kind is to decide whether there has been a wrongful act or breach of duty on the part of the Defendant *vis-à-vis* the Plaintiff. That being the prior question, if it is answered against the Plaintiff the matter is concluded. I shall therefore consider that issue in the first place.

The Appellant, according to the finding of the Lord Ordinary, suffered substantial damage, and suffered it owing to the conduct of the motorist. But the infliction of damage on a plaintiff does not in itself give a cause of action. Damage due to the legitimate exercise of a right is not actionable, even if the actor contemplates the damage. It is *damnium absque injuria.* The damage must be attributable to the breach by the defendant of some duty owing to the plaintiff. Where there is no immediate physical action by the defendant upon the plaintiff, but the action operates at a distance or it not direct or is what is called nervous shock, difficulties arise in ascertaining if there has been a breach of duty. Some cases are comparatively simple. Thus in *Smith* v. *London and South Western Railway Co.,* L.R. 6, C.P. 14, at p. 22, Blackburn J. makes some observations, obvious enough but not to be forgotten, ' If the negligence were once established it would be no answer ' that it did much more damage than was expected. If a man fires ' a gun across a road where he may reasonably anticipate that ' persons will be passing and hits someone, he is guilty of negligence ' and liable for the injury he has caused; but if he fires in his own ' wood, where he cannot reasonably anticipate that anyone will be, ' he is not liable to anyone whom he shoots, which shows that what ' a person may reasonably anticipate is important in considering ' whether he has been negligent." Much to the same effect Scrutton L.J., in the *Polemis* case, 1921, 3 K.B. 560, at p. 577, said, " To deter- " mine whether an act is negligent, it is relevant to determine " whether any reasonable person would foresee that the act would " cause damage; if he would not the act is not negligent. . . . Once " the act is negligent the fact that its exact operation was not fore- " seen is immaterial." These simple propositions are as much a part of the law of Scotland as of England. It would be, I repeat, a grievous defect if in a branch of law, of modern development like that of negligence; and one affecting the ordinary life of the people, there were a divergence in principle between the two laws. But having regard to the views on this point expressed by Lord Mackay and Lord Jamieson, I take it that they accept the test. Lord

Jamieson quotes the well-known aphorism of Lord Atkin in *Donoghue v. Stevenson*, 1932, A.C. 562, a Scotch case, at p. 580, ' You must take reasonable care to avoid acts or omissions which " you can reasonably foresee would be likely to injure your neigh- " hour." And " neighbour " means " persons so closely and directly " affected by my act that I ought reasonably to have them in con- " templation as being so affected when I am directing my mind to " the acts or omissions which are called in question ". I do not read Lord Atkin's language in a similar context in *Hambrook* v. *Stokes*, 1925, 1 K.B. 141, at p. 156, as going beyond what he said hi *Donoghue (supra).*

[9] 2

This general concept of reasonable foresight as the criterion of negligence or breach of duty (strict or otherwise) may be criticised as too vague. But negligence is a fluid principle, which has to be applied to the most diverse conditions and problems of human life. It is a concrete not an abstract idea. It has to be fitted to the facts of the particular case. Willes J. defined it as absence of care according to the circumstances *(Vaughan* y. *Toft Vale Co.*, 5 H. & N. 079, at 688). It is also always relative to the individual affected. This raises a serious additional difficulty in the cases where it has to be determined not merely whether the act itself is negligent against someone but whether it is negligent *vis-à-vis* the plaintiff. This is a crucial point in cases of nervous shock. Thus in the present case John Young was certainly negligent in an issue between himself and the owner of the car which he ran into, but it is another question whether he was negligent *vis-à-vis* the Appellant.

In such cases terms like " derivative" and " original" and " primary " and " secondary " have been applied to define and distinguish the type of the negligence. If, however, the Appellant has a cause of action it is because of a wrong to herself. She cannot build on a wrong to someone else. Her interest which was in her own bodily security, was of a different order from the interest of the owner of the car. That this is so is also illustrated by cases such as have been called in the United States " rescue " or " search " cases. This type has been recently examined and explained in the Court of Appeal in *Haynes* v. *Harwood,* 1935, 1 K.B. 146, where the Plaintiff, a police constable, was injured in stopping runaway horses, in a crowded street, in which were many children. His act was due to his mental reaction, whether instinctive or deliberate,

to the spectacle of others' peril. The Court of Appeal approved the language used by the trial judge, Finlay J. (1934, 2 K.B. 247), when he held that to leave the horses unattended was a breach of duty not only to any person injured by being run over (in fact, no one was so injured), but to the constable. Finlay J.'s words were: " It seems to me that if horses run away it must be quite " obviously contemplated that people are likely to be knocked " down. It must also, I think, be contemplated that persons will " attempt to stop the horses and try to prevent injury to life or " limb." I may also refer to the admirable judgment of Cardozo J. in the New York Court of Appeals, in *Wagner* v. *International Railway Co.,* 232, N.Y. 176, a " search " case, which is to the same effect. This again shows how the ambit of the persons affected by negligence or misconduct may extend beyond persons who are actually subject to physical impact. There indeed may be no one injured in a particular case by actual impact. But still a wrong may be committed to anyone who suffers nervous shock or is injured in an act of rescue. The man who negligently allows a horse to bolt, or a car to run at large down a steep street, or a savage beast to escape is committing a breach of duty towards every person who comes within the range of foreseeable danger, whether by impact or shock. But if there is no negligence or other default, there can be no liability for either direct impact or for nervous shock. Thus, if owing to a latent defect or some mischance for which no one is liable, a terrifying collision occurs between vehicles on the road, and the occupants are killed or suffer horrible injuries, a bystander who suffers shock, whether through personal fear or merely horror, would have no action. On somewhat similar principles may be solved the problem of the old lady at Charring Cross, who suffers shock because she narrowly escapes being run over. She cannot claim damages if the driver is driving carefully, whether he hits her or not.

The present case, like many others of this type, may, however, raise the different question whether the Appellant's illness was not due to her peculiar susceptibility. She was eight months gone in

pregnancy. Can it be said, apart from everything else, that it was likely that a person of normal nervous strength would have been affected in the circumstances by illness as the Appellant was? Does the criterion of reasonable foresight extend beyond people of ordinary health or susceptibility, or does it take into account the

peculiar susceptibilities or infirmities of those affected which the Defendant neither knew of nor could reasonably be taken to have foreseen ? Must the manner of conduct adapt itself to such special individual peculiarities? If extreme cases are taken, the answer appears to be fairly clear, unless indeed there is knowledge of the extraordinary risk. One who suffers from the terrible tendency to bleed on slight contact, which is denoted by the term " a bleeder," cannot complain if he mixes with the crowd and suffers severely, perhaps fatally, from being merely brushed against. There is no wrong done there. A blind or deaf man who crosses the traffic on a busy street cannot complain if he is run over by a careful driver who does not know of and could not be expected to observe and guard against the man's infirmity. These questions go to " culpa- " bility, not compensation ", as Bankes L.J. said in the *Polemis* case *(supra),* at p. 571. No doubt it has long ago been stated and often restated that if the wrong is established the wrongdoer must take the victim as he finds him. That, however, is only true, as the *Polemis* case *(supra)* shows, on the condition that the wrong has been established or admitted. The question of liability is anterior to the question of the measure of the consequences which go with the liability. That was the second point, decided not for the first time, but merely reiterated in the *Polemis* case *(supra).* It must be understood to be limited however to " direct" consequences to the particular interest of the Plaintiff which is affected. The *Liesbosch* case, 1933, A.C. 449, illustrates this limitation.

What is now being considered is the question of liability, and this, I think, in a question whether there is duty owing to members of the public who come within the ambit of the act, must generally depend on a normal standard of susceptibility. This, it may be said, is somewhat vague. That is true. But definition involves limitation, which it is desirable to avoid further than is necessary in a principle of law like negligence, which is widely ranging and is still in the stage of development. It is here, as elsewhere, a question of what the hypothetical reasonable man, viewing the position, I suppose *ex post facto,* would say it was proper to fore- see. What danger of particular infirmity that would include must depend on all the circumstances; but generally, I think, a reason- ably normal condition, if medical evidence is capable of defining it, would be the standard. The test of the Plaintiff's extraordinary susceptibility, if unknown to the Defendant, would in effect make him an insurer. The lawyer likes to draw fixed and definite lines and is apt to ask where the thing is to stop. I should reply it should stop where in the particular case the good sense of the jury

or of the Judge decides. I should myself be disposed, as at present advised, to say that it should have stopped short of judgment for the Plaintiff in *Owens* v. *Liverpool Corporation,* 1939, 1 K.B. 394. The particular susceptibility there was to my mind beyond any range of normal expectancy or of reasonable foresight. I cannot, however, forbear referring to a most important case in the High Court of Australia, *Chester* v. *Waverley Corporation,* 62 C.L.R. 1, where the Court by a majority held that no duty was made out The dissenting judgment of Evatt J. will demand the consideration of any judge who is called upon to consider these questions.

But when I apply the considerations which I have been discussing to the present appeal, I come to the conclusion that the judgment should be affirmed. The case is peculiar, as indeed, though to a varying extent, all these cases are apt to be. There is no dispute about the facts. Upon these facts, can it be said that a duty is made out, and breach of that duty, so that the damage

[11] 4

which is found is recoverable? I think not The Appellant was completely outside the range of the collision. She merely heard a noise, which upset her, without her having any definite idea at all. As she said: " I just got into a pack of nerves and I did not know whether I was going to get it or not." She saw nothing of the actual accident, or indeed any marks of blood until later.

1 cannot accept that John Young could reasonably have foreseen, or more correctly, the reasonable hypothetical observer could reasonably have foreseen, the likelihood that anyone placed as the Appellant was, could be affected in the manner in which she was. In my opinion John Young was guilty of no breach of duty to the Appellant and was not in law responsible for the hurt she sustained. I may add that the issue of duty or no duty is indeed a question for the Court, but it depends on the view taken of the facts. In the present case both Courts below have taken the view that the Appellant has, on the facts of the case, no redress, and I agree with their view.

This conclusion disposes of the present case and makes it unnecessary to decide the difficult question which was the subject of lengthy argument and elaborate citation of authorities before your Lordships. I have carefully considered all the authorities cited, and it may well be that some day this House will have to examine

the exact meaning and effect of what Kennedy J. said in *Dulieu* v. *White (supra).* He was, he said, inclined to think that there was at least one limitation: " the shock where it operates through the "mind must be a shock which arises from a reasonable fear of " immediate personal injury to oneself." That statement, if meant !to lay down a rigid rule of law, has been overruled by the Court of Appeal in *Hambrook v. Stokes,* 1925, 1 K.B. 141, which now lays down the English Law unless it is set aside by this House. As at present advised, I agree with that decision. Kennedy J.'s dictum, if intended to lay down a rigid limitation, is not, I think, in accordance with principle or with cases like *Wilkinson* v. *Downton,* 1897,

2 Q.B. 57. It finds no support in the judgment of Phillimore J., who implicitly lays down a wider principle. But as I may some day have to decide the question in this House, I prefer to express here no final opinion. If indeed the Inner House, having to determine a case like *Hambrook* v. *Stokes (supra),* takes a different view, this House may have to decide between the conflicting views of the two Appellate Courts, because in a modern and developing branch of law like that of negligence, the law adopted by the two Courts should, if possible, be uniform. But that is a matter for the future. Kennedy J.'s dictum does indeed give a rough criterion which may be useful in some cases. But, always assuming that the wrongful act is established, the damage to be proved is physical injury due to nervous shock. Modern medical science may perhaps show that the nervous shock is not necessarily associated with any particular mental ideas. The worst nervous shock may for 'the moment at least paralyse the mind. But I do not pursue these questionings on this occasion.

I concur in the motion proposed.

Lord

Thanker-

ton.

Lord
Russell of
Killowen

Lord

Macmillan

Lord Wright

Lord Porter

[12]

HAY OR BOURHILL

v.

YOUNG

Lord Porter (read by lord wright)

MY LORDS,

This case raises a question which has been much canvassed during the period beginning with *Victoria Railways* v. *Coutlas*, 13 App Cas 222, and ending with *Hayes* v. *Harwood* [1935], 1 K.B. 146.

The problem to be determined is whether the driver of a vehicle who through his negligence causes physical injury to one person is responsible for any and (if so) what consequent emotional injury to another, at any rate if that emotion results in physical illness, or perhaps it may be put more generally by asking to whom and for what effects of his negligence a tort feasor is liable.

In considering the question it is I think essential to bear in mind the distinction drawn in *Polemis* v. *Furness Withy* [1921], 3 K.B. 560; a distinction which is perhaps best expressed in the words of Channell B., taken from *Smith* v. *L & N.W. Railway*, L.R. 6 C.P. 14, at p. 21, which are quoted by Scrutton L.J. at p. 574. " Where there is no direct evidence of negligence the " question what a reasonable man might foresee is of importance in " considering the question whether there is evidence for the jury " of negligence or not . . . but when it has been once determined " that there is evidence of negligence the person guilty of it is " equally liable for its consequences whether he could have foreseen " them or not."

For the present I think it immaterial to consider whether the second proposition is accurate or not. Before any decision upon quantum of damage is required, it has first to be determined whether the defender has been guilty of any negligence towards the pursuer. ' The law takes no cognizance of carelessness in the abstract. It " concerns itself with carelessness only where there is a duty to " take care and where failure in that duty has caused damage "

(per Lord Macmillan in *Donoghue* v. *Stevenson* [1932] AC 562 at p. 618. It is not enough to say that the Respondent was guilty of negligence towards some one. Admittedly he was, and I will assume without deciding that for all damages, whether expected or unexpected, to that person he is liable. But is he therefore liable for all damages of whatsoever nature to all other persons affected by his negligence whether he could reasonably foresee that he would injure them or not ?

For the present purpose I am also prepared to assume without deciding that all types of injury are included, physical, mental and emotional, and that once a defender is shown to be negligent towards a pursuer he is liable for all such consequences.

Does it follow from this assumption that the defender is guilty of negligence towards all persons on the highway because conceivably they might in other circumstances have suffered physical damage, and amongst others towards those who were never in personal danger themselves or in fear for their children or even for third persons but were merely emotionally disturbed because some person was in fact injured and because they heard the crash or saw the result of the accident ?

In *Dulieu* v. *White* [1901], 2 K.B. 669, Kennedy J. thought that only those in reasonable fear for their own safety could recover, not, I think, because he thought the damage was too remote but because he thought that unless there was such fear no legal duty was involved. As he says at p. 675, " A has no legal duty not to

" shock B's nerves by the exhibition of negligence towards C or

" towards the property of B or C In *Smith* v. *Johnson & Co.*

" (unreported) a man was killed by the defendants' negligence in
" the sight of the plaintiff and the plaintiff became ill, not from
'"the shock produced by fear of harm to himself, but from the
" shock of seeing another person killed. The Court held that this
" harm was too remote a consequence of the negligence. I should
" myself, as I have already indicated, have been inclined to go a step
" further and to hold upon the facts in *Smith* v. *Johnson (supra)* that
" as the defendant neither intended to affect the plaintiff injuriously
" nor did anything which could reasonably or naturally be expected
" to affect him injuriously there was no evidence of any breach of
" legal duty towards the plaintiff or in regard to him of that absence

" of care according to the circumstances which Willes J. in *Vaughan* " v. *Taft Vale Railway Co.,* [1860] 5 H. & N. 679 at p. 688 gave " as a definition of negligence." So Phillimore J. in the same case after suggesting at p. 684: " It may be (I do not say that it is " so) that a person venturing into the streets takes his chance of " terrors. If not fit for the streets at hours of crowded traffic he or " she should not go there," says at p. 685, " The difficulty in these " cases is to my mind not one as to the remoteness of the damage, " but as to the uncertainty of there being any duty." It is true that he does also envisage the possibility of liability for mental shock apart from fear of personal injury in the remark on p. 682: " I " think there may be cases in which A owes a duty to B not to inflict " a mental shock on him or her and that in such a case if A does " inflict such a shock upon B, and physical damage thereby ensues, " B may have an action for the physical damage though the " medium through which it has been inflicted is the mind." But his previous remarks show that he would not necessarily include mental shock due to the sight of an accident in the streets.

In *Hambrook* v. *Stokes* [1925], 1 K.B. 141, in which the plaintiff succeeded, negligence was admitted, and as Lord Atkin, then Atkin L.J., pointed out, such an admission can only mean an admission of negligence towards the plaintiff. But none of the Lords Justices who heard the case confined themselves to considerations founded upon this fact. Bankes L.J., at p. 151, expressed himself thus: "... What a man ought to have antici- " pated is material when considering the extent of his duty. " Upon the authorities, as they stand, the defendant ought " to have anticipated that, if his lorry ran away down mis " narrow street, it might terrify some woman to such an extent, " through fear of some immediate bodily injury to her health, that " she would receive such a mental shock as would injure herself ", and he then goes on to assert that in his view no distinction can be drawn between the fear of a mother for her own safety and her fear for her children. He was careful to limit the scope of his decision to the facts of the case then under consideration and to confine his determination to cases where the claimant was in fear for his or her own personal safety or that of his or her children. Of *Smith* v. *Johnson & Co.* he says, at p. 150: " It may well be that " the duty of a person to take care does not extend to a person in the " position of the plaintiff in *Smith* v. *Johnson &* Co. *[supra)* or to "the person indicated as B in Kennedy J.'s illustration, and yet "may extend to a person in the position of the plaintiff's wife." Atkin L. J., at p. 156, said: " Apart from the admission in the

" pleadings I think that the cause of action is complete. The duty
" of the owner of a motor car in a highway is not a duty to refrain
" from inflicting a particular kind of injury upon those who are
" in the highway. If so, he would be an insurer. It is a duty to
" use reasonable care to avoid injuring those using the highway.
" It is thus a duty owed to all wayfarers, whether they are injured
" or not. . . . Further the breach of duty does not take place
" necessarily when the vehicle strikes or injures the wayfarer. The

" negligent act or omission may precede the act of injury. In this
" case it was completed at the top of Dover Street when the car
"was left unattended. . . ." He continued, on p. 158: 'In
"my opinion it is not necessary to treat this cause of
" action as based upon a duty to take reasonable care to avoid
"administering a shock to wayfarers. The cause of action, as
" I have said, appears to be created by breach of the ordinary
" duty to take reasonable care to avoid inflicting personal injuries
" followed by damage, even though the type of damage may be
"unexpected, namely, shock. The question appears to be as to
"the extent of the duty and not as to remoteness of damage."
Sargant L.J. differed and like Kennedy J. would confine liability to cases of reasonable fear for personal safety but only because in his view the injury complained of could not reasonably have been anticipated and therefore the defendant had broken no duty which he owed to the defendant. At p. 162 he says: " . . . I should
"prefer, with Kennedy J., to put it not on the ground that the
"harm was too remote a consequence of the negligence but on
" (what is often practically equivalent) a consideration of the extent
"of the duty of the defendant towards the plaintiff and others
" on and near the highway. That is to say that, as the defendant
" did not do anything which could reasonably or naturally be
" expected to cause the harm in question to the plaintiff, there was
"no evidence of any breach of duty towards him for which the
" defendant could be rendered liable." In the result the plaintiff succeeded.

A conclusion in favour of the plaintiff was also reached by the Court of Appeal in *Owens* v. *Liverpool Corporation* [1939], I K.B. 394, in which the driver of a tram negligently ran into a hearse containing the body of a relative of the plaintiffs and was held liable to them in respect of illness caused by the shock of seeing the accident. The Lords Justices seem to have accepted

the view that the driver ought to have anticipated that the result of his negligence might be to cause emotional distress to spectators of the consequent accident and therefore was guilty of negligence towards any one physically affected by feelings induced by the sight presented to them. With all respect I do not myself consider the Court of Appeal justified in thinking that the driver should have anticipated any injury to the plaintiffs as mere spectators or that he was in breach of any duty which he owed to them.

I have however dealt with both these cases and particularly with *Hambrook* v. *Stokes (supra)* somewhat at length because they show the high water mark reached in claims of the character now in question. It will be observed that in the earlier case all the Lords Justices were careful to point out that the vital problem was the extent of the duty and not the remoteness of damages—a view in which they were supported by the opinions of Kennedy and Phillimore JJ. in *Dulieu* v. *White (supra).* With this view I agree, and ask myself whether the defenders in the present case owed any duty to the pursuer.

In the case of a civil action there is no such thing as negligence in the abstract: there must be neglect of the use of care towards a person towards whom the defendant owes the duty of observing care. And I am content to take the statement of Lord Atkin in *Donoghue* v. *Stevenson* [1932], A.C. 562, at p. 580, as indicating the extent of the duty. ' You must take," he says, " reasonable " care to avoid acts or omissions which you can reasonably fore- ″ see would be likely to injure your neighbour. Who then in law ″ is my neighbour ? The answer seems to be, persons who are so " closely and directly affected by my act that I ought reasonably ″ to have them in contemplation as being so affected when I am " directing my mind to the acts or omissions which are called in " question."

Is the result of this view that all persons in or near the street down which the negligent driver is progressing are potential victims of his negligence? Though from their position it is quite impossible that any injury should happen to them and though they have no relatives or even friends who might be endangered, is a duty of care to them owed and broken because they might have been but were not in a spot exposed to the errant driving of the peccant car?

I cannot think so. The duty is not to the world at large. It must be tested by asking with reference to each several complainant, was a duty owed to him or her.

If no one of them was in such a position that direct physical injury could reasonably be anticipated to them or their relations or friends normally I think no duty would be owed: and if in addition no shock was reasonably to be anticipated to them as a result of the defender's negligence, the defender might indeed be guilty of actionable negligence to others but not of negligence towards them.

In the present case the defender was never herself in any bodily danger nor reasonably in fear of danger either for herself or others. She was merely a person who as a result of the action was emotionally disturbed and rendered physically ill by that emotional disturbance. The question whether emotional disturbance or shock, which a defender ought reasonably to have anticipated as likely to follow from his reckless driving, can ever form the basis of a claim is not in issue. It is not every emotional disturbance or every shock which should have been foreseen. The driver of a car or vehicle even though careless is entitled to assume that the ordinary frequenter of the streets has sufficient fortitude to endure such incidents
as may from time to time be expected .to occur in them, including the noise of a collision and the sight of injury to others, and is not to be considered negligent towards one who does not possess the customary phlegm.

In *Hambrook* v. *Stokes (supra)* the Defendant's lorry was left unattended and improperly braked at the top of a steep and narrow street with the engine running, with the result that it started off by

itself and ran violently down the hill, putting the Plaintiff in fear for the safety of her children whom she had just left and thereby causing a serious illness and ultimately her death.

In such circumstances it might well be held that the negligence complained of was a potential danger to all those in the way and that the careless driver should have foreseen the likelihood of actual or apprehended injury to anyone in the street down which the lorry might run and the possibility of illness being produced in a mother from fear that the run-away car would injure her children.

The position of the defender in the present case is more favourable. The rider of the cycle had not left it to career at its own will —he was always in control and his negligence was not to all those in the highway but only to anyone turning or intending to turn in front of him into a side road. The pursuer was not such a person and the only allegation of negligence which I can find in the condescendence is not towards her but, as I understand it, towards traffic proceeding across or at any rate down the road towards the cyclist. So far as the pursuer is concerned she complains of nothing but the disturbance caused by an accident to the cyclist himself and in her claim confines her allegation to a general averment against him of negligence resulting in a collision with a motor car. She in no way connects that negligence with herself except by the assertion that she sustained a very severe shock to her nervous system and by an amendment assented to in the Inner House expressly repudiates any fear of personal injury.

5 [16]

The Lord Ordinary, if I understand him aright, was nevertheless prepared to treat the case on the basis that the pursuer had been put in fear of bodily injury to herself. " At the best for her ", he says, " it can be said that the shock arose from a fear of immediate " bodily injury to herself, but only from a fear which had no " rational basis—or in other words an unreasoned fear, and as the " whole facts disclose an unreasonable fear."

In your Lordships' House the pursuer's representatives preferred to rest their case upon the terms of the amended plea and confined their arguments to considerations based upon an averment that the pursuer was not put in fear of injury to herself or others but was

only emotionally disturbed and rendered physically ill by the crash and possibly by the sight of the injured man.

This limited contention was no doubt prudently adopted since, though the Lord Ordinary had found that any fear of personal injury was unreasoned and unreasonable, he had made no similar finding as to fear engendered by the crash or sight.

In order, however, to establish a duty towards herself, the pursuer must still show that the cyclist should reasonably have foreseen emotional injury to her as a result of his negligent driving, and, as I have indicated, I do not think she has done so.

If I am right in thinking that the pursuer has established no duty towards herself in the deceased man and no breach of any duty she must fail unless it can be said that there is some principle in the law of Scotland, which is not to be found in the law of England, under which she can recover. I should be loth to think that there is any difference between the principles adopted in the two systems. Nor can I find in the cases quoted any decision or even dicta which would warrant a decision in favour of the pursuer in the present instance.

Taking the cases in the order in which they were quoted the claim in *Cooper* v. *Caledonian Railway Co.* [1902], 4 F. 880, was based on an allegation of fear of personal physical injury and even in that case the allegation was only held to be relevant if it appeared that the fright resulting from the negligent act might reasonably arise in a mind of average intelligence and strength, i.e., it must not be unreasoned and unreasonable. *Gilligan* v. *Robb* [1910], S.C. 856, contained an averment of negligence and fear of physical injury. In *Ross* v. *Corporation of Glasgow* [1919], S.C. 174, in which a tramcar was driven negligently on the wrong line but drawn up slowly and carefully short of another car, it was held that fright thereby caused was not naturally or probably caused by the negligent act and that the defenders had no duty to anticipate such a consequence. *Brown v. Corporation of Glasgow* [1922], S.C. 527, and *Currie* v. *War drop* [1927], S.C. 538, both led to considerable divergence of opinion and in each the conclusion that a cause of action existed was reached by a majority of three against two. In the former there was an allegation of fear of personal injury and a finding by the Court that that fear was reasonable. In the latter a man and his fiancée walking together were knocked down by a negligent motor driver—the man killed and the woman suffered physically from consequent nervous shock partly due to the accident to herself and partly to fear for the safety of her com-

panion. Undoubtedly there was in that case a duty to the pursuer (the woman) and a breach of that duty and the decision of the majority was due to that fact coupled with the impossibility of distinguishing between the physical injury due to each type of shock. *A v. B's Trustees* [1906], 13 S.L.T. 830, in which a lodger committed suicide in the lodgings he had hired and both did some material damage and administered a nervous shock to his landladies may be explained as founded on contract or on the fact that the material damage might have been anticipated. Finally in *Walker* v. *Pitlochry*

[17] 6

Motor Co. [1930], S.C. 565, the pursuer was held entitled to recover in respect of the physical consequences of shock occasioned by the sight of injury caused to a near relative, shock which it was held might reasonably have been anticipated as a result of the negligent act.

To the same effect is the Irish case of *Bell v. Great Northern Railway Co. of Ireland* [1890], 26 L.R.Ir. 428, in which illness due to reasonable apprehension of personal injury due to the defendants' negligence was held to give a cause of action.

These cases are at any rate no more favourable to the pursuer's contention than those decided in England. In all three countries no doubt shock occasioned by deliberate action affords a valid ground of claim (see *Wilkinson* v. *Downton* [1897] 2 QB 57 and *Janvier* v. *Sweeney* [1919] 2 K.B. 316), and so I think does shock occasioned by reasonable apprehension of injury to oneself or others, at any rate if those others are closely connected with the claimant. What is reasonable may give rise to some difference of opinion but whether illness due to shock which might reasonably have been anticipated as the result of injury to others can or cannot form the basis of a successful claim need not now be considered. No exceptionally loud noise or particularly gruesome sight is alleged or any circumstance suggesting that the cyclist should have anticipated he would cause a shock to the pursuer.

On the ground that there never was any duty owed by the deceased man to the pursuer or breach of such a duty, I should dismiss the Appeal. In so deciding, I believe I am following the reasoning and conclusion of the Lord Ordinary as well as those of the majority in the Inner House, with whose opinions I agree.

Mr. Montague Berryman

(COUNSEL FOR THE RESPONDENT) :

May it please your Lordships; before your Lordship puts the Motion to the House, there is one point which arises as to the costs to which I am instructed to draw your Lordships' attention and with which I am instructed to invite your Lordships to deal. Your Lordships will remember that the case started with an interlocutor of Lord Robertson dated the 26th April, 1940; upon that there was a reclaiming motion which was heard before the Extra Division on the 1st August, 1940—your Lordships will find that at pages 12 and 13 of the Appellant's Case—and upon that the case was remitted in order that there might be a proof before answer. On that reclaiming motion the Respondent to this appeal was ordered to pay the costs, although in fact Lord Robertson, I think—I am so instructed; I was not there when the case was argued—had in fact arrived at the same conclusions as your Lordships without any reference to the argument at all

Lord Thankerton:

But that was purely on relevancy. The pursuer succeeded on her motion, and she got her expenses.

Mr. Berryman:

That is so. That is all I was dealing with.

Lord Thankerton:

That is not touched, of course.

Mr. Berryman:

No, at the moment that is not touched.

Lord Wright:

It is not the subject of appeal.

7 [18]

Lord Macmillan:

It is not the effect of our decision to deprive the pursuer of her expenses in the Inner House on a preliminary discussion on relevancy.

Lord Thankerton:

No, we do not touch any interlocutor below. You need have no anxiety about your expenses. " Costs " here means only the costs of this Appeal.

Mr. Berryman:

It was only in our anxiety to get repayment of those costs that I was instructed to address your Lordships.

Lord Thankerton:

It is not appealed against.

Mr. Berryman:

No, strictly I do not think it is. If your Lordships please.

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