that she struck a rock or the ground on her passage, but that it did not appear to be by the negligence of the master or pilot—that, notwithstanding the striking, she sailed—and that the total loss was owing to the negligence of the master.

CAIRNS v. KIPPEN, &c.

Clerk, Jeffrey, and *Moncreiff,* for the Pursuer.
Jo. Gordon and *Cockburn* for the Defenders.

(Agents, *Gibson, Christie,* and *Wardlaw,* W. S. and *Alexander Youngson,* W. S.)

PRESENT,
LORDS CHIEF COMMISSIONER AND GILLIES.

ANDERSON *v.* PYPER & Co. &c.

1820. March 18.

Damages claimed against the proprietors, guard, and driver of a stage-coach, for injury done by an overturn of the coach.

AN action of damages against the proprietors, guard, and driver of a stage-coach, at the instance of a passenger hurt by an overturn.

DEFENCE.—The overturn was occasioned by a defective axle, for which the defenders are not liable.

ANDERSON
v.
PYPER & Co.
&c.

ISSUES.

"Whether, on or about the 18th day of "July 1818, the Waterloo Coach, run by "John Pyper and Company, and others, de- "fenders, and of which the defender John "Watson was guard, and William Walker "and John Forrest were drivers, was over- "turned on the road from Kinross to Perth, "at or near Milnathort, in the county of "Kinross, in consequence of the negligence "or improper conduct of the said coachmen "or guard in driving the said coach, whereby "the pursuer, then passenger in said coach, "suffered bodily harm, to the damage and "injury of the said pursuer?

"Whether the said coach was overturned, "time and place aforesaid, in consequence of "one of the axle-trees being badly construct- "ed, faulty, and defective, or composed of in- "sufficient materials, whereby the pursuer, "then a passenger in said coach, suffered "bodily harm, to the damage and injury of "the said pursuer?

"Whether the alleged faulty and defective "construction of the said axle-tree, and the "insufficiency of the materials by which the

" accident is alleged to have happened, arose " from the inattention, negligence, or mis- " conduct of the said defenders, or persons " acting for them therein ?

" Damages laïd at—for medical expences " L.200, solatium L.2000."

It having been stated that the defenders refused to produce the way-bill, Mr Moncreiff, at the conclusion of the pursuer's evidence, offered to produce it; but Mr Jeffrey said that the production was of no use, as they could not then search for witnesses.

LORD CHIEF COMMISSIONER.—This summons is dated in 1819, and you state that ten days ago you called for the way-bill, to enable you to find out witnesses. We do hope that the time will come, when parties will inquire after their witnesses before they bring their action, and not after the Issues are settled.

Alison opened the case for the pursuer, and contended, that at common law the proprietors of the coach are liable for the damage done by any defect in it, whether visible or not, as well as for negligence or improper conduct of their servants. That, *in addition* to the common law, there was a statute (50. Geo.

ANDERSON v. PYPER & Co. &c.

III. c. 48.) regulating the number of passengers, &c. and to prevent them sitting on the luggage.

Moncreiff, for the defenders, maintained that the defenders were not liable for a latent defect;—that the furious driving and overloading was disproved by the pursuer's witness;—that if a passenger sat on the luggage, there was no necessity for his doing so; and that the plea founded on the statute, was a new one, brought out now for the first time. If the coach had been top-heavy, the statute might have applied.

LORD CHIEF COMMISSIONER.—The act gives its own remedy, by imposing a penalty, but does not apply to this case.

Moncreiff.—The second Issue is more important than the first; but even if you find upon it for the pursuer, you cannot find damages against us, the proprietors.

The question here is, the state of the coach before the accident, and all the evidence applies to the appearance of the iron after the accident. In England, Sir J. Mansfield held, that the injury being proved, the presumption was against the proprietors.—Christie *v.* Greggs, 2 Camp. 79. But in this country, it is necessary to prove some negligence on the

part of our neighbours, to entitle us to claim reparation. It was a *damnum fatale*, or *absque injuria*. There is no evidence that the flaw existed before the coach left Queen's Ferry.

3d Issue.—To entitle the pursuer to damages, he must prove both the *2d* and *3d* Issues. We shall prove that we furnished a sufficient coach, and were attentive in inspecting it; and there is no warranty of the safe conveyance of passengers, as there is of goods.

Jeffrey, for the pursuer, maintained—The pursuer paid for conveyance in a sound coach, and had been put into an unsound one; and, as a lawyer, he was not aware of the distinction between conveyance of passengers and luggage. Though he did not maintain the liability of the proprietors for a pure accident arising from some external cause; yet he held them liable, if they furnished insufficient horses, carriages, &c. whether they knew it or not, in the same manner as the owners are liable if a vessel is not sea-worthy.

The 1*st* and *2d* Issues must be taken together; and they amount to this, that the

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coach was weak, and that, from overloading and overdriving, the axle broke. The presumption, according to the case quoted, is, that the overturn arose from negligence; and there is no law to shew, that general evidence is sufficient to get over this presumption. I must protest against what is said as to the inspection being sufficient in the case referred to; but even if it were the rule, there is no proof of such inspection in this case.

LORD CHIEF COMMISSIONER.—The two questions here are, 1*st*, Whether the pursuer is entitled to a verdict? and 2*d*, If he is so, what is the amount of the damages?

1*st Issue*.—The overturn, and the damage or injury suffered, have been distinctly proved; but the real question here is, whether this overturn and injury were occasioned by the negligence of the defenders; and it has been correctly stated to you, that the proprietors are liable for the negligence of their servants.

It will not be necessary to go through the evidence in detail, as it must be sufficiently in your recollection. There is contrariety of evidence as to overdriving; but in my view,

the evidence against the coach being over-driven, greatly preponderates. However, this is a matter entirely for your consideration.

In my opinion, you are not, in this case, to take the act of Parliament referred to as law, but as evidence. It is not to be held as fixing the number of passengers, so that the proprietors are liable in damages if they exceed this number; but it is to be taken as evidence of what the Legislature thought was the proper number of passengers, and as a criterion to assist you in forming an opinion on the question of overloading. There is nothing in the terms of the Issues which would entitle you to consider it in any other view.

So far as I know, this is the first case of the sort which has been decided in this country; and even in England there have been very few such cases. If I considered the carriage of persons to fall under the same rule as the carriage of goods, I must then state to you the law of common carrier, as regulated by the law of Scotland.

But I consider the case of passengers different; and as no case has been mentioned similar to the present, I must draw what light I can from the analogy of the law in the

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Proprietors of a stage-coach not liable in damages to an individual, under 50. Geo. III. c. 48. See p. 264.

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other end of the island. My brother thinks it conformable to the law of Scotland, to hold the principle stated from the Bar, and drawn from that country, as the principle that should regulate the present case; and this I state to you, not as the law of England, but as a general principle to regulate a case not yet decided in this country. The rule then is, that if the carriage is sound as far as the human eye can discover, the proprietors are not liable; and this I state to you as the subject of inquiry in the present case.

You must discard from your minds the analogy stated as to the carriage of passengers and goods. The fear of the tricks of common carriers has led to a rule, making their case an exception from the general principle, and holding them absolutely responsible for the damage done to goods committed to their charge, unless it arises from the act of God or the King's enemies; but the same reason does not hold as to passengers. In England, the principle at first was thought to be the same, but on farther inquiry it was found to be different; and in this first case in this country, the Court mean to lay it down to you distinctly, that the law is not the same as to passengers and goods.

2d Issue.—This is a mere question of fact; and if you are of opinion that the axle was not faulty, you will find for the defender; but if it was faulty, then comes the third, which is the important Issue.

3d Issue.—In this we must attend to the meaning of negligence, inattention, &c.; and these are best understood by considering the converse of them, diligence, attention, &c. In this, as in every thing else, the words must be taken in reference to the matter under discussion. The question then is, whether that care, diligence, and attention, which is applicable to the subject, has been used; whether the defenders have used the utmost care to which human foresight could reach. You are to consider the state of the coach, and form your opinion whether the human eye could have discovered the defect. It requires a clear case to be made out; and has the pursuer made out such a case? Has he proved insufficiency; and have the defenders proved that it could not have been discovered? These I lay down to you as the principles on which you are to judge of this case; not because they are the law of England, but because they are the dictates of common sense.

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(After reading part of the evidence, his Lordship proceeded)—

You are to say whether there was such appearance of defect as the eye of an artificer, applied with reasonable attention, could discover; and will take into consideration, that the eye of an experienced person might discover defects imperceptible to others. After contrasting the evidence of the different witnesses, you will find for the pursuer or defenders, according to your opinion on this point.

(After commenting on the evidence for the defenders, his Lordship said)—

I think you had better find generally for the pursuer or defenders, than adopt the suggestion from the Bar, of finding a special verdict. By a general verdict, I think justice will be done in the case; and if there are any objections to the direction in point of law, they will be better and more neatly brought into discussion on a motion for a new trial, and a Bill of Exceptions taken to the decision then given.

Damages ought never to be given as a punishment, but as a reparation; and in the present case, we have nothing to do with the

police of the country, or correction of the defenders.

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I feel very anxious as to the result of this case, being the first on the subject; but though it is very desirable to have the law settled, that cannot be done by running wild on the subject.

Verdict—"For the defenders."

Jeffrey and *Alison* for the Pursuer.

Moncreiff and *Cockburn* for the Defenders.

(Agents, *Tennent* and *Lyon*, w. s. and *James Greig*, w. s.)

PRESENT,

LORDS CHIEF COMMISSIONER AND GILLIES.

1820. May 23.

A rule was obtained upon the defenders, to shew cause why a new trial should not be granted.

New trial refused.

Moncreiff.—This application was made on three grounds. 1*st*, That the distinction drawn between the principle applicable to passengers and goods, is not founded in law. 2*d*, That the question of whether the coach was overloaded, under 50th Geo. III. was with-

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drawn from the Jury. *3d*, That the verdict is contrary to evidence.

It is said we are liable for the insufficiency of the coach, even if there was no negligence. It is on the doctrine of reparation alone that the coach proprietors are liable. The presumption of fraud is the foundation of the liability of a carrier; but was this ever applied to injury to a person? Even in the case of a ship which is relied on, proof that she was minutely inspected before sailing, throws the burden of proof on the other side; but the warranty of a vessel only applies to goods. The argument on the other side goes to this, that we must furnish a perfect machine. In 2. Campbell, 79. this very case is decided.

It is said there was misdirection as to the overloading.

LORD CHIEF COMMISSIONER.—As I understood Mr Jeffrey at the trial, he stated, not only that the overloading caused the accident; but also that he was entitled to damages on account of the loading being contrary to the Act of Parliament.

Moncreiff.—We hold this to have been a fair Jury question as to negligence, which was fairly submitted to the Jury.

Jeffrey, in applying for the rule, and now in reply, stated—We apply for a new trial on the ground of misdirection; the Jury having been directed that the proprietors were not liable, if they had used all diligence to discover the flaw in the axle.

We maintain, that the law of Scotland does not recognise the distinction laid down at the trial; and that though the carriage of passengers does not fall under the presumption of fraud, as in the case of goods, that still the proprietors are liable for an injury done to either. The case is similar to that of a vessel, which must be sufficient. Abbot, 229.; 5. East, 428, Lyon *v.* Mills.

In the contracts of sale, location, &c. the party gives an absolute warranty; and it is expedient the same should apply here. This is the doctrine of the Roman law, and Pothier holds the same.

There is some puzzle in the law of common carriers, by holding fraud as the foundation of the claim. It might be introduced on that ground, but is now supported on general policy, as an injury to goods cannot be said to be fraudulent. Mr Campbell says, this question has not been solemnly tried in England, and his opinion is in our favour.

S

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We do not found much on the overloading, but were entitled to a verdict on the second Issue; and in that respect the verdict is contrary to evidence.

LORD CHIEF COMMISSIONER.—The Court was very desirous to hear parties fully. The object of the motion is, that we should enable parties to have recourse to another trial; and the application is grounded in part on a question of law.

The questions here were, how far the insufficiency of the carriage was the cause of the injury; whether the proprietors are liable to repair the injury; whether a human being injured by the accident, is entitled to recover damages for the suffering occasioned by this overturn?

It is said that the right to recover damages in this case rests on the law of common carrier; but this is not correct. A carrier is bound absolutely to convey the goods to the place of destination; but in this sort of undertaking the proprietors are only bound to furnish a carriage sufficient for the purpose, and to give all possible diligence to that end.

The law of common carrier, it was said, is not now founded on a security against

fraud; but in all the books and authorities, that is made the ground of the liability.

The principle of fraud cannot apply to human beings: they cannot be made away with like goods.

M'Causeland *v.* Dick, M. M. 9246.; Ersk. III, 1, 28, 29.

Neither does the principle of sea-worthiness apply. The peculiar contract of insurance on ships makes seaworthiness necessary as applicable to that contract, but not to other contracts.

The principle which governs the furnishing carriages for conveying persons is this: The carriage must be sufficient, as far as human care and inspection can secure sufficiency. The liability for injury to a person rests on the negligence of the owners, and not on the securing against a fraud.

Although there have not been so many cases here as in England, I am of opinion, that what I stated is the law of Scotland, as well as of England. When I refer to the law of England, it is not as deciding the question, but to see whether there is a principle which, by analogy, would apply here. It is said the English cases are not solemn decisions; and reference is made to the opinion of the reporter. I shall not say whe-

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ther we ought to refer to the opinion of a private lawyer as authority; but I must say, that the case of Aston *v.* Heaven et Alt, 2. Esp. 531, is not a mere *nisi prius* case, but is reported, and has been subjected to the criticism of the Bar, without being questioned.

I am of opinion that the liability rests on negligence, and have stated the grounds of my opinion.

As to the coach being overloaded, if there was any error, it was in admitting evidence on the subject. It is not stated in any of the papers as the ground for subjecting the proprietors.

As to the verdict being contrary to evidence, if I am right in the law, then the question of negligence must always be for the Jury,—we cannot fix how many inspections are necessary, and with what velocity the coach may move. Had a case of gross negligence been made out, the Court might have set aside the verdict; but as the flaw had only the appearance of a hair, which, on the evidence, the Jury thought human skill could not discover antecedently to the cause of the injury; and as evidence of attention on the part of the proprietors was laid before the Jury, with which they were satisfied, we think we ought not to grant a new trial.