1952 Oct. 30, 31 Nov. 3 — 1953 *Jun. 26.

YVONNE GUAY (*Plaintiff*) .... APPELLANT;

AND

SUN PUBLISHING COMPANY LIMITED (*Defendant*) .... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Tort—Negligence—Newspaper—Negligent misstatement—False report of death of husband and children—Whether actionable by wife—Absence of malice—Whether duty owed—Nervous shock—Whether damages recoverable.

The respondent published in one issue of its daily newspaper printed in Vancouver, a news item stating that the appellant's husband and their three children had been killed in an automobile accident in Ontario where they were living. No such accident had taken place but the appellant read the item and claimed that the resulting shock affected her health. The respondent could not explain its publication. The appellant claimed damages for negligence and did not allege fraud or malice or the existence of any contractual relationship. The action was maintained by the trial judge but dismissed by a majority in the Court of Appeal for British Columbia.

Held: (Rinfret C.J. and Cartwright J. dissenting), that the appeal and the action should be dismissed.

Per Kerwin J.: Since there was no duty in law owed by the respondent to the appellant, the former could not be held liable in negligence for the shock and impairment in health suffered by the appellant as a result of reading the report. The appellant was not a "neighbour" of the respondent within the meaning of Lord Atkin's statement in *Donoghue v. Stevenson* ([1932] A.C. 562), since she was not a person so closely and directly affected by the publishing of the report that the respondent ought reasonably to have had the appellant in contemplation as being affected injuriously when it was directing its mind to the act of publishing.

Per Estey J.: Assuming that the respondent owed a duty to the appellant to exercise reasonable care to verify the truth of the report, because injury would be foreseeable to a reasonable person, the appellant cannot succeed since the evidence does not establish that she suffered physical illness or other injury consequent upon shock or emotional disturbance caused by a reading of the report.

Per Locke J.: Since it was conceded on behalf of the appellant that the respondent had acted without malice in publishing the article believing the statements made to be true, there was no cause of action, even though the respondent had acted carelessly in failing, before publication, to make adequate inquiries as to their truth, and damage has resulted. *Dickson v. Reuter's Telegram Co.* (1877) L.R. 3 C.P. 1; *Derry v. Peek* (1889) 14 App. Cas. 366; *Nocton v. Ashburton* [1914] A.C. 932; *Angus v. Clifford* [1891] 2 Ch. D. 449; *Le Lievre v. Gould* [1893] 1 Q.B. 491; *Balden v. Shorter* [1933] 1 Ch. 427 and *Chandler v. Crane* [1951] 2 K.B. 164. Nothing decided in *Donoghue v. Stevenson* [1932] A.C. 562 affected the question to be determined.

*PRESENT: Rinfret C.J. and Kerwin, Estey, Locke and Cartwright JJ.

Per Rinfret C.J. and Cartwright J. (dissenting): There is no analogy between the present case and an action for damages for misrepresentation or for injurious falsehood; the present case is analogous to a case in which the respondent has unintentionally but negligently struck the appellant or caused some object to strike her. The respondent, as a reasonable man, should have foreseen the probability of the appellant reading the report and suffering injury as a result. (*Donoghue v. Stevenson* [1932] A.C. 562 and *Hambrook v. Stokes Bros.* [1925] 1 K.B. applied). Therefore a duty rested upon the respondent to check the accuracy of the report before publishing it.

2. The respondent failed in that duty.

3. The appellant can recover damages for nervous shock even though there was no physical impact (*Hay or Bourhill* v. *Young* [1943] A.C. 92).

4. The evidence as to damages does not warrant an interference with the assessment made by the trial judge.

APPEAL from the judgment of the Court of Appeal for British Columbia (1), reversing, O'Halloran J.A. dissenting, the decision of the trial judge and dismissing the action for injurious falsehood.

D. L. Silvers for the appellant.

D. McK. Brown for the respondent.

The dissenting judgment of the Chief Justice and of Cartwright J. was delivered by:—

CARTWRIGHT J.:—This is an appeal, brought by special leave granted by the Court of Appeal for British Columbia, from a judgment of that court (1) reversing, by a majority, the judgment of Wood J. in favour of the appellant for $1,025 and costs and directing that the action be dismissed. O'Halloran J.A., dissenting, would have dismissed the appeal and on the cross-appeal would have increased the damages to $3,275.

The material facts may be summarized as follows. The appellant is a married woman. In February 1948 she was living, separate from her husband, in the City of Vancouver. Her husband was living with their three children in Northern Ontario. The respondent publishes a daily

(1) [1952] 2 D.L.R. 479; 5 W.W.R. (N.S.) 97.

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newspaper in the City of Vancouver. On the 3rd February 1948, the defendant published the following item in its newspaper:—

Ex-Vancouver Man, Children
Killed in Crash.

A former Vancouver man and his three children were killed in an antomobile-train collision in Northern Ontario over the weekend, according to word received by relatives here.

Mrs. R. C. Guay, 1972 West Sixth, said today she and her husband had been notified that her husband's brother, Dick Guay, his daughter and two sons, are all dead.

The wife of the dead man is believed to be in Vancouver, Mrs. Guay said.

Mr. Guay left Vancouver last June and has been living in North Bay.

The accident occurred when he was motoring with the three children from Timmins to North Bay. The news of the tragedy was sent here by another brother who lives in Ontario.

The statement that Mr. Guay and the children had been killed was untrue. They had not been concerned in any accident. It was true, however, that the appellant's husband was known as Dick Guay, that he had a brother whose name was R. C. Guay, that he had another brother living in Ontario and that the children were a daughter and two sons. The evidence does not disclose where R. C. Guay was living at the time of the publication but there is nothing to suggest he was living in Vancouver. It is clear that neither Mr. nor Mrs. R. C. Guay lived at the address mentioned, 1972 West Sixth. There is no evidence as to how or by whom the item was furnished to the respondent. It seems to be a reasonable inference that it was concocted by someone, acquainted with the affairs of the appellant and her husband, who wished to hurt the appellant.

On the day on which the item was published the appellant, in accordance with her usual custom, purchased a copy of the respondent's newspaper, read the item, believed it, and suffered from severe shock which somewhat seriously affected her health. She required treatment by two doctors, extending over some months, was prevented from carrying on her customary work and suffered a partial disability of indefinite duration.

It is conceded that there was neither malice nor fraud on the part of the defendant. The appellant claims damages for negligence. She does not allege the existence of any contractual relationship between herself and the respondent.

The learned trial judge was of opinion that under the principles stated in *Donoghue v. Stevenson* (1), and *Hay or Bourhill v. Young* (2), the respondent owed a duty to the appellant which it failed to perform, that such failure caused the injuries suffered by her and that she was accordingly entitled to judgment. The majority in the Court of Appeal were of opinion that the respondent would be under no liability unless it had acted wilfully or maliciously and consequently did not find it necessary to decide whether or not it had been negligent.

The following questions were argued before us. (i) Under the circumstances, did the respondent owe a duty to the appellant to be careful? The appellant submits that it did. The respondent submits that it owed no duty to the appellant other than a duty not to publish false news, which might injure her, wilfully, fraudulently or maliciously. (ii) If the respondent was under a duty to the appellant to take care, was there a breach of such duty? (iii) Even if the foregoing questions are answered in favour of the appellant could she recover damages for nervous shock unaccompanied by any physical impact? and (iv) The quantum of damages.

It is first necessary to observe that the cause of action alleged by the appellant is based on negligence regarded as a specific tort in itself. In *Grant v. Australian Knitting Mills Ltd.* (3), Lord Wright, who delivered the judgment of the Judicial Committee, discusses the judgments in *Donoghue's* case (*supra*) and says at page 103:—

> It is clear that the decision treats negligence, where there is a duty to take care, as a specific tort in itself, and not simply as an element in some more complex relationship or in some specialized breach of duty, and still less as having any dependence on contract. All that is necessary as a step to establish the tort of actionable negligence is to define the precise relationship from which the duty to take care is to be deduced. It is, however, essential in English law that the duty should be established: the mere fact that a man is injured by another's act gives in itself no cause of action: if the act is deliberate, the party injured will have no claim in law even though the injury is intentional, so long as the other party is merely exercising a legal right: if the act involves lack of due care, again no case of actionable negligence will arise unless the duty to be careful exists.

(1) [1932] A.C. 562. (2) [1943] A.C. 92.
(3) [1936] A.C. 85.

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The learned trial judge refers to the often quoted passage in the judgment of Lord Atkin in *Donoghue's* case (*supra*) at page 580:—

> At present I content myself with pointing out that in English law there must be, and is, some general conception of relations giving rise to a duty of care, of which the particular cases found in the books are but instances. The liability for negligence, whether you style it such or treat it as in the other systems as a species of 'culpa', is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay. But acts or omissions which any moral code would censure cannot in a practical world be treated so as to give a right to every person injured by them to demand relief. In this way rules of law arise which limit the range of complainants and the extent of their remedy. The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably forsee 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.

The learned trial judge proceeds:—

> As I stated above, the article in the newspaper indicated that the wife and mother whose husband and children were supposed to have been killed lived in Vancouver and she naturally would read or at least hear of the article. Surely, therefore, she was the defendant's neighbour.

In *Hay or Bourhill v. Young* (*supra*) at page 111, Lord Wright points out "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." The judgments of all the Law Lords who took part in the last mentioned case appear to me to establish that in determining this issue of duty or no duty it is material to consider what the defendant ought to have contemplated as a reasonable man, and that, *prima facie* at least, a duty to take care arises towards those individuals as to whom a reasonable man in the position of the defendant would have anticipated that they would be injured by the omission to take such care.

For the reasons given by the learned trial judge and by O'Halloran J.A. I am of opinion that a reasonable man in the position of the respondent would have foreseen the probability of the appellant reading the news item and suffering serious injury as a result and that consequently a duty rested upon the respondent to take care to check its authenticity before publishing it; unless, as is argued for the respondent, the authorities negative such a duty where the act complained of is the speaking or writing of words.

Counsel for the respondent contends that *Donoghue's* case has never so far been applied to negligence in words and that it has uniformly been held that fraud or malice is an essential ingredient of a cause of action for damages based on words spoken or written. He does not suggest any analogy between the case at bar and an action for defamation but argues that it is similar to actions for damages for misrepresentation or for injurious falsehood. In my view it is analogous to neither. The gist of the former is the making of false statements to the plaintiff whereby he is induced to act to his own loss; and that of the latter, is the making of false statements to others concerning the plaintiff whereby he suffers loss through the action of those others.

In my view the case at bar is an action on the case for negligently inflicting injury to the person of the appellant and thereby causing injury to her health, and is closely analogous to, if not identical with, a case in which the defendant has unintentionally but negligently struck the appellant or caused some object to strike him. In principle I find it difficult to assert that a defendant who unintentionally but carelessly injures an appellant by a blow or an electric shock should be under liability but a defendant who causes a similar, and perhaps much more serious, injury to an appellant by carelessly inflicting a mental shock by the use of words should escape liability.

I find it unnecessary to attempt to choose between the view of the majority and that of Denning L.J. in *Candler v. Crane Christmas and Co.* (1), which was, in essence, an action for damages for misrepresentation, as I have already expressed my view that the cause of action in the case at bar differs in kind from that in a case where the appellant's loss is due to his having been induced to act to his loss by representations made by the defendant. For similar reasons I can derive little assistance from the judgment in *Shapiro v. La Morta* (2), and *Balden v. Shorter* (3), both of which were actions for injurious falsehood.

Two cases, *Wilkinson v. Downton* (4), and *Janvier v. Sweeney* (5), resemble the case at bar in several respects. In the former Wright J., and in the latter the Court of Appeal, held that damages were recoverable for illness

(1) [1951] 2 K.B. 164.
(2) (1923) 40 T.L.R. 201.
(3) [1933] 1 Ch. 427.
(4) [1897] 2 Q.B. 57.
(5) [1919] 2 K.B. 316.

resulting from shock caused by words spoken directly by the defendant to the plaintiff; but in both cases the defendant knew when speaking the words that they were false so that the element of wilfulness, which is lacking in the case at bar, was present. In *Janvier v. Sweeney* the Court of Appeal approved the decision in *Wilkinson v. Downton,* and speaking of that decision Bankes L.J., said at pages 321 and 322:—

> In my view that judgment was right. It has been approved in subsequent cases. It did not create any new rule of law, though it may be said to have extended existing principles over an area wider than that which they had been recognized as covering, because the Court there accepted the view that the damage there relied on was not in the circumstances too remote in the eye of the law. The substance of that decision may be found in the following passage from the judgment of Wright J. After referring to the doctrine of Pasley v. Freeman and Langridge v. Levy the learned judge said: "I am not sure that this would not be an extension of that doctrine, the real ground of which appears to be that a person who makes a false statement intended to be acted on must make good the damage naturally resulting from its being acted on. Here there is no injuria of that kind. I think, however, that the verdict may be supported upon another ground. The defendant has, as I assume for the moment, wilfully done an act calculated to cause physical harm to the plaintiff—that is to say, to infringe her legal right to personal safety, and has in fact thereby caused physical harm to her. That proposition without more appears to me to state a good cause of action, there being no justification alleged for the act. This wilful injuria is in law malicious, although no malicious purpose to cause the harm which was caused nor any motive of spite is imputed to the defendant."

In *Dulieu v. White and Sons* (1), the plaintiff suffered illness as a result of nervous shock caused by the defendant's servant negligently driving a van into the publichouse of the plaintiff's husband while the plaintiff was behind the bar. There was no actual impact upon the person of the plaintiff. It was held she was entitled to recover damages. Phillimore J. said at page 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—as by terrifying 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.

and at page 683:—

> I cordially accept the decision of my brother Wright in Wilkinson v. Downton that every one has a legal right to his personal safety, and that it is a tort to destroy this safety by wilfully false statements and thereby to cause a physical injury to the sufferer. In that case it will be observed that the only physical action of the wrong-doer was that of speech.

(1) [1901] 2 K.B. 669.

Dulieu v. White and Sons was approved by the Court of Appeal in *Hambrook v. Stokes Bros.* (1), in which damages were recovered for injuries caused to the plaintiff's wife by shock caused by the defendants negligently permitting their unattended lorry to rush down a steep hill, the shock being caused by the wife's fear, not for her own safety, but for that of her children. It will be observed that in both of these cases there was no element of wilfulness or malice, but the shock was administered by the instrumentality of a vehicle, not of words.

I share the view of O'Halloran J.A. and the learned trial judge that the American decisions to which counsel referred are not of great assistance as they do not discuss the problem in the light of the principles laid down in *Donoghue's* case, and for this reason I refrain from a detailed examination of them.

While it is true, as is pointed out by Lord Haldane in *Nocton v. Ashburton* (2), that "liability for negligence in word has in material respects been developed in our law differently from liability for negligence in act" I can find no reason for refusing to apply the principles stated in the passage from Lord Atkin's speech in *Donoghue's* case, quoted above, to the case of a false statement communicated directly by a defendant to a plaintiff in such circumstances that a reasonable man in the position of the defendant would have foreseen the probability of the mere communication causing a serious shock with resulting injury to the health of the plaintiff. Wrottesley J. in *Old Gate Estates v. Toplis* (3), expresses the view that the application of *Donoghue's* case is confined to negligence which results in danger to life, danger to limb or danger to health. It is not necessary to decide whether this is always so but in my view *Donoghue's* case should apply to the particular facts of the case at bar where what the respondent should have foreseen was the probability of danger to the health of the appellant. The circumstance that in *Dulieu v. White and Sons* and in *Hambrook v. Stokes Bros.* the shock was caused by negligently presenting a vehicle to the view of the person shocked in such circumstances as to terrify her while in the case at bar the shock was caused by negligently presenting the false news item to the appellant

(1) [1925] 1 K.B. 141. (2) [1914] A.C. 932 at 948.
(3) [1939] 3 All E.R. 209 at 217.

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does not seem to me to be a satisfactory ground for affirming liability in the one case and denying it in the other. I cannot distinguish in principle between liability for nervous shock caused to a mother by carelessly allowing a truck to run away and so to cause her to think that it will injure her children and liability for nervous shock caused to her by carelessly communicating a false statement to her which will cause her to believe that all her children have met a violent death. Indeed, in my opinion, the probability of injurious shock to the claimant would be more readily foreseen in the latter instance than in the former.

In my opinion *Hambrook v. Stokes Bros.* rightly decides that the right to recover damages which result from nervous shock negligently caused to the plaintiff is not limited to cases in which the shock arises from a reasonable fear of immediate personal injury to the plaintiff. It is true that that decision has not been finally passed upon by the House of Lords. It was dealt with in all the judgments delivered in *Hay or Bourhill v. Young* (*supra*). Lord Thankerton and Lord Macmillan reserved their opinion in regard to it. Lord Russell of Killowen said that he preferred the dissenting judgment of Sargant L.J. to the decision of the majority but that the judgment of the House did not amount to a disapproval of that decision. Lord Wright stated that as at present advised he agreed with it. Lord Porter refers to it as showing the high water mark reached in claims of the character under discussion, and explains the dissent of Sargant L.J. as being based on the view that the injury complained of could not reasonably have been anticipated and therefore the defendant had broken no duty which he owed to the plaintiff. In the result, it appears to me that we are free to follow *Hambrook v. Stokes Bros.* and I have already indicated my view that we should do so. I think that the existence of liability for shock negligently caused should be determined not by inquiring whether the shock resulted from fear for the personal safety of the claimant but rather by inquiring whether a reasonable person in the position of the defendant would have foreseen that his negligent act would probably result in shock injurious to the health of the claimant.

I conclude, as did the learned trial judge, that the respondent did owe a duty to the appellant to take reasonable care not to inflict a mental shock on her by communicating the false item to her and that the first question listed above should accordingly be answered in favour of the appellant.

The second question presents little difficulty. I agree with O'Halloran J.A. and the learned trial judge that the respondent failed in its duty to take care. Inquiries occupying only a few minutes would have shewn that no such person as Mrs. R. C. Guay lived at the address stated in the item. The evidence of the respondent's witness quoted by O'Halloran J.A. seems to me to conclude this question against the respondent.

The third question would present no difficulty if it were not for the decision of the Judicial Committee in *Victorian Railway Commissioners v. Coultas* (1). For the reasons given by O'Halloran J.A., in the case at bar, those given by Middleton J.A., speaking for the Court of Appeal for Ontario in *Negro v. Pietros Bread* (2), and those given by Hogg J., as he then was, in *Austin v. Mascarin* (3), I think that we are not bound to follow and ought not to follow the decision in the *Coultas case*. I would respectfully adopt as a correct statement of the law the following passage from the judgment of Lord Macmillan in *Hay or Bourhill v. Young* (*supra*) at page 103:—

> 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 recognized that an action will lie for injury by shock sustained through the medium of the eye or the ear without direct contact.

It follows from the above reasons that I think that the appeal should be allowed and it remains to consider the fourth question, whether the judgment of the learned trial judge should be restored *simpliciter* or whether the damages should be increased in accordance with the view of O'Halloran J.A. After an anxious consideration of all the evidence dealing with the question of damages, I have reached the conclusion that we ought not to interfere with the assessment made by the learned trial judge, who had

(1) (1883) 13 App. Cas. 222. (2) [1933] O.R. 112.
(3) [1942] O.R. 165.

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the advantage, always great and in this case peculiarly so, of actually seeing and hearing the witnesses, and particularly the appellant herself.

Before parting with the matter I wish to mention the argument addressed to us that if the judgment of the learned trial judge is restored it will, in effect, amount to a decision that a newspaper must warrant the truth of everything it prints. In my view there is nothing in the judgment of the learned trial judge or in what I have said above which has any such effect. This decision does not touch the case of a reader of a newspaper who suffers financial loss through acting to his detriment on inaccurate information which he reads in the paper. The questions involved in such a case are not before us, as they would have been if, for example, the appellant had been induced by reading the item to fly to Timmins thereby incurring expense. In this regard I think it well to follow the example set by Lord Wright in *Grant v. Australian Knitting Mills, Ld.* (*supra*) where, faced with a somewhat similar argument, he said at page 107:—

> In their Lordships' opinion it is enough for them to decide this case on its actual facts. No doubt many difficult problems will arise before the precise limits of the principle are defined: many qualifying conditions and many complications of fact may in the future come before the Courts for decision. It is enough now to say that their Lordships hold the present case to come within the principle of Donoghue's case, . . .

I would allow the appeal and restore the judgment of the learned trial judge. The appellant should have her costs in the Court of Appeal and in this Court, the respondent should have its costs of the cross-appeal in the Court of Appeal.

KERWIN J.:—In one issue of its daily newspaper printed in Vancouver, the respondent published a news item stating that the husband and three children of the appellant had been killed in an accident in Northern Ontario. This report was untrue. The information leading to the publication did not come from one of the recognized press services or from any of the respondent's reporters or correspondents but apparently from someone who must have known of the appellant and the whereabouts of her husband and children. The respondent was unable to say who that was or the manner in which the information was conveyed to it. The respondent was not actuated by malice

and there was no contractual relationship between it and the appellant. Upon consideration of the evidence, I am satisfied that the trial judge rightly found that the respondent was negligent in publishing the item and therefore the question is whether it is liable in negligence for the shock and impairment in health suffered by the appellant as a result of her reading the report. There is no authority in this Court that compels us to decide either way but there is a considerable body of opinion leading to an answer in the negative.

Negligence is a separate tort: *Donoghue v. Stevenson* (1): *Grant v. Australian Knitting Mills Ltd.* (2). *Hay or Bourhill v. Young* (3). Several cases bearing upon the point to be determined in this appeal have been decided both before and after this proposition was firmly established, some of which will now be referred to. *Derry v. Peek* (4), was an action for damages for deceit, and the speeches of all the members of the House of Lords and the reasons for judgment in subsequent cases referring to that decision must be read with that fact in mind. In *Shapiro v. La Morta* (5), as stated by Lord Justice Banks at 626, the Court of Appeal proceeded upon the basis that:— "It was not disputed that in order to succeed the plaintiff must prove that the publication by the defendants was malicious." From this I take it that counsel had admitted that malice was necessary, and it is in the light of that circumstance that one must read the statement of Lord Atkin at page 628:— "I think the plaintiff fails in consequence of being unable to prove that the damage was caused by a representation that was malicious."

However, it had been laid down by the Common Pleas in *Rawlins v. Bell* (6) and by the Exchequer Chamber in *Ormrod v. Huth* (7), that an injury caused by a statement false in fact but not so to the knowledge of the party making it, or made without intent to deceive, will not support an action. In *Playford v. United Kingdom Electric Telegraph Company Limited* (8), the Queen's Bench decided that the defendant was not liable in damages for a mistake made by it in transmitting a telegram sent to the plaintiff

(1) [1932] A.C. 562.
(2) [1936] A.C. 85.
(3) [1943] A.C. 92.
(4) (1889) 14 App. Cas. 337.
(5) (1924) 130 L.T.R. 622.
(6) [1895] 1 C.B. 951.
(7) (1895) 14 M.&.W. 651.
(8) (1869) L.R. 4 Q.B. 706.

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by a third party, upon which the plaintiff acted to his detriment. This decision apparently proceeded upon the ground that there was no contract between the plaintiff and the defendant but in *Dickson v. Reuter's Telegram Company, Limited* (1), the Common Pleas Division held that the decision disposed of the case before it where the defendant had negligently delivered to the plaintiffs a message intended for a third person and the plaintiffs had suffered damages as a consequence of acting upon the telegram. *Rawlins v. Bell* and *Ormrod v. Huth* were referred to by Denman J., speaking on behalf of the Court. The judgment of the Common Pleas Division was affirmed by the Court of Appeal (2). Lord Justice Bramwell stated that plaintiffs' counsel had admitted that the case prima facie fell within the general rule "That no action is maintainable for a mere statement although untrue and although acted on to the damage of the person to whom it is made unless that statement is false to the knowledge of the person making it." After posing the question whether any duty arose by law he proceeded:— "If it did arise by law, the consequence would be that the general rule which has been admitted to exist is inaccurate, and that it ought to be laid down in these terms, that no action will lie against a man for misrepresentation of facts whereby damage has been occasioned to another person, unless that misrepresentation is fraudulent or careless. But it is never laid down that the exemption from liability for an innocent misrepresentation is taken away by carelessness." Lord Justice Brett said that the general rule was that no erroneous statement is actionable unless it be intentionally false and that this seemed to be admitted by the plaintiffs' counsel. Lord Justice Cotton pointed out that it was admitted that misrepresentation alone would not have supported an action but that it was contended that owing to the nature of the business carried on by the defendants they were bound to warrant the accuracy of the message, or at least to guarantee that every precaution had been taken by their agents to avoid mistake. In *Balden v. Shorter* (3), Maugham J. decided that an action would not lay if a person by a false statement made negligently but in the belief that it was true led a third person to act to his damage.

(1) (1876) L.R. 2 C.P.D. 62. (2) (1877) L.R. 3 C.P.D. 1.
(3) [1933] 1 Ch. 427.

In *Nocton v. Ashburton* (1), the House of Lords decided that *Derry v. Peek* did not prevent an action succeeding where there was a fiduciary relationship between a mortgagee and a solicitor but, at page 948, Lord Haldane pointed out that "liability for negligence in word has in material respect been developed in our law differently from liability for negligence in act." In truth there appear to be weighty reasons for differentiating between the liability in these two classes of cases. Defamatory statements, oral or written, were in very early times placed in a category by themselves and with the protection afforded by the law to those so affected there was a reluctance to hold liable in damages the publishers of incorrect non-defamatory statements made negligently but not maliciously. It is important to note that the same reluctance existed in the State of New York because the judgment of Cardoza J., speaking for the majority of the Court of Appeals, in the well-known case of *MacPherson v. Buick* (2), was approved by two of their Lordships in *Donoghue v. Stevenson.*

The Court of Appeals, speaking through the same judge who by then had become Chief Judge, also decided *Glanzer v. Shepherd* (3). There a public weigher employed by a seller of beans by his negligence in weighing, or in reporting the weight, gave to the purchaser a certificate which erroneously overstated the amount delivered. A third party relying upon the certificate sustained damages for which the weigher was held liable upon the ground that the controlling circumstance was not the character of the consequences but its proximity or remoteness in the thought and purpose of the action, and that the copy of the weigh slip was sent to the plaintiff for the very purpose of inducing action. Subsequently, in *Jaillet v. Cashman* (4), the Court of Appeals, affirming the judgments below, held that a stock-ticker company was not liable where it had given wrong information as to the decision of a Court, as a result of which a speculator reading the tape in a broker's office was misled into dealing in shares the value of which was affected by the decision. No reasons were given but the trial Court had compared the ticker services to a newspaper, stating that practical expediency was more important than logic. Still later, in *Ultra Mares v. Houche* (5),

(1) [1914] A.C. 932.
(2) (1916) 217 N.Y. 382.
(3) (1922) 223 N.Y. 236.
(4) (1923) 235 N.Y. 511.
(5) (1931) 255 N.Y. 170.

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Chief Judge Cardoza delivered the unanimous judgment of the Court of Appeals and, referring to *Jaillet v. Cashman,* stated that "if liability had been upheld, the step would have been a short one to the declaration of a like liability on the part of proprietors of newspapers." In the case then before him, public accountants were held not liable for an inaccurate certificate as to a company's finances if made merely negligently and not fraudulently. The Chief Judge pointed out at page 185 that if, as was argued, the principle should be extended so as to cover such a case "the extension, if made, will so expand the field of liability for negligent speech as to make it nearly, if not quite, co-terminus with that of liability for fraud." Such an expansion had already been negatived by Lord Justice Bramwell in the *Dickson* case.

We may now revert to the decision in *Donoghue v. Stevenson,* upon which the trial judge and the dissenting judge in the Court of Appeal relied. While there are traces in some quarters of a distinction being drawn between damages for injuries to a person in body or mind or damages to a person's property on the one hand, and economic loss on the other, there would appear to be difficulty in ascertaining a sound basis for such a distinction. On the other hand there may be differences of substance between cases where a person of his own volition proceeds to act upon a negligent but non-fraudulent mis-statement, and where he does not so act but suffers damage as a direct result of the mis-statement. No opinion, therefore, is expressed as to the decision of the Court of Appeal in *Candler v. Crane* (1). In any event it is unnecessary to explore these matters further because I am of opinion that in this case the appellant was not a "neighbour" of the respondent within the meaning of Lord Atkin's oft-quoted statement in *Donoghue v. Stevenson* since she was not a person so closely and directly affected by the publishing of the report that the respondent ought reasonably to have the appellant in contemplation as being affected injuriously when it was directing its mind to the act of publishing. This being so, there was no duty in law owed by the respondent to the appellant.

The appeal should be dismissed with costs.

(1) [1951] 2 K.B. 164.

ESTEY, J.:—The respondent published, under date of February 3, 1948, in its newspaper the Vancouver Sun, the following:

EX-VANCOUVER MAN, CHILDREN
KILLED IN CRASH

A former Vancouver man and his three children were killed in an automobile-train collision in Northern Ontario over the weekend, according to word received by relatives here.

Mrs. R. C. Guay, 1972 West Sixth, said today she and her husband had been notified that her husband's brother, Dick Guay, his daughter and two sons, are all dead.

The wife of the dead man is believed to be in Vancouver, Mrs. Guay said.

Mr. Guay left Vancouver last June and has been living in North Bay.

The accident occurred when he was motoring with the three children from Timmins to North Bay. The news of the tragedy was sent here by another brother who lives in Ontario.

This news item was, upon the evidence, probably delivered at the office of the respondent by some person whose identity has not been determined. It was a false statement, published as received, without in any way checking its contents.

The appellant read this item on the evening of its publication and was naturally deeply grieved and affected. She inquired at the address given and found that no Mrs. Guay resided there, nor could she obtain any information with respect to the contents of the news item. She later inquired by telephone of the respondent and received a very indifferent answer. A friend later telephoned with the same result, but no effort was made to inquire of the officers or employees in the more responsible positions. In the result, respondent officers did not learn of the misstatement until the appellant consulted a lawyer in the fall who, under date of November 5, 1948, wrote a letter advising that based upon "negligent editing" a claim for damages would be made. The investigation then made by the respondent could not ascertain precisely just how the statement had been received, more than that it was not from one of the recognized news services.

The appellant alleges that as a consequence of reading this news item she "suffered shock resulting in an acute anxiety state." On her behalf it is submitted that such shock was a foreseeable consequence within the meaning of

our law of negligence and, therefore, before publication the respondent owed a duty to her to exercise reasonable care to verify the truth thereof.

Counsel for the appellant did not cite, nor have we found in our law, a decision directly in point. He submits, however, that if not before then since the decision of *Donoghue v. Stevenson* (1), respondent owed the duty already expressed to the appellant and, because she suffered shock resulting from a breach thereof, she should recover therefor.

Counsel for the respondent submits that throughout the decided cases and recognized texts, both before and since the *Donoghue* decision, statements are found to the effect that recovery is not permitted for damage resulting from statements negligently made.

In Salmond on the Law of Torts, 10th Ed., 1945, at p. 580, the learned author, in discussing the law of deceit, states:

> Mere negligence in the making of false statements is not actionable either as deceit or as any other kind of tort. This is the anomalous rule established by the House of Lords in the leading case of Derry v. Peek, (1889) 14 App. Cas. 337. Although in almost all other forms of human action a man is bound to take reasonable care not to do harm to others, this duty does not extend to the making of statements on which other persons are intended to act.

In Pollock on Torts, 11th Ed., 1951, at p. 430, the learned author, after discussing liability in tort arising out of a contract in favour of a contracting party against one not a party to the contract, goes on to discuss that under English law a telegraph company is not liable to the recipient of a telegram for damages caused by the negligent transmission of that message, while in the United States a telegraph company would be liable to such a recipient. After pointing out that the United States decisions "are on principle correct," the learned author goes on to state at p. 430:

> Generally speaking, there is no such thing as liability for negligence in word as distinguished from act and this difference is founded in the nature of the thing.

In *Dickson v. Reuter's Telegram Company* (2), cited by the learned author, Brett L.J., at p. 7, states:

> If the case for the plaintiffs be simply that there was a misrepresentation upon which they have reasonably acted to their detriment, it must fail, owing to the general rule that no erroneous statement is actionable unless it be intentionally false.

(1) [1932] A.C. 562.   (2) [1877] L.R. 3 C.P.D. 1.

In a note at p. 429 of Pollock on Torts, 11th Ed., referring to the *Dickson* case, it is stated:

> Its authority would be impaired if Lord Atkin's wide principle in Donoghue v. Stevenson, 1932, A.C. 562, could be accepted, but it is submitted that it is still good law.

Bowen L.J. in *Le Lievre v. Gould* (1), referring to "the suggestion that a man is responsible for what he states in a certificate to any person to whom he may have reason to suppose that the certificate may be shewn", adds that

> The law of England does not go to that extent: it does not consider that what a man writes on paper is like a gun or other dangerous instrument, and, unless he intended to deceive, the law does not, in the absence of contract, hold him responsible for drawing his certificate carelessly.

The foregoing quotations and others to similar effect are found in discussions of false statements intentionally made or statements which, when negligently made, have induced a person to pursue a course of action from which he suffered financial loss. They are, therefore, not made in relation to a discussion of an issue such as here raised.

Respondent submitted that *Candler v. Crane Christmas & Co.* (2), supported his contention. In the *Candler* case a firm of accountants was employed to prepare a statement of accounts and a balance sheet. Their clerk, in the course of his duty, negligently prepared the statement of accounts and a balance sheet which he knew would be used to induce the plaintiff to invest. The latter, relying thereon, did invest and suffered a loss. The accountants, however, were held not liable. The majority of the Lord Justices felt bound by *Le Lievre v. Gould, supra,* while Lord Denning, in a dissenting opinion, though since *Donoghue v. Stevenson, supra,* such precedents ought to be reviewed. Whatever the decision may be when such a case is reviewed by the House of Lords, it and similar cases have to do with negligent misstatements which induced a decision on the part of the plaintiff to pursue a course of conduct from which he suffered financial loss. There the essential factor is the inducement founded upon the misstatement, which is quite different from the present case where the contention is that the respondent suffered shock from a reading of the misstatement.

(1) [1893] 1 Q.B. 491 at 502. (2) [1951] 1 All E.R. 426.

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While there does not appear to be any difference in principle between pecuniary and personal injury, historically greater emphasis has been placed upon the latter. What is important is the difference in the nature and character of negligent misstatements which cause someone to act to his detriment and those that normally and usually cause shock and consequent physical illness or other injury.

In the absence of binding authority the issue must be determined upon principle. At common law defamatory statements and malicious statements relative to title or goods and deceit are treated in a manner separate and distinct from acts or other conduct. On the other hand, a person who intentionally makes false statements is liable in damages for personal injuries which directly result therefrom. *Wilkinson v. Downton* (1); *Janvier v. Sweeney* (2); *Bielitzki v. Obadisk* (3).

That facts similar to those here present have not been the subject of litigation in our own courts may be due to several factors. Newspapers gather and publish news in a manner that, having regard to the nature of their business, even if due care be used, errors and mistakes will occur. These errors and mistakes are so common that the natural impulse is, upon reading such an item, that it may not be true and to commence appropriate inquiry. Moreover, the question of liability for physical injuries consequent upon shock has been of comparatively recent origin and the law in relation thereto does not appear to be settled. *Victorian Railways Commissioners v. Coultas* (4); *Dulieu v. White & Sons* (5); *Hambrook v. Stokes Bros.* (6); *Owens v. Liverpool Corporation* (7); *Bourhill (Hay) v. Young* (8). Whatever the reason may be, no similar case has been found in the reports in our own country or in Great Britain and counsel cited only two in the United States.

In the United States the plaintiff in both cases was denied recovery. *Herrick v. Evening Express Pub. Co.,* (9) is a decision of the Supreme Judicial Court of the State of Maine. The Portland Evening Express Advertiser negligently published, under the heading "Boy Dies Across," a

(1) [1897] 2 Q.B. 57.
(2) [1919] 2 K.B. 316.
(3) (1921) 15 S.L.R. 153.
(4) (1888) 13 App. Cas. 222.
(5) [1901] 2 K.B. 669.
(6) [1925] 1 K.B. 141.
(7) [1939] 1 K.B. 394.
(8) [1943] A.C. 92.
(9) (1921) 113 A. 16.

picture of the plaintiff's son and a report of his death. In fact the plaintiff's son was not dead. Recovery was denied on the basis that damages for mental suffering, apart from physical impact, could not be recovered.

Curry et ux. v. Journal Pub. Co. et al (1), is a case almost identical in its facts. The proprietors of the Albuquerque Journal, a daily newspaper in New Mexico, negligently published that "George Curry, 70, former territorial governor of New Mexico, . . . died here Sunday afternoon." In fact he had not died. This news item was read by his son Clifford Curry and the latter's wife and as a consequence both suffered mental and physical injury. The court stated two questions, first "Are damages that result from words negligently spoken or written, as distinguished from acts, actionable?" and second "Can damages be recovered from the publishers of a newspaper for the consequences of grief resulting in physical injury, occasioned by reading in such paper a negligently published false report of the death of the reader's parent?" Both British and United States authorities were considered and the decision was undoubtedly influenced by cases similar in character to the *Candler* case, *supra,* and particularly the decision of *Jaillet v. Cashman* (2) (affirmed in the Appellate Division (3), and in the Court of Appeals (4)). There the defendant supplied to its subscribers items of current news by what is known as a ticker service. The plaintiff read from this ticker service an incorrect report of a decision of the United States Supreme Court dealing with the matter of taxation. As a consequence the plaintiff sold his stock and suffered a loss which he could not recover from the operator of the ticker service. In the course of the reasons for judgment it was stated at p. 173:

> No attempt has been made by any American court . . ., nor will be by us, to state rules which will apply generally to all conditions or circumstances, which will authorize a recovery for damages resulting from false words negligently written or spoken, and in the absence of contract, malice, intentional injury, or other like circumstance. We hold that in some such cases recovery may be had, but we will confine our decision to the facts of this particular case.

(1) (1937) 68 P. (2d) 168.
(2) 189 N.Y.S. 743.
(3) 194 N.Y.S. 947.
(4) 235 N.Y. 511.

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The Court found more than one basis upon which to deny liability, one of which was expressed at p. 174 as follows:

> In this world of disease and death the families of aged persons, while never entirely prepared, yet may not be greatly surprised to hear of their death at any time; and such serious consequences to the plaintiffs, and particularly to Mrs. Curry (a daughter-in-law of Governor Curry), are so unusual and unlikely to happen under any circumstances, and certainly not to persons in good health (and nothing appears to the contrary), that it cannot be said there was an appreciable chance of such results; and defendants, as reasonable men, could not have realized that there was an appreciable risk to the health of plaintiffs from reading the article, though they had known of plaintiffs' existence, which does not appear.

The Court, it would appear, in the foregoing is directing its mind to the issue of the existence of a duty rather than to that of remoteness of damage.

Lord Wright, in *Bourhill (Hay) v. Young* (1), after pointing out that damage by mental shock may give a cause of action, went on to state at p. 106:

> Where there is no immediate physical action by the defendant on the plaintiff, but the action operates at a distance, or is not direct, or is what is called nervous shock, difficulties arise in ascertaining if there has been a breach of duty.

The difficulty here envisaged is emphasized by a consideration of *Dulieu v. White & Sons* (2), where Kennedy J. was of the opinion that the shock, in order to provide a basis for liability, must arise from "a reasonable fear of immediate personal injury to oneself," which the Court of Appeal refused to follow in *Hambrook v. Stokes Bros.* (3). This conflict of opinion, though considered, was not resolved in *Bourhill (Hay) v. Young, supra.*

In view of the more recent development of the law of torts and the present state of authorities, I am not prepared to say that there can never be recovery for physical illness or other injury caused by shock consequent upon negligent misstatements. Whether in a particular case such as the present a duty to exercise due care exists because injury, as a normal and ordinary consequence, would be foreseeable to a reasonable person, always presents an important and difficult question. While rather disposed to the conclusion upon the authorities already mentioned and, in particular, the remarks in *Bourhill (Hay) v. Young, supra,* and those of Professor Goodhart in Modern Law

(1) [1943] A.C. 92. (2) [1901] 2 K.B. 669.
(3) [1925] 1 K.B. 141.

Review, Vol. 16 at p. 25, that in the particular facts of this case a duty does not rest upon the respondent, it is unnecessary to decide that issue. Even if it be assumed that such a duty rested upon the respondent, which I do not decide, it is an essential part of the appellant's case that damages be established. *J. R. Munday Limited v. London County Council* (1); Pollock on Torts, 15th Ed., p. 139; Winfield Law of Torts 5th Ed., p. 19.

No question as to the sufficiency of the proof of damage appears to have been raised before the learned trial judge. The evidence discloses that at the time of reading the article the appellant was emotionally upset, but it does not disclose illness or absence from work at that time. While this is not conclusive, it is, in the circumstances of this case, significant. The appellant had purchased a restaurant in 1946 and had sold it in December, 1947, when she took a trip east and visited her children. She returned to Vancouver in January, 1948, and went to work at Pratts Secret Service with whom she was employed as an investigator "checking on the employees" of another employer. At the time of reading the item here in question she was so employed and states that a few weeks later she was asked to resign, as her work was not satisfactory. In the following May, 1948, she took back the restaurant and again sold it in May, 1949. Thereafter she accepted a position at Eaton's which she retained until January, 1950, when she was laid off because "they were over-staffed." She went back to work for Eaton's in the spring of 1950 and at the time of the action was employed with the B.C. Electric. No person was called who had been associated with her either in business or socially who deposed to any illness or change of conduct on her part. She herself stated:

> I would not say that I am sick or anything, but any time any little things upset me so badly. When I balance the cash, if there is a few cents short, I will be nights without sleep. Everything upsets me. Otherwise, physically, I am O.K.

The medical evidence is far from conclusive. Although the article appeared on February 3, a doctor was not consulted until October. He deposed that there was no physical disability other than the fact that she was suffering from an anxiety as exemplified by symptoms of pulse and moist or cold palms and soles. He did express his opinion,

(1) [1916] 2 K.B. 331.

based upon her history as she gave it to him and his own examination, that her condition was directly related to the reading of the news item here in question. He, however, went on to depose that the fact that she had been living apart from her husband and children, with the attendant uncertainty and insecurity, would cause her condition of anxiety such as he found it. Another doctor agreed that her condition might be the result of her separation from husband and family and, in referring particularly to emotional disturbances, stated:

> I think, in medical experience and psychological experience as it usually occurs it is an examination of various factors, and it is difficult to single out one factor and say, "That is the factor".

In *Wilkinson v. Downton, supra,* where, because of the intentionally made false statement, the plaintiff suffered shock causing physical illness and other injury, the remarks of Wright J. at p. 58 are relevant to this issue:

> These consequences were not in any way the result of previous ill-health or weakness of constitution; nor was there any evidence of predisposition to nervous shock or any other idiosyncrasy.

Moreover, it is important to keep in mind what must be proved in order that damages may be recovered, as stated in Pollock on Torts, 15th Ed. at p. 37, as follows:

> A state of mind such as fear or acute grief is not in itself capable of assessment as measurable temporal damage. But visible and provable illness may be the natural consequence of violent emotion, and may furnish a ground of action against a person whose wrongful act or want of due care produced that emotion. . . . In every case the question is whether the shock and the illness were in fact natural or direct consequences of the wrongful act or default; if they were, the illness, not the shock, furnishes the measurable damage, and there is no more difficulty in assessing it than in assessing damages for bodily injuries of any kind.

In my opinion the evidence does not establish that the appellant suffered physical illness or other injury consequent upon shock or emotional disturbance caused by a reading of the item in question.

The appeal should be dismissed with costs.

LOCKE, J.:—This is an appeal from a judgment of the Court of Appeal for British Columbia (1) which allowed the appeal of the present respondent from a judgment for damages awarded against it at the trial by Wood, J. O'Halloran, J.A. dissented and would have dismissed the appeal and increased the amount of damages awarded.

(1) [1952] 2 D.L.R. 479; 5 W.W.R. (N.S.) 97.

The question to be determined is one of general importance. The respondent company publishes a daily newspaper called the Vancouver Sun having a large circulation in Vancouver and throughout the Province of British Columbia. On February 3, 1948, there appeared in the newspaper the following article:—

Ex-Vancouver man, Children
Killed in Crash

A former Vancouver man and his three children were killed in an automobile-train collision in Northern Ontario over the weekend, according to word received by relatives here.

Mrs. R. C. Guay, 1972 West Sixth, said today she and her husband had been notified that her husband's brother, Dick Guay, his daughter and two sons, are all dead.

The wife of the dead man is believed to be in Vancouver, Mrs. Guay said.

Mr. Guay left Vancouver last June and has been living in North Bay.

The accident occurred when he was motoring with the three children from Timmins to North Bay. The news of the tragedy was sent here by another brother who lives in Ontario.

No such accident had taken place. There was no such person as Mrs. R. C. Guay living at the address given and there is no evidence that anyone of that name had made any such statement as was attributed to her by the article.

The appellant, the wife of the man referred to as "Dick" Guay and the mother of the three children, by her statement of claim alleged that the publication of the article was negligent on the part of the respondent and that, as a result of such publication she was caused to believe that her husband and children had been killed and, in consequence, suffered shock which resulted in an acute state of anxiety, as a consequence of which she had been unable to carry on her customary occupation and would, for an indefinite time, be partially disabled. She further claimed that she had for a period of approximately three weeks been unable to discover the truth and, believing during such period that her children and husband were dead, had suffered intense mental anguish which affected her mental and physical well-being. Malice on the part of the respondent was not pleaded.

While the question to be determined is a matter of law, it is, I think, of some importance to consider the facts in this particular case, in order to appreciate the extent of the liability of newspapers contended for by the appellant.

The appellant lives in Vancouver and, at the time of the publication of the article in question, was living apart from her husband, in accordance with the terms of an agreement of separation made between them on February 4, 1947. Three children had been born of her marriage to Ulderic Guay and by the terms of the agreement the husband undertook the custody of the children and their maintenance and support and it was agreed that he should be at liberty to remove them to the Town of Val Gagni, Ont., where his brother and sister resided and where suitable schooling and maintenance might be afforded to the children. The parties agreed thereafter to live separate and apart, the wife to be free of any control or authority of the husband and surrendering all claims upon him for support or maintenance. The agreement contained further provisions that the wife should have the right of access to the children at all reasonable times. In accordance with this agreement, Guay had removed the children to Timmins, Ont. during the summer of 1947 and the appellant had spent Christmas and New Year's with them at that place, returning to Vancouver on January 7, 1948. It was on February 2 of that year that she saw the article in question.

While it might have been expected that the appellant reading of the death of all the members of her family would have either telephoned immediately to the persons in Timmins with whom her children resided to obtain further information and to learn where and when they were to be buried, or obtained this information by telegraph, she did none of these things. According to her, she had some friends telephone to the Sun newspaper but they could not get any "satisfactory explanation" and accordingly she wrote to her husband's relatives in Ontario but got no answer. She also wrote to her mother who, in turn, wrote to her eldest brother in Quebec to investigate whether the article had appeared in the Eastern papers. The brother apparently wired the Chief of Police in Timmins who informed him that there never had been such an accident. He then wired this information to his mother who lived in Saskatchewan, who, in turn, forwarded the telegram to Mrs. Guay at Vancouver. According to the appellant, she received this wire which had been sent to her brother from Timmins on February 19 around the beginning of March.

She had, however, some three or four weeks after February 2 received a letter from one of the children, which was the first intimation she had that the article had been untrue.

At the time of the publication the appellant was employed as a store detective by a commercial firm in Vancouver and while she continued in that employment for a few weeks she was so upset by the news that she was unable to carry on her duties and was asked by her employer to resign. She first consulted a doctor on October 27, 1948. According to her, she had been nervous and upset since reading the article but, as she thought there was nothing wrong with her physically, she had not thought that there was any point in seeing a physician. Doctor Kaplan, whom she first consulted, had examined her and found that her pulse rate was high, that she had an increased blood pressure and suffering from sweating of the palms with cold extremities, these symptoms indicating to him that she was suffering anxiety. Doctor Kaplan had experience in psychiatric work and after hearing Mrs. Guay's story prescribed concentrated therapy. In his opinion, her condition was directly related to the incident in question.

While Mrs. Guay had telephoned to the newspaper office a few days after the publication, the person to whom she spoke and whose identity does not appear told her that the reporter who had turned in the article was out and was unable to give her any information. The employer of her sister, at the latter's instance, also telephoned to the respondent's office and spoke to someone who, he thought, was a person at the news desk who could not tell him the source of the information upon which the article was based. It was not until November 5, 1948, more than nine months after the time of publication, that the solicitors wrote the publishing company to say that the appellant claimed damages for negligence, by reason of the publication. In the letter it was said that, as a result of what was described as "a series of fortuitous circumstances" Mrs. Guay had been unable to discover the erroneous nature of the report for some weeks.

According to Mr. Charles F. Bailey, the business manager of the respondent company, the first intimation that had been received by the respondent that the article published

had been incorrect was this letter from the solicitors. After receiving the letter, endeavours had been made to locate the R. C. Guay referred to in the article but no one of that name lived at 1972 West 6th Avenue in Vancouver and they were unable to find any such person. Inquiries were also made among the employees of the publishing company but none of those in its employ at that time knew anything about the matter and the respondent had been unable to ascertain by whom the report had been turned in to the office. According to Mr. Bailey, an average of from 800 to 1,000 despatches or news reports of various kinds are received daily and, of these, less than half are published. News despatches are received from the Canadian Press and the British United Press but the article in question had not been transmitted by either of these organizations. Asked as to the manner in which other news received by the paper was handled, he said that stories brought in by their own trained reporters were not checked, except for further background material and that:—

> Similarly where news reports that come from our country correspondents, unless there should be something in the nature of the story that would indicate that further enquiries should be made before it was published. It would not normally be checked; other than for elaboration. Unsolicited stories, particularly those that would come in by telephone, we or any other newspaper would normally be wary of and more careful. Those presented in person would have to be checked, largely on their merits, by the decision of the editor handling the story.

He said further that it was in the discretion of the editor handling the matter as to what check there should be made. Whether the story in question had been received by the newspaper in writing or by telephone and reduced to writing in the office, does not appear. Owing to the volume of material that came in to the office of such a newspaper every day, it is found impossible, according to this witness, to keep it on file for any protracted length of time. The delay in disputing the accuracy of the report had thus prevented the respondent from making any effective efforts to find out the source of its information for the article in question.

The respondent had been unable to find anyone in its employ in November 1948 who had been in its employ in February 1948 who knew the appellant or her husband or any of her family. It is, I think, apparent, however, from the terms of the article that the information had been given

to the respondent by some one who knew something about the family of the appellant (which consisted of a daughter and two sons as stated) and it being the fact that Guay had left Vancouver the previous June and had been living in North Bay or in that vicinity. Whether the informant had heard a false report of such an accident or acted maliciously in giving the information to the newspaper cannot be determined. The good faith of the respondent, however, is not questioned.

Wood, J. by whom the action was tried, considered that the judgment of Lord Atkin in *Donoghue v. Stevenson* (1), stated the principle which should be applied. The passage in the judgment relied upon reads:—

> The liability for negligence, whether you style it such or treat it as in other systems as a species of 'culpa', is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay. But acts or omissions which any moral code would censure cannot in a practical world be treated so as to give a right to every person injured by them to demand relief. In this way rules of law arise which limit the range of complainants and the extent of their remedy. The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, Who is my neighbour? receives a restricted reply. 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.

The learned trial Judge found on the evidence that the respondent had been negligent in publishing the article. He then said:—

> I take the view that the defendant owed a duty to the plaintiff and that as a result of its failure to observe that duty the plaintiff suffered.

The exact nature of the duty is not stated but I think it to be clear that it was to refrain from publishing a news item of this nature, without first making reasonable efforts to ascertain that the facts were as stated.

In the Court of Appeal (2), Sidney Smith, J.A., with whom Robertson, J.A. agreed, was of the opinion that nothing decided in *Donoghue v. Stevenson* touched the question in the present matter. I respectfully concur in that opinion. The learned Justice of Appeal considered that the matter was to be determined upon the principle

(1) [1932] A.C. 562 at 580. (2) [1952] 2 D.L.R. 479; 5 W.W.R. (N.S.) 97.

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which had been applied in *Shapiro v. La Morta* (1) and *Balden v. Shorter* (2). O'Halloran, J.A. agreed with Wood, J. and in concluding his judgment said in part:—

> Once the Donoghue concept of the tort of negligence is accepted, then whether appellant owed a duty vis-a-vis the respondent not to harm her by negligent publication of a false news item of the kind in this case, is a question of fact.

and said that this fact had been found in favour of the present appellant by the trial Judge who had neither misapprehended the evidence or misconceived its weight. He further expressed the opinion that the general damages allowed had been inadequate and would have allowed the appeal and increased the amount to $3,000.

In my opinion, there was evidence from which the learned trial Judge might draw the inference that the defendant had acted negligently in publishing the article without first making an effort to ascertain its accuracy. There may have been some explanation regarding this aspect of the matter which might have been made, had the appellant made her claim promptly instead of waiting for a period of over nine months. Since, however, the respondent was unable to give any evidence at all as to the source of its information and as an enquiry by telephone or otherwise would have immediately disclosed the fact that there was no such person as Mrs. R. C. Guay living at 1972 West 6th Avenue and no one of that name known there, the finding at the trial that this was negligent conduct should not, in my opinion, be disturbed. The question to be determined in this appeal is as to whether, assuming that the appellant suffered injury in consequence of the publication, she has a right of action against the respondent.

It is well at the outset in a matter of such importance to consider the extent of the liability which, it is asserted, exists. It is neither suggested in the pleadings or the argument that the respondent acted maliciously or with any intent to injure the appellant, or that the statement was published recklessly without caring whether it was true or false, upon proof of which malice might be inferred. The case is to be decided upon the footing that the respondent acted honestly and in good faith. The appellant's contention, put bluntly, amounts to this that newspapers owe a duty to all those who may read their publications to

(1) (1924) 40 T.L.R. 201.
(2) [1933] 1 Ch. 427.

exercise reasonable diligence to see that any items they publish are true, and are accordingly liable for a negligent misstatement should damage result from its publication.

The statement complained of was a misrepresentation. A misrepresentation may be either innocent or fraudulent. If innocent, it may be a ground for rescission of a transaction or a good defence to an action for specific performance but, subject to the certain exceptions to be noted, it gives no right of action sounding in damages (*Heilbut v. Buckleton*) (1). In *Taylor v. Ashton* (2), an action was brought against directors of a bank for fraudulent misrepresentations as to its affairs. The jury found the defendants not guilty of fraud but expressed the opinion that they had been guilty of gross negligence. Baron Parke, who delivered the judgment of the Court, said as to this (p. 415):—

> It is insisted that even that (that is, the gross negligence) accompanied with a damage to the plaintiff in consequence of that gross negligence, would be sufficient to give him a right of action. From this proposition we entirely dissent; because we are of opinion that, independently of any contract between the parties, no one can be made responsible for a representation of this kind, unless it be fraudulently made.

In *Dickson v. Reuter's Telegram Company* (3), where the defendant, through the negligence of its servant, had delivered to the plaintiffs a message not intended for them and they, reasonably supposing that it came from their agents and was intended for them, acted upon it and thereby incurred a loss, Bramwell, L.J. said that the general rule of law is clear that no action is maintainable for a mere statement, although untrue, and although acted on to the damage of the person to whom it is made, unless that statement is false to the knowledge of the person making it. Brett, L.J. said (p. 7) that if the case for the plaintiffs was simply that there was a misrepresentation upon which they have reasonably acted to their detriment, it must fail, owing to the general rule that no erroneous statement is actionable unless it be intentionally false.

The decision in *Derry v. Peek* (4), must be considered together with *Nocton v. Ashburton* (5). *Derry v. Peek* was an action for damages for deceit, but certain statements made in the course of the judgments bear upon the matter

(1) [1913] A.C. 30 at 48.
(2) (1843) 11 M.&W. 402.
(3) (1877) L.R. 3 C.P. 1.
(4) (1889) 14 App. Cas. 366.
(5) [1914] A.C. 932.

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to be considered here. When that case was heard in the Court of Appeal (*Peek v. Derry* (1)), Cotton, Hannen and Lopes, L.JJ. had all expressed the view that if a false statement is made without reasonable ground for believing it to be true an action for deceit would lie and considered that, though fraud was not proven, the directors who made the statements were liable on this footing. The judgment of the Court of Appeal was reversed in the House of Lords. All of the law Lords disagreed with this view. Lord Herschell pointed out the essential difference between making a statement careless whether it be true or false and, therefore, without any real belief in its truth, and making a false statement through want of care which is nevertheless honestly believed to be true. For the latter class of statement there was no liability for deceit. Cotton, L.J. had said that when a man makes an untrue statement with an intention that it shall be acted upon without any reasonable ground for believing that statement to be true, he makes default in a duty which was thrown upon him from the position he has taken upon himself and he violates *the right which those to whom he makes the statement have to have true statements only made to them.* Referring to this, Lord Herschell said (p. 362):—

> Now I have first to remark on these observations that the alleged 'right' must surely be here stated too widely, if it is intended to refer to a legal right, the violation of which may give rise to an action for damages. For if there be a right to have true statements only made, this will render liable to an action those who make untrue statements, however innocently. This cannot have been meant.

After a review of the authorities he said further (p. 375):

> But that such an action (i.e. for deceit) could be maintained notwithstanding an honest belief that the statement made was true, if there were no reasonable grounds for the belief, was, I think, for the first time decided in the case now under appeal.

The directors of the railway company who had issued a prospectus containing a statement which they believed to be true, but which was in fact untrue, were relieved from the liability imposed upon them by the judgment of the Court of Appeal.

(1) (1877) 37 Ch.D. 541.

In *Angus v. Clifford* (1), decided by the Court of Appeal on an appeal from Romer, J. the effect of the decision in *Derry v. Peek* was considered. The head note which accurately expresses the result of the case reads:—

> If a person who makes a false statement entertains a bona fide belief that the statement is true, an action of deceit cannot be maintained against him on the ground that he formed his belief carelessly or on insufficient reasons. If he had formed no belief whether the statement was true or false, and made it recklessly without caring whether it was true or false, an action of deceit will lie against him. But not so if he carelessly made the statement without appreciating the importance and significance of the words used, unless indifference to their truth is proved.

The action was brought by the shareholder of a mining company for damages alleged to have been sustained by his having been induced to take shares in the company by untrue statements contained in the prospectus. The judgment of Romer, J. does not make quite clear the ground upon which he proceeded in holding the directors liable and he did not refer either to *Peek v. Derry* which had already been decided in the Court of Appeal or to *Derry v. Peek*. He found, however, that the statements were untrue, that they were material, and that the plaintiff had relied upon them and said that he thought it was clear that no proper care was taken by the defendants with reference to them. He did not find fraud. The decision was reversed in the Court of Appeal. Lindley, L.J., referring to the judgment of the learned trial Judge and after mentioning the fact that he had not found that the directors were guilty of fraud, said in part (p. 463):—

> Then he comes to the conclusion that that statement, being untrue, was material; and then he rather appears to have proceeded upon the theory, that that alone would be enough, without addressing his mind to the further question whether these gentlemen would be liable, supposing that they did make this untrue statement, but made it carelessly, as distinguished from fraudulently. His judgment, when we read it carefully, shews upon the face of it, I think, that his mind was not addressed to that particular point, which was the point mainly argued before us. The judgment, so far as I read it, seems to me quite consistent with his having proceeded upon the view that Peek v. Derry, 37 Ch.D. 541, as decided in this Court, was law, whereas it was reversed by the House of Lords, as we all know.

He said further, referring to the case by its title in the Court of Appeal (pp. 463-4):—

> Speaking of Peek v. Derry broadly, I take it that it has settled once for all the controversy which was well known to have given rise to very considerable difference of opinion as to whether an action for negligent

(1) [1891] 2 Ch.D. 449.

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misrepresentation, as distinguished from fraudulent misrepresentation, could be maintained. There was considerable authority to the effect that it could, and there was considerable authority to the effect that it could not; and as I understand Peek v. Derry (14 A.C. 337), it settles that question in this way—that an action for a negligent, as distinguished from a fraudulent, misrepresentation in a company's prospectus cannot be supported; I think it is perfectly impossible to read the judgments which were delivered in that case, especially Lord Herschell's to which I will allude presently, without seeing that that is the broad proposition of law which Peek v Derry has settled, and settled for good.

After considering in detail what had been said by Lord Herschell, Lindley, L.J. concluded (p. 466):—

If it is fraud, it is actionable, if it is not fraud, but merely carelessness —it is not.

Upon the evidence he found that there was no moral obliquity in what the directors had done, that it was what he described as "pure blundering, pure carelessness", and that being the case the action could not be maintained. Bowen, L.J. said that after reading the evidence he did not feel satisfied that there was any dishonesty at all, though he thought there was very gross and culpable carelessness in the use of their language.

In *Le Lievre v. Gould* (1), mortgagees of the interest of a builder under a building agreement advanced money to him from time to time on the faith of certificates given by a surveyor that certain specified stages in the progress of the buildings had been reached. The surveyor was not appointed by the mortgagees, and there was no contractual relation between him and them. In consequence of the negligence of the surveyor, the certificates contained untrue statements as to the progress of the buildings but there was no fraud on his part. Lord Esher, M.R. who had written one of the judgments in *Heaven v. Pender* (2), considered that the later case had no application and that it had been established by *Derry v. Peek* that in the absence of contract an action for negligence cannot be maintained where there is no fraud. This statement must be taken to be qualified by what was later decided in *Nocton v. Ashburton.* Bowen, L.J. said in part (p. 501):—

Negligent misrepresentation does not amount to deceit, and negligent misrepresentation can give rise to a cause of action only if a duty lies upon the defendant not to be negligent, and in that class of cases of which Derry v. Peek was one, the House of Lords considered that the circumstances raised no such duty.

(1) [1893] 1 Q.B. 491. (2) (1883) 11 Q.B.D. 503.

After referring to *Heaven v. Pender* and cases of that class and to the liability of owners of certain chattels and of dangerous premises, Bowen, L.J. asked himself if they had any application to cases such as the one under consideration and said as to this (p. 502):—

Only, I suppose, on the suggestion that a man is responsible for what he states in a certificate to any person to whom he may have reason to suppose that the certificate may be shewn. But the law of England does not go to that extent: it does not consider that what a man writes on paper is like a gun or other dangerous instrument, and, unless he intended to deceive, the law does not, in the absence of contract, hold him responsible for drawing his certificate carelessly.

A. L. Smith, L.J., who agreed in dismissing the appeal, was also of the opinion that the principle of *Heaven v. Pender* had no application to the case.

Nocton v. Ashburton (1), was an action brought against a solicitor claiming damages on the footing that the defendant had improperly and in bad faith advised Ashburton to realease from a mortgage held by him a valuable part of the security, knowing that it would thereby be rendered insufficient, and of having represented untruly that the remaining security would be sufficient. *Derry v. Peek* was considered at length in the judgments delivered.

The trial Judge, Neville, J. had found that the charge of fraud was not proved and dismissed the action. The Court of Appeal had reversed the finding and granted relief on the ground that there had been fraud. It was decided in the House of Lords that upon the evidence the Court of Appeal was not justified in reversing the finding of fact of the trial Judge but that the plaintiff was not precluded by the form of his pleadings from claiming relief on the footing of a breach of a duty arising from the existence of a fiduciary relationship and was entitled to succeed on that ground. The summary of the judgment of Viscount Haldane, L.C., contained in the head note of the report, sufficiently states the effect of the judgments of the Lord Chancellor and of Lord Dunedin and Lord Shaw of Dumferline, a majority of the members of the Court. It reads as follows (p. 932):—

Per Viscount Haldane L.C.: Derry v. Peek (1889) 14 App. Cas. 337, which establishes that proof of a fraudulent intention is necessary to sustain an action of deceit, whether the claim is dealt with by a Court of Law or by a Court of Equity in the exercise of its concurrent jurisdiction, does not narrow the scope of the remedy in actions within the exclusive

(1) [1914] A.C. 932.

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jurisdiction of a Court of Equity, which, though classed under the head of fraud, do not necessarily involve the existence of a fraudulent intention, as, for example, an action for indemnity for loss arising from a misrepresentation made in breach of a special duty imposed by the Court by reason of the relationship of the parties.

Unless innocent misrepresentations made in the course of the negotiations leading up to the formation of a contract or in company prospectuses (before the latter matter was dealt with by statute) are to be distinguished from innocent misstatements of fact made in a newspaper or by an individual orally or in writing, this was the state of the law, as it affects the matter in question here, in 1932 when *Donoghue v. Stevenson* was decided. In that well-known case a shop assistant sought to recover damages from a manufacturer of aerated waters for injuries suffered as a result of consuming part of the contents of a bottle of ginger beer which contained the decomposed remains of a snail. The ginger beer had been purchased in a cafe in Paisley and not from the manufacturer. It was contained in a sealed glass container which would not in the ordinary course of events be opened until required for consumption. The exact point to be determined, and indeed the only point, was as to whether under these circumstances the manufacturer owed a duty to the ultimate consumer to take reasonable care that the contents of the bottle were fit for human consumption.

The present action is one of many, however, which have been undertaken on the footing that much more than this was decided in the judgment of Lord Atkin in the passage to which reference was made by the learned trial Judge. In *Grant v. Australian Knitting Mills Ltd.* (1), the Judicial Committee considered *Donoghue's* case and, after saying that they would follow it and that the only question which they were concerned with was what the case decided, said (p. 102):—

Their Lordships think that the principle of the decision is summed up in the words of Lord Atkin:—

A manufacturer of products, which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him with no reasonable possibility of intermediate examination, and with the knowledge that the absence of reasonable care in the preparation or putting up of the products will result in an injury to the consumer's life or property, owes a duty to the consumer to take that reasonable care.

(1) [1936] A.C. 85.

Shapiro v. La Morta (1), referred to in the reasons for judgment of Sidney Smith, J.A. was decided prior to *Donoghue's* case. The action was brought by a professional pianist against the proprietors of a music hall who had erroneously published a report that she would appear at their hall during a certain week. In consequence, she lost another engagement and brought an action for injurious falsehood. Lush, J. held that as the statement was published bona fide the plaintiff could not recover and this was sustained by the unanimous judgment of the Court of Appeal consisting of Bankes, Scrutton and Atkin, L.JJ. The latter, it will be noted, agreed with Scrutton, L.J. that the statement was not actionable in the absence of malice.

In *Balden v. Shorter* (2), an action for injurious falsehood, Maugham, J. dismissed the action, holding that malice had not been shown and that the words were at the worst made without any indirect motive or any intention of injuring the plaintiff and in the belief that they were true. While this case was decided after the decision in *Donoghue v. Stevenson,* that case was not referred to either in the argument of counsel nor in the judgment.

In *Old Gate Estates v. Toplis* (3), a case referred to by the learned trial Judge and, I think, applied by him to a limited extent, the action was brought against a firm of valuators for negligence in making their valuation of certain real property. The valuation had been made at the request of the promoters of the plaintiff company but it was contended that the defendants knew that it was to be used for the purpose of the company and, therefore, owed a duty to the company to take proper care in making the valuation. Wrottesley, J., after referring to the passage from the judgment in *Donoghue v. Stevenson,* referred to by the learned trial Judge in the present matter, held the principle there stated to be inapplicable, it being confined to negligence which resulted in danger to life, limb or health, while the claim by Old Gate Estate Limited was for pecuniary loss. With respect, I think the true ground for distinguishing Donoghue's case was not that stated but rather that *Le Lievre v. Gould,* above referred to, was still the law and was decisive of the issue. I do not think the question as to whether a duty exists is to be decided by the nature of the injury claimed to have been sustained.

(1) [1924] 40 T.L.R. 201. (2) [1933] 1 Ch. 427.
(3) [1939] 3 All E.R. 209.

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The only other reported decision in England to which, I think, reference may usefully be made is *Candler v. Crane* (1), where in an action brought against a firm of accountants for negligence in preparing a financial report it was again attempted to apply the language of Lord Atkin in *Donoghue's* case to a case of negligent misstatement. Cohen and Asquith, L.JJ. following *Derry v. Peek* and *Le Lievre v. Gould,* were of the opinion that the action had been properly dismissed by the trial Judge, the false statements having been made carelessly but not fraudulently, and were not actionable in the absence of any contractual or fiduciary relationship between the parties and that this principle had in no way been qualified by the decision of the majority in Donoghue v. Stevenson. Denning, L.J. dissented.

Sammond on Torts, 10th Ed. 580, states the result of the decision in *Derry v. Peek* as being that a false statement is not actionable as a tort unless it is wilfully false and that mere negligence in the making of false statements is not actionable either as deceit or as any other kind of tort. The exceptions to the rule are then stated as being where there is a contractual duty, a fiduciary relationship as in *Nocton v. Ashburton,* and cases of warranty of authority and certain cases where the rule as to estoppel by representation may operate. It cannot be and is not suggested that the present case falls within any of these exceptions.

In the October 1951 issue of the Modern Law Review there is an article by Lord Wright regarding *Re Polemis* (2), in which, after referring to the difficulty which sometimes arises in distinguishing cases of remoteness of damage from cases of absence of duty, he says in part (14 Mod. L.R. 401):—

I may here note without developing or discussing or criticising the particular rules which by way of contrast have been applied in the case of negligent misstatements. I think Lord Atkin must have intended to recognize the distinction when in Donoghue v. Stevenson, at pp. 581 and 582, Le Lievre v. Gould was cited in his judgment. Furthermore he could not have intended to lay down a different rule from that stated in Nocton v. Ashburton as defining the extent of duty in regard to negligent misstatements. Negligence in words is distinguished there from negligence in acts. The former, it is there said, involves no breach of duty in the absence of fraud, contract or fiduciary relationship. Recently in the Court of Appeal in Candler v. Crane, Christmas & Co., Asquith, L.J., as he then was, and Cohen L.J. have held (Denning L.J. dissenting) that

(1) [1951] 2 K.B. 164. (2) [1921] 3 K.B. 560.

Le Lievre v. Gould is not qualified by Donoghue's Case and so at the moment the law is fixed. Asquith L.J. observes that Donoghue's Case has never been applied to injury other than physical, by which I apprehend he means to include also material injury. Without being dogmatic this seems to be generally true on the authorities. Perhaps it is more accurate to say that Donoghue's Case has never so far been applied to negligence in words. There may well be a substantial practical reason of a general character for that, as is suggested by Cohen L.J. in a long quotation from the language of Cardozo C.J. in Ultramares Corporation v. Touche (1931) 255 N.Y. Rep. 170. I think that in English law the general duty for purposes of the law of tort should as the law stands be limited so as not to include mere negligence in words and the first part of the rule in Re Polemis should be limited accordingly or at least only applied if it is applied with a difference.

Donoghue v. Stevenson has been referred to in some of the judgments in this Court in *Dozois v. Pure Spring Co. Ltd.* (1): *Marleau v. People's Gas Supply Co.* (2): *Attorney-General v. Jackson* (3): *The King v. Anthony* (4) and *Booth v. St. Catharines* (5), but in none of these cases was there any question as to its application to cases such as the present.

We have been referred to the decision of Wright J. in *Wilkinson v. Downton* (6), which, it is suggested, touches in some manner on the point to be decided here. There a defendant who had falsely represented to the plaintiff that her husband had met with a serious accident, knowing the statement to be untrue and intending that it should be believed, was held liable. The basis upon which liability was found was that the defendant had wilfully done an act calculated to cause physical harm to the plaintiff and had in fact cause such harm to her. In the present matter it is common ground that the defendant published the article in good faith, believing it to be true, and without malice. The matters considered in *Janvier v. Sweeney* (7), appear to me to be equally remote from the question arising in the present action.

If the principle which has been applied in the leading cases to which I have referred, where damage has been occasioned by acting upon the faith of a misstatement innocently made, is applicable to a claim where the damage is nervous shock or some other physical injury resulting from merely reading or hearing the statement, the matter

(1) [1935] S.C.R. 319.
(2) [1940] S.C.R. 708.
(3) [1945] S.C.R. 489.
(4) [1946] S.C.R. 569.
(5) [1948] S.C.R. 564.
(6) [1897] 2 Q.B. 57.
(7) [1919] 2 K.B. 316.

is concluded by authority. It is, however, urged on behalf of the present appellant that since the injury in respect of which damages are claimed was suffered as a result of reading the false report, and not as a result of acting upon it, some different principle applies. If this contention were sound, it would, in my opinion, follow that if, through an error in the stock market reports carried by nearly all daily newspapers, the quoted price of a stock was shown at one-half its true market price on that day, a person whose entire fortune was invested in that stock, reading the report and sustaining a severe nervous shock in finding that he had suffered a calamitous loss, could recover damages but if, believing the report, he immediately sold his shareholdings by private contract for much less than their true worth before discovering the error in the report, there could be no recovery. It will not do, in my opinion, to say that a person negligently, though innocently, publishing a false stock market report would not reasonably contemplate that nervous shock might be sustained by persons whose fortunes would be greatly affected if the report were true. It is a matter of common knowledge that during the depression of 1929 many persons who lost fortunes were seriously affected in health and that many people destroyed themselves. If there is any authority for the distinction other than the language employed by Wrottesley J. in *Old Gate Estates v. Toplis*, we have not been referred to it and I am unable to discover any. Logically, I can see no basis for any such distinction.

In *Heaven v. Pender*, Brett M.R. (later Lord Esher), in considering a claim advanced against a dock owner by a workman in the employ of a ship painter, who had contracted with a ship owner to paint the outside of a ship, for injuries sustained by the collapse of a staging outside of the ship supplied by the dock owner under contract with the ship owner, said in part (p. 509):—

The proposition which these recognised cases suggest and which is, therefore, to be deduced from them, is that 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 recognise 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.

If this language was to be taken literally, it could be applied to the circumstances of the present case and it may be noted that the distinction sought to be drawn here between claims for injury to the person and claims for injury to property is not made. It is perhaps due to the fact that when in *Le Lievre v. Gould* (1), Lord Esher made it clear that, in his view, this statement of the law had no application where the claim was for negligent misrepresentation, that one does not find in the reports either in England or Canada decided cases in which claims were considered of the nature asserted in the present action until after the decision in *Donoghue v. Stevenson* in 1932.

In that case, Lord Atkin, referring to the above quoted statement from the judgment of Brett, M.R. in *Heaven v. Pender* and saying that, as framed, it was demonstrably too wide, said, following that portion of his judgment which I have quoted above at 580:—

> This appears to me to be the doctrine of Heaven v. Pender as laid down by Lord Esher (then Brett M.R.) when it is limited by the notion of proximity introduced by Lord Esher himself and A. L. Smith, L.J. in Le Lievre v. Gould.

After quoting further from what had been said in *Le Lievre v. Gould,* Lord Atkin continued (p. 581):—

> I think that this sufficiently states the truth if proximity be not confined to mere physical proximity, but be used, as I think it was intended, to extend to such close and direct relations that the act complained of directly affects a person whom the person alleged to be bound to take care would know would be directly affected by his careless act.

With this limitation Lord Atkin appears to have adopted the statement of Brett M.R. in *Heaven v. Pender.* This is the view taken by the learned author of Salmond on Torts (10th Ed. p. 434, Note X) and, as pointed out by Asquith L.J. in *Candler v. Crane* (p. 188), while Lord Atkin pointedly referred to *Gould's* case in his speech he neither hinted nor suggested that it was wrongly decided or that his statement of the law was inconsistent with it.

As Lindley, L.J. said in the course of his judgment in *Angus v. Clifford,* the controversy as to whether an action for negligent misrepresentation, as distinguished from fraudulent representation, could be maintained, was settled once and for all by the judgment of the House of Lords in *Derry v. Peek.* This statement must be taken to be qualified by the judgment in *Nocton v. Ashburton,* but the

(1) [1883] 1 Q.B. 491.

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present matter does not fall within any of the exceptions which are, in my opinion, accurately enumerated in the passage from the 10th edition of Salmond on Torts above referred to. This was the state of the law when the judgment of Lord Atkin in *Donoghue v. Stevenson* was written and, unless he had changed his mind about the matter after he wrote his judgment in *Shapiro v. La Morta,* this was also his view of the law. I do not think that the passage from his judgment in *Donoghue v. Stevenson* was intended by him to declare the law as to the liability for negligent misstatements or to have any application to such liability. It is inconceivable, in my opinion, that if Lord Atkin and the Law Lords who agree with him in *Donoghue v. Stevenson* had intended to declare a principle of law inconsistent with what had been decided in the House of Lords in *Derry v. Peek* and *Nocton v. Ashburton* and by the Court of Appeal in *Le Lievre v. Gould,* they would not have said so in plain terms. That this is the considered view of Lord Wright is made clear from the article written by him in the Modern Law Review.

This appeal fails, in my opinion, and should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Freeman, Freeman & Silvers.*

Solicitors for the respondent: *Russel & Dumoulin.*