Donoghue v Stevenson —The Immortal Snail —90th Anniversary Conference Papers

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Foreword

The Law Society of Scotland was delighted on 26 May 2022 to offer jurisdictions across the Common Law world the opportunity to celebrate the 90th Anniversary of the handing down of the decision in *Donoghue v Stevenson* by holding its on-line conference: celebrating the Immortal Snail.

The Society was grateful to the many representatives of the judiciary, academia and the legal professions for joining in this unique, global and historic conference. It was a significant learning experience and an immense amount of fun.

The conference brought together lawyers from New Zealand, Australia, Singapore, India, Zimbabwe, Nigeria, South Africa, Israel, Ireland, the United Kingdom and its constituent jurisdictions England and Wales, Scotland and Northern Ireland, from the jurisdictions of the Caribbean Court of Justice, Antigua and Barbuda, the Bahamas, Barbados, Belize, Dominica Grenada, Guyana, Jamaica, Montserrat, St. Kitts and Nevis, Saint Lucia, St. Vincent and the Grenadines, Suriname, Trinidad and Tobago, from Canada New Brunswick, Ontario and British Columbia and the United States—the final stop on the globe-trotting tour of the Common law (and Mixed) jurisdictions.

The purpose of the conference was to reflect on, examine, analyse, discover and learn about *Donoghue v Stevenson*, the 1932 case of the snail in the ginger beer bottle, the case called in 1990 by the then Solicitor General for Scotland, Alan Rodger QC the "most famous case in the whole Commonwealth World of the common law.". This is why we celebrated this famous case. It is a (some would say *the*) foundational case from the Appellate Committee of the House of Lords in the law of delict and the Common law of tort. It set out the basis of the modern law of negligence in Common Law jurisdictions across the world by establishing the general principle of the underlying duty of care. In doing so it continues to impact the law in most of those jurisdictions referred to and more besides. As Michael Clancy has said "It is like a legal "golden thread" representing something akin to unity whilst respecting diversity".

It is a case that resonates, that engages, that encourages. Through the generations since 1932 people in society at large have benefited from the general duty of care set out by Lord Atkin in his enunciation of the famous neighbour principle.

Lord Atkin said, "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"

We heard much about Lord Atkin during the conference one special contribution being the personal recollections from his granddaughter Elizabeth Barry.

It is on the basis of that very principle, the principle of "product liability", that anyone injured by a defective product can sue for recovery of their loss. Manufacturers must not, in making their products, breach the underlying duty of care. Because of Mrs. Donoghue's tenacity, the skill of her solicitor Walter G Leechman and counsel instructed by him as well as the wisdom of the judges in the Appellate Committee in the House of Lords (well three of them anyway) that all our lives have since been made safer and our rights as consumers have been protected. That is something worth celebrating.

The Society is very grateful to the Continuing Legal Education Society of British Columbia and its Director of Publications, Laura Selby for agreeing to produce this online book of the conference proceedings. It lays a good basis for those who will undertake the centenary in 2032.

Ken Dalling
President, The Law Society of Scotland
May 26, 2022

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CHAPTER 1

Introduction to *Donoghue v Stevenson*—The Immortal Snail—90th Anniversary Conference Papers

I. THE CONFERENCE DAY [§1.1]

The Donoghue versus Stevenson: 90th anniversary conference — The Immortal Snail can trace its lineage to the 20th anniversary reunion of the graduating class of 1962 at the Faculty of Law, University of British Columbia. It reflects *The Paisley conference on the law of negligence — The Pilgrimage to Paisley* September 28-30th 1990 and the *Who then in law is my neighbour? Donoghue v Stevenson: 80 years on — An International Conference* organised by the University of the West of Scotland on 25-26 May 2012. Both these events were held in Paisley where Mrs Donoghue allegedly consumed the noxious brew of snail and ginger beer.

The conference was conceived during early days of the Covid-19 pandemic as the world was grappling with the expansive use of virtual meetings on a number of video platforms as lockdown measures came into force. In March, April and May 2021 the concept of the conference grew from very modest beginnings. The original proposal put to the Law Society of Scotland's Public Policy Committee envisaged:

> The 90th anniversary of the case is likely to attract significant interest around the world. It has deep impact in most common law jurisdictions and there is likely to be considerable focus on the case and its implications. The Public Policy Committee is asked to endorse the concept of the Society holding a conference (form to be determined) around the anniversary next year which would engage with the judiciary in Scotland England and Northern Ireland and also common law and continental judges for whom the case is significant.

Only seven named contributors were originally identified and the time frame ran from 09:30-17:00. At that time the Law Society envisaged a hybrid event but Covid-19 uncertainties caused the concept to be revised to being exclusively an online event.

By May 2022 there were remarkably more than 40 contributors from most common law jurisdictions and the duration of the conference had increased to run from 07:00 until 18:30.

The conference globetrotting began in New Zealand with a welcome from the New Zealand Chief Justice Rt Hon Helen Winkelmann DBE, followed by an expert panel chaired by the President of the New Zealand Law Society, Jacqueline Lethbridge, Professors, Geoff McLay, Stephen Todd, and Mike French and expert practitioner Andrea Challis. Stephen Todd also supplied songs on the theme of Donoghue v Stevenson to the music of Arthur Sullivan from his songbook *Leading Cases in Song,* which entertained those attending the conference during breaks in the academic content.

The baton then passed to Australia where following an introduction from Tass Liveris, President of the Law Council of Australia, Hon Judge Michael Kirby AC, CMG, chaired a session which acknowledged Lord Atkin's Australian connection with contributions from

Professors Prue Vines and Wendy Bonython (both veterans of the 2012, *Who then in law is my neighbour? Donoghue v Stevenson: 80 years on — An International Conference*).

At this point, following the Australian contribution, the conference arrived in the UK where the attendees were treated to a welcome from members of the judiciary from each of the UK jurisdictions: Rt Hon Lord Reed President of the United Kingdom Supreme Court (the court created in 2005 as successor to the Appellate Committee of the House of Lords which decided the case in 1932), Rt Hon Lord Carloway, Lord President of the Court of Session in Scotland (this court founded in 1532 the Inner House of which decided against Mrs Donoghue on appeal), Rt Hon Lord Burnett, the Lord Chief Justice of England and Wales and The Lady Chief Justice of Northern Ireland, Rt Hon Dame Siobhan Keegan.

This welcome from the judiciary was supplemented by that from the UK solicitor professions: Ken Dalling, President of the Law Society of Scotland, Brigid Napier, PresidentLaw Society of Northern Ireland and Nick Emerson, Deputy Vice-President, Law Society of England and Wales.

One of the benefits of the online conference was that the constraints of time meant something quite different from those one would expect in an in-person conference. The session following the UK welcome encapsulated the benefit of the virtual arrangements. This session brought together contributors from five jurisdictions, India, Israel and three in Africa operating across four time zones. The session was chaired Sternford Moyo, the renowned President of the International Bar Association from Zimbabwe, and brought together Funke Adekoya SAN from Nigeria, Dr Leo Boonzaier from the University of Cape Town in South Africa, Professor Tamar Gidron, Zefat Academic College, Israel and Justice Gita Mittal, former Chief Justice of Jammu and Kashmir and former Acting Chief Justice of Delhi. This diverse group helped the attendees understand how *Donoghue v Stevenson* had varying impacts on the legal systems under discussion, including no application in South Africa where as Dr Boonzaier explained, Roman Dutch law applied the Lex Aquila, to persistent application in Israel as related by Professor Gidron, where the British Palestine Mandate law which codified the decision has been adopted by Israel.

Following that multi-jurisdiction session, the conference arrived in Scotland where Lord Carloway, making his second appearance of the day gave his reflections on the relationship between the Court of Session, the House of Lords and the UK Supreme Court. The following session superintended by Christine O'Neill, Chair of the Scottish Solicitor Firm Brodies involved Rt Hon Lady Paton, Chair of the Scottish Law Commission who examined the relationship between the civil and criminal laws in her presentation on the Snail and Crime: Donoghue v Stevenson and Gross Negligence Manslaughter.

The next two sessions were chaired by participants from the University of the West of Scotland Paisley campus which is a stone's throw from the site of the Wellmeadow cafe where Mrs Donoghue allegedly consumed the snail in her ginger beer on 26 August 1928. The first session chaired by the University's Principal and Vice Chancellor, Dr Lucy Meredith, brought together the first transatlantic contributors of the day — Justice Russell Brown of the Supreme Court of Canada and Hon Adrian Saunders, President of the Caribbean Court of Justice who contributed their views from Canada and the Caribbean jurisdictions.

Dale McFadden (another veteran of the 2012 Conference) and Susannah Paul, both teaching at the University, then chaired a session involving academics from universities around the British Isles. The conference heard from Dr Bobby Lindsay, lecturer at the School of Law, the University of Glasgow; Dr Christine Beuermann, senior lecturer at the University of Newcastle; Dr Ursula Connolly, lecturer at the School of Law, National University of Ireland, Galway and John Stannard, senior lecturer at the School of Law, Queen's University, Belfast.

Following that contribution, the conference once more spanned the globe with a session chaired jointly by Meera Furtado, Head of Law and Secretary General the Commonwealth Legal Education Association and Patricia McKellar, Associate Director University of London, undergraduate laws programme. The content was provided by Professor John Kleefeld (another participant from the 2012 conference), University of New Brunswick who gave insight into his ongoing research into the citation of the case across many Commonwealth jurisdictions in his talk titled "Spatiotemporal influence of judicial decisions: the case of Donoghue v Stevenson", and Professor Gary Chan Kok Yew, Singapore Management University who explained how the case fluency the laws of Singapore and Malaysia.

The penultimate session of the day highlighted the influence of Justice Benjamin Cardozo and US case law on the decision making process in the case. In a session chaired by Roddy Dunlop QC, Dean of the Faculty of Advocates (Scotland's independent referral bar), Richard Wright, Professor of Law Emeritus, Chicago-Kent College of Law, Illinois Institute of Technology spoke about "The relationship between Donoghue, McPherson and Palsgraf and the further development of the principles discussed in those cases." The influence of US cases on the Appellate Committee is one of the more interesting factors in the decision in Donoghue against Stevenson and it was good to be able to provide an opportunity for that strand of comparative influence to be examined in such an in-depth way.

The last session was entitled the "Ongoing Pilgrimage to Paisley" and brought the conference full circle to where it began. The conference heard from Hon Justice Martin Taylor, the retired Justice of the British Columbia Court of Appeal, Cayman Islands Court of Appeal and British Columbia Supreme Court who is the foremost evangelist for appreciation of the case and its global importance and the cohort of those who share his enthusiasm, the Paisley Irregulars.

Martin Taylor told the attendees about the development of interest in the case since 1962 in Vancouver through the conferences in 1990 and 2012 culminating in the 90 Anniversary event in 2022. He told the attendees about the importance of the case from his perspective and highlighted the work of the Irregulars as promoters of the cause.

Following Justice Taylor, there were contributions from firstly Lord Hope of Craighead who recounted his personal recollections of the 1990 conference, including putting on display the keepsake ginger beer bottle which he was given on that day in September 1990.

Secondly the conference was treated to some personal recollections of Lord Atkin. Lord Atkin was born in Brisbane in 1867, his future wife Lizzie Hemmant was also born then in the same year within 100 yards of his birthplace. The couple had 6 daughters and two sons. One of the Daughters was Nancy Atkin and the conference was privileged to hear from her daughter Elizabeth Barry who was accompanied by her daughter Emma Greville Williams, a solicitor with the law firm of Brodies. Elizabeth, in interview with Emma, told the attendees how the Lord Atkin she knew was a good man and dedicated judge, a man of strong Christian faith and a loving grandfather.

The conference then heard from the Paisley Irregulars. The Paisley Irregulars is an informal group of lawyers and judges, centered on the Honourable Martin R. Taylor. They comprise Mr. Taylor's former judicial law clerks and several other members *honoris causa*. Members are located in several Canadian provinces and in the United Kingdom; some are textbook authors or law school professors or adjunct faculty: https://www.paisleyirregulars.ca/about-all-hail-the-snail. The creativity of the group was clearly on display in this segment with copious references to the film *The Paisley Snail* by David Hay QC and *May the Musical* by Bruce Fraser QC.

The conference closed at 18:30 on 26 May 2022 having ensured that the 90th Anniversary of the case had been well and truly commemorated throughout the globe.

II. ACKNOWLEDGEMENTS [§1.2]

Major thanks are due to David Lee, our professional Conference Chair who ensured good time-keeping, pertinent questions and a friendly but disciplined ambience. Equal thanks are due to the Law Society of Scotland CPD Team: Alex Graham, Claire Hunter, Jessica McClure, Sophie McIvor, Jim McKay, Natalia Shibli, Rachel Steer and Christopher Tomlinson. The role they played in ensuring that the Conference worked so well is a testimony to the collective dedication, hard work and co-operation they bring to their work.

I would also like to acknowledge: Johanne Bray KC, CEO, the Canadian Bar Association; Laura Selby, B.A., LL.B., Director of Publications, Continuing Legal Education Society of British Columbia; Margery Nicoll, Deputy Chief Executive Officer and Director, International at the Law Council of Australia; Jamie Warnock, Head of Policy and Engagement, The Law Society of Northern Ireland; Martin Taylor KC; Bronwyn Jones General Manager Policy, Courts and Government and Teresa Grace, Board Secretary, New Zealand Law Society; the Paisley Irregulars particularly: A. F. Wylie OBE (Lord Kinclaven), Bruce Fraser KC, David Hay KC, Gregory S Pun KC, Dr Jane Ingman Baker, Richard J Olson and Victoria Shroff; Dale McFadzean Lecturer, School of Business and Creative Industries, University of the West of Scotland; Fergus Whyte, Advocate and Susannah Paul Lecturer, School of Business and Creative Industries, University of the West of Scotland.

Michael P Clancy OBE, WS,

Director Law Reform, The Law Society of Scotland

Part 2—Origins of the Case in Scotland

CHAPTER 2

What Happened in the Court of Session in *Donoghue v Stevenson*

I. AUTHOR BIO [§2.1]

The Right Honourable Lord Carloway was appointed as Lord President of the Court of Session and Lord Justice General of Scotland in December 2015. He has been a Senator of the College of Justice since February 2000. He was appointed to the Second Division of the Inner House in August 2008, before becoming Lord Justice Clerk in August 2012. His report into criminal law and practice was published in November 2011.

He is a graduate of Edinburgh University (LLB Hons) and was admitted to the Faculty of Advocates in 1977. He served as an advocate depute from 1986 to 1989 and was appointed as a Queen's Counsel in 1990. From 1994 until his appointment as a judge he was Treasurer of the Faculty of Advocates.

Lord Carloway is an Honorary Bencher of Lincoln's Inn in London and King's Inn in Dublin. He is a Fellow of the Royal Society of Edinburgh.

He is an assistant editor of "Green's Litigation Styles" and contributed the chapters on "Court of Session Practice" to the Stair Memorial Encyclopaedia and "Expenses" in Court of Session Practice.

He was the joint editor of "Parliament House Portraits: the Art Collection of the Faculty of Advocates" and is a former president of the Scottish Arts Club.[1]

II. INTRODUCTION [§2.2]

It is a great pleasure to be a part of this event today. I have been asked to explain what happened in the Court of Session, the court in Edinburgh where the case started, before it went south to the House of Lords in London.

III. THE ACTORS [§2.3]

Mrs Donoghue had been separated from her husband and was living in a deprived part of Glasgow. She was working as a shop assistant at the time of the snail incident.[2] Steps were

taken to have her placed on the Poor's Roll.[3] If admitted, a judge would appoint an advocate to her cause. He would represent her free of charge; payment of his fee from the defenders being dependent upon success.[4] Only those who were unable to afford to carry on a litigation, and who had sufficient grounds for commencing it,[5] were eligible for admission. Mrs Donoghue must have qualified, because her appeal was funded in this way.[6] She was designated as "poor" Mrs Donoghue in the court papers and the official law reports.[7]

Mrs Donoghue was represented in the Outer House, that is the first instance court, by Robert Gibson, who later became Chairman of the Scottish Land Court, and by George Morton KC, later Sheriff Sir George Morton KC, as junior and senior counsel respectively. Sir George was known for his furtherance of good causes.[8] The Lord Ordinary (the first instance judge), Lord Moncrieff, had a reputation for the rapidity of his mental processes, and for forcing counsel to give of their best in his court.[9] He has been described as the unsung hero of the case. After all it was this judge who decided the case correctly in the first place, in the face of precedent to the contrary.[10] He determined that Mrs Donoghue's case on paper was relevant in law and merited inquiry at a proof.

In the Second Division of the Inner House, to which Lord Moncrieff's decision was reclaimed,[11] Mrs Donoghue's legal team was joined by William Milligan as a second junior counsel. Mr Milligan later took silk. As a Unionist politician, he was to become Solicitor General, Lord Advocate, and finally, as Lord Milligan, a Senator of the College of Justice; that is a judge of the Court of Session. Lord Milligan was known for his conscientious approach.[12]

In her appeal to the House of Lords, Lord Milligan took over as sole junior to Sir George. It is not clear why Mr Gibson was replaced. It may have been a simple changing of the guard after the loss in the Inner House, or as a result of his lack of availability.[13] He became an Advocate depute[14] at around this time. He was later proposed as a Fellow of the Royal Society of Edinburgh by none other than Lord Moncrieff, so we can be reasonably certain that the quality of his pleading was not to blame.[15]

In Stevenson's corner was a very prestigious team indeed. This was James Clyde, as the junior, and Wilfrid Normand KC as senior. Clyde and Normand were both Unionist politicians. They later occupied the offices of both Lord Advocate and then Lord President of the Court of Session, though of course not at the same time. Lord Normand ended his career as a Lord of Appeal in Ordinary in the House of Lords. Together they represented Stevenson through every stage of the case.

IV. *MULLEN V AG BARR & COMPANY LTD* [§2.4]

In order to understand the context in which the Court of Session decided *Donoghue*, it is necessary to look at the combined cases of *Mullen* and *McGowan v AG Barr & Co*.[16] These were appeals from Glasgow and Greenock sheriff courts which were determined by the Second Division a little over a year before *Donoghue* was heard by Lord Moncrieff.[17] Barrs are a very well-known company in Scotland. They manufacturer what is known in their advertising material as Scotland's other national drink; Barr's *Irn Bru*.[18] The facts in *Mullen* were remarkably similar to those in *Donoghue*. The pursuers claimed reparation for illness suffered as a result of drinking ginger beer from dark-coloured bottles which were manufactured by Barrs. They contained dead mice, an affliction which was shared in sister cases in the United States against Coca Cola.

The pursuers' claims in *Mullen* and *McGowan* had respectively been deemed relevant by the sheriff at Glasgow but irrelevant on appeal by the Sheriff Principal and relevant by both the sheriff and the sheriff principal in Greenock. On appeal to the Court of Session, the appellate court, unusually, allowed a proof[19] and this was taken by one of the Division judges, Lord Hunter.

In the Second Division, the pursuers had a strong team in the form of, as senior counsel, Craigie Aitchison KC, who became Lord Advocate under Ramsay MacDonald's second labour government and was later the Lord Justice Clerk. The junior was John Watson, who was later to become Sir John Watson. He was solicitor general under the same government. He had worked with Craigie Aitchison[20] on the Oscar Slater Case,[21] and later became Sheriff Principal of Caithness Orkney and Shetland. The defenders were represented by Mr Clyde as junior and by James Keith as senior. Mr Keith was later a Court of Session judge and then, as Lord Keith of Avonholm, a Lord of Appeal.[22]

The Lord Justice Clerk, who is Scotland's second most senior judge and who chairs the Second of the two appellate Divisions of the Court of Session, was Lord Alness. This was Robert Munro, who had been in Lloyd George's coalition government from 1916 until he became LJC in 1922. The defenders were assoilzied[23] on the basis that no duty of care was owed by a manufacturer to a consumer except in limited circumstances. None of the exceptions applied: there was no contract between the defenders and the pursuers; the presence of the mice in the bottles was latent; and ginger beer was not an inherently dangerous product. Consequently, the defenders owed no duty of care to the pursuers.[24] They had taken all usual and necessary precautions against the contamination of their bottles, and followed best industry practice in so doing.[25]

Lord Hunter dissented. He would have found in Mrs Donogue's favour. He considered[26] that a relationship existed whereby a duty of care was owed to the consumer by the manufacturer because the latter had invited the public to purchase their goods by advertisement and product labelling.

V. THE OUTER HOUSE [§2.5]

Both the English and Scottish civil court systems focus on the speedy resolution of cases. The difference is the manner in which that is achieved. In Scottish litigations, the rules are designed to try to resolve matters at an early stage without the necessity of hearing evidence. This differs from the English tradition, which focusses on trying to get matters to trial and resolving them as quickly as possible in that forum. In Scotland, it is common for civil cases to be sent for a debate on the written pleadings before any evidence is heard. Debates consist purely of legal argument. The pursuer's written case is taken at its highest. The court is asked to consider whether the case as written is relevant in law and sufficiently specific to give the defender fair notice of the case against him. Debates can result in lines of argument, or areas of fact, which are respectively without merit or irrelevant being struck out. The issues for inquiry are narrowed, and sometimes there will be complete dismissal of the pursuer's claim without the need for a contentious proof of fact.

Mrs Donoghue's case was sent to debate. Mr Stevenson's counsel argued that there was no general duty owed by manufacturers towards their consumers to take reasonable care in the preparation of their products, unless the goods were inherently dangerous. Lord Moncrieff was not persuaded. Wrongdoers owed a duty of care to qualified sufferers. A relationship would be created in any case where there was a reasonable anticipation that the sufferer may be in danger, should there be a failure to take care. Tainted food was one such danger. It did not matter that the danger was introduced by negligence as opposed to being inherent in the food itself.[27]

The problem for Lord Moncrieff was what to do about the apparently on all-fours precedent of *Mullen*. The answer was to tiptoe gently around each of the opinions of the majority in *Mullen*. He reasoned that the Lord Justice Clerk had declined[28] to determine whether a duty existed, preferring to base his decision on the absence of any negligence on the part of Barrs. Although Lord Ormidale was of the view that no duty existed, he too had decided the case

on the basis that there was no negligence. Lord Anderson's discussion of the existence of a duty was framed under reference to a concession made by the pursuers which was not easy to reconcile with their argument.

Lord Moncrieff determined that there was no basis in the Scots law of reparation, which is based on Roman principles, for refusing a consumer who has sustained injury as the direct result of the manufacturer's negligent failure to implement proper safeguards or due diligence, a right of action. Mrs Donoghue's averments disclosed a relevant case in law and that case ought to be allowed to proceed to an inquiry into the facts.[29] If Mrs Donoghue proved her written averments, her case would succeed. Mr Stevenson reclaimed; in effect appealed to the Division of the Inner House.

VI. THE INNER HOUSE [§2.6]

Unfortunately for Mrs Donoghue, the case was heard by the Second Division, which comprised of precisely the same judges who had made up the appellate Division in *Mullen*. Each judge adhered to his reasoning in *Mullen*, including Lord Hunter, who dissented again. There being a majority decision that no duty was owed to Mrs Donoghue by Mr Stevenson, the action was dismissed.[30] So far as the judges in Scotland were concerned, therefore, two (Lords Moncrieff and Hunter) were in favour of Mrs Donoghue's claim. Three (Lords Alness, Ormidale and Anderson) were against. It was a 3 – 2 division. Curiously none of the opinions of the Court of Session judges appear in the official reports; either in Scotland's Session Cases or England's Appeal Cases. Only a brief summary of them is given. That is reasonable given the brevity of the opinions in the Division, but Lord Moncrieff's opinion is a substantial, if rather discursive, judgment which would have merited publication at the time.

So on to the House of Lords the case went. The rest is history. With the assistance of the two Scottish judges in the Lords, the 3 – 2 majority in the Court of Session was reversed. That would make it five all in terms of judicial opinion, but away goals in London counted at least double. Mrs Donoghue won. What did that mean? All that had been ordered was an inquiry into the facts. That was enough to secure a settlement. Bolstered and encouraged by the result in London, and after some tough negotiation, she secured a substantial sum of £200, or about £15,000 in today's currency, by way of settlement.

NOTES

1 I am grateful to my law clerk, Ysabeau Middleton, for preparing the first draft of this introductory talk.

2 Rodger: *Mrs Donoghue and Alfenus Varus* (1988) CLP 1 at 6.

3 *Ibid*, citing Mrs Donoghue's petition of appeal lodged on 26 February 1931.

4 *Records of the Parliament of Scotland to 1707*, 1425/3/26, "Of the bills complaint", 12 March 1425.

5 See *Macaskill v McLeod* (1897) 24 R 999, Lord Young at 1000 – 1001.

6 Chapman, *The Snail and the Ginger Beer*, (2009) at 6.

7 Eg 1932 SC (HL) 31.

8 *Obituary* 1953 SLT (News) 147.

9 *Obituary* 1949 SLT (News) 174.

10 *Lord Moncrieff, the Unsung Hero*, Scottish Council of Law Reporting (Donoghue v Stevenson Case Resources | Lord Moncrieff (scottishlawreports.org.uk).

11 Broadly, "appealed".

12 *Obituary of the Right Hon. Lord Milligan*, 1957 SLT (News) 186.

13 Chapman (*supra*) at 31.

14 A prosecutor in the High Court of Justiciary

15 Biographical Index of Former RSE Fellows 1783 – 2002 Part 1 (A – J), p 355, Royal Society of Edinburgh.

16 1929 SC 461.

17 On 27 June 1930.

18 Formerly *Iron Brew*

19 A hearing of evidence

20 And James Clyde

21 1928 JC 94

22 "in Ordinary" (a judge in the House of Lords).

23 Absolved of blame

24 Lord Ormidale at 472; Lord Anderson at 479.

25 LJC (Alness) at 467; Lord Ormidale at 473; Lord Anderson at 480.

26 at 477.

27 *Donoghue v Stevenson*, Session Papers (Appeal Cases) 1932 No 5 at 4 – 6 (opinion of Lord Moncrieff).

28 1926 SC 461 at 470.

29 *Ibid* at 18 – 20.

30 *Ibid* at 21 – 23.

Part 3—New Zealand

CHAPTER 3

Opening Speech to *Donoghue v Stevenson*—The Immortal Snail—90th Anniversary Conference

I. AUTHOR BIO [§3.1]

The Right Honourable Helen Winkelmann (GNZM) was sworn in as New Zealand's 13th Chief Justice on 14 March 2019. She is the second Chief Justice since introduction of the Supreme Court Act 2004 which ended appeals to the Privy Council.

A graduate from Auckland University, Justice Winkelmann began work as a law clerk with Auckland firm Nicholson Gribbin (later Phillips Fox, now DLA Piper). She was admitted to the bar in 1985. In 1988, she became the first female partner and one of the youngest ever in the firm's then 117-year history. Justice Winkelmann remained at the firm until 2001 when she began practice as a barrister sole specialising in insolvency, commercial litigation, and medical disciplinary litigation. In 2004 she was appointed as a High Court Judge; followed by Chief High Court Judge in 2010 and was appointed to the Court of Appeal in 2015.

As Chief High Court Judge Justice Winkelmann introduced reforms aimed at improving accessibility to High Court processes in its civil jurisdiction, improving the timeliness with which the Court dealt with both civil and criminal matters, and improving public understanding of the work of the Courts. Justice Winkelmann reintroduced publication of High Court annual reporting, including judgment timeliness data, and established a senior courts Twitter account to improve communication with the public.

She is the New Zealand representative on the Board of the Australasian Institute of Judicial Administration and from November 2012 – November 2019 was Chair of the Institute of Judicial Studies – the body responsible for providing continued education to judges. As Chief Justice she retains a keen interest in judicial education.

II. INTRODUCTION TO DONOGHUE V STEVENSON [§3.2]

E ngā mana, e ngā reo, nau mai, haere mai ki tēnei hui whakahirahira kia whakanui itētahi o ngā kēhi rongonui rawa atu o te ao ture – arā ko *Donoghue v Stevenson*. Iti te ngata, engari, roa te autō i te ao ture.

Nō reira, kei a koutou kua tae mai i ngā hau e whā, nau mai, tauti mai, whakapiri mai rā ki te kaupapa nei.

I have just welcomed you in te reo Māori, the first language of Aotearoa New Zealand. I have welcomed you as esteemed guests gathered in this virtual space from the four corners of the earth, in order to celebrate one of the most famous legal cases—*Donoghue v Stevenson.*

Although the snail that was the focus of the case in *Donoghue v Stevenson* was small—if it existed at all—the trail it has left in the law is long. I am no geographer, but I think that

Aotearoa New Zealand may be the furthest this snail has travelled. And so it is fitting that this wonderful seminar, which will take us on a tour of the common law world, should begin here at the bottom of the world.

I understand that this seminar is attended by people from around the common law globe. The virtual realm provides a wonderful opportunity for us to gather to celebrate the common law tradition we share. I acknowledge the work of our hosts, the Law Society of Scotland, in conceiving of and planning this seminar.

Why does *Donoghue v Stevenson* loom so large in the legal mind? It certainly was a significant case in the development of the law, as we will hear. But not so significant perhaps as to fully explain the phenomenon.

Part of its staying power is undoubtedly the story that lies behind it – an engaging tale occurring in an everyday setting, with a protagonist, May Donoghue, to whom we can relate.

But I think the case's prominence in the legal mind lies primarily in what the case reveals about the common law method. Some see it as an exemplar of the creative capacity of the common law—an exemplar of how common law method responds to changing times and changing community expectations. Others see the timing of the case as exemplifying nothing so much as the common law's lassitude—because it took so long to respond to changes that had been under way since the beginning of the industrial revolution.

However you frame it, we can agree that the response, when it came, is to be celebrated. And whatever the debate about how timely the response, the subsequent travels of that case throughout the common law world certainly provide evidence of the creative capacity of the common law.

The development of the precedent set by *Donoghue v Stevenson* in each of the jurisdictions we will hear from during the course of this seminar provides a worked example of how the framework of common law principles is able to respond to the very different social and cultural settings of each of the common law nations.

As the speakers in this session will explain, we have our own Antipodean spin on *Donoghue v Stevenson* explicitly based on the need to respond to the unique circumstances of this country.

Aotearoa New Zealand certainly provides a unique context. We are a South Pacific nation of 5 million people—a nation founded in 1840 by a Treaty between the English Queen and the Māori people. European settlers arriving in Aotearoa New Zealand in the early nineteenth century found a country that already had a law—the first law of Aotearoa New Zealand, which is called tikanga—Māori customary law. As is now established by case law, the common law we apply in New Zealand must engage with that first law.

As I look to the future I anticipate arguments that tikanga should play a role in New Zealand in the future development of the *Donoghue v Stevenson* line of cases—tikanga concepts such as whanaungatanga (the importance of community), mana (the inherent dignity of the individual), hara (wrong), utu (response to that wrong) and ea (the reintroduction of balance to the community).

These concepts are not so alien to the common law mindset. If expressed in the English language, perhaps they would have sounded familiar to Lord Atkins back in 1932. But they may yet provide a further adventure in the law for that little snail.

CHAPTER 4

Spencer on Byron: Clarifying the Scope of the *Hamlin* Duty in New Zealand

I. AUTHOR BIO [§4.1]

Mike French is a senior law academic in the law school at the Auckland University of Technology (AUT). He led the development of the AUT law degree which accepted its first cohort of students in 2009. Mike has extensive experience in teaching law to both law students and business students. He joined AUT in 2002 after a number of years in the Law School at the University of Greenwich in London where he was at various times the acting Head of School and the director of the LLM programme. Mike's current teaching and research interests are in the areas of private obligations and remedies. He was privileged to be able to present a paper at the conference held at the University of the West of Scotland in Paisley in 2012 to celebrate the 80th anniversary of the *Donoghue v Stevenson* decision.

II. INTRODUCTION [§4.2]

Identifying the appropriate test for finding a duty of care in novel situations is a matter that has exercised the minds of the judiciary across all common law jurisdictions since Lord Atkin's famous formulation of the 'neighbour' principle in *Donoghue v Stevenson*.[1] Almost 40 years after *Donoghue* the English Court of Appeal, in *Dutton v Bognor Regis Urban District Council*,[2] applied the 'neighbour' test and held that a local council could be liable to both the original and subsequent owners of a house where damage was suffered as a result of the council's surveyor having negligently approved the foundations during the construction of the property.[3] Prior to that decision it had not been considered that a territorial authority would owe such a duty of care to original owners and subsequent purchasers of a property.

The decision in *Dutton* marked the beginnings of judicial divergences across jurisdictions which continue to resonate over 50 years later. In New Zealand the cases dealing with the liability of territorial authorities for negligently constructed buildings have been intricately

linked with the development of the jurisprudence in the tort of negligence generally. This article examines those cases, looks at how the approach of the New Zealand courts has differed with those in other jurisdictions and considers some of the impacts which those decisions have had on the development of broader principles in the tort of negligence.

III. DEVELOPMENTS IN THE 1970S [§4.3]

In 1978, the House of Lords, dealing with a similar set of facts in *Anns v Merton London Borough*,[4] confirmed the decision of the Court of Appeal decision in *Dutton*.[5] Lord Wilberforce, who delivered the leading speech,[6] considered that although, as a public body discharging functions under statute, the powers and duties of a territorial authority were defined in terms of public law, there may nevertheless be other parallel private law duties arising out of the exercise of those functions which would enable individuals to sue for damages in a civil court.[7] In defining the circumstances in which those private law duties might be imposed, his Lordship drew a distinction between the policy, or discretionary, decisions and the operational decisions respectively which a council could be required to make in carrying out its statutory functions. Lord Wilberforce acknowledged that the distinction between the policy and the operational was one of degree but considered that generally policy decisions would be ones for the authority to make rather than the courts but the more "operational" a power or duty may be the easier it was to superimpose on it a common law duty of care.[8]

In relation to the particular facts of the case, Lord Wilberforce considered that, while there would be a duty on the council to give proper consideration to the question whether it should inspect or not, the decision on the amount of resource to allocate to the inspection of foundations of residential buildings was essentially a policy decision which would be difficult to attack. However, if inspections were undertaken - the "operational" aspect - there was, in principle, a duty to exercise reasonable care. The standard of care had to be related to the duty to be performed – namely, to ensure compliance with the bylaws – and that should take into account not only the fact that the inspector's function was supervisory but also the fact that once the inspector had passed the foundations they were covered up, with no subsequent opportunity for inspection by present or future owners. Lord Wilberforce considered that, in that situation, a cause of action arose when the state of the building was such that there was an imminent danger to the health or safety of persons occupying it.[9]

There are two points to be noted at this juncture. First, both the majority of the Court of Appeal in *Dutton*[10]and a majority of the House in *Anns*[11]characterised the loss to the plaintiff as being physical damage to the property itself rather than pure economic loss.

Secondly, in reaching his decision in *Anns* Lord Wilberforceset out his well-known two stage approach for determining whether, on any particular set of facts, a duty of care exists between the parties:[12]

> First, one has to ask whether as between the alleged wrongdoer and the person who has suffered damage there is a constant relationship or proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter - in which case a prima facie duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negate or reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise.

In 1977 the New Zealand Court of Appeal followed the reasoning in *Dutton* in *Bowen v Paramount Builders (Hamilton) Ltd*.[13] The case raised the question of whether a builder was responsible in negligence to a subsequent purchaser of a building for damage caused to that property by his carelessness in construction. Although Richardson P dissented and found that on the particular facts there had been no negligence on the part of the builder, all members of

the Court considered that the situation was covered by *Dutton* and treated the damage not as pure economic loss but as economic loss associated with physical damage to the property itself.[14] This characterisation of the loss was subsequently accepted by the Court of Appeal in *Mount Albert Borough Council v Johnson*[15]without further examination of the basis for recovery of such loss under the tort of negligence.

Anns had been decided between the first instance decision and the Court of Appeal hearing in *Mount Albert* and the Court of Appeal had already taken an earlier opportunity to approve the approach taken by the House of Lords. In *Scott Group Ltd v McFarlane*[16] Woodhouse J had described the two-step test propounded by Lord Wilberforce as "a valuable and logical guide to the way in which a decision should be made as to whether a duty of care exists in an apparently novel situation".[17] In *Mount Albert* theCourt of Appeal endorsed that earlier recognition considering that "an essentially pragmatic approach is currently appropriate in the field of negligence".[18]

IV. DEVELOPMENTS IN THE 1980S [§4.4]

There was a mixed reaction to the decision in *Anns* and the mid-1980s witnessed a flurry of activity in the courts across the UK, Australian, Canadian and New Zealand jurisdictions where the two-stage approach to finding a duty of care was closely scrutinised. In the UK, where initially there had been favourable reaction to Lord Wilberforce's formulation,[19] the House of Lords began the process of reining in what it saw as the expansionist tendencies of the approach. The attack was led by Lord Keith of Kinkel who, in *Governors of the Peabody Donation Fund v Sir Lindsay Parkinson Ltd*,[20] had warned against the "temptation" of treating the statements in *Anns* as being of a "definitive character", preferring instead to consider whether it was "just and reasonable" to impose a duty of care of particular scope upon the defendant.[21] The High Court of Australia in *Sutherland Shire Council v Heyman*[22]had declined to follow the two-stage approach, preferring "that the law should develop novel categories of negligence incrementally and by analogy with established categories".[23]On the other hand, the principle in *Anns* was applied by the Supreme Court of Canada in *City of Kamloops v Nielsen.*[24]

In New Zealand's Court of Appeal in 1986 there was a trilogy of cases which considered the question of the liability in negligence of local authorities.[25] In *Brown v Heathcote County Council*[26]the Court reviewed the "major overseas decisions" in "a developing and difficult field of law". Cooke P opined that while New Zealand's law of negligence was "significantly indigenous in its origins and development", the New Zealand courts had found it "helpful to think in a broad way" along the lines of the two-stage approach in *Anns* and that Lord Wilberforce's analysis was "helpful" in determining whether it was "just and reasonable that a duty of care of a particular scope was incumbent upon the defendant".[27] The learned judge also stated that while, "if the loss in question is merely economic, that may tell against a duty", it would not be "automatically fatal to a duty of care".[28]

In *Stieller v Porirua City Council*[29]the Court of Appeal considered that the construction of houses with good materials and in a workmanlike manner was a matter within the Council's control and that both the Council and its residents benefited from regulations which made for the economic and social well-being of the community and the creation of a pleasant environment. Accordingly, the Court held that the council's liability was not confined to those defects which affected health and safety or to those which damaged or threatened other parts of the structure,[30] and it awarded the plaintiff $10,000 for the replacement of weatherboards on the house and $1,000 for discomfort and inconvenience.

V. DEVELOPMENTS IN THE 1990S [§4.5]

In 1990 two decisions of the House of Lords spelt the death knell for the *Anns* approach in the UK. In *Caparo Industries plc v Dickman*[31] the House supported Lord Keith of Kinkel's view that it was not possible for any single general principle to provide a practical test which could be applied to every situation to determine whether a duty of care was owed and the scope of any such duty. In fact, *Caparo* itself is notable for seeming to embrace two different approaches to finding a duty of care: first,a majority of the House[32] expressed a preference for the incremental approach which had been propounded by Brennan J in the High Court of Australia in *Sutherland Shire Council v Heyman*;[33]secondly, *Caparo* has been generally regarded as introducing a tripartite test for the determination of the duty of care which asks whether the harm was foreseeable, whether there was sufficient proximity between the parties and whether the imposition of a duty of care would be fair, just and reasonable.[34]

The second case, which was directly significant for the particular issue of the tortious liability of territorial authorities in these situations, was the House of Lords' decision in *Murphy v Brentwood District Council*.[35]Following a number of cases where the House of Lords had shown a marked inclination to confine the *Anns* doctrine within narrow limits,[36]*Murphy* was concerned with the liability of a District Council which had negligently approved plans resulting in a residential property being built on defective foundations and consequently directly raised the question of whether *Anns* had been correctly decided on its facts.

In and at times scathing rebuttal, the House of Lords considered that Lord Wilberforce in *Anns* had been wrong to characterise the loss as physical damage. Rather it was pure economic loss[37] and, on the basis of the law as it stood at the time of the decision in *Anns*, pure economic loss was not within the scope of any duty of care owed to the plaintiffs by the local authority.[38] Lord Keith of Kinkel criticised *Anns* for introducing "a new species of liability governed by a principle indeterminate in character but having the potentiality of covering a wide range of situations, involving chattels as well as real property". He considered that it was an unsatisfactory principle and expressed a preference for the incremental approach to finding a duty of care advocated by Brennan J in *Sutherland Shire Council*.[39] The decision in *Murphy* was that *Anns* had beenwrongly decided as regards the scope of any private law duty of care resting upon local authorities in relation to their function of taking steps to secure compliance with building bylaws or regulations. The House of Lords recognised that the decision in *Anns* had been relied on for 13 years, but nevertheless concluded that departing from it would re-establish a degree of certainty into this area of the tort of negligence.[40] As a result *Dutton* and all subsequent cases decided in reliance on *Dutton* and/or *Anns* were overruled.[41] Since *Murphy* the English courts have not recognised a duty of care with respect to buildings of any kind.

In *Murphy* the House of Lords[42] questioned the approach of the New Zealand Court of Appeal in *Bowen*[43] which raised the question of whether the New Zealand courts would continue to apply the *Anns* principle following the decision in *Murphy*. In *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants and Investigations Ltd* [44]a full bench of the Court of Appeal was unanimous in agreeing that the decision in *Murphy* should not lead to any changed approach to the tort of negligence in New Zealand.[45] In support of Lord Wilberforce's two-stage approach, Cooke P said:[46]

> A broad two-stage approach or any other approach is only a framework, a more or less methodical way of tackling a problem. How it is formulated should not matter in the end. Ultimately the exercise can only be a balancing one and the important object is that all relevant factors be weighed. There is no escape from the truth that, whatever formula be used, the outcome in a grey area case has to be determined by judicial judgment. Formulae can help to organise thinking but they cannot provide answers.

Subsequently, in 1994 in *Invercargill City Council v Hamlin*[47] the Court of Appeal was asked to consider the specific question of whether the established New Zealand law on the liability of a territorial authority to house owners and subsequent owners should be altered in the light *Murphy* and other House of Lords' decisions.[48] Again a full bench of the Court of Appeal was unanimous in holding that the approach of the New Zealand courts to the issue should not change direction.

While the respective judgments contain differences of focus in setting out the reasons for the New Zealand courts not following *Murphy* on this question,[49] there are essentially three aspects which emerge from those judgments: first, there is a consideration of the social conditions at the time when the facts giving rise to the cause of action in the case arose; secondly, there is consideration of the impact of decisions from the courts, government policy and the legislative changes which had occurred over the intervening years; and thirdly, there is a consideration of the likely ramifications of changing the law relating to the liability of local councils.

Richardson J, in particular, emphasised the necessity of grounding the decision in the social and governmental context of the time. He recognised the "obvious difficulties" in examining the case from a 1994 perspective when the house had been built 20 years earlier,[50] but identified a number of features which he considered distinctive of the New Zealand housing environment as they were in the 1970s and 1980s:[51]

- The high proportion of occupier-owned housing;
- Much of the housing construction was undertaken by small-scale cottage builders for individual purchasers;[52]
- The nature and extent of governmental support for private home building and home ownership;
- The surge in house building construction that occurred in the buoyant economy of the 1950s and 1960s – in 25 years through to the mid-1970s the housing stock more than doubled;
- The wider central and local governmental support for private home building;
- The fact that it had never been a common practice for new house buyers, including those contracting with builders for construction of houses, to commission engineering or architectural examinations or surveys of the building or proposed building.

In that general context Richardson J considered that the role of the local authority in relation to the building of homes in New Zealand was very different to the role of the local authorities in the UK.[53] It considered that the scope of local authority involvement extended beyond pure health and safety concerns[54] to consideration of comfort and convenience and standards of workmanship and sound construction, that the powers of local authorities were intended to be exercised for the protection of owners, occupiers or users of buildings, that building inspectors employed by the council had a significant advisory and educative role, and that home-owners in New Zealand did traditionally rely on the local council to exercise reasonable care not to allow unstable houses to be built in breach of the bylaws.[55]

The second aspect in the reasoning of the Court of Appeal was that there was nothing in the cases since *Bowen* and, more significantly perhaps, nothing in the building legislation passed since the 1970s, which provided any basis for altering the approach adopted by the New Zealand courts. The Court observed that over the previous 20 years the courts had been consistent in imposing liability on local authorities for latent defects in dwelling houses caused, or contributed to, by the carelessness of building inspectors in the exercise of their supervisory and controlling functions "without as far as is known any sense that it does other than justice".[56]

The Court of Appeal also noted, obiter, that it was significant that after 18 years of case law in this field "embodying what is essentially a social value judgment",[57] and following the House of Lords' decision in *Murphy*, Parliament had not taken the opportunity to change the law in relation to private damage claims against councils when it had enacted the Building Act 1991.[58] On the contrary, it found that the structure of the legislation indicated that the possible liability of local authorities was part of the accountability at which the legislation was directed. In particular, it was noted that s 91 of the Act, which imposed a long stop limitation period on civil proceedings, implicitly recognised that territorial authorities amongst others could be liable for careless acts or omissions in relation to latent building defects.[59] Against the background of judicial authority, comprehensive reviews of building controls and legislation which had made no attempt to change the basic law in the area, the Court of Appeal considered that any change should come from Parliament rather than the courts.[60]

The third strand of reasoning to be extracted from the Court of Appeal's deliberations in *Hamlin* was its consideration of the possible ramifications of any change to the law. Richardson J[61] identified three policy considerations which he considered would need to be taken into account before there was any move to change the law in this area. First, changing the law would have significant community implications particularly affecting home-owners, the building industry, local bodies, approved certifiers and insurers. The relationships and fee structures developed under the extant legislative regime would have to change if the local authorities were no longer liable for the negligent acts and omissions of their building inspectors. Secondly, any change would have significant economic implications for the country because the legislation and the risk allocation inherent in it is predicated on the shared understanding that local authorities can be held liable if they are negligent. Thirdly, the rights of subsequent purchasers of a house with unknown or known building defects would need to be considered and any move to put their ability to recover on a contractual basis[62] would raise further questions of risk allocation under the building control regime and would require a wide-ranging analysis of all the economic and social implications.

Hamlin was appealed to the Privy Council[63] which upheld the Court of Appeal's decision. Lord Lloyd[64] had doubts that the circumstances were in fact so very different in England and New Zealand but considered that it was the perception that mattered and that New Zealand judges were in a much better position to decide on such matters as community standards and expectations. He also considered that it would be "rash" for the Board to ignore the concern expressed that to change New Zealand law in this area to make it consistent with the decision in *Murphy* would have "significant community implications" and would require a "major attitudinal shift".

VI. THE *HAMLIN* DUTY AND COMMERCIAL BUILDINGS [§4.6]

Bowen, *Johnson* and *Hamlin* itself all involved residential properties and, on the face of it, the basis for the decision in *Hamlin* would suggest that the duty of care owed by councils to home-owners would not extend to the owners of commercial property suing for economic loss. In *Hamlin* Cooke P had left the point open but observed that in a case of commercial or industrial construction "the network of contractual relationships normally provides sufficient avenues of redress to make the imposition of supervening tort duties not demanded".[65]

The first case which directly considered the question of whether the *Hamlin* duty would be extended to a commercial property owner was *Three Meade Street Limited v Rotorua District Council*.[66]In the High Court, Venning J was clear that the *Hamlin* duty did not automatically extend to owners of commercial property but he was also of the view that it was not possible to lay down a rule that under no circumstances would councils owe a duty to such property owners.[67] Ultimately, he said, the question was whether in light of all the circumstances of

the particular case it was just and reasonable that a duty of care should be imposed on the defendant council.[68]

Venning J considered that the contractual arrangements between the plaintiff company on the one hand and the builders, engineers and architects involved in the development on the other and the potential for the plaintiff to protect itself from damage through those contractual obligations sounded against finding a duty of care owed by a council whose role was relatively minor and whose charges were relatively insignificant.[69]

In two subsequent cases the Court of Appeal also refused to find a duty of care owed by councils to owners of commercial properties. [70]In *Te Mata Properties Ltd v Hastings District Council*[71]the appellants discovered that two motels which they had purchased suffered from leaky building syndrome. They sued (among others) the District Council for the cost of the necessary remedial works, the loss of value of the properties, consequential losses and general damages. They relied principally on *Hamlin* in alleging that the Council owed a duty of care to them in performing its obligations under the Building Act 1991, which included granting the relevant business permits, inspecting the properties as they were being constructed and issuing certificates of compliance on completion. The Court of Appeal was unanimous in holding that there was no justification for extending the *Hamlin* cause of action beyond the specific limits of private dwellings.[72]

Queenstown Lakes District Council v Charterhall Trustees Ltd[73]involved an upmarket lodge which had been damaged by fire alleged to have been caused by a faulty design and/or construction in the lodge's chimney. The appeal was from a decision by Fogarty J in the High Court not to allow a strike-out application by the Council which it argued was justified on the ground, inter alia, that Charterhall, as a commercial operator of the lodge, was not covered by the *Hamlin* duty. The Court of Appeal considered that Charterhall could not be classified as "vulnerable" in the same way as house-owners and that it was able to manage the risk of errors by its contractors through the contractual arrangements which it made with them.[74]

The underlying rationale of the decision in *Hamlin* was based on the recognition that members of the public are vulnerable when they buy homes and that council inspectors are relied on to validate that those homes have been constructed in accordance with the requirements. It is these related elements of vulnerability and reliance which served to distinguish the residential home owner from the owner of commercial or industrial property.[75] Parties to commercial dealing have better means of protecting themselves through their contractual arrangements and, as a general proposition, it is much less likely that the courts will be prepared to find a duty of care arising where the owner could have protected itself from the economic consequences of the defendant's negligence by obtaining a warranty from the builder, architect or engineer against defects in the building.[76] Indeed, to impose a duty of care where such contractual arrangements do exist could, in many cases, have the effect of undermining the contractual negotiation of risks and liabilities, particularly where there was a closely negotiated network of contracts.[77]

However, a focus on "vulnerability" of the owner as a basis for distinguishing between residential and commercial property lacked coherency. There was no reason to assume that all residential homeowners were necessarily vulnerable and no owners of commercial buildings were.[78] Neither was it clear, for example, why in some cases the High Court was prepared to grant strike out applications by councils involved in negligently signing off on buildings which, although not residential, were not truly commercial either; [79] these included a residential and medical facility for the aged,[80] a church,[81] and a number of schools.[82]

Three Meade Street, Te Mata and *Charterhall* all involved properties which, while being classified by the respective courts as commercial properties, nevertheless had the purpose of providing (transitory) accommodation for members of the public. Indeed, the same sort of argument could be made of other types of commercial buildings such as office blocks where

employees spend a significant amount of their time. One of the issues raised in *Charterhall* was whether a duty of care would be owed to the owner of a commercial building where the defects in the building threatened the health and safety of anyone who might occupy it for the time being.[83] While accepting that the Building Act did have a purpose of protecting the health and safety of those who use buildings the Court of Appeal considered that the fact that a body has statutory responsibility for a task does not necessarily mean that it will be liable at common law for damages to anyone who suffers loss as a result of its careless performance of the task. Further the Court noted that even if the imposition of a duty of care in relation to health and safety was consistent with the policy of the Building Act, Charterhall had not brought the action as a person whose health and safety had been jeopardised; it had sued as an entity which had suffered financial loss, in part through property damage but principally through the loss of income.[84] While it appears that the Council will not owe the owner of a defective commercial building a duty of care in respect of economic harm, the question of whether it might be held to owe a duty of care to occupiers of that building in respect of health and safety issues arising from exposure to that defect remains open.[85]

In *Three Meade Street* Venning J presciently observed:[86]

> There are a myriad of situations that may arise. A 30-floor high-rise office complex will involve different considerations to the construction of a corner dairy, yet on one view both are commercial in nature. A number of "commercial" buildings may have dual use. A commercial block of shops may have flats above them providing residence for owner/occupiers of the units. A multi-storey apartment may be a commercial development but provide for residential use. The value of the property in issue may vary widely. A commercial warehouse in Timaru might be worth $100,000 as opposed to an architecturally designed home in Auckland worth $5m.

A. *SUNSET TERRACES* [§4.7]

In *North Shore City Council v Body Corporate 188529 (Sunset Terraces)*[87] the Council appealed the ruling in the lower courts[88] that it was liable to the owners of units in two residential apartment blocks for their losses due to water damage resulting from faulty construction which would have been identified had the Council performed its statutory duties of inspection and consent with reasonable care. A significant aspect of the facts of the case was that some of the units in the development had been purchased by investors who did not occupy the accommodation themselves.

The case is also important as representing the first opportunity that the newly established New Zealand Supreme Court had to consider directly the application of the *Hamlin* duty.[89] As a threshold issue, the Council argued that the Court of Appeal and Privy Council decisions in *Hamlin* should not be followed on the basis first, that there had been material changes in the socio-economic fabric of New Zealand society in the intervening years and, secondly, that a materially different legislative landscape came into force with the Building Act 1991, which had not been there at the time of the events giving rise to the *Hamlin* litigation. The Supreme Court disagreed, confirming the *Hamlin* duty as a "soundly and firmly based principle of New Zealand law", with "good policy reasons" to support it.[90]

The Supreme Court then had to consider whether the duty should be confined to the circumstances of the *Hamlin* case itself[91] or whether it could be applied to any building which was intended for residential use. The Supreme Court considered that the duty was owed to all owners of the apartments.[92] In defining the scope of the *Hamlin* duty the Court said that the rationale for a duty owed to home owners is the combination of two related proximity elements: "the control which councils have over building projects and on the general reliance which people acquiring premises to be used as a home place on the council to have exercised its independent powers of control and inspection with reasonable skill and care".[93]

The Supreme Court saw no reason to confine the application of the principle to "single stand-alone modest dwellings whose owners personally occupy them". If the duty was "designed to protect the interests citizens have in their homes" then, as a matter of principle and logic, that duty should extend to all homes irrespective of "ownership structure, size, configuration, value or other facets of premises intended to be used as a home". [94]

The Supreme Court considered that the fact that professionals such as engineers and architects were involved in large scale developments should make no difference to the liability of the Council; purchasers were unlikely to know the extent of the professionals' involvement and it may have been limited or not relevant to the problems giving rise to the loss in question. But, more fundamentally, input from professionals should not absolve Councils from liability because the rationale for the *Hamlin* duty was the Council's power of control and the general reliance which is placed on their independent inspection role.[95]

Both the Court of Appeal[96] and the Supreme Court[97] agreed with Heath J in the High Court that a duty of care should be premised on the *intended* end use of a building. [98] Heath J considered that councils should owe a duty of care to original or subsequent owners or occupiers of a unit where the intended use of the building was disclosed as residential in the plans and specifications (or where the council knew that to be the intended use).[99] Where a residential use was disclosed it would have the effect of putting the Council on notice that it would owe a duty of care to prospective purchasers; it could then put in place appropriate processes to manage the risks of the statutory obligations cast upon it.

While the Supreme Court considered that the "bright line" proposed by Heath J had the dual advantages of simplicity of expression and predictability in outcome,[100] it nevertheless posed some questions regarding the coherency of the duty. First, the focus on the use of the premises rather than the relationship which owners have with the premises had the effect of extending the *Hamlin* duty to owners who had residential premises built for commercial reasons (or those who purchased them for such reasons). The Supreme Court considered that this was consistent with the policy reasons for the duty pointing out that protection of a non-owner occupant, such as a tenant, could be achieved only through a duty owed to the owner.[101]

Secondly, a related issue which was not discussed directly in *Sunset Terraces*, was the effect, if any, of a subsequent change to the use of the premises on the duty. If, for example, a barrister subsequently purchased a unit in a development identified as being for residential use and set up her chambers in that unit would the duty continue to apply? Presumably, the answer should be in the affirmative because any duty would arise at the time the consents and code compliance certificates were issued and the potential for changed use is not a factor which should affect the designation of a building as identified in the plans.[102] Certainly predictability and certainty of outcome would suggest that the purchasing barrister be owed the same duty as the person selling the unit.

The third issue which arose was more problematic. It concerned the question of what happened where, in Heath J's words, there is "the troublesome possibility of a mixed-use development."[103] The court in *Sunset Terraces* left the question open[104] but that issue was to the fore in a different case which was then before the courts.

B. *SPENCER ON BYRON* [§4.8]

Body Corporate No 207624 v North Shore City Council [Spencer on Byron][105]concerned a multi-storey building of 23 floors. The complex is operated as a hotel and it contains all the associated amenities which might be expected from a hotel including a tennis court, gymnasium and swimming pool. While the building contains 243 units which are all individually owned[106] and rented almost exclusively to paying guests, there are also six residential penthouse apartments in the complex which are used as private dwellings.

The plans submitted to Council clearly showed the proposed penthouse apartments but the four building consents issued in 2000 all described the building as "New Commercial/ Industrial". Spencer on Byron was completed in 2001 and the Council issued a series of code of compliance certificates pursuant to the Building Act 1991 for the building consents issued. Soon after completion the properties in the complex began to show evidence of physical defects allegedly due to lack of weathertightness. Extensive remedial work was required with a total estimated cost of almost $19.5m.[107] The Body Corporate[108] and the owners brought actions against a number of parties including the builders, the architects, the engineers, the insurer of a cladding company and the North Shore City Council. The claims against the Council alleged negligence in performing its statutory functions of issuing building consents, inspecting and approving the development and in the issuing of the code compliance certificates.

On an application by the Council, the High Court[109] struck out the claims in negligence by the Body Corporate and the owners of the hotel units on the basis that they were commercial properties and the Council could not arguably owe those owners a duty of care. However the High Court refused to strike out the claims by the owners of the residential apartments which were used as private dwellings. While finding that the existence of the residential apartments could not, and did not, affect the designation of the building as a commercial building, Potter J concluded that the possibility that the owners of the penthouses might succeed in establishing against the Council a duty of care based on *Hamlin* could not reasonably be excluded.[110] Potter J considered that, if the "bright line" approach was the appropriate test,[111] then the claim by the penthouse owners would fail[112] but considered the "situation in respect of any duty of care to be at least arguable".[113] The building owners appealed and the Council cross-appealed against the refusal to strike out the apartment owners' claims in negligence.

Significantly, in argument before the Court of Appeal it was common ground between the parties that in the High Court Potter J had not been correct in considering that it was arguable that the Council might owe a duty of care to one group of owners but not to others; the parties agreed that it was simply not feasible to isolate the waterproofing issues by reference to the residential and commercial components in the building and either the Council owed a duty of care to all owners and the Body Corporate or none.

The Court of Appeal was unanimous in finding that the six residential apartments were no more than incidental to the hotel units or the commercial nature of the building as a whole; that their presence in the Spencer on Byron complex could not convert its essential character into a residential building; and that it did not change the nature of the hotel units owners' interests from commercial to residential. Further, the Court considered that the scope of the Council's liability could not be expanded to include a class which was not entitled to protection by the expedient of an argument that a duty owed to one owner in the building equates to an obligation to all.[114]

The Court divided however on the question of whether a separate duty could be owed to the residential apartment owners. Dissenting on this point, Harrison J regretted that "no principled attempt" had been made in argument by the apartment owners to follow through on Potter J's judgment and reasoning in support of such an approach.[115] He considered that the *Hamlin* duty was absolute and its articulation in *Sunset Terraces* did not seem to allow for exceptions. The duty was designed to protect the interests which owners have in their homes and it was owed to all home-owners alike without distinctions based on structure, size, value or the nature of ownership.[116] Given that, Harrison J concluded that the fact that the residential properties were within the same structure as commercial properties, that the building as whole was predominantly commercial in nature, and that the Council performed its statutory functions in relation to the building as a whole, could not operate individually or collectively at a policy level to displace the Council's liability to the apartment owners.[117]

The majority of the Court of Appeal decided that no duty was owed. It considered that to impose a duty of care solely in respect of the residential component in the circumstances of this case would not be fair, just and reasonable; to do so would be to impose different tortious duties on the Council in respect of the residential and commercial components of the building, with no logical justification given the acceptance by the parties of the integrated nature of building and the indivisibility of the watertightness issues affecting the entire building.[118]

In the author's view the approach taken by the majority was fraught with difficulties.[119] There was the obvious problem of determining the point at which a residential component in a development constitutes the "substantial component" which will trigger a duty arising. More crucially though, denying the Council's liability to residential homeowners in the context of mixed-use developments on the basis the proportion of residential accommodation has not reached the undefined threshold which makes it a "substantial component" ran counter to the rationale of the *Hamlin* duty. While there may have been practical implications in finding a duty owed to just the residential owners these were not insurmountable[120] and the majority's approach had the effect of making the existence of a duty conditional upon arbitrary or variable factors, a situation which was rejected by the Supreme Court in *Sunset Terraces*.[121]

In something of an unexpected decision, the majority in the Supreme Court[122] declined to follow either of the approaches in the Court of Appeal. Instead, it overruled the earlier Court of Appeal decisions in *Te Mata* and *Charterhall* and held that territorial authorities owed a duty of care in their inspection role not only to the owners of residential premises but also to the owners of commercial premises.

Three separate judgments were issued by the majority,[123] each evincing slightly different approaches to the question before them. Elias CJ did not consider the claim to be a "novel" one[124] and thought that to draw a distinction between the owners of residential buildings and the owners of commercial buildings would be inconsistent with the Supreme Court's recent decision in *Sunset Terraces*.[125] The Chief Justice did not agree with the Council's argument that a duty of care to the owners of commercial buildings should be excluded for policy reasons under the *Anns* approach. In her view the Building Act 1991 now set up a relationship of sufficient proximity between the Council and building owners to give rise to a duty of care and the nature of that relationship did not differ according to the use to which the building is put.[126]

Tipping J stressed that he was not going to couch "the issue as being whether the residential duty should be *extended* to all other buildings",[127] preferring a "de novo" analysis based on the *Anns* approach of considering the question of proximity and a weighing of relevant policy factors. His starting point was that, while proximity was a necessary condition for finding a duty, once proximity was established a duty should be found to exist "unless it would not be in the public interest to recognise the duty".[128] In the learned judge's opinion the ultimate question was whether it was reasonable to recognise the duty and his analysis of the policy factors did not provide any good reason for denying "the prima facie duty of care established by the existence of proximity between the parties".[129]

Chambers J[130] was of the opinion that the case involved "a duty of care in new circumstances" and said that whether or not the courts should recognise such a duty was "ultimately a matter for judicial evaluation of competing policy factors". [131] He concluded that there was no principled basis for distinguishing between the liability of those involved in the construction of residential buildings and those involved in the construction of other kinds of buildings and that any other conclusion would be inconsistent with the building legislation.[132]

William Young J disagreed with the majority. In his view the relevant question was whether it was fair, just and reasonable to impose a duty of care.[133] The learned judge considered that *Hamlin* and *Sunset Terraces* had been correctly decided on the bases of foreseeability and reliance. [134] However, in his opinion, any extension of the duty to the owners of commercial

buildings could not be justified by reference to the existing authorities and the principles established in those cases,[135] or by reference to the relationship, and the ensuing reliance if any, between commercial building owners and territorial authorities,[136] or by reference to any associated policy considerations.[137]

VII. CONCLUDING OBSERVATIONS [§4.9]

In *Spencer on Byron* the conclusion of the Court, William Young J dissenting, was that councils owe a duty of care in their inspection role to owners, both original and subsequent, regardless of the nature of the premises. The decision marked a significant clarification of the law with the Supreme Court pointing out that the authorities which preceded *Te Mata* and *Charterhall* did not purport to limit the duty of care recognised according to the type of building or its use.[138] The Supreme Court refused to draw a distinction between vulnerable and non-vulnerable or commercial and non-commercial property on the basis that the question of vulnerability must be looked at not in relation to the plaintiff in the case at hand but in relation to likely plaintiffs as a class.[139]

Prior to the decision in*Spencer on Byron* the courts had emphasised the reliance which the owners of residential buildings placed in the control exercised by territorial authorities over the building process.[140] In *Spencer on Byron* there was a subtle shift of focus to the control itself as being the predominant consideration – a factor the Court found which applies equally to buildings of all kinds.[141]

When enacting the Building Act 1991, Parliament clearly envisaged that local authorities would continue to be liable in tort if they negligently issued building consents or negligently inspected during the course of construction.[142] Further, there is nothing in the Act to suggest that a distinction so far as liability under the tort of negligence was concerned between residential houses and other buildings.[143] Recently, in*Southland Indoor Leisure Centre Charitable Trust v Invercargill City Council* the Supreme Court noted:[144]

> … *Spencer on Byron* confirmed the importance of the Council's role and responsibilities under the 1991 Act and the emphasis on statutory purpose. The relevance of the statutory basis is apparent from the references to the interlocking regulatory framework, the Council's control over the construction process and associated reliance, and in the reference to the fact that the common law duty of care "marches in step with the statutory functions" Parliament imposed on local authorities and building certifiers. As to the purpose, that included, but is not limited to, protection of the health and safety of those using the building. The purposes are promoted by ensuring compliance with the building code as a minimum standard

While the basis for finding a duty of care may have shifted to the relationship of proximity set up by the requirements of the relevant legislation, *Hamlin* remains one of the most significant decisions in New Zealand's civil jurisprudence.[145] The decision was a response to the country's attitude to housing at the time. Homeownership was the holy grail for many New Zealand families throughout the twentieth century and, from the 1950s, the post-war baby boom and the expanding economy created increased demand for new housing; unfortunately, that led to many New Zealand homes being negligently constructed.[146]

It is true that a number of the socio-political-economic factors identified by Richardson J in *Hamlin* as being distinctive of the New Zealand housing market in the early 70s would no longer be relevant today. However, there is still a high proportion of occupier-owned housing (although the percentage has been steadily decreasing[147]) and it is still the case that new house buyers would not normally commission independent engineering or architectural examinations or surveys. Of course, we should not be surprised by the latter – the *Hamlin* decision itself has provided a self-fulfilling prophecy in that regard.

In *Hamlin* the Court of Appeal approved the 18 years of precedent since *Bowen.* The Supreme Court decision in *Sunset Terraces* 15 years later confirmed that the duty continued to be firmly established within New Zealand jurisprudence and applied to all residential homes irrespective of "ownership structure, size, configuration, value or other facets of premises intended to be used as a home".[148] Given the weight of judicial authority, the approach taken by the legislature in the Building Act 1991 (and in the Building Act 2004), and the significant continuing economic and political implications which flow from the decision, it is hardly surprising that there has been a general consensus that if there were to be any significant change to the *Hamlin* duty it would be brought about by Parliament rather than the courts.[149] There has never been any suggestion the Parliament was minded to introduce legislation to change the *Hamlin* duty; either in respect of the owners of residential premises; or, since the decision in *Spencer on Byron*, in respect of the owners of commercial premises.

More generally, the decisions in the cases involving defective buildings have had a significant impact on the development of the tort of negligence in New Zealand in two major respects. First, in relation to finding a duty of care, the building cases have reaffirmed the importance of the approach set out in *Anns.*[150]Lord Wilberforce's two-stage approach has been treated as a framework to assist analysis rather than as a formula to provide answers, [151] and the courts have taken the view that there is no substantial difference between the *Anns* approach of considering "whether there are any considerations which ought to negate or reduce or limit the scope of the duty" and the subsequent *Caparo* refinement:[152]

> As to that framework, it seems to us that it must amount to the same thing whether stated as having two stages (one of which has two parts) or as three stages. The important insight found in . . . New Zealand cases is that when a court is considering foreseeability and proximity, it is concerned with everything bearing upon the relationship between the parties and that, when it moves to whether there are policy features pointing against the existence of a duty of care – that is, whether it is fair, just and reasonable to impose a duty – the court is concerned with externalities – the effect on non-parties and on the structure of the law and on society generally.

Statements from the UK courts would also seem to support the view that there is no significant difference in practice between the general approach in the New Zealand and English courts respectively (and in other jurisdictions). In *Caparo*,[153] Lord Bridge of Harwich accepted[154] that the concepts of proximity and fairness were incapable of any precise definition which would give them "utility as practical tests". In *Takaro Properties Ltd v Rowling*[155]Lord Keith of Kinkel[156] emphasised the importance of considering all the relevant circumstances in deciding whether a duty of care should be imposed, and that the question was of an intensely pragmatic character well suited for gradual development but requiring most careful analysis. And in *Customs and Excise Commissioners v Barclays Bank plc*[157]Lord Bingham considered that the "threefold test provides no straightforward answer"[158] and that the incremental test was only helpful "when used in combination with a test or principle which identifies the legally significant features of a situation".[159]

Certainly, there are differences in the decisions reached on particular issues within the respective jurisdictions - and the defective building cases are a prime example of that – but ultimately those differences turn on what the courts have concluded is "fair, just and reasonable" having regard to the policy considerations within those jurisdictions.[160] As Lord Bingham said in *Customs and Excise Commissioners*, " [I]t seems to me that the outcomes (or majority outcomes) of the leading cases . . . are in every or almost every instance sensible and just, irrespective of the test applied to achieve that outcome".[161]

The second issue on which the defective buildings cases have been critical in developing the jurisprudence in New Zealand is on the question of the recovery of pure economic loss. Despite some strained depictions of the nature of the loss in the early cases dealing with defective buildings,[162] it has been clear since *Murphy* that in most of these cases the damage

claimed – the cost of repair - is correctly characterised as pure economic loss.[163] That has been accepted by the New Zealand courts and the underpinning logic of the *Hamlin* decision is generally recognised to be the need to protect vulnerable home owners from economic loss.[164]

In overruling *Anns*, the House of Lords in *Murphy*[165]confirmedthe approach in the English Courts of excluding recovery of pure economic loss[166] except in those cases where the scope of the duty is such that it can be said that the defendant has voluntarily assumed responsibility for that type of loss.[167]

In jurisdictions other than the UK, an exclusionary rule has not been applied[168] and courts have considered various factors in determining whether there should be recovery of economic loss.[169] In New Zealand the courts have not rejected claims simply because they involve recovery of pure economic loss.[170] In *Hamlin* Cooke P said:[171]

> Harm to the person is one thing: harm to economic interests, whether caused by damage to property or in some less tangible way, is another. Broad distinctions, if required, can perhaps be more usefully and more realistically drawn on those lines than on the basis of sometimes metaphysical and controversial distinctions between "pure" and "impure" economic damage. Much tort law, possibly even most, is concerned with economic damage of some kind.

Since Cardozo CJ's seminal statement in *Ultramares v Touche*,[172] the courts in all jurisdictions have been cautious about finding liability for such losses "where that may expose the defendant to unlimited liability to an indefinite number of persons whose rights may have been affected or interfered with by the negligent conduct".[173] The New Zealand courts have rarely had to wrestle with the indeterminacy issue, [174] although recently, in *Attorney-General v Strathboss Kiwifruit Limited*,[175] the Court of Appeal considered that to hold that the then Ministry of Agriculture and Forestry (MAF) owed a duty of care to kiwifruit orchardists to avoid the devastating Psa bacteria entering New Zealand in 2010, would be unfair, unjust and unreasonable because of the risk of indeterminate liability.[176] In the area of personal injuries of course, the accident compensation regime has meant that the courts have been relieved of the attendant concern that the floodgates of litigation might be opened.[177]

Caution has been exercised however in cases where to allow the recovery of economic loss under the tort of negligence would cut across a coherent body of law in another field; where there are, or could realistically have been, other remedies for the plaintiff has been treated as relevant to the assessment of vulnerability.[178] In *Te Mata* Baragwanath J suggested that *Hamlin* was an exception to the general principle that damages for pure economic loss are generally irrecoverable in negligence[179] but, with respect, that does not appear to accurately represent the position in New Zealand. There have been a number of cases where recovery for pure economic loss has been allowed,[180] and the courts have consistently made clear their view that, while the fact that the damage suffered is economic loss may weigh against a duty of care, it is not decisive per se.[181] A position which has been reiterated by the Supreme Court in *Spencer on Byron*.[182]

VIII. POSTSCRIPT: NEW ZEALAND'S "LEAKY BUILDINGS" CRISIS [§4.10]

The hotel in *Spencer on Byron* was just one of thousands of leaky buildings which continue to be a major cause of concern in New Zealand. In the late 1990s and early 2000s a combination of factors resulted in a large number of buildings being built which were vulnerable to moisture ingress. Those factors included:

- The Building Act 1991 itself reduced controls on the building industry on the assumption that building quality would be mostly assured by market-driven forces.

- A boom in the housing market in New Zealand which resulted in (1) a large number of builders with little or no industry related qualifications[183] or experience who were carrying out often quite complex construction work with little or no supervision and (2) developers who had no incentive to pay for the proper design of the buildings and failed to deliver the appropriate level of supervision of construction to ensure that the buildings were built properly.
- A preference for design features in buildings which made them susceptible to moisture ingress - many leaky buildings were constructed in the Mediterranean style with parapets, flat roofs and inadequate or no eaves.
- The use of modern monolithic cladding systems which were used outside their specifications or installed incorrectly.
- Air-tight sealing of claddings and windows and wall cavities filled insulation.
- The approval by the Building Industry Authority[184] of the use of untreated kiln dried framing timber which was particularly susceptible to any moisture ingress.

In 2009, a Government report[185] estimated that the likely number of homes affected was in a range from 22,000 to 89,000 with a "consensus forecast" of 42,000 failures at an economic cost to repair of $11.3 billion. However, the report also recorded the view of many experts that the majority of monolithic-clad dwellings constructed before 2006 would suffer from 'weathertightness' issues making the total number of failures in excess of 110,000 homes at an estimated repair cost of around $30 billion.[186]

In 2015 apartment owners won $20.05 million - including $10 million from Auckland Council.

The crisis resulted in claims being brought against local councils for failing to properly enforce the requirements of the Building Act 1991 and the associated regulations.[187] On judge observed that the large number of leaky homes across the country tended "to suggest a wholesale failure by councils to face systematically and robustly the reality that without firm control of standards the temptation for developers to throw up cheap buildings of defective quality would be irresistible" and that the council's evidence of wide-spread low standards suggested a "systemic failure by councils to perform their obligations".[188]

NOTES

1 [1932] AC 562 (HL) at 580-581.

2 [1972] WLR 299 (CA).

3 At 312.

4 [1978] AC 728 (HL). *Anns* was also concerned with allegations of negligence against the local authority's building inspectors. There were two preliminary points of law at issue in *Anns*: the first was whether, on the facts, there was a breach of a duty of care owed by the council to the plaintiffs; the second was whether the claim was statute-barred.

5 While holding that *Dutton* was "in the result rightly decided", Lord Wilberforce considered that the approach taken by Lord Denning MR in that case,if applied generally, would put too high a duty on a local authority. The decision in *Dutton* was therefore approved subject to the House's clarification of the "correct legal basis for the decision".

6 Lord Diplock (at 761), Lord Simon of Glaisdale (at 761) and Lord Russell of Killowen (at 771) agreed with Lord Wilberforce. Lord Salmon while arriving at the same decision as the rest of the House delivered a separate speech dealing with one particular aspect of the case.

7 At 754.

8 At 754.

9 At 755.

10 See: Lord Denning MR at 312; Sachs LJ at 319 considered that it was physical damage although he considered that to distinguish between physical damage and economic damage was to adopt a fallacious approach; Stamp LJ, relying on the decision in *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 (HL), considered that the duty owed by the council could embrace economic damage.

11 See Lord Wilberforce at 759.

12 At 751-752.

13 [1977] 1 NZLR 394 (CA).

14 See at 410 per Richardson P, at 417 per Woodhouse J, at 423 per Cooke J. At first instance, Speight J had found in favour of the builder on the basis that the loss was purely economic (see [1975] 2 NZLR 546 at 558).

15 [1979] 2 NZLR 234 (CA) at 239 per Cooke and Somers JJ, at 242 per Richardson J

16 [1978] 1 NZLR 553 (CA).

17 At 573; and see Cooke J at 584.

18 At 238 per Cooke and Somers JJ, at 242 per Richardson J.

19 See eg *McLoughlin v O'Brian* [1983] 1 AC 410 (HL) and *Junior Books v Veitchi Co* [1983] 1 AC 520 (HL).

20 [1985] 1 AC 201. See also: *Candlewood Navigation Corp v Mitsui O.S.K. Lines* [1986] AC 1 (HL); *Leigh and Sillivan Ltd v Aliakmon Shipping Co Ltd* [1986] AC 786 (HL); *Yuen Kun Yeu v Attorney-General of Hong Kong* [1988] AC 175 (PC); *D & F Estates Ltd v Church Commissioners for England* [1989] AC 177 (HL).

21 At pp 240-241.

22 (1985) 157 CLR 424 (HCA) at 481.

23 At 588 per Brennan J.

24 [1984] SCR 2 (SCC).

25 *Brown v Heathcote County Council* [1986] 1 NZLR 76 (CA); *Stieller v Porirua City Council* [1986] 1 NZLR 84 (CA); *Craig v East Coast Bays City Council* [1986] 1 NZLR 99 (CA). Reserved judgments in all three cases were handed down simultaneously on 19 June 1986.

26 [1986] 1 NZLR 76 (CA).

27 At 79-referring rather pointedly perhaps to Lord Keith of Kinkel's comments in *Peabody*.

28 At 79-80. Interestingly, on appeal, the Privy Council upheld the award of remedial damages and appeared to accept Cooke P's conclusion that a mere economic loss would not be fatal to finding a duty of care: see [1987] 1 NZLR 720 (PC) at 725-726 per Lord Templeman; and see Cooke P's subsequent comments on that Privy Council decision in *Invercargill City Council v Hamlin* [1994] 3 NZLR 513 (CA) at 519.

29 [1986] 1 NZLR 84.

30 At 94. See eg *Invercargill City Council v Hamlin* [1994] 3 NZLR 513 at 533 per Gault J.

31 [1990] 2 AC 605 (HL).

32 At 618 per Lord Bridge of Harwich, at 628 per Lord Roskill, at 629 per Lord Ackner, at 633 and 635 per Lord Oliver of Aylmerton.

33 (1985) 157 CLR 424 (HCA) at 481.

34 At pp 617-618 per Lord Bridge. And see eg: *Spring v Guardian Assurance* [1995] 2 AC 296 (HL); *Customs and Excise Commissioners v Barclays Bank Plc* [2007] 1 AC 181 (HL).

35 [1991] 1 AC 398 (HL).

36 At 471 per Lord Keith of Kinkel; at 474 per Lord Bridge of Harwich

37 At 466 and 470 per Lord Keith of Kinkel; at 475 per Lord Bridge of Harwich; at 484 per Lord Oliver of Aylmerton; at 492 per Lord Jauncey of Tullichettle

38 See at 468 per Lord Keith of Kinkel

39 At 461 and see above at n 23.

40 At 471–472; see also at 475 per Lord Bridge of Harwich.

41 At 472.

42 At 469 per Lord Keith of Kinkel; at 477–478 per Lord Bridge of Harwich; at 487 per Lord Oliver of Aylmerton; at 495–496 per Lord Jauncey of Tullichettle.

43 Following *Dutton v Bognor Regis*–see above n 13.

44 [1992] 2 NZLR 282 (CA). These two proceedings involved separate applications to strike out an allegation of negligence against an investigator engaged by the insurer to investigate and report to it on claims under the respective policies. Rule 15.1(1)(a) of the High Court Rules provides that the Court may, at any stage of a proceeding, strike all or part of a pleading out where a pleading discloses no reasonable cause of action or defence or other case appropriate to the nature of the proceeding. The jurisdiction is to be exercised sparingly and only in clear cases. In relation to applications to strike out claims which plead novel duties of care the Supreme Court has said: "[T]he case should be allowed to go to trial, unless as a matter of law the pleaded facts are incapable of giving rise to the duty of care asserted": see *Couch v Attorney General* [2008] 3 NZLR 725 (SC) at [118].

45 At 304 per Cooke P, at 306 per Richardson J, at 316 per Hardie Boys J, at 312 per Casey J, at 325 per Sir Gordon Bisson.

46 At 294.

47 [1994] 3 NZLR 513 (CA).

48 The first defendant building company had ceased trading, had no assets and took no part in the proceedings. At first instance it was accepted by all parties that the City Council owed a duty of care to

the plaintiff but counsel for the local authority reserved the right to argue the *Murphy* issue on appeal. The issue in the High Court was whether plaintiff's claim was time barred. In finding for the plaintiff, Williamson J in the High Court applied *Mount Albert Borough Council v Johnson* [1979] 2 NZLR 234 and *Askin v Knox* [1989] 1 NZLR 248 in holding that under the Limitation Act 1950 time started to run when the defect in the building became apparent or manifest ("the reasonable discoverability test"): *Hamlin v Bruce Stirling Ltd* [1993] 1 NZLR 374. The basis for calculating the applicable period is now governed by s 11 Limitation Act 2010.

49 Cooke P for example emphasises the orthodoxy of the New Zealand approach by contrasting the "upheavals in high level precedent" in the UK with the constancy of the New Zealand approach over 20 years, by pointing out the similarity between the New Zealand approach and that adopted in the Canadian Supreme Court, and by concluding that it is legitimate for judges in different common law countries to reach different conclusions on such issues. Richardson J on the other hand suggests that the differing social contexts and legislative regimes within the respective jurisdictions justify a difference in approach. For a trenchant criticism of Richardson J's judgment in *Hamlin* see Allan Beever, *Rediscovering the Law of Negligence* (Hart Publishing, Oxford, 2007) at 253-254.

50 [1994] 3 NZLR 513 (CA) at 528.

51 At 524-525.

52 Richardson J (at 524) referred to the "Commission of Enquiry into Housing in New Zealand" ([1971] 4 AJHR H-51) in noting that the New Zealand house was not a factory produced article but was custom built to suit the site and owner and that, apart from comparatively few major operators, most firms in the building industry at the time were small with 85 per cent of home builders employing fewer than six workers.

53 See also Cooke P at 519, by Casey J at 530, by Gault J at 534 and by McKay J at 546.

54 In *Anns* a majority of the House of Lords considered that the question whether the Council came under a duty of care towards the plaintiffs had to be considered in relation to the powers, duties and discretions arising under the Public Health Act 1936: see [1978] AC 728 (HL) at 760 per Lord Wilberforce.

55 At 525–526 per Richardson J, at 519 per Cooke P, at 530 per Casey J, at 534 per Gault J, at 546 per McKay J.

56 At 522 and 524 per Cooke P, at 524 and 528 per Richardson J, at 529 per Casey J, at 533 per Gault J.

57 At 528 per Richardson J.

58 At 523 per Cooke P, at 534 per Gault J. The Building Act 1991 which moved the emphasis away from the previous prescriptive regime to a performance-based code (ie it stated how a building and its various components must perform rather than prescribe how it must be designed and constructed) was enacted following a decade of research and study which culminated in the 1990 Report of the Building Industry Commission to the Minister of Internal Affairs, "Reform of Building Controls".

59 At 524 per Cooke P; at 526–527 per Richardson J.

60 At 528 per Richardson J; at 534 per Gault J; at 546 per McKay J.

61 At 528–529, at 546 per McKay J.

62 See *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 AC 85 (HL).

63 [1996] 1 NZLR 513 (PC).

64 At 521.

65 [1996] 1 NZLR 513 (CA) at 520. Cooke P was referring to the contractual relationship between developers, builders, engineers and architects, but as Lord Denning MR said in *Dutton*, "if the builder is not liable for the bad work the council ought not to be liable for passing it": [1972] 2 WLR 299 (CA) at 309.

66 [2005] 1NZLR 504 (HC).

67 At [39]-[40] and echoing Cooke P's caution in *Hamlin* (see at [1994] 3 NZLR 513 (CA) at 520).

68 At [43].

69 At [50]–[52]. The Court found that all told the fees charged by the council amounted to less than 1 per cent of the sale price of $835,000, which represented the value of the motel when sold to the plaintiff.

70 Both cases involved strike out applications.

71 [2009] 1 NZLR 460 (CA).

72 At [73] per Baragwanath J; at [84] per Robertson and O'Regan JJ. The Court of Appeal referred to the definition of "household unit" in s 2 of the Building Act 1991 as ". . . any building or group or buildings, used or intended to be used solely or principally for residential purposes and occupied or intended to be occupied exclusively as the home or residence of not more than one household; but does not include a hostel or boarding house or other specialised accommodation."

73 [2009] 3 NZLR 786 (CA).

74 At [39].

75 *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants and Investigations Ltd* [1992] 2 NZLR 282 per Richardson J at 308-309; see also, Jane Stapleton *Duty of Care: Peripheral Parties and Alternative Opportunities for Deterrence* (1995) 111 LQR 301 at 344.

76 In this respect the approach of the New Zealand courts to date has been generally aligned with the position adopted by the Australian High Court: see eg *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515. But note that in *Winnipeg Condominium Corporation No 36 v Bird Construction Co* [1995] 1 SCR 85 the Supreme Court of Canada refused to strike out a claim by the owner of an apartment building holding that where negligence in the planning or construction of a building caused it to be dangerous, the subsequent purchaser could recover the costs of making the building safe.

77 See eg *Rolls Royce New Zealand Ltd v Carter Holt Harvey Ltd* [2005] 1 NZLR 324 (CA) per Glazebrook J at [122].

78 *Carter Holt Harvey Ltd v Minister of Education* [2016] NZSC 95 at [53].

79 See *Minister of Education v Econicorp Holdings Ltd* [2011] NZCA 450 at s [39] and [61] per Arnold J.

80 *Kerikeri Village Trust v Nicholas* HC Auckland CIV-2006-404-0005110, 27 November 2008.

81 *Auckland Christian Mandarin Church Trust Board v Canam Construction (1955) Ltd* HC Auckland CIV-2008-404-8526, 25 June 2010.

82 *Mt Albert Grammar School Board of Trustees v Auckland City Council* HC Auckland CIV-2007-404-4090, 25 June 2009. But note that in *Minister of Education v Econicorp Holdings Ltd* [2011] NZCA 450, while acknowledging that the Ministry was "large, well resourced and no stranger to property transactions" (at [34]) and that there were "significant policy considerations pointing against imposing a duty of care" (at [62]), a majority of the Court of Appeal nevertheless refused to strike out an action brought against the builder and the architect of a school hall. In 2009 the Minister of Education said that at least 73 schools were affected; and in 2011 that 157 schools still needed repairs, at an estimated cost of at least $1.5 billion: Gibson, Anne (18 September 2009) "Schools' leaky building toll soars" *The New Zealand Herald* at http://www.nzherald.co.nz/leaky-buildings/news/article.cfm?c_id=562&objectid=10598073 (Retrieved July 2022); Fisher, Amanda (28 January 2011). "Huge bill for leaky schools" *The Dominion Post* at http://www.stuff.co.nz/national/education/4591094/Huge-bill-for-leaky-schools (Retrieved July 2022).

83 In *Te Mata* Baragwanath J considered that it was arguable that the need to protect occupants' health and safety could justify the imposition of liability on councils even in a commercial context (see at [37]–[60]) and the judge would have given the appellants time to amend their pleadings to include such a claim (see at [80]). However, the other members of the Court of Appeal, Robertson and O'Regan JJ,did not agree with Baragwanath J on this point noting that despite having had ample opportunity to include in their statement of claim pleadings relating to a duty based on health and safety concerns, the appellants had chosen not to do so (see at [85]–[86]). The Court of Appeal decision in *Te Mata* was issued after Fogarty J in the High Court had delivered his judgment in *Queenstown Lakes* and before the latter case was heard by the Court of Appeal Charterhall submitted a draft amended statement of claim which incorporated the health and safety pleading.

84 At [42].

85 For an interesting discussion of the possible health effects arising from exposure to "leaky buildings" see Jeroen Douwes and Philippa Howden-Chapman *An Overview of possible health effects from exposure to "leaky buildings"* in Steve Alexander and others *The Leaky Buildings Crisis: Understanding the Issues* (Thomson Reuters, Wellington, 2011) at 71.

86 [2005] 1NZLR 504 (HC) at [40].

87 [2011] 2 NZLR 289 (NZSC). The appeal to the Supreme Court joined two separate appeals from judgments of the Court of Appeal: *North Shore City Council v Body Corporate 188529 (Sunset Terraces)* [2010] 3 NZLR 486 (CA) and *O'Hagan v Body Corporate 189855 (Byron Avenue)* [2010] 3 NZLR 445 (CA).

88 In the High Court [2008] 3 NZLR 479 and the Court of Appeal at [2010] 3 NZLR 486.

89 The New Zealand Supreme Court (*Te Kōti Mana Nui*), was established on 1 January 2004 by the Supreme Court Act 2003 and sat for the first time on 1 July 2004. It replaced the right of appeal to the Judicial Committee of the Privy Council.

90 At [26]. See also *Southland Indoor Leisure Centre Charitable Trust v Invercargill City Council* [2017] NZSC 190 at [56] per Elias CJ, O'Regan and Ellen France JJ.

91 At issue in *Hamlin* was a stand-alone "modest" single dwellinghouse occupied by its owners.

92 With respect to the appeal in the *Byron Avenue* case the Supreme Court agreed with the Court of Appeal that under s 13 of the Unit Titles Act 1972 the body corporate could sue on behalf of the unit holders for damage suffered by the common areas of the building: at [55]–[59] per Tipping J and at [11] per Elias CJ.

93 At [48] per Tipping J.

94 At [47]–[49] per Tipping J and at [7] per Elias CJ.

95 At [50] per Tipping J and at [8] per Elias CJ.

96 [2010] 3 NZLR 486 (SC) at [69].

97 [2011] 2 NZLR 289 (SC) at [51] per Tipping J.

98 [2008] 3 NZLR 479 (HC).

99 At [220].

100 At [214] and [217].

101 [2011] 2 NZLR 289 (SC) at [53] per Tipping J.

102 See the obiter comments of Potter J in *North Shore City Council v Body Corporate 207624 (Spencer on Byron)* HC Auckland CIV-2007-404-4037, 11 November 2009 at [22].

103 [2008] 3 NZLR 479 (HC) at [219].

104 [2011] 2 NZLR 289 (SC) at [51] per Tipping J.

105 *Body Corporate No 207624 v North Shore City Council [Spencer on Byron]* [2012] NZSC 83

106 Each had its own unit title issued pursuant to the Unit titles Act 1972.

107 Lost rental income or alternative accommodation costs of almost $2.4m and general damages of almost $4.4m were also claimed.

108 The body corporate is responsible for the repair and maintenance of common property within multi-unit developments (see s 15(1) of the Unit Titles Amendment Act 2013, replacing s 138 of the Unit Titles Act 2010).

109 HC Auckland CIV-2007-404-4037, 11 November 2009.

110 At [108].

111 Potter J released her decision after the High Court and Court of Appeal decisions in *Sunset Terraces* but before the Supreme Court decision in that case.

112 Potter J (at [110]) considered that the claim would fail because the description of the building in consent applications and certificates was "New Commercial/Industrial" and the judge considered that would entitle the Council to proceed on the basis that it did not owe a duty of care in relation to the building generally. However, as noted, the plans did indicate the presence of the residential apartments and in *Sunset Terraces* the courts at all levels referred to the intended use of the building as identified in "the plans".

113 At [111].

114 [2011] 2 NZLR 744 (CA) at [39] per Harrison J, at [102] per Ellen France and Randerson JJ.

115 At [34].

116 At [42].

117 At [43]–[44].

118 [2011] 2 NZLR 744 (CA) at [106].

119 Mike French, *Donoghue v Stevenson and local authorities: A New Zealand perspective – can the tort of negligence be built on shaky foundations* The Juridical Review (2013) Part 3 287.

120 As Harrison J pointed out (at [51]) the division of ownership does not affect the ability to carry out the physical repair or maintenance; it will simply be reflected in an allocation of loss.

121 Above n 93.

122 Above n 105 per Elias CJ, Tipping, McGrath and Chambers JJ (William Young J dissenting).

123 Elias CJ and Tipping J each gave separate judgments and McGrath and Chambers JJ issued a joint judgment.

124 At [6] per Elias CJ.

125 At [12].

126 At [10], [16]–[18].

127 At [25] per Tipping J.

128 At [54].

129 At [55].

130 Delivering the judgment on behalf of himself and McGrath J.

131 At [64].

132 At [71].

133 At [292] per William Young J.

134 At [226]. In relation to the specific facts and mixed-use developments William Young J preferred the approach taken by Harrison J in the Court of Appeal: see at [318].

135 At [293]–[295].

136 At [296]–[299].

137 At [309]–[316].

138 At [6] per Elias CJ; at [97] per Chambers and McGrath JJ.

139 At [197]-[198] per Chambers and McGrath JJ; at [38] per Tipping J. See also *Carter Holt Harvey Ltd v Minister of Education* [2016] NZSC 95 at [54].

140 At [299] Per William Young J; see also *Invercargill City Council v Hamlin* [1994] 3 NZLR 513 (CA) at 524–525.

141 At [9] per Elias CJ; at [35] per Tipping J. However, see the contrary view of William Young J at [247].

142 At [100] per Chambers and McGrath JJ.

143 At [16]-[17] per Elias CJ; at [29] per Tipping J; at [106] per Chambers and McGrath JJ.

144 *Southland Indoor Leisure Centre Charitable Trust v Invercargill City Council* [2017] NZSC 190 at [60] (references omitted) per Elias CJ, O'Regan and Ellen France JJ; at [118] per William Young and Glazebrook JJ.

145 See eg: Susan Glazebrook *What makes a leading case? The narrow lens of the law or a wider perspective?* (2010) 41 VUWLR 339; Ivor Richardson *The Permanent Court of Appeal: Surveying the 50 Years* in Rick Bigwood (ed) *The Permanent New Zealand Court of Appeal: Essays on the First 50 Years* (Hart Publishing, Oregon, 2009).

146 Peter Spiller *New Zealand Court of Appeal 1958-1996: A History* (Thomson Brookers, Wellington, 2002) at 405

147 Stats NZ reports that at the time of the 2018 Census New Zealand's homeownership rates were at their lowest since the 1950s. Homeownership peaked in the 1990s, at 73.8 percent of households, but by 2018, homeownership had fallen to 64.5 percent of households – see at https://www.stats.govt.nz/reports/housing-in-aotearoa-2020.

148 Above n 93.

149 See for example: *Invercargill City Council v Hamlin* [1994] 3 NZLR 513 (CA) at 528 per Richardson J; *North Shore City Council v Body Corporate 188529 (Sunset Terraces)* [2011] 2 NZLR 289 (SC) at [20] per Tipping J; Geoff McLay, *Legal doctrine, the leaky homes crisis and the limits of judicial law-making*, in Steve Alexander and others *The Leaky Buildings Crisis: Understanding the Issues* (Thomson Reuters, Wellington, 2011) at 16–17.

150 The Supreme Court of Canada has taken a similar stance to the New Zealand courts; see eg *City of Kamloops v Nielsen* [1984] 2 SCR 2 (SCC), *Cooper v Hobart* [2001] 3 SCR 537 (SCC).

151 *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants and Investigations Ltd* [1992] 2 NZLR 282 (CA) at 294 per Cooke P; *Couch v Attorney General (on appeal from Hobson v Attorney General)* [2008] 3 NZLR 725 (SC) at [52] per Elias CJ and Anderson J.

152 *North Shore City Council v The Attorney-General as Successor to the Assets and Liabilities of the Building Industry Authority* [2012] NZSC 49 at [156] per Blanchard, McGrath and William Young JJ. See also: *Rolls-Royce New Zealand Ltd v Carter Holt Harvey Ltd* [2005] 1 NZLR 324 at [58] per Glazebrook J.; *Brown v Heathcote County Council* [1986] 1 NZLR 76 (CA) at 79 per Cooke P; *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants and Investigations Ltd* [1992] 2 NZLR 282 (CA) at 294–295 per Cooke P, at 305–306 per Richardson J, at 312 per Casey J, at 316–318 per Hardie Boys J; *Attorney-General v Carter* at [22] and [30].

153 [1990] 2 AC 605 (HL).

154 At 618.

155 [1987] 2 NZLR 700 (PC).

156 At 709.

157 [2007] 1 AC 181 (HL).

158 At [6].

159 At [7].

160 See eg *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants & Investigations Ltd* [1992] 2 NZLR 282 (CA) at 295 per Cooke P.

161 [2007] 1 AC 181 (HL) at [8].

162 Above n 10, n 11, n 14, n 15.

163 Above n 37.

164 *Invercargill City Council v Hamlin* [1994] 3 NZLR 513 (CA) at 533 per Gault J; *Te Mata Properties v Hastings District Council* [2009] 1 NZLR 460 at [84] per Robertson and O'Regan JJ.

165 Above n 38.

166 See eg: *Candlewood Navigation Corp Ltd v Mitsui O.S.K. Lines Ltd* [1986] AC 1 (HL); *Leigh and Sillavan Ltd v Aliakmon Shipping Co Ltd* [1986] AC 786 (HL).

167 See eg: *Murphy v Brentwood DC* [1991] 1 AC 398 at 485-486 per Lord Oliver; *Customs and Excise Commissioners v Barclays Bank plc* [2007] 1 AC 181 at 210 per Lord Walker.

168 For example, in opposition to the exclusionary approach adopted in the English jurisdiction, courts in Canada, Australia and New Zealand have allowed recovery for relational financial loss in certain circumstances although there have been differences in opinion regarding the scope of such recovery: for a summary of the approaches in the respective jurisdictions see for example Stephen Todd (ed) *Todd on Torts* (8th ed, Thomson Reuters, Wellington, 2019) at [5.9.03].

169 In *Perre v Apand Pty Ltd* (1999) 198 CLR 180 (HCA) at [102]–[105] McHugh J identified five factors to be considered in cases of economic loss: the reasonable foreseeability of the loss; the avoidance of indeterminate liability; the protection of the autonomy of individuals; the vulnerability to risk; and the extent, if at all, to which the defendant knew of the risk and its magnitude.

170 In *Spring v Guardian Assurance Plc* [1995] 2 AC 296 (HL) at 313 per Lord Keith of Kinkel. The New Zealand jurisdiction was described as being "tender in its approach to claims in negligence involving pure economic loss".

171 [1994] 3 NZLR 513 at 521.

172 *Ultramares Corp v Touche, Niven & Co* (1931) 174 NE 441 at 444 per Cardozo CJ.

173 *Riddell v Porteous* [1999] 1 NZLR 1 (CA) at 10-11 per Blanchard J. See also*Spartan Steel v Martin & Co* [1973] 1 QB 27 at 38–39 per Lord Denning MR; *Caltex Oil (Australia) Pty Ltd v Dredge "Willemstad"* (1976) 136 CLR 529 at 552 per Gibbs J; *Canadian National Railway Co v Norsk Pacific Steamship Co Ltd* [1992] 1 SCR 1021 at [49] per McLachlin J. The English courts have denied recovery for relational economic loss even where, on the particular facts, there have been no concerns about indeterminate liability – see *Leigh & Sillavan Ltd v Aliakmon Shipping Co Ltd (The Aliakmon)* [1986] AC 785 at 816-17 per Lord Brandon.

174 *North Shore City Council v Attorney-General* [2012] NZSC 49 (*The Grange*) at [160] per Blanchard J.

175 *Attorney-General v Strathboss Kiwifruit Limited* [2020] NZCA 98.

176 At [274]. The Court of Appeal was concerned not only that the profit to growers in the kiwifruit industry over four years was estimated to be $2.47 billion but also that, "if a duty of care is owed in relation to the consideration of import permit applications for kiwifruit pollen, the same duty would logically apply to pollen for all plant types" (at [252].

177 *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants & Investigations Ltd* [1992] 2 NZLR 282 (CA) at 297 per Cooke P; *North Shore City Council v The Attorney-General as Successor to the Assets and Liabilities of the Building Industry Authority* [2012] NZSC 49 at [156] per Blanchard, McGrath and William Young JJ. This raises the interesting, but ultimately unanswerable, question as to how the New Zealand jurisprudence in the tort of negligence generally and the recovery of economic loss in particular would have developed had the accident compensation regime not been introduced.

178 *Rolls-Royce New Zealand Ltd v Carter Holt Harvey Ltd* [2005] 324 at [62];*South Pacific Manufacturing Co Ltd v New Zealand Security Consultants & Investigations Ltd* [1992] 2 NZLR 282 (CA) at 309-309 per Richardson J; *Perre Apand Pty Ltd* (1999) 198 CLR 180 (HCA) at [120] per McHugh J; Jane

Stapleton *Duty of Care: Peripheral Parties and Alternative Opportunities for Deterrence* (1995) 111 LQR 301.

179 [2009] 1 NZLR 460 (CA) at [62] and [73] per Baragwanath J, at [84] per Robertson and O'Regan JJ.

180 See eg: *New Zealand Forest Products Ltd v Attorney-General* [1986] 1 NZLR 14 (CA); *Mainguard Packaging Ltd v Hilton Haulage Ltd* [1990] 1 NZLR 360 (HC). In *Taupo Borough Council v Birnie* [1978] 2 NZLR 397 (CA) the Court of Appeal held that a hotel owner could recover for loss of business profits after the defendant caused his hotel to flood, on the basis that the flooding not only made some rooms unavailable for a time but also deterred travellers and travel agents from making further bookings because of doubt about whether satisfactory accommodation would be available. The Court of Appeal's categorisation of this loss as consequential has been questioned: see Stephen Todd (ed) *Todd on Torts* (8th ed, Thomson Reuters, Wellington, 2019) at [5.9.02].

181 See eg: *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants & Investigations Ltd* [1992] 2 NZLR 282 (CA) at 294 per Cooke P; *Rolls Royce New Zealand Ltd v Carter Holt Harvey Ltd* [2005] 1 NZLR 324 (CA) at [63]; *North Shore City Council v Body Corporate 188529 (Sunset Terraces)* [2011] 2 NZLR 289 (SC) at [30].

182 Above n 105 at [12] per Elias CJ, at [41] per Tipping J, at [187] per Chambers and McGrath JJ.

183 In 1992 the Government subsidised workplace-based training which operated mainly through the apprenticeship system was replaced by an industry training scheme which was voluntary for employers and industries. The Ministry of Education is currently undertaking a review of industry training – see at http://www.minedu.govt.nz/NZEducation/EducationPolicies/TertiaryEducation/PolicyAndStrategy/ReviewIndustryTraining.aspx.

184 The Building Industry Authority (BIA) was a Crown entity run by an independent board established by the Building Act 1991 to provide general supervision of the regulatory system for building work. Largely as a result of a perceived failure to deal satisfactorily with the leaky buildings crisis, BIA was abolished by the Building Act 2004 and its functions moved to the Ministry of Business, Innovation & Employment (MBIE).

185 *Weathertightness – Estimating the Cost*, prepared by PriceWaterhouseCoopers for the Department of Building and Housing, Wellington (2009). See also: Building Industry Authority (2002), *Report of the Overview Group on the Weathertightness of Buildings to the Building Industry Authority* ("The Hunn Report"), Wellington New Zealand; Department of Building and Housing, *Internal Evaluation Report*, Wellington (2008); Department of Building and housing (2002), *Report of the Overview Group on the Weathertightness of Buildings to the Building Industry Authority*, Wellington New Zealand. Some estimates put the cost much higher; see eg Peter Dyer *Rottenomics: The Story of New Zealand's Leaky Buildings Disaster* (David Bateman Ltd 2019) who argues that the final cost of recladding affected homes alone could exceed $52 billion.

186 In 2013 the apartment owners in *Spencer on Byron* reached a settlement of $20.05 million including $10 million from Auckland Council (the successor to the North Shore City Council). The estimated repair bill in 2014 was around $26 million however remedial work did not commence until 2018 by which time the repair work was estimated to cost $37 million: Anne Gibson, Spencer on Byron owners sue lawyers, $37m leaky building repairs underway, *The New Zealand Herald* at https://www.nzherald.co.nz/business/spencer-on-byron-owners-sue-lawyers-37m-leaky-building-repairs-underway/NEG2BLH4DXP7JHHMWTB2SX25MM/ (accessed July 2022).

187 As a result of the leaky buildings crisis Parliament enacted the Building Act 2004 to strengthen the regulatory regime and the Weathertight Homes Resolution Services Act 2006 which included a limited financial assistance package (FAP) for affected homeowners.

188 *Dicks v Hobson Swan Construction Ltd (in Liquidation)* [2006] 7 NZCPR 681 (HC) at [98] and [99] per Baragwanath J.

Part 4—Australia

CHAPTER 5

Australia—The True Birthplace of *Donoghue v Stevenson*

I. AUTHOR BIO [§5.1]

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II. INTRODUCTION [§5.2]

On a November day in 1867, in a small house on Tank Street alongside the Brisbane River, in the colony of Queensland, Mary Elizabeth Atkin (nee Ruck) gave birth to her firstborn son, a boy named James Richard.[1]

Three years later, Mary, accompanied by her three sons – two more having been born in the intervening years – would sail for the UK, leaving behind her husband Robert, the boys' father.[2] The children would never see their father alive again: he would die in 1872, at the age of thirty, just under two years after their departure from the colony.[3] Indeed James, the oldest son, would not return to Australia in his lifetime.

Of all the law lords who made legal history[4] by finding that a small-scale manufacturer of soft drinks in impoverished Paisley in the intervening years between World War One and World War Two owed a duty of care not to cause harm to a young woman he had never met,[5] Lord Atkin nonetheless had the strongest ties to Australia.

How then can it be claimed that Australia is 'the true birthplace of *Donoghue v Stevenson*', as the title of this panel seems to suggest? Even in an age of hyperbolic headlines in mainstream and social media, this claim seems to be somewhat exaggerated. And yet there are commonalities between the fledging nation – as Australia was by the time May Donoghue's friend purchased the now-notorious bottle of ginger beer – and the personal and political values held by negligence law's most famous architect.

This article seeks to explore those commonalities, finding that they are correlative rather than causative in nature. It suggests that the reason Australia was so swift in adopting Lord Atkin's approach to negligence[6] was due at least in part to the values instilled in James Atkin and others within the colonies, rather than anything specifically attributable to geography.

III. THE ORIGINS OF JAMES ATKIN [§5.3]

While Australians are more than happy to claim Lord Atkin, author of possibly the most 'Delphic' and 'elusive' principles of the common law,[7] as one of our own, Australia served essentially as a bookend to the life of a proudly self-identifying Welshman.[8]

His formative years were not spent here. He did not practice his profession here, or travel here, or even retire here. His direct experience of Australia was limited to the immediate area of the Queensland cottage his parents were living in when he was born and the nearby house to which they moved six months later.[9]

So in order to make any immediate connections between Australia and Lord Atkin, it is necessary to go deeper, and perhaps to reframe the question.

As negligence law scholars and practitioners know all too well, causation is a critical issue over which much judicial and scholarly ink has been spilled. Rather than considering what Australia did to 'cause' Lord Atkin, it is more pertinent to instead consider what made both Lord Atkin - and Australia - fertile ground for the developing tort of negligence.

While there can be little doubt that Australia has embraced negligence law as enthusiastically as the rest of the common law world, I contend that it was the progressive views in which Lord Atkin was steeped as a child and young man that led to his articulation of the neighbour principle, rather than any incident of geography.

Those values were shared by his mother Mary and her extended family who raised young Lord Atkin and his brothers in Wales;[10] and his father Robert, who remained in Brisbane and was influential as a colonial politician, journalist, editor, and newspaper owner. [11]

Evidence of Robert's influence is not hard to find - he was a public figure until his death at the age of thirty. His archived journalism – accessible through the National Library of Australia's newspaper archive – demonstrates his values and politics.[12] Politically, he was a leader of the 'town liberal' movement -[13] a group who opposed the dominant squatter pastoralist model of land management. He advocated for reforms to the electoral process, including enhanced governor oversight and expansion of franchise. He criticised perceived corruption regarding major infrastructure within the colony, including railway connections to the Rockhampton area where he and Mary had initially settled; and along with his political allies, advocated for causes including public health, public education, and labour protection.[14]

With one of those allies – his Irish compatriot Dr Kevin Izod O'Doherty, who delivered the infant James Atkin – he formed a remarkable friendship, transcending O'Doherty's background as a Catholic transported to Van Diemen's land for sedition, and Robert Atkin's status as Protestant Free settler.[15] Together they established Queensland's Hibernian society, which was premised on the foundation that 'decent people of good will could advance the common good while at the same time remaining faithful to the faith of their fathers'.[16] That endeavour reflects the liberal, tolerant, and socially progressive views we have come to associate with Robert's eldest son.

Another political ally and friend with shared values, William Hemmant, would in time become Lord Atkin's father-in-law. Hemmant had known Robert Atkin extremely well prior to his death, having partnered with him in the Queensland parliament to represent the Brisbane electorate of East Moreton.[17]

The influence of Robert's values, conveyed through letters written to his son before his death, the public record of his activities, and the reflections of those who knew Robert well, including Lord Atkin's mother and father-in-law, must have been strong. That Mary, Lord Atkin's mother, shared those values, is also evident.[18]

Mary's journalistic contribution to the colony, through her husband's papers, reveals that she actively shared her husband's reformist views, rather than passively coexisted alongside them. Mary wrote for her husband's newspapers and was involved in translating and editing content for them, including contributing some articles more political in nature than was typical for women contributors at the time. Throughout her journalistic writings Mary's voice rings true, echoing the progressive liberal views she demonstrated in her personal correspondence.[19]

Just as Robert and Mary's politics influenced the man their son would become, those views left their mark on Queensland society, through Robert and his allies work in parliament, and his journalistic endeavours. Those views were not unique to the Robert and Mary Atkin's of Queensland, however: in each of the colonies there were similarly minded people, seeking to escape similar confining circumstances in Ireland and Britain to pursue a new and better life, driven by a spirit of liberalism.

It is perhaps unsurprising therefore that Lord Atkin's judicial values resonated with the shared values of the Federation formed from the colonial system his parents contributed to shaping, albeit with proportionally less personal causal potency.

These values are evident throughout Lord Atkin's work. Many of his commercial judgments, for example, demonstrate an understanding of the commercial realities of small business,[20] such as those his family engaged in, albeit with varying degrees of success.[21]

But it is primarily negligence law with which we are concerned here. Lord Atkin's views on negligence - and the neighbour principle itself - were by no means a 'sudden revelation' he had on being confronted with a pauper plaintiff and the remains of a suicidal snail in a bottle of fizzy drink.

Glimpses of his approach in *Donoghue* were evident in earlier judgements and his extra-curial work. *Everett v Griffiths* – where he foreshadowed that the state may owe individuals a duty of care - is a pertinent example.[22] And he rehearsed the neighbour principle not just in private - around the dinner table, as recalled by his children and grandchildren[23] – but also in a speech delivered shortly before May Donoghue's plight came to his judicial attention.[24]

IV. INTANGIBLE CONNECTIONS [§5.4]

Although I outlined a moment ago how tenuous Lord Atkin's physical connections with Australia were, that should by no means diminish the influence he had on the development of the Australian law. Herbert Vere Evatt, High Court justice and political leader, was a long-term correspondent of Lord Atkin, [25] who is likely to have been instrumental in Lord Atkin's appointment - representing Australia - on the War Crimes Commission prior to his death in 1944.[26]

In Evatt, Lord Atkin's neighbour principle found fertile soil. He wrote to Lord Atkin in the immediate aftermath of *Donoghue v Stevenson*, lauding the judgement,[27] and was influential in the case ultimately responsible for bringing negligence into Australian law, via a dissenting opinion involving a nasty rash and a particularly noxious pair of long johns.[28] He also wrote a much-celebrated dissent in a subsequent case, which helped to change negligence's development regarding pure mental harm claims.[29]

That is also not to say that Australia has fully embraced negligence in the same way as other parts of the Commonwealth. Rather, our variety of negligence law has developed its

own responses - I hesitate to use the word 'solutions' - to some problems that have dogged negligence throughout the common law world.

An example of this divergence is our response to the concerns perhaps most stridently identified by Lord Buckmaster's dissent in Donoghue - 'if one then why not fifty?' [30] - specifically, the development of control mechanisms to limit the ambit of duty of care-based claims brought before the courts.

To the deep and long-lasting grief of generations of Australian law undergraduates, Australian courts enjoyed a long and ultimately unproductive flirtation with the concept of 'proximity' - used, but not defined, by Lord Atkin himself in *Donoghue* - as a control mechanism. Successive judicial attempts to clarify the concept succeeded only in making it more diffuse and less useful. Indeed, in *Sullivan v Moody* it was acknowledged by Justices Gleeson, Gaudron, McHugh, Hayne and Callinan as giving

> little practical guidance in determining whether a duty of care exists in cases that are not analogous to cases in which a duty has been established. It expresses the nature of what is in issue, and in that respect gives focus to the inquiry, but as an explanation of a process of reasoning leading to a conclusion its utility is limited'. [31]

Essentially- it provides a useful *post facto* descriptor of an outcome but offers little value as a predictor or determinant.

With what, then, did Australian courts replace 'proximity'? Did they leave a gaping tear in the fabric of negligence, through which any and all claims could pass? Did they instead adopt - or adapt - mechanisms developed in other jurisdictions? The famous *Anns*[32] test, succeeded by the three-stage 'fair just and reasonable,' test from *Caparo v Dickman* in the UK,[33] its Canadian variation, the Anns-Cooper test;[34] or the *Spandeck*[35] test developed in Singapore, for example?

Sadly for Australian law students, the answer to this is 'no'. Rather than replacing proximity with any one test, we are instead left with a set of four characteristics of 'challenging' novel duty of care cases, identified by the High Court in *Sullivan v Moody*.[36]

That list is itself supplemented by an additional list of 17 'salient features' subsequently compiled from precedent by President Allsop of the NSW Court of Appeal in *Caltex v Stavar*.[37] This list is neither exhaustive nor are individual features 'compulsory'. Prospective plaintiffs and defendants must work their way through each feature individually - but not necessarily sequentially - in order to determine whether or not a duty of care exists. And no particular evaluative weight is ascribed to any of the features.

This somewhat idiosyncratic Australian approach leads into the final point I wish to consider tonight. If Australia's contribution to the origins of negligence law is tenuous - more correlative than causative - does it perhaps instead offer insights into its future? I think it does - and the site of Lord Atkin's birth provides a useful illustration of how.

V. THE FUTURE OF NEGLIGENCE – AN ANTIPODEAN ADVENTURE IN CLIMATE CHANGE? [§5.5]

In May last year, in a first instance decision of the Australian Federal Court, a group of children – using a subset of the 'salient features' - successfully argued at first instance that the Federal Minister for the Environment owed them a novel duty of care when considering whether or not to approve an application by a mining company to extend a coal mine development.[38]

The decision represented the first time negligence law had successfully been used by climate change activists to *pre-emptively* restrain the infliction of future harms by government. The

decision was recently – inevitably – overturned on Appeal.[39]'Inevitably' because the claim strained the law of negligence in multiple directions at once, resulting in internal and external incoherence, and was inconsistent with the 'incremental' development that is a feature of negligence law.[40]

The plaintiffs have indicated that they will not appeal further. Despite their loss, the case has raised the public profile of the issue and increased political pressure and public debate about climate change.

And it is here that I think negligence law – despite the many acknowledged challenges it presents to prospective plaintiffs – will nonetheless have a significant role to play. For while *Sharma* proved ineffective in restraining state-sanctioned future harms, negligence law nonetheless directly assists some who have already been affected by climate change, for example through class action litigation arising from lethal bushfires in Victoria and New South Wales; as well as class actions based on widescale drought, flooding, and other extreme weather events; and may further act as a behaviour modifier on those who would seek to avoid liability.

Today, the site of the cottage in which Lord Atkin was born hosts the Brisbane Federal Law Court building. As noted above, the site is located not far from the banks of the Brisbane River, which flooded in February this year. When the river flooded previously, in 2010-2011, it peaked at 4.4 metres, inundating parts of the central business district where the courts are located and causing 33 deaths and $3.2 billion damage in the Greater Brisbane area.

The High Court recently withheld Special Leave to Appeal against a finding of no liability in negligence by one of two water utilities named in the class action, along with the state government. The other utility provider, and the government, had previously negotiated a settlement of $440 million based on findings that they were collectively 50% liable for the damage caused to the 4,500 plaintiff members of the class.[41] It is perhaps ironic that compensation for the previous catastrophic flood event in the Brisbane City Centre was yet to be finalised when the next catastrophic flood occurred.

The Tank Street site on Lord Atkin's birth itself did not flood this time around. It may not fare so well in future heavy rain events which, along with other extreme weather phenomenon, seem both inevitable and increasingly frequent. Large scale class actions against states and corporations for failing to mitigate climate change's foreseeable consequences may well become a feature of Australian negligence law.

And fear of losing those class actions, accompanied by widescale loss of life, limb and property, may do much to focus the minds of those in positions of power on future-proofing their climate-change susceptible undertakings. Will the 'future children' mooted in *Sharma*, realising the harms foreshadowed by the plaintiffs in *Sharma*, fare better before the law than their forebears who sought to prevent those harms did? Only time will tell…..

It certainly seems foreseeable - and neither far-fetched nor fanciful - that the seeds sown by Lord Atkin 90 years ago may have a role to play in the future of the country of his birth, in responding to the most confronting existential challenge of our time… right on the doorstep of the place of his birth.

NOTES

1 Lewis, Geoffrey. *Lord Atkin*. London: Butterworths, 1983 at 1; Applegarth, P.D.T. "Lord Atkin: Principle and Progress." *Australian law journal* 90, no. 10 (2016): 711–751 at 712.

2 Lewis, Geoffrey. *Lord Atkin*. London: Butterworths, 1983. at 3.

3 Applegarth, P.D.T. "Lord Atkin : Principle and Progress." *Australian law journal* 90, no. 10 (2016): 711–751 at 713.

4 That *Donoghue v Stevenson* is a judgement of great historical significance in the common law world is evident from the number of legal case anthologies it features in: see eg Allan C Hutchinson, *Is Eating People Wrong? Great Legal Cases and How They Shaped the World* (New York: Cambridge University Press, 2011) ch 6.; Paul Reed and Philippa Harris, 'The Snail in the Bottle: Donoghue v Stevenson', in Cases that Changed Our Lives, ed Ian McDougall, LexisNexis; Wilson, James. *Trials & Tribulations: Uncommon Tales of the Common Law*. London: Wildy, Simmonds & Hill Publishing, 2015; and the standalone book Chapman, Matthew. *The Snail and the Ginger Beer: the Singular Case of Donoghue v Stevenson*. 1st ed. London: Wildy, Simmonds & Hill, 2010. There are also multiple special editions of journals, and many standalone articles and speeches in addition to those cited in this article which also discuss the case in detail, but are beyond the scope of this article to list here.

5 *Donoghue v Stevenson* [1931] UKHL 3, [1932] AC 562, 1932 SC (HL) 31, [1932] UKHL 100.

6 *Grant v Australian Knitting Mills* (1935) 54 CLR 49. Even the formal acceptance of the principle into Australian law was mediated by the British courts. With the exception of Evatt J, the High Court of Australia rejected the principle from 'the snail case' – *Grant v Australian Knitting Mills* (1933) 50 CLR 387. It wasn't until the case was heard on appeal by the Privy Council some two years later that it became an accepted part of the Australian law. See e.g. Peter Handford, 'A Century of Torts: Western Australian Appeals to the High Court 1903-2003 (2004) 32 UWAL Rev 106 at 108.

7 Allan Hutchinson, 'Some "What If" Thoughts: Notes on Donoghue v Stevenson Osgoode Hall Law Journal 51.2 (2014) : 701-712.

8 Applegarth, P.D.T. "Lord Atkin: Principle and Progress." *Australian law journal* 90, no. 10 (2016): 711–751 at 711.

9 Gerard Carney, "Lord Atkin: His Queensland Origins and Legacy" in M White and A Rahemtula (eds), *Supreme Court History Program Yearbook 2005*, 33-61 at 34.

10 Lewis, Geoffrey. *Lord Atkin*. London: Butterworths, 1983. at 4; Applegarth, P.D.T. "Lord Atkin: Principle and Progress." *Australian law journal* 90, no. 10 (2016): 711–751 at 714-715.

11 Lewis, Geoffrey. *Lord Atkin*. London: Butterworths, 1983. p3 ; P. A Keane, 'Lord Atkin: Irish Roots and the Queensland Connection, 2nd Annual Lord Atkin Oration, Selden Society Lecture, Brisbane, 30 August 2018, Available at https://archive.sclqld.org.au/judgepub/2018/keane20180830.pdf; Gerard Carney, "Lord Atkin: His Queensland Origins and Legacy" in M White and A Rahemtula (eds), *Supreme Court History Program Yearbook 2005*, 33-61 at 34.; P.D.T Applegarth, 'Lord Atkin: Principle and Progress (2016) 90 ALJ 711 at 712-715; Geoffrey Luck, 'The Story Behind Lord Atkin of Snail', Quadrant (2015) 66-74, at 69-74.

12 Geoffrey Luck, 'The Story Behind Lord Atkin of Snail', Quadrant (2015) 66-74, at 69-74.

13 G. Carney, 'Lord Atkin: his Queensland Origins and Legacy' Supreme Court History Program Yearbook 2005 (Queensland) at 45.

14 P. A Keane, 'Lord Atkin: Irish Roots and the Queensland Connection, 2nd Annual Lord Atkin Oration, Selden Society Lecture, Brisbane, 30 August 2018, Available at https://archive.sclqld.org.au/judgepub/2018/keane20180830.pdf at 8.

15 P. A Keane, 'Lord Atkin: Irish Roots and the Queensland Connection, 2nd Annual Lord Atkin Oration, Selden Society Lecture, Brisbane, 30 August 2018, Available at https://archive.sclqld.org.au/judgepub/2018/keane20180830.pdf

16 P. A Keane, 'Lord Atkin: Irish Roots and the Queensland Connection, 2nd Annual Lord Atkin Oration, Selden Society Lecture, Brisbane, 30 August 2018, Available at https://archive.sclqld.org.au/judgepub/2018/keane20180830.pdf

17 G. Carney, 'Lord Atkin: his Queensland Origins and Legacy' Supreme Court History Program Yearbook 2005 (Queensland) at 49-51; G. Lewis, 'Lord Atkin' (1999) Hart Publishing, Oxford at 9-10.

18 P.D.T Applegarth, 'Lord Atkin: Principle and Progress (2016) 90 ALJ 711; G. Carney, 'Lord Atkin: his Queensland Origins and Legacy' Supreme Court History Program Yearbook 2005 (Queensland); G. Lewis, 'Lord Atkin' (1999) Hart Publishing, Oxford.

19 Gerard Carney, "Lord Atkin: His Queensland Origins and Legacy" in M White and A Rahemtula (eds), *Supreme Court History Program Yearbook 2005*, 33-61 at 44.

20 Prior to going to the bench, Atkin built up a thriving practice at the commercial bar. Some of his more significant commercial judgements, identified specifically by Lewis for their commercial pragmatism, include eg *Bell v Lever Bros* [1932]AC 161; *Lake v Simmons* [1926] 2 KB 51; *The Fibrosa* [1943] AC 32; *United Australia v Barclays Bank* [1941]AC 1, and *Re Wait* [1927] 1 Ch 606. G. Lewis, 'Lord Atkin' (1999) Hart Publishing, Oxford at 68-75.

21 Robert Atkin unsuccessfully bought a stake in a livestock brokerage business while he was living in central Queensland see Gerard Carney, "Lord Atkin: His Queensland Origins and Legacy" in M White and A Rahemtula (eds), *Supreme Court History Program Yearbook 2005*, 33-61 at 41-42.

22 *Everett v Griffiths* [1920]3 KB 163 CA.

23 G. Lewis, 'Lord Atkin' (1999) Hart Publishing, Oxford at 25, and 57.

24 Atkin, J. R. 'Law as an Educational Subject', (1932) *Journal of the Society of Public Teachers of Law* 30.

25 G. Lewis, 'Lord Atkin' (1999) Hart Publishing, Oxford at 66-67;

26 G. Lewis, 'Lord Atkin' (1999) Hart Publishing, Oxford at 45. Evatt served as Attorney-General and Minister for External Affairs from 1941 until 1949.

27 G. Lewis, 'Lord Atkin' (1999) Hart Publishing, Oxford at 66-67.

28 *Grant v Australian Knitting Mills* (1933) 50 CLR 387

29 *Chester v Waverly Corporation* (1939) 62 CLR 1.For a discussion of this case, and particularly Evatt's role, see Haigh, Gideon. *The Brilliant Boy: Doc Evatt and the Great Australian Dissent*. Cammeray, N.S.W: Scribner, 2021.

30 *Donoghue v Stevenson [1932] A.C. 562* at 577–578.

31 *Sullivan v Moody* [2001] HCA 59; 207 CLR 562; 75 ALJR 1570, at [48].

32 *Anns v. Merton London Borough Council* (1977), [1978] AC 728 (HL (Eng)).

33 *Caparo Industries Plc v Dickman* [1990] 2 A.C. 605 HL.

34 *Cooper v Hobart*, 2001 SCC 79, [2001] 3 SCR 537.

35 *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency*, [2007] SGCA 37,[2007] 4 SLR (R) 100.

36 *Sullivan v Moody* [2001] HCA 59; 207 CLR 562; 75 ALJR 1570, at [50].

37 Allsop P, *Caltex Refineries (Qld) Pty Ltd v Stavar* [2009] NSWCA 258 at [103].

38 *Sharma by her litigation representative Sister Marie Brigid Arthur v Minister for the Environment* [2021] FCA 560 (27 May 2021)

39 *Minister for the Environment v Sharma* [2022] FCAFC 35 (15 March 2022).

40 Brennan J, *The Council of the Shire of Sutherland v Heyman* (1985) 157 CLR 424 at [14].

41 *Queensland Bulk Water Supply Authority t/as Seqwater v Rodriguez & Sons Pty Ltd* [2021] NSWCA 206 (8 September 2021).

CHAPTER 6

Australia—The True Birthplace of *Donoghue v Stevenson*?

I. AUTHOR BIO [§6.1]

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II. INTRODUCTION [§6.2]

In this paper I seek to examine the possibility that Australian judges already had a more flexible approach to judging than their English counterparts, and that because of this they were more likely to take up the 'neighbour' principle than the manufacturer's liability principle in *Donoghue v Stevenson*.[1] Following Lunney, I make some suggestions about why and how this might have worked when the current mode of legal analysis was said to be 'complete legalism' and consider a range of Australian High Court cases from before and after *Donoghue v Stevenson* was decided.

III. CULTURAL CRINGE OR ADAPTING TO CIRCUMSTANCES? [§6.3]

One of the benefits of being a small (in terms of population) and therefore unimportant country like Australia is that it makes one very aware of other nations and what they are doing. In Australia we are used to bemoaning the 'cultural cringe' aspect of this outward looking stance. And, indeed, it has often been argued that our law was such an example of cultural cringe, and certainly there have been some extreme examples of slavishly following the English law.[2] But the fact that we are a small country has another side. Looking outwards can create conservatism or cultural cringe, but it can also create some awareness of differences and other possibilities which allows for change or reform. The various Australian dominions' law was often more different from English law than may be allowed for. For example, Crown immunity was abolished in NSW in 1857.[3] This was partly because infrastructure in the colonies was nearly always a matter for government. Australian women all had the federal vote by 1902[4] and could even stand for Parliament in several jurisdictions, the first woman in Parliament being Edith Cowan in Western Australia in 1928. Of course, English law was only received into these jurisdictions when it was regarded as suitable for the circumstances of the colony.[5] This assisted in developing and applying some attitudes and views of society which differed from the English views, despite the strong tendency to cite English law. Even the difference in landscapes and the perils of floods, fires and droughts in Australia meant a different view had to be taken. How did this play out in the relationship between Australian and English law?

IV. LORD ATKIN'S BIRTHPLACE [§6.4]

We were asked to give a paper on 'Australia: the true birthplace of *Donoghue v Stevenson*?' One presumes this is a reference to Lord Atkin's early childhood in Brisbane, Queensland. In fact, when Lord Atkin was born in Brisbane in 1896, Australia as a legal entity did not exist. He lived in the Dominion of Queensland, which only became part of the Commonwealth of Australia in 1901. It was very much still 'one of the colonies' while Lord Atkin lived there, and had only separated from New South Wales in 1859. However, Australia as a geographical place clearly did exist. Lord Atkin's father was a Member of Parliament in Queensland and had a strong interest in the welfare of ordinary people. Lord Atkin's Welsh mother, a journalist, appeared to be the same. No doubt their views influenced their son. Some of those views may have been affected by living in Queensland, a place with strong egalitarian notions associated with unions join. For example, the Queensland Shearer's Union was formed in 1887 and the Queensland Teachers' Union was formed in 1889. In 1891 Unions in NSW and Queensland created a new political party, the Australian Labor Party, which in 2022 formed government in Australia. An interesting suggestion is that perhaps exposure in Lord Atkin's early years not to the law but to the culture of Queensland, the place where he lived may have allowed him to absorb not only his parent's views, but also a sense of the importance of justice for the common people., which is ultimately shown to us in his judgment in *Donoghue v Stevenson*. In this way, perhaps we could look at Australia as part of Lord Atkin's development and in that way being the true birthplace of *Donoghue v Stevenson*.

Of course, this is somewhat 'overegging the pudding' in order to deal with the brief we have been given, but it is interesting to speculate on. As Wendy Bonython has discussed a number of issues including the close connection between Lord Atkin and 'Doc' HV Evatt, I propose to continue by looking at the treatment of negligence in Australia in the High Court, in the 1930s both before and after *Donoghue v Stevenson* was decided.[6]

V. HISTORICAL JUDICIAL ATTITUDES IN AUSTRALIA [§6.5]

In 1965, Hamish Gray argued that Australian and New Zealand Courts had displayed a marked awareness of a common law community which required 'a comparative approach to these sources…in determining the law of Queensland or Tasmania or wherever the case may be.[7] He contrasted this with the 'insularity' of the English lawyer as exemplified by Lord Buckmaster's dissenting judgment in *Donoghue v Stevenson*.[8]I would argue that the English 'insularity' was a product of being a powerful country which did not need to look outward (unless looking down as well at us colonials!).

Lunney[9] argues that the mechanism for this outward looking approach which Howarth suggested Australian judges had was that Australian judges had multiple loyalties (to England and Australia and the common law as a wider community within the Empire) and that this gave them a flexibility that English judges could lack.

Mark Lunney, considering the years 1901 to 1945, has observed:[10]

> Australian lawyers had no difficulty in having equal but dual loyalties , loyalties that recognised a distinct kind of Australian patriotism which was not inconsistent with the maintenance of ancestral ties…the characteristic mode of engagement was progressive, recognising the limits that a colonial or dominion court had in making wholesale changes but equally careful to ensure that as far as possible the common law, in both theory and in its practical application, was suitable for a country with very different characteristics from England…..Assertions that the common law was the same throughout the Empire hid the fact that in its application Australian lawyers and judges were adapting it to suit the needs of a quite different Australian society.

Lunney's observation is pertinent here, as what I hope to show is that we can see in the Australian judgments an eagerness to use structures which make it easier to adapt the law. He also points out that it is important to look at what the lawyers 'actually did as opposed to what they said they did.' [11] For example, the time of *Donoghue v Stevenson*, the thirties, was also the time of Dixon J's 'strict and complete legalism',[12] but even in the exercise of that method, we see judges making choices which indicate their independence of judgment. Michael Coper has suggested that Dixon J's judgments were more nuanced than his account of legalism suggests: 'in truth, Sir Owen's elegant, nuanced complex and allusive essay boil[ed] down to a preference for change that is gradual and evolutionary rather than abrupt'.[13]

In the light of the possibility that Australian ways may have contributed to *Donoghue v Stevenson* it seems useful to examine some of the Australian cases for signs of a particular style which allowed them to apply the English law to the different Australian circumstances and indicated a greater flexibility.

In this paper I argue that what we see in the Australian cases is indeed a frequent reference to general rather than particular principles, and that this precedes *Donoghue v Stevenson*. I also argue thatpreference for general principle in *Donoghue v Stevenson* may have been particularly attractive to the Australian judges because of their need look outward to the Empire and apply the common law to their own particular circumstances.

VI. LORD ATKIN'S APPROACH IN *DONOGHUE V STEVENSON* [§6.6]

What is striking about Lord Atkin's judgment in *Donoghue v Stevenson* is his unwillingness to allow the law to simply strike out the action. He is not satisfied with the justice of the situation, although he is constrained by the doctrine of precedent. He spends considerable time looking for 'statements of general application defining the relations between parties that give rise to the duty.'[14] He is unwilling to 'ratify' the court's (e.g., Lord Buckmaster's)

> engagement [with]…an elaborate classification of duties…and yet the duty which is common to all the cases where liability is established must logically be based on some element common to the cases where it is found to exist[15]

He goes on to say 'there must be and is some general conception of relations giving rise to a duty of are, of which the particular cases found in the books are but instances'.[16] He is searching for a higher level of generality, but thinks Brett MR's statement in *Heaven v Pender* is too broad.[17] He draws on the Judaeo-Christian moral code by referring to the story of the Good Samaritan and limiting its reference to 'neighbours'. The well-known words are:

> 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.

This is quite different from the manufacturer's liability rule: 'A manufacturer puts up an article of food in a container which he knows which will be opened by the actual consumer. There can be no inspection by any purchaser…' [we will call this the 'manufacturer's liability rule']. The manufacturer's liability rule is much more specific than the neighbour principle, and much simpler to use. Lord Atkin regards the view that 'the poisoned consumer has no remedy against the negligent manufacturer' as deeply problematic:

> If this were the result of the authorities I should consider the result a grave defect in the law, and so contrary to principle that I should hesitate long before following any decision to that effect which had not the authority of this House[18]

The characteristic of seeking to protect the consumer or client by drawing on precedent while attempting to work with a principle at a higher level of generality, and willingness to look outside to other ideas in order to mould such principles may be seen in some aspects of Australian jurisprudence in the time before *Donoghue* was decided. How *Donoghue v Stevenson* was received by the Australian courts also emphasises these characteristics. Perhaps these characteristics were part of the Australian approach to life which Lord Atkin was exposed to in his early years.

VII. AUSTRALIAN APPROACHES BEFORE *DONOGHUE V STEVENSON* [§6.7]

How did the High Court of Australia approach negligence before *Donoghue v Stevenson* was decided? One thing to note is that in the cases before the High Court there seem to be relatively little emphasis on contract. This contrasts with the position in England where the barrier of privity of contract was very important,[19] and it could be argued was the reason that *Donoghue v Stevenson* was brought as an action.

I was struck by the judgment of Isaacs and Powers JJ in the case of *Hoyts PL v O'Connor* which was decided in 1928.[20] In that case the appellant owned a building which had an awning which projected over the street. The appellant invited a number (20-40) of people to stand on the awning to see a procession. About five other uninvited persons came and also stood on the awning against the protest of the appellant. Immediately after these people came the awning fell to the ground. The respondent was underneath the awning and was injured. Note that at this time jury trial was usual in such civil cases. The jury found the appellant liable and the appellant's application to the Supreme Court was refused. The issue was misdirection of the jury. One of the judge's directions to the jury was that where the appellant might reasonably have anticipated the intrusion, a verdict of negligence could be found. Isaacs and Powell JJ in a joint judgment held that the appeal should not be allowed. The appellant had argued that

the appellant was not responsible for the intruders, to which the respondent argued that the appellant owed him a 'a higher duty than that of merely exercising reasonable care to avoid insecurity'. Isaacs and Powers JJ gave little weight to the 'higher duty' but emphasised that the case did not turn on occupiers' liability but on highway cases. Their treatment of this as a 'new and unaccustomed case' is interesting. They refer to Bracton: 'If however, any new and unaccustomed cases shall emerge, and such as have not been usual in the realm if indeed any like cases have occurred let them be judged after a similar case'…[21] They also refer to Park J in *Vaughan v Menlove*[22]saying 'every man must use his own so as not to hurt another.' Isaacs and Powers JJ said this statement was 'adapted to the facts of the case which were "new in specie"'. They rarely discuss duty but they do discuss 'fundamental principles' such as 'that a man in exercising his own rights of property is to pay due regard to the rights of others'. They give a definition of negligence which upholds the direction given by the trial judge and hints at the neighbour principle[23]:

> Negligence is the absence of that care which the law requires in the circumstances. Care means taking reasonable precautions to guard against injury to another, which an ordinarily prudent persons would anticipate as likely….Whether in a given case care is required by law…depends on the relation of the parties and must be determined by the Court.

They are using the highway cases (duty owed to persons lawfully on the highway) but seeking to expand their scope. Ultimately, they held that the owner, who set up the awning as a place where people could stand to view the procession should have anticipated that people might attempt to enter and it was therefore reasonable for the jury to decide that this was something the owner should have anticipated and that the appeal should not be allowed. As Lunney says some features of the decision are worthy of note, including

> …the idea that liability in negligence for a danger caused by the conduct of third parties was imposed on the basis that the conduct of the third parties was anticipated – reasonably foreseeable in modern parlance – was accepted.[24]

These are very similar statements to those in the majority in *Donoghue v Stevenson*, and particularly, the neighbour principle as expressed by Lord Atkin. Foreseeability and anticipation are closely connected.

In separate judgments Chief Justice Knox and Starke J rejected the responsibility of the owner in these circumstances on the basis of occupiers' liability, seeing the 'trespassers' as not a responsibility of the owner. They held that the appeal should be allowed and a new trial ordered. There being a 2:2 result, the Chief Justice had the casting vote and the appeal was allowed.

I am not suggesting that Isaacs and Powers JJ pre-empted *Donoghue v Stevenson*, but it is interesting to see that they are moving towards a broader principle than they had been seeing, with a pattern of raising the level of generality of the discussion which allows for more variation. Because the major issue was directions to the jury the discussion of duty is reduced and is less direct than it otherwise might have been. Their judgment seems to me to be closer to *Donoghue's case* than the English cases often seen as its precursors e.g., *Winterbottom v Wright, Heaven v Pender*[25]etc. And they were in dissent technically as it was a 2:2 judgment with the Chief Justice deciding against them.[26]

When *Donoghue v Stevenson* was decided a note on it appeared in the *Australian Law Journal*,[27] 'The Liabilities of Manufacturers of Goods'. The writer recognised that it was 'one of the most important decisions in the law of torts of recent years.'[28] The writer expressed the rule in the case as the manufacturer's liability rule rather than the neighbour principle, but emphasised that a broad reading of this, recognising underlying principle, should be used. He also notes that the 'proximity' referred to by Lord Atkin is not mere physical proximity – it

is the proximity that is created by the possible effect of one party on another.[29] Again we see an emphasis on flexibility.

VIII. AFTER *DONOGHUE V STEVENSON* [§6.8]

I consider a number of cases which were decided in the High Court of Australia after *Donoghue v Stevenson* was decided until the end of the 1930s. How they dealt with the case shows, I submit, that they tended to choose the more general ratio decidendi than the specific, and that, despite the talk about 'strict and complete legalism', we do see a preference for the ability to be flexible.

A. DANGEROUS UNDERPANTS? [§6.9]

The most significant and earliest Australian case after *Donoghue* was *Australian Knitting Mills Ltd v Grant*.[30] This went on to the Privy Council[31] in which *Donoghue* was applied,[32] but we are discussing Australian views at present.

The most familiar judgment of *Grant v Australian Knitting Mills* is the Privy Council advice given by Lord Wright.[33] That came on appeal from the High Court of Australia. Lord Wright, as we all know, used the case to explain and solidify the law as it was set out in *Donoghue v Stevenson*. Mr Grant purchased some woollen underwear from a retailer who had got it from the manufacturer. Mr Grant's skin became irritated and he then developed a severe skin condition, apparently caused by sulphites remaining in the underwear. He argued that this was caused by the negligence of the manufacturer. He sued the retailer under the Sale of Goods Act (SA) and the manufacturer for negligence.

Before it went to the Privy Council the case was heard in the High Court. Starke, Dixon and McTiernan JJ held that the plaintiff's claim failed against both defendants, allowing the appeal. Evatt J dissented. For our purposes the claim against the manufacturer is what is of interest. The High Court was considering this case in mid-1933, about a year after *Donoghue v Stevenson* was decided. Of the four judges only three considered *Donoghue v Stevenson* – Starke and Dixon JJ in the majority, and Evatt J in dissent. Starke J rejected the argument that a duty arises because bisulphite of soda is a dangerous thing. He accepts the articulation of the duty as it was in *Donoghue v Stevenson*:[34]

> Articles of underwear are manufactured which the Knitting Mills knows and intends shall be purchased by members of the public through retail houses and worn by them, without any interference or examination of the articles by any intermediate handler of the goods. The duty…is to use reasonable care that the garments shall be free of any defects that would be likely to make them dangerous to use.

However, his concern is with the breach of duty, which he does not think has been established.

Dixon J (with whom McTiernan J agreed) referred to the manufacturer's duty from *Donoghue v Stevenson*, noting 'In this Court, the question whether the contention [of a duty of care] is well founded must depend upon the interpretation of the decision of the House of Lords in *Donoghue v Stevenson*.'[35] However, he found it unnecessary to decide on the manufacturer's duty of care because, similarly to Stark J, he did not think breach of duty was established. He felt on the facts and the divergent medical evidence that it could not be concluded that Dr Grant's irritation (which led to him being in bed for 17 weeks) was caused by chemicals in the garments.

Evatt J dissented, holding that the manufacturer should be held liable. He accepted the Chief Justice's view that Dr Grant's skin condition was caused by chemicals in the garments. The manufacturer argued that the level of control required by *Donoghue v Stevenson*, referring

to Lord Macmillan's statement 'I regard his control as remaining effective until the article reaches the consumer and container is opened by him. The intervention of any exterior agency is intended to be excluded…'[36] was to be read as 'The basis of *Donoghue v Stevenson* is not that the defect is not discoverable except by examination, but that the manufacturer retains control'[37] and that the manufacturer in *Donoghue* had intentionally created exclusion from examination and this was distinguishable from the situation in *Grant's case*.[38]

Evatt J rejects this argument. He argued that[39]

> [Lord Macmillan's] judgment invoked the idea of "control" by the manufacturer, but this was intended to describe such action on the part of a manufacturer as was intended to, and would ordinarily secure, that the manufactured article should reach the ultimate consumer in precisely the same condition as when it left the manufacturer. The broad principle is thus stated by Lord Macmillan:
>
> > Now I have no hesitation in affirming that a person who for gain engages in the business of manufacturing articles of food and drink intended for consumption by members of the public in the form in which he issues them is under a duty to take care in the manufacture of these articles. That duty, in my opinion, he owes to those who he intends to consumer his products. He manufactures his commodities for human consumption: he intends and contemplates that they shall be consumed. By reason of that very fact he places himself in a relationship with all the potential consumers of his commodities and that relationship which he assumes and desires for his own ends imposes upon him a duty to take care to avoid injuring then. He owes them a duty not to convert by his own carelessness and article which he issues to them as wholesome and innocent into an article which is dangerous to life and health.

Evatt J also thought Lord Thankerton's judgment and Lord Atkin's emphasised that the exclusion of interference was part of creating the direct relationship with the consumer. Lord Atkin referred to this as proximity, but he defines it and Evatt J selects this passage which explains how the duty arises[40]

> [… towards] 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 of omissions which are called in question.

The point was that while proximity is the basis of the duty, it is 'not confined to mere physical proximity' but takes account of the knowledge of the defendant that a person would be directly affected. Lord Macmillan's statement makes that clear. On this basis, Evatt J held that the manufacturer was owed a duty of care to the plaintiff.

Another point of interest is that Evatt J refers to the fact that Lord Macmillan's and Lord Thankerton's rationes decidendi were narrower than Lord Atkin's, but that the case at hand met the requirements of all three. Justice Evatt then discusses the reach of *Donoghue v Stevenson*. He refers to Lord Atkin's statement supporting his conclusion, when he says[41]

> There are other instances than of articles of food and drink where goods are sold intended to be used immediately by the consumer…where the same liability must exist…I confine myself to articles of common household use, where everyone, including the manufacturer knows that the articles will be used by other persons than the actual ultimate purchase, - namely by members of his family and his servants and in some cases his guests. I do not think so ill of our jurisprudence as to suppose that its principles are so remote from the ordinary needs of civilised society and the ordinary claims it makes upon its members as to deny a legal remedy where there is so obviously a social wrong.

Evatt J then turns to US cases – *McPherson v Buick Motor Co*[42] and *Smith v Peerless Glass Co*[43] which extended it. What seems to be characteristically for at least some Australian judges,

Evatt J's judgment shows evidence of looking outward, and of interest in principle over rules. In this case all the judgments took account of this new case and recognised its importance.

B. GUNDAGAI TO TUMUT RAILWAY [§6.10]

In April 1933 the High Court's judgment in *Transport Commissioners of New South Wales v Barton*[44] was decided. A government railway from Gundagai to Tumut passed through pastoral country which was unfenced. The railway statute provided that the railway authority did not need to fence the land. A mare got onto the line and was hit by the train at about 40 mph and killed. The owner of the mare sought damages for the train driver's negligence. According to the account in the Commonwealth Law Reports, counsel did not argue *Donoghue v Stevenson*. However, in the judgment of Gavan Duffy CJ and Starke J, the case was discussed. They referred to the neighbour principle and in relation to that, held that where the statute provides that the Commissioners need not fence, 'that only accentuates the care that must be used in other directions if they do not fence'.[45] The Commissioners argued against this that the plaintiff had no right to have his animals straying on the railway line (while they could not deliberately run over the animals nor recklessly disregard so the animals were trespassers. The judges referred to the duty of care owed in occupiers' liability as 'but a particular instance of the general duty of care involved in the law of negligence'[46] and then had to choose whether to use the wider *Donoghue v Stevenson* neighbour principle, or the narrower version of occupiers liability. They chose the latter, which meant that the judges' direction to the jury, which was a more general direction about the failure of the driver to have a proper lookout, was wrong.

Dixon J dealt with the case as an occupiers' liability case and held that the duty depended on knowledge of the presence of the trespasser and what would be reasonable care in all the circumstances. In his opinion there was no breach. He did not mention *Donoghue v Stevenson*.

Evatt and McTiernan JJ, in separate judgments, treated the case as the narrower form of occupiers' liability and did not mention *Donoghue v Stevenson*.

C. 1936 AND 1937 [§6.11]

A 1936 case which mentions *Donoghue v Stevenson,* only mentioned it in relation to res ipsa loquitur.[47] *Bunyan v Jordan*, in 1937 was a somewhat idiosyncratic case concerned nervous shock created by a very particular sequence of events where an employee Miss Bunyan, saw a revolver on her boss, Jordan's desk which he showed her was loaded. She left and returned to see poison on his desk, left again and heard her boss saying he was going to kill himself or someone else. She then left the store whereupon she heard a gunshot but saw her boss a few minutes later. She delivered the takings to him and he began to tear up the notes saying he would not be there in the morning. She began to feel ill. At trial she argued a *Wilkinson v Downton*[48]claim and a negligence claim. She was non-suited but appealed to the Full Court of the Supreme Court of NSW where Jordan CJ avoided discussion of *Coultas*[49]and used *Donoghue v Stevenson* to show that the duty of care was now an essential part of the process. He characterised the duty as one where a reasonable person [he said 'man'] would realize that the person suffering nervous shock would be likely to be physically injured by the act. He took personal injury to include where the physical injury was communicated by touch, sight, hearing and nerves or tissue. He noted that the standards of foreseeability changed over time, but dismissed the appeal. In the High Court no judges mentioned *Donoghue v Stevenson*. They focused on intentionality as in *Wilkinson v Downton*. Latham CJ dismissed the negligence claim on the basis that it was not foreseeable. Rich J took a similar view, but Dixon J held that there was no intention to induce harm, but without mentioning *Donoghue v Stevenson* that the test of foreseeability had not been met. Evatt J did not consider the negligence claim and decided on the basis of intentionality.

D. RACE-CALLING [§6.12]

Victoria Park Racing & Recreation Grounds Co Ltd v Taylor[50]was decided in 1937. It concerned the fact that a platform had been built outside a racecourse high enough for a person to stand there and call the race and for it to be broadcast. The racecourse owners objected because attendance at the races was dropping. The case was run as a nuisance case where the interference was with a right of privacy. Latham CJ was unable to see that any right was violated by the race calling nor that there was any unnatural user of the land. If the man had called the race from the upstairs floor of a house there would have been no objection. Rich J (dissenting) said 'I adapt Lord Macmillan's words [in *Donoghue v Stevenson*] and say 'The categories of nuisance are not closed'[51] and he argued that 'there is a limit to this right of overlooking and that limit must be found in an attempt to reconcile the right of free prospect from one piece of land with the right of profitable enjoyment of another. ' He (as does Evatt J) presciently mentions that television may affect this. It is interesting to see Rich J making an argument for the expansion of legal principles as times and circumstances change, using *Donoghue v Stevenson* as support. He would have allowed the appeal.

Dixon J (in majority) discussed the application of nuisance to the case but did not think there was any right to exclude broadcasting of things that can be seen on the plaintiff's land. He objected to Rich's view, saying

> I have had the advantage of reading the judgment of Rich J, but I am unable to regard the considerations which are there set out as justifying what I consider amounts not simply to a new application of settled principle but to the introduction into the law of a new doctrine.

At the beginning of his judgment Dixon J argued that there were limits to the fundamental principles which could be deduced from tort law.[52]

> The law of tort has fallen into great confusion, but, in the main, what acts and omissions result in responsibility and what do not are matters defined by long-established rules of law from which judges ought not wittingly to depart and no light is shed upon a given case by large generalizations about them…

Evatt J does refer to *Donoghue v Stevenson* after a discussion of nuisance. He observes that the plaintiffs' substantial objection is to the loss of revenue rather than interference with their use of land. The plaintiff's cause of action, he says, must be established, but this must be done on the basis of fundamental principles which were summarised in *Donoghue v Stevenson*. The statements he refers to are statements about general principle, how the law should be stated etc and how English law adapts:

He quotes Lord Atkin:[53]

> I venture to say that in the branch of the law which deals with civil wrongs, dependent in England at any rate entirely upon the application by judges of general principles also formulated by judges, it is of particular importance to guard against the danger of stating propositions of law in wider terms than is necessary, lest essential factors be omitted in the wider survey and the inherent adaptability of English law be unduly restricted.

The problem here is that the plaintiffs are struggling to prove a nuisance, and cannot point to a precedent in their favour. And then Evatt J also suggests that *Donoghue v Stevenson* can be applied to nuisance:

> The statements of general principle in *Donoghue v Stevenson* are equally applicable to the tort of nuisance.

He states that the interference with the plaintiff's profitable use of land takes place precisely at the point where the plaintiff would make their profit. Evatt notes that the announcer over and

over says that he is broadcasting from the racecourse, which is untrue. Evatt J notes the fact that 'the conduct of the defendants cannot be regarded as honest should not be overlooked if the statement of Lord Esher is still true that 'any proposition the results of which would be to show that the common law of England is wholly unreasonable and unjust, cannot be part of the common law of England (quoted in *Donoghue v Stevenson*).[54] And, after he sets out some propositions – that there is no general right to privacy, but neither is there an unrestricted right to spy or overlook another person, and creating devices to overlook a property would create liability in nuisance if damage, discomfort or annoyance is caused. He then goes on to again apply statements from *Donoghue v Stevenson*.

He says:

> The above suggested statement of principle may require either extension or qualification, but in essence I think that it is in accordance with the principles of the common law of England, the "inherent adaptability" of which is as essential to-day as ever it was, having regard to our "altering social conditions and standards." These phrases of lord Atkin and Lord Macmillan, though applied to another branch of the common law, are equally applicable to the problem which has arisen in this case.

Evatt J then decided that the plaintiff was entitled to an action for damages for private nuisance and an injunction against the defendants. McTiernan J joined the majority in dismissing the appeal.

What we see here is the High Court being very familiar with *Donoghue v Stevenson* and using it not only as a precedent for the duty of care in negligence, but using the dicta of the House of Lords in that case as support for law-changing. It is also notable that in many of the cases the High Court is more interested in the use of the neighbour principle than the manufacturer's liability rule. The neighbour principle, of course, gives much more scope to a final appellate court, so it is not surprising.

E. THE BOY IN THE DITCH [§6.13]

The last case I want to talk about is *Chester v Waverley Municipal Council.*[55]This involved a young boy who drowned in a ditch in a road near his parents' home. The ditch had been dug in the road by the Council and it was 12 m by 3 m and 2 m deep. The boy went missing and his mother and other people searched for him for several hours until his body was found in the ditch. His mother was present when the body was found. She brought an action in nervous shock against the Municipal Council. The ditch had a railing around it and lamps, but nothing to prevent a child falling in.

In the High Court the majority, Latham CJ, Starke and Rich JJ (Evatt J dissenting) held that the appeal should be dismissed. The majority was clearly concerned with reducing or maintaining the scope of nervous shock cases. They also held that Mrs Chester's nervous shock was not foreseeable. Indeed they were, to modern eyes, remarkably unsympathetic. Applying *Donoghue v Stevenson* Latham CJ said

> Death is not an infrequent event, and even violent and distressing deaths are not uncommon. It is, however, not a common experience of mankind, that the spectacle, even of the sudden and distressing death of a child, produces any consequence of more than a temporary nature in the case of bystanders or even of close relatives who see the body after death has taken place

Chief Justice Latham also quoted Lord Atkin's statement in *Donoghue v Stevenson* in the form of the neighbour principle:

> :" 'the persons in respect of whom the duty exists are 'persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being

> so affected' (that is, so injured)" when I am directing my mind to the acts or omissions which are called in question."

Rich J did not mention *Donoghue v Stevenson*, sticking to the Australian case *Bunyan v Jordan*,[56] and said

> A mother's shock on the production of the dead body of her child falls outside the duty of the municipality in relation to the care of its roads. She was not using the road nor a witness of the accident. Her subsequent shock is not reasonably within contemplation of the defendant as a consequence of the condition of the road.

And Starke J, who also did not consider *Donoghue v Stevenson* observed

> In my opinion the shock to the appellant is not within the ordinary range of human experience; it is so remote from the act or omission of the respondent in opening or guarding the trench that no reasonable person ought to or would foresee or contemplate the injury to the appellant.

They took the view that a duty did not arise because Mrs Chester's illness was not foreseeable.

It should be noted that *Coultas*' case[57] was a significant barrier since it had held that the Victorian Railway Commissioners were not liable for the injury Mrs Coultas suffered as a result of a very near miss at a railway crossing caused by the railway attendant opening the gate when a train was too close. Mrs Coultas suffered a miscarriage and subsequent illness. The trial judge and Full Court of the Supreme Court of Victoria held in favour of Mrs Coultas, but the Commissioners appealed to the Privy Council. In this case the Privy Council took the view that this was a matter of remoteness and that mental harm caused by 'sudden terror' was not a consequence which in the ordinary course of things would follow the gatekeeper's negligence. By the time *Chester* was decided, although Australian courts were bound by *Coultas*, they often distinguished it.

Evatt J was in dissent. There is a massive contrast between the sentiments of Evatt J compared to the majority's judgment. Evatt J's judgment began with a detailed statement of the facts. He then considered the feelings of Mrs Chester while she looked for Maxie.

> During this crucial period [while Maxie was lost] the plaintiff's condition of mind and nerve can be completely understood only by parents who have been placed in a similar agony of hope and feat with hope gradually decreasing.[58]

The judgment allows us to see Mrs Chester looking in an agony of fear and hope which is ultimately dashed, and also into Evatt's emotional relationship with his own children – he is identifying with her. He goes on to quote William Blake from the *Songs of Experience*. The use of literature is striking and has real impact in the judgment, giving it an emotional depth that marks it out very strongly from the majority judgments. Evatt J then quoted Australian Furphys' book *Such is Life*, which has many stories of lost children. He pointed out that the range of human responses to an accident is wide, and that this is common knowledge, thus disposing of the foreseeability argument made by the lower courts. This argument is the legalistic argument, but the references to literature are extremely unusual in Australian law at the time, as is the clear acceptance of the validity of Mrs Chester's emotional reaction to her son's death.

Evatt J's judgment is notable not just for its use of poetry and literature and the emotional note it strikes, but also for its use of *Donoghue v Stevenson.*

He notes that the trial judge held that Mrs Chester could not recover because she had not seen her child fall into the trench. Evatt J also observed that the trial judge did not seem to base his decision on any duty. He regards the judges' view as too narrow and particularistic

view including as it does what seems to be a view that *Hambrook v Stokes* applies only to bystanders or passers by.

He then says:

> But I think that the law is at one more civilized and more humane. Behind the illustration provided by *Hambrook v Stokes Brothers* lies the broader principle enunciated by Lord Atkin in *Donoghue v Stevenson* in order to help in determining whether the common law has established a relationship of duty between a defendant on the one hand, and a plaintiff or the class to which a plaintiff belongs, on the other: 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 I contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.

The reference to 'the law being more civilised and more humane' echoes Lord Atkin's statement that 'I do not think so ill of our jurisprudence as to suppose that its principles are so remote from the ordinary needs of civilised society and the ordinary claims it makes upon its members as to deny a legal remedy where there is so obviously a social wrong.'[59] Evatt J then applies this to the circumstances and notes that the defendant would know that a trench filled with water would be very attractive to children, and, knowing that children often had to play in the streets, it was foreseeable that a child could drown. When considering that danger, the defendant would also see that parents would try to find the child or rescue him from danger and in doing this might sustain harm themselves. He rejects the view that Mrs Chester was a 'susceptible and emotional mother' and therefore unforeseeable., saying 'only the most indurate heart" could have gone through the experience without serious physical consequences.'"[60] He then goes on to explore the equivalent to the eggshell skull for duty – that the fact that someone is especially susceptible does not matter if the injury would have harmed a normal person. He then traverses a number of English and American cases that support him.

Evatt J was in dissent in *Chester*, but even Latham CJ refers to the neighbour principle rather than the manufacturers' liability principle in his discussion of *Donoghue v Stevenson*.

IX. CONCLUSION [§6.14]

This small survey of negligence cases in one court suggests that the judges' approaches to negligence, even before *Donoghue v Stevenson* was decided tended to be broad ranging and to favour views of the *ratio decidendi* and discussions of the law which operate at a high level of generality and allow for flexibility to apply the law to the particular circumstances of Australia. This applies to dissenting and majority judges, with some exceptions. The cases after *Donoghue v Stevenson* which I have examined suggest that Lunney's thesis about Australian judges in this period is correct to emphasise their view of the common law less as English law, and more as law of the Empire, in which Australia had a significant place. Rather than cultural cringe, what we see in the Australian jurisprudence is an outward looking court trying to adapt what it sees as the common law of the Empire, which is their Empire too, to its own conditions, and using the tools available to do that. When *Donoghue v Stevenson* came along Australian judges were quick to use the general principle rather than the more specific manufacturer's liability rule; this was part of the fact that Australian judges were crafting their own jurisprudence, slowly and quietly, in order to serve their country and its people best.

NOTES

1 [1932] AC 562.

2 One notorious example is the legislation Victoria passed to say the United Kingdom was 'not beyond the seas' from Victoria to allow the legislation to apply in Victoria: see Bruce Kercher, *An Unruly Child: a history of law in Australia*, Allen & Unwin, 1995, p 101.

3 Claims against the Government of New South Wales Act 1857 (NSW).

4 Women received the right to vote and the right to stand for Federal Elections in 1902 and this was confirmed by the Commonwealth Electoral Act 1918 (Cth). The right to vote in the States for women varied from 1894 (SA) to 1908 (Qld).

5 *Australian Courts Act* 1828(Imp), s 24 - all English law in force on 28 July 1828 was in force in New South Wales (then including Tasmania, Victoria and Queensland as well as modern New South Wales) insofar as it was applicable to the new colony. This was a formalisation of the common law rules about reception, said by Sir William Blackstone (1 Comm 107:) 'Such colonists carry with them only so much of the English law as is applicable to the condition of an infant Colony…'

6 Peter Handford covered the Australian approach up to the 80th anniversary in the 80th Anniversary Conference volume of the *Juridical Review*: Peter Handford, 'The Snail's Antipodean Adventures' (2013) Pt 3 *Juridical Review* 315.

7 Hamish Gray 'The Development and Function of the Law of Tort in the Twentieth Century in Australia and New Zealand' (1965) 14(2) *Int and Comp Law Quarterly* 309-409, 407. This is similar to Mark Lunney's argument in *A History of Australian Tort Law: England's Obedient Servant?* (Cambridge University Press, 2018)

8 [1932] AC 562, 576-577.

9 Mark Lunney, above n 7.

10 M Lunney, above n 7 p 2.

11 Ibid

12 Sir Owen Dixon, "Swearing in of Sir Owen Dixon as Chief Justice" (1952) 85 CLR xi at xiii-xiv (not in online version of CLR).

13 Josev (n 1) 101, quoting Michael Coper, 'Critique and Comment: Concern about Judicial Method' (2006) 30(2) *Melbourne University Law Review* 554, 561.

14 Above n 8, 578.

15 Above, n 8, 580.

16 Ibid

17 *Heaven v Pender* (1883) 11 QBD 503, quoted in *Donoghue v Stevenson* at 508.

18 *Donoghue v Stevenson* 582-3.

19 As in *Heaven v Pender* (1883) 11 QBD 503; *Winterbottom v Wright* (1842) 10 M & W 109; 152 ER 402 and others.

20 (1928) 40 CLR 566.

21 *Hoyts Pty Ltd v O'Connor* [1928] HCA 7 p4 of 9; 40 CLR 566.

22 *Vaughan v Menlove* (1837) 3 Bing NC 468, 132 ER 490 (CP).

23 *Hoyts Pty Ltd v O'Connor* [1928] HCA 7 p5 of 9 ; 40 CLR 566.

24 M Lunney, *A History of Australia Tort Law: 1901-1945: England's Obedient Servant?* (Cambridge UP, 2018) p 10.

25 Above n 19.

26 The Chief Justice then had a deciding vote.

27 (1932) 6 Australian Law Journal 176.

28 Above n 22, 176

29 In my view this is the basis of 'proximity as principle', proximity as it was posed by Deane J in *Jaensch v Coffey* and then picked up by the High Court and used in later cases such as *Rottnest Island Authority v ?* before it was rejected by a differently constituted High Court: see Prue Vines 'Fault, responsibility and negligence in the High Court of Australia' (2000) 8(2) *Tort Law Review* 130-145 and 'The needle in the haystack: principle in the duty of care' (2000) 23 (2) *University of New South Wales Law Journal* 35.

30 (1933) 50 CLR 387.

31 A word about the doctrine of precedent and the High Court in the 1930s. The High Court was the court at the apex of both State and Federal Law at this time, but a case could go from the High Court to the Privy Council as well. This is what happened to *Grant* case. (This involved a sea voyage each way of about two months). Appeals to the Privy Council from the High Court ended in 1974, but there was a period when appeals to the Privy Council from the state Supreme Courts could be chosen as an alternative to appealing to the High Court. This created some difficulties with precedents Appeals from State Courts to the Privy Council were abolished in 1986. For example in 1985 a case was appealed from a single judge decision of the Supreme Court of NSW to the Privy Council: *Candlewood Navigation Corporation v Mitsui OSK Lines* [1986] AC 1.

32 *Australian Knitting Mills v Grant* (1936] AC 85; See O Howard Beale, *Grant v AKM* (1935) 9 *Australian Law Journal* 288 where he notes that the Privy Council agreed with Evatt J in the High court.

33 *Grant v Australian Knitting Mills* [1936] AC 85.

34 *AKM v Grant*, at 409

35 *AKM v Grant* at 412.

36 Quoted in *AKM v Grant* at 438

37 At 394

38 At 393

39 *AKM v Grant* 438-9

40 *AKM v G* at 439

41 *AKM v G* at 440-441

42 (1916) 217 NY 382.

43 (1932) 259 NY 292.

44 *Transport Commissioners of New South Wales v Barton* (1932-33) 49 CLR 114.

45 *Barton*, at 122

46 *Barton*, at 123.

47 *David v Bunn* (1936) 56 CLR 246.

48 *Wilkinson v Downton* [1897] 2 QB 57; 66 LJQB 493.

49 *Victorian Railway Commissioners v Coultas* (1888) 13 App Cas 2250

50 (1937) 58 CLR 479.

51 *Victoria Park*, above n 50 at 483.

52 *Victoria Park*, above n 50 at 489.

53 *Victoria Park*, above n 50 at 91.

54 *Victoria Park*, above n 50 at 93.

55 (1939) 62 CLR 1.

56 *Bunyan v Jordan* [1937] HCA 5: (1937) 57 CLR 1.

57 *Railway Commissioners of Victoria v Coultas* (1888) 13 App Cas 222.

58 P 275

59 *Donoghue v Stevenson*, at 583.

60 *Chester*, above n 55.

Part 5—Singapore and Malaysia

CHAPTER 7

Recent Developments in Duty of Care: Perspectives from Singapore and Malaysia

I. AUTHOR BIO [§7.1]

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II. INTRODUCTION [§7.2]

Singapore and Malaysia have shared common law roots for a considerable period of time. English common law was received into the Straits Settlements comprising Singapore, Malacca and Penang via the Second Charter of Justice of 1826[1] subject to suitability to local conditions and modifications.[2] When the neighbour principle in respect of personal injuries was enunciated in the House of Lords decision in *Donoghue v Stevenson* in 1932, both Singapore and Malaysia were part of the British colonial system. A quarter of a century later, Malaysia gained her independence. Shortly thereafter, in 1963, the state of Singapore, Peninsular Malaysia, North Borneo and Sarawak formed the Federation of Malaysia albeit for a brief period. Singapore left the Federation in 1965 and declared her independence. By then, the landmark decision of *Hedley Byrne & Co Ltd v. Heller & Partners Ltd*[3] extending duty

of care to embrace economic losses flowing from negligent misstatements had already been pronounced. Post-independence, Malaysia[4] and Singapore[5] have continued to apply English common law including tort law subject to local circumstances. Thus, it is fair to say that Singapore and Malaysia are not only physically proximate but also circumstantially proximate neighbours bound by common lego-historical ties.

Since the defining moment in *Donoghue v Stevenson*, the tort of negligence had been gaining ground slowly and steadily building upon case precedents and abiding by *stare decisis*. I will focus on the recent decisions of the Singapore Court of Appeal in the main as well as a few decisions by the Malaysian Federal Court which have made important pronouncements on duty of care, no doubt inspired by *Donoghue v Stevenson* and other related developments.

III. DEVELOPMENTS RELATING TO DUTY OF CARE IN SINGAPORE AND MALAYSIA [§7.3]

Before I highlight the more recent judicial developments, a little historical background to the earliest case precedents in Singapore and Malaysia that have applied *Donoghue v Stevenson* would not be totally out of place. In 1961, the Malaysian court in *Sathu v. Hawthornden Rubber Estate Co Ltd*[6] had already explicitly recognised the Atkinian neighbour principle. The plaintiff's grazing cattle had trespassed on the defendant's rubber estate which was sprayed with a poisonous weed-killer (sodium arsenite). As a result, the cattle died from arsenic poisoning. Ong J succinctly summarised the legal position as follows:

> A man owes certain duties to his neighbour, but liability in law is limited strictly to neighbours coming within the is (sic) category of those defined by Lord Atkin as "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."

On the facts, there was no duty owed by the defendant as it was not aware that the plaintiff's cattle would stray onto its estate, and the plaintiff had been warned prior to the incident not to allow the cattle to trespass onto the defendant's estate.

In 1973, Choor Singh J sitting in the Singapore High Court in *The "Lexa Maersk"*[7] held, following the "well-known doctrine of *Donoghue v Stevenson"*, that the second defendant, as lighterers to transport certain goods, owed a duty of care to the plaintiffs who were consignees of the goods that had been damaged.[8] The basis for the duty of care was the second defendant's "proximity to the goods" as it had known from past dealings with the first defendants' local agents that the goods in question belonged to consignees.[9] In the same year, Winslow J in the Singapore High Court decision of *Dobb & Co Ltd v. Hecla*[10] endorsed the Atkinian neighbour principle in a claim for personal injuries suffered by a tiling contractor's employee against another contractor for the negligent construction of a scaffolding of a building that led to the employee's injuries.

IV. SINGAPORE: *SPANDECK* AND POST-*SPANDECK* DEVELOPMENTS IN DUTY OF CARE [§7.4]

Prior to the landmark decision on duty of care in *Spandeck Engineering (S) Pte Ltd v. Defence Science & Technology Agency*[11] ("*Spandeck*") in 2007, the Singapore courts had applied the two-stage test in *Anns v. Merton London Borough Council*[12] and/or the three-part test in *Caparo Industries plc v. Dickman*.[13] For claims in economic losses, the preferred test was often that in *Anns* whilst the *Caparo* test tended to apply to claims for physical injuries and property damage. There were, however, no satisfactory justifications given for the application of the different tests.

One of the Singapore cases which had applied the *Caparo* test to a claim in personal injuries was *TV Media Pte Ltd v. De Cruz Andrea Heidi*[14]("*TV Media*"). The plaintiff, a TV celebrity who had consumed slimming pills and suffered liver damage, sued the manufacturer. However, the manufacturer, being outside the jurisdiction, could not be located for the writ to be served on it. In *TV Media*, the Singapore Court of Appeal extended the *ratio decidendi* in *Donoghue v Stevenson*- that a manufacturer would owe a duty of care to consumers who suffered injuries from the consumption of defective products - to a duty owed by the distributors of the slimming pills to the plaintiff.[15] Hence, the extension of the *ratio* in *Donoghue* was instrumental in allowing the claims in negligence to be successfully pursued against TV Media, the wholesale distributors of the slimming pills. TV Media had advertised the pills as being effective and safe, sold the pills with the knowledge that the pills were being distributed in unmarked packaging to consumers without proper dosage instructions or written precautions, and the court found that the plaintiff had reasonably relied on the reputation of TV Media.

A. DEVELOPMENT OF A NEW TEST FOR DUTY OF CARE [§7.5]

In 2007, the Singapore Court of Appeal in *Spandeck* adapted the two-stage test in *Anns v Merton* to formulate a single test regardless of the type of actionable damage. To establish a duty of care, the plaintiff had to show that the preliminary threshold of factual foreseeability would be satisfied and that the relationship between the parties were sufficiently close and proximate at the first stage to give rise to a *prima facie* legal duty. At the second stage, strong countervailing policy considerations, if any, may negate or restrict the scope of the *prima facie* duty at the first stage. The approach, according to the court, involved a judicious balancing of the universal (in the form of the two-stage *Spandeck* test) and the particular (by recourse to analogous case precedents or "incrementalism" at each stage).

Though it was foreseeable that the plaintiff, the owner of a construction project, would suffer economic losses should the defendant, the superintending officer of the project, fail to supervise and properly certify the costs of the contractor's works, the relationship between the parties was adjudged not sufficiently proximate. The contract between the project owner and contractor had contemplated that in the event of a dispute concerning under-certification of works, the contractor was entitled to refer such matters to arbitration against the project owner. Here the main analogous case precedent was the English Court of Appeal decision in *Pacific Associates Inc v Baxter*,[16] and the analysis was based on the impact of the contractual framework on duty of care. Policy considerations for not imposing a duty of care was also consistent with the contractual framework analysis.

How would we know whether the relationship between the parties in particular case was sufficiently "close and direct" per *Donoghue v Stevenson*? The approach, according to the court in *Spandeck*, was to examine the twin criteria of voluntary assumption of responsibility and reliance and three facets of physical, causal and circumstantial proximity, and their applicability to the facts of the case. Subsequently, the Singapore Court of Appeal highlighted the significance of other proximity factors including the defendant's control over risks of harm to the plaintiff, the plaintiff's dependence on the defendant, and the defendant's knowledge of the plaintiff's vulnerability.[17]

I will now briefly mention with the help of a few illustrative cases how the *Spandeck* framework and the neighbour principle in *Donoghue* have been applied to the more novel cases.

B. OCCUPIERS' LIABILITY FOR PERSONAL INJURIES [§7.6]

The first case example is the application of *Spandeck* to occupiers' liability for personal injuries in *See Toh Siew Kee v. Ho Ah Lam Ferrocement (Pte) Ltd.*[18] The claimant, who had trespassed

on land in which the first and second defendants possessed proprietary interests, was injured by certain mooring operations carried out by the third defendant on the premises. Though the plaintiff had commenced lawsuits based on both the rules of occupier's liability and in the tort of negligence, the Singapore Court of Appeal allowed the claim in negligence only against the third defendant and awarded partial damages due to the plaintiff's contributory negligence.

This 2013 decision marked an important legal change in Singapore by abolishing the former occupier's liability rules in favour of applying the tort of negligence. Henceforth, the standard of care expected of occupiers of premises to entrants generally would be based on reasonableness instead of the prior standards that differed depending on the specific category of the entrants (invitees, licensees and trespassers). The impetus for this change was the newly-minted *Spandeck* test in Singapore which was, in turn, inspired by *Donoghue* and *Anns* in particular.

VK Rajah JA, in a "brief interlude on the neighbour principle", made a few insightful comments on its inseparable linkage with the universal Golden Rule (which I can do no better than to extract *verbatim*):[19]

> The notion of not doing to others what you do not want them to do to you is merely the flip-side of loving thy neighbour as thyself (referred to hereinafter as "the Golden Rule"). Some academics have claimed that Lord Atkin's "neighbour" principle is Biblically inspired … … However, I would like to point out that the Golden Rule is not peculiar to any one belief system or culture. As Harry J Gensler has opined in *Ethics and the Golden Rule* … …, the Golden Rule "is a global standard – endorsed by nearly every religion and culture … for many centuries". Pertinently, Confucius, when asked whether there was a teaching which could serve as the guiding principle for conduct, replied: "What you do not want others to do to you, do not do to others" … … It is thus evident that Lord Atkin's "neighbour" principle also emphatically reflects the mores of Asian societies (such as Singapore). Pertinently, distinguished jurists have persuasively shown that the "neighbour" principle is a universal communitarian value … … Indeed, John Finnis … has unabashedly declared that "love of neighbour as oneself" is the master principle of morality from which all other moral principles can be inferred or deduced … …

His Honour then observed the similarities between the Golden Rule and Immanuel Kant's Categorical Imperative to "act only in accordance with that maxim through which you can at the same time will that it become a universal law". VK Rajah JA made a perceptive point that Kant had stated "*quod tibi non vis fieri*" (Latin for not doing to others what you do not want others to do to you) in his "Groundwork of the Metaphysics of Morals".[20] Based on the above, he concluded that Lord Atkin's neighbour principle was "a statement of universal application".[21]

C. RELATIONAL ECONOMIC LOSS [§7.7]

Would a plaintiff, who has suffered economic losses due to negligently inflicted damage to property that is not owned by him, be entitled to claim the losses against the defendant in negligence? At common law, there are different bases for establishing a duty of care owed by the defendant in such a claim (for what is commonly known as "relational economic losses") eg, the presence of an identifiable plaintiff as in *Caltex Oil (Australia) Pty Ltd v. The Dredge "Willemstad*;[22] and the existence of a "joint venture" between the plaintiff and the property owner as in *Canadian National Railway Co v. Norsk Pacific Steamship Co Ltd et al*.[23]

In the Singapore case of *NTUC Foodfare v Co-operative Ltd v. SIA Engineering Co Ltd*,[24]the negligence of the defendant's employee, an airtug operator, caused property damage to a pillar at an airport. The pillar supported the floor of the lounge area where the plaintiff was operating its food kiosk. As a result of the damage to the pillar, the Building and Construction Authority closed off part of the lounge area which included the area where the kiosk was

located. With respect to the plaintiff's claim for economic losses, the Court of Appeal applied the *Spandeck* framework instead of the existing caselaw precedents from the abovementioned foreign jurisdictions, and found a duty of care owed by the defendant's employee based on physical and causal proximity. In addition, it took account of the defendant employee's knowledge that his negligence would likely result in economic losses to a "determinate class of persons" namely the occupiers at the lounge area who would be deprived of using their premises. Significantly, the absence of indeterminate liability was also a policy consideration at the second stage of the *Spandeck* test which supported the imposition of a duty of care.

D. "BIRTH" OF A NEW CATEGORY OF ACTIONABLE DAMAGE FOR WRONGFUL FERTILISATION [§7.8]

The final case, *ACB v. Thomson Medical Centre Pte Ltd*,[25] has attracted much attention from lawyers and academics in Singapore and beyond. It is a profound and philosophical judgement on an issue that strikes at the very core of humanity. The plaintiff, who was of Chinese descent, sought conception via *in vitro* fertilisation (IVF) at a fertility clinic. Instead of using the sperm of the plaintiff's husband, who was of Caucasian descent, for the IVF treatment, the defendants had mistakenly fertilised the plaintiff's egg with the sperm from a donor who was of Indian descent. The claim for damages for pain and suffering associated with the pregnancy was not disputed by the defendants. The controversy was over the claim for the costs of raising the child (or "upkeep costs").

The Singapore Court of Appeal in *ACB* denied the claim for upkeep costs as the purported head of damages would, in their view, run contrary to the essence of parental responsibilities for their children which could not be reduced to the mere financial valuation of losses. Andrew Phang JA, delivering the judgement of the Court of Appeal, recounted the historical developments in the duty of care in respect of the different types of actionable damage ranging from personal injuries in *Donoghue*, economic losses in *Hedley v. Byrne* to psychiatric harms in *McLoughlin v. O'Brian*[26] as well as Lord Macmillan's dictum in *Donoghue v Stevenson* on the need to "adapt itself to the changing circumstances of life".[27] Of significance for the duty of care analysis was the claim for upkeep costs that was denied based on public policy considerations:[28]

> The issue of whether a particular head of damage is actionable is one which affects not just the parties to the instant suit, but all of society and, thus, the analysis usually takes place at the second stage of the *Spandeck*.

Upon considering the alternative claim for loss of autonomy, it decided that, though autonomy is an important value, loss of autonomy itself without any "objective detriment" would not be sufficiently coherent to qualify as a head of damage. The court ultimately awarded the plaintiff the loss of genetic affinity that was grounded in both biological and socio-cultural linkages.

V. MALAYSIA: DUTY OF CARE APPROACH AND CLAIMS FOR ECONOMIC LOSSES [§7.9]

As mentioned above, Malaysian courts have applied the neighbour principle in *Donoghue v Stevenson* since independence. At present, the Malaysian courts are inclined towards the duty of care approach in *Caparo v. Dickman*. The Federal Court of Malaysia in *Tenaga Nasional Malaysia v. Batu Kemas Industri Sdn Bhd*,[29] the landmark decision in 2018, stated in no uncertain terms that, notwithstanding the reference to some earlier cases which have applied the *Anns* test, "[i]n Malaysia, it is *Caparo* that holds sway".[30]

This was a case on the liability for damages (specifically economic losses) suffered by the plaintiff, an owner of a factory, that arose from a power failure due to the defendant's

negligence. The Malaysian court considered *Spartan Steel & Alloys Ltd v. Martin & Co (Contractors) Ltd*,[31] and concluded that economic losses consequent to physical damage could be recovered by the plaintiff but not pure economic losses.

I will give two notable case examples involving construction projects that have impacted duty of care developments in Malaysia. The first is *Majlis Perbandaran Ampang Jaya v. Steven Phoa Cheng Loon & Ors*[32] (also known as the "Highland Towers case"). The Federal Court of Malaysia in *Highland Towers* had, as in *Tenaga Nasional Malaysia*, applied the three-part test in *Caparo*. Further, eschewing an exclusionary approach to economic losses, the court stated that pure economic losses were recoverable in Malaysia "under limited situations".[33] The important question was, according to the court, whether the scope of the duty of care in the circumstances of the case was such as to "embrace damage of the kind which the plaintiff claims to have sustained".[34]

The local authority was eventually held not liable for pure economic losses in respect of its failure to implement a drainage master plan to prevent the collapse of certain blocks of residences. Abdul Hamid Mohamad and Arifin Zakaria FCJJ referred to, amongst others, the "limited resources and manpower" of the local authority, and the need to prioritise "basic necessities for the general public" over the "compensation for pure economic loss of some individuals who are clearly better off".[35] It was therefore not fair, just and reasonable to impose a duty on the local authority.

In *Lok Kok Beng & 49 Ors v. Loh Chiak Eong & Anor*,[36] the purchasers of industrial property claimed for financial losses arising from the negligence of the architects in preparing the layout plan and the certification of works. As a result, there was a delay in the delivery of vacant possession of the purchaser's industrial units. The architects argued that they could not apply for a certificate of fitness for the project as instructed by the developers. This was because a certificate from the Department of Environment (DOE) could not be obtained as the waste-water treatment plant, as required by the DOE to be built, was not functioning properly.

The Federal Court of Malaysia held that there was no duty of care owed by the defendant to the plaintiff. The developers (and not the defendant architects) were responsible for the construction of the waste-water plant. The latter work was outside the scope of duty of care of the architects. In terms of proximity, the sales and purchase agreement between the developers and purchasers indicated that in the event of any delay in obtaining the certificate of fitness, the remedy provided is for the purchasers to sue the developers in breach of contract and/or negligence. Thus, the court was of the view that the agreement had negated the alleged proximity between the plaintiff and defendant. Moreover, it was contrary to public policy to impose a duty on the architects vis-à-vis the delivery of vacant possession within the developer's contractual period.

As is consistent with the *Highland Towers* case, it was stated in *Lok Kok Beng* that the recovery for economic loss must be dependent on the facts of the case. It also opined that public policy must be considered but should not be the sole determinant of liability.[37] Both *Spandeck* and *Caparo* were cited by the Federal Court.

VI. LOOKING BACK AND AHEAD [§7.10]

Donoghue v Stevenson and subsequent developments have certainly been influential in Singapore and Malaysia albeit in different ways. Singapore courts apply the *Spandeck* test developed in 2007 whilst Malaysia follows substantially the three-part test in *Caparo*. Nevertheless, we have seen from the brief narration of cases above how *Donoghue*, *Anns* and/or *Caparo* have applied to determine duty of care in both established categories and novel cases. The *ratio* of *Donoghue* has, for example, been extended beyond the typical manufacturer/retailer-consumer relationships to distributors of products. *Donoghue* had also

served as a driver for legal reform through the abolition of the old rules for occupiers' liability and the application of the tort of negligence. Furthermore, *Donoghue* and arguments based on proximity and/or policy could form the basis for new categories of actionable damage ranging from personal injuries, economic losses, psychiatric harms to the loss of genetic affinity.

There remain, of course, challenges ahead as to the future development of the duty of care framework/test, not least because of the evolving complexity of real-life conditions and the myriad factual scenarios that can arise. In this regard, I see two specific (and continuing) challenges: first, to determine the scope of proximity (ie, the notion of sufficiently close and direct relationships per *Donoghue v Stevenson*) that is capable of dealing with the probably infinitesimal and myriad fact scenarios; and secondly, to develop incrementalism, as the database of case precedents expands, in a principled manner in order to ascertain, not only the scope of proximity, but also the appropriate policy considerations that are applicable to the local conditions of the jurisdiction concerned.

NOTES

1 See *R v Willans* (1858) 3 Kyshe 16, *per* Maxwell R.

2 See Andrew B. L. Phang, "The Reception of English Law" in Kevin Y. L. Tan (ed) *Essays in Singapore Legal History* (Marshall Cavendish Academic and Singapore Academy of Law, 2005), p 9.

3 [1963] 3 WLR 101.

4 Civil Law Act 1956, s 3.

5 Application of English Law Act 1993 (2020 Rev Ed), s 3(1).

6 [1961] MLJ 318, *per* Ong J (21 Aug 1961).

7 [1971–1973] SLR(R) 791 (31 August 1973).

8 The analogous precedent of *Lee Cooper Ltd v C H Jeakins & Sons Ltd* [1967] 2 QB 1 was also cited.

9 [1971–1973] SLR(R) 791 at [38]-[39].

10 [1971–1973] SLR(R) 821 (19 September 1973).

11 [2007] 4 SLR(R) 100.

12 [1978] AC 728.

13 [1990] 2 AC 605.

14 [2004] 3 SLR(R) 543.

15 It cited *Watson v Buckley, Osborne, Garett & Co, Ltd* [1940] 1 All ER 174.

16 [1990] 1 QB 993.

17 *Anwar Patrick Adrian v Ng Chong & Hue LLC* [2014] 3 SLR 761.

18 [2013] 3 SLR 284.

19 [2013] 3 SLR 284 at [22].

20 The learned judge cited a footnote to para 4:430 of Immanuel Kant's "Groundwork of the Metaphysics of Morals" in *Practical Philosophy* at p 80.

21 [2013] 3 SLR 284 at [25].

22 (1976) 136 CLR 529.

23 (1992) 91 DLR (4th) 289. The Singapore court also cited the Australian case of *Perre v Apand Pty Ltd* (1999) 198 CLR 180 though no clear *ratio* was discerned from the decision.

24 [2018] 2 SLR 588.

25 [2017] 1 SLR 918.

26 [1983] 1 AC 410.

27 [2017] 1 SLR 918 at [2].

28 [2017] 1 SLR 918 at [50].

29 [2018] 5 MLJ 561.

30 [2018] 5 MLJ 561 at [58].

31 [1972] 3 All ER 557.

32 [2006] 2 MLJ 389.

33 [2006] 2 MLJ 389 at [86].

34 [2006] 2 MLJ 389 at [21].

35 [2006] 2 MLJ 389 at [80]-[81].

36 [2015] 4 MLJ 734.

37 [2015] 4 MLJ 734 at [64].

Part 6— Israel

CHAPTER 8

How Related Are the Scottish Snail of 1926 and the Israeli Decomposed Snail of 2022? Is *Donoghue v Stevenson* Still Relevant in 21st Century Law?

I. AUTHOR BIOS [§8.1]

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II. INTRODUCTION [§8.2]

On 26 August 1926 Mrs. May Donoghue, a Glasgow shop assistant, visited a tea shop in 1 Well Meadow Street in Paisley, Glasgow with a friend. Mrs. Donoghue's friend ordered and paid for May Donoghue's ice cream and ginger beer. The ginger beer came in a dark opaque bottle supplied by D. Stevenson. After Mrs. Donoghue had consumed most of the beer, she realized that the bottle contained the remains of a decomposed snail. Mrs. Donoghue fell ill and was diagnosed with gastroenteritis and shock. She later filed a suit against Stevenson with the Court of Session, Outer House. Lord Moncrieff decided in favor of Mrs. Donoghue.

Stevenson appealed to the Inner House. The appeal was allowed. Mrs. Donoghue then filed a petition to appeal to the House of Lords. On the 26 May 1932 the majority of the House (2-3) allowed the appeal.[1] The case was eventually settled following the death of Stevenson.

On 22 August 2022 Israeli media announced a huge recall of several frozen vegetable products, following various reports from consumers who found decomposed "creatures" – including remains of a snail – in the plastic packages of frozen green beans that were sold across the country by Tnuva, one of Israel's largest food corporations.[2]

If this recall entails a lawsuit by the angry and frustrated consumers (most likely a class action), will the Israeli court find *Donoghue v Stevenson* relevant? Will the case be part of the plaintiff's list of references? Should the 2022 court apply the 90-year-old English precedent to the case at hand?

The following is a detailed (mostly) affirmative reply to these queries and a concise explanation of the uniqueness of the relationships between the aging Scottish immortal snail and Israeli negligence law.

III. HISTORICAL BACKGROUND [§8.3]

The decision of Lord Atkin (Lord Thankerton and Lord Macmillan concurring) in *Donoghue v Stevenson* modernized the law of negligence in both Scotland and England. Its impact on tort law worldwide cannot be understated. It marked the beginning of a modern era in which tort liability is independent of contract and is flexible enough to be applied to ever-growing factual and legal circumstances. The principle of negligence[3] has become the center of tortious liability in common law systems as well as in mixed legal systems.[4] The idea that the old proverb "love the neighbor"[5] should be turned into a binding legal text was both practical and logical.

And this is exactly where the relevance to the Israeli tort regime in general and to the Israeli tort of negligence in particular becomes clear. Two factors played leading roles in turning *Donoghue v Stevenson* into one of the significant pillars of Israeli private law.

First, the historical factor: When the British Mandate on Palestine (Israel) came into force, liability for bodily harm was practically nonexistent according to Ottoman Law,[6] and the British Mandatory legislator was just about to introduce the first version of a Tort Ordinance to Palestine (Israel)[7] following the example set in Cyprus,[8] that as a Crown colony was also in dire need of codification by the British Government of Cyprus. Second, the nature and spirit of the Israeli judiciary and Israeli legal society of that time *vis-a-vis* the nature and substance of the *Donoghue v Stevenson* principle. This principle, that eventually was amalgamated into the Tort Ordinance of 1944, was met by friendly legal minds that from then on, and for many long decades after, applied the "neighbor principle" as one of the most important values in Israeli legal system even outside the original negligence regime. The cumulative factors – the dire need for legal solution in cases of bodily harm caused by negligence; the "familiar" and logical context of the "neighbor principle" that became a written law; and the massive role of the judiciary – all supply a coherent starting point for understanding why the "neighbor principle" that was not alien to the Israeli population at large, was well accepted and well employed by Israeli tort law, as we shall show below.

But first we need to briefly look into the uniqueness of the Israeli legal system and the leading characteristics that facilitated the successful incorporation of a statutory tort codification and common law concepts and the formulation of an important body of binding precedents that enabled lawmakers to carefully define the wide scope of the tort of negligence and to define liability in negligence in a workable format that could fit the ever-changing life circumstances in modern society. The binding statutory provision to "love thy neighbor" – that originated from case law and turned to statute[9] and had become one of the leading motifs in Israeli

law – coupled with the common law perception of judge-made-law as a binding source of law, provided the best workable formula for the creation of an adaptable law of negligence. An "open system" (case law) on top of a "closed system" (statute law) actually produced a successful adoption of the English tort law, simplified and modified "according to the special circumstances of Palestine/Israeli country and its inhabitants", according to Article 46 of The Palestine Order in Council 1922:

> 46. The jurisdiction of the Civil Courts shall be exercised in conformity with the Ottoman Law in force in Palestine on November 1st, 1914….; and subject thereto and so far as the same shall not extend or apply, shall be exercised in conformity with the substance of the common law, and the doctrines of equity in force in England… . Provided always that the said common law and doctrines of equity shall be in force in Palestine so far only as the circumstances of Palestine and its inhabitants and the limits of His Majesty's jurisdiction permit and subject to such qualification as local circumstances render necessary.[10]

IV. ISRAELI TORT REGIME – MIXTURE OF STATUTE AND PRECEDENTS [§8.4]

Reflecting the history of the state of Israel, from Ottoman Palestine through Great Britain's Mandate in 1923, to the establishment of the independent State of Israel in 1948, the mixed nature of the Israeli legal system and the reason for its categorization as a "mixed jurisdiction" and a member of "The Third Legal Family" is easily understood.[11]

This unique mixed nature, and its success, can also be attributed to the important human factor that had a central part in the process of building Israeli society and crafting its laws and to the identity of those who were responsible for making and applying the law.

During the formation years of the Palestine-Israeli law, Israel was – as it still is – a country built on immigration. This feature is responsible for many of Israel's modern characteristics, and it is one of the reasons that Israeli law and society have evolved into a mixture of old *and* new, east *and* west, liberal *and* traditional, religious *and* secular, (over) regulation *and* free-market ideas, as well as statutory law *and* judicial precedents, politics *and* Supreme Court fearless justices.

Israeli statesmen, politicians and jurists came from all walks of life. Those who contributed to building the state and crafting the law were immigrants from Europe, England, and America. Some of them studied law in Istanbul.[12] Others were already renowned jurists from Italy,[13] Austria, Germany[14] and the US.[15] They carried with them values, beliefs, intellect and knowledge that eventually had to be integrated.

Thus, the mixed nature of the budding Israeli legal system was just as could be anticipated. It was the result of both the legal heritage left by the Ottoman and the British Mandate lawmakers, that was later joined by independent Israeli legislation, *and* the pluralistic nature, origins, skills and values of those who led the proliferating legislative process in Israel in its formative stage and even later, during its more modern era.

Within this mixity of Ottoman law, common law, civil law and religious law, Israeli tort law had always been – and still is – a perfect model of the English common law.[16] As such, it had a noticeable impact on both the Israeli legal system at large and on Israeli negligence law in particular.[17] The Mandatory Civil Wrongs Ordinance of 1944,[18] later translated into Hebrew and reworked as The Tort Ordinance (New Version) 1968,[19] is even now the main source of tort liability in Israel (excluding car accidents and product liability where strict liability is imposed, subject to bodily harm). The Ordinance was originally copied by the British Mandatory legislator from the then applicable English tort law. The dominating tort of negligence, section 50 in the original Ordinance of 1944, was initially an exact quotation of Lord Atkin's neighbor principle in *Donoghue v Stevenson*. It still is. The 1944 old version of the Civil Wrongs Ordinance was translated into modern Hebrew in 1968 and the new title

became: The Tort Ordinance (New Version). But the principle, the logic and the terms of liability, including the famous dicta of Lord Atkin, remained unchanged.

Nonetheless, it would be a mistake to infer that current Israeli negligence law is similar to current English law of torts. While *Donoghue v Stevenson* is still a statutory provision within the modern Israeli Tort Ordinance, and the language of Lord Atkin is still embedded in sections 35-36 of the Ordinance (New Version), Israeli law has long parted ways with its prominent ancestors and has formed its own perception of what "love your neighbor" – which is part of basic Jewish heritage – should mean in a tortious situation.

The following sections first briefly draw a picture of the legal history of the original Civil Wrongs Ordinance 1944 and the current Tort Ordinance (New Version) and then proceed to show the amazing part that *Donoghue v Stevenson* played in shaping the Israeli tort of negligence. We close with short remarks concerning the independent path the Israeli Supreme Court adopted during the last few decades and the current move towards stabilizing the duty-of-care pendulum. This leads us to the closing reply to the question of whether *Donoghue v Stevenson* is still relevant in the 21st century and to the relevance of the Scottish decaying 96-year-old snail to the 2022 decomposed snail that might find itself in court in the near future.

V. CONCISE HISTORY OF ISRAELI NEGLIGENCE LAW [§8.5]

A. LEGISLATION [§8.6]

The original Civil Wrongs Ordinance, 1944, by the High Commission for Palestine with the advice of the Advisory Council, came into force on July 15, 1947. Section 50 sets down the foundation of liability in negligence as follows:

- Original section 50:

> Any person who by his negligence causes damage to another person to whom he owes a duty, in the circumstances, not to be negligent, commits a civil wrong.
>
> ….and a person shall owe such duty to all persons whom…. reasonable person ought to have contemplated as likely, in the usual course of things to be affected by the negligence….

The Tort Ordinance (New Version) introduced some changes in language but not in essence:

- Current section 35.[20]

> Where a person commits an act which a reasonable and prudent person would not have committed under those circumstances or fails to commit an act which a reasonable and prudent person would have committed under those circumstances… then such act or failure thereof shall constitute negligence; where a person was negligent with regards to another person, for whom he has the obligation not to act as he did under those circumstances, it shall constitute as negligence. Any person who causes damage to another by his negligence commits a civil wrong.

- Current section 36

> The duty enumerated under section 35 shall be vested towards all persons and towards the owner of any property, where a reasonable person ought to have foreseen that they might be affected by an act, or failure to commit an act, under those circumstance as enumerated under the section.

Both texts, section 50 of the original Ordinance of 1944, (which in essence is based on the Civil Wrongs Law of 1911 of Cyprus),[21] and sections 35-36 of the Tort Ordinance (New Version),

explicitly borrow from Lord Atkin's famous dictum in the *Donoghue v Stevenson* decision. Both refer to the duty of care as the source of liability and both adopt the neighbor principle.

B. INTERPRETATION [§8.7]

Section 1 of the Civil Wrongs Ordinance 1944 directed the Israeli (then Palestine) courts to interpret and apply the Ordinance according to English case law:

> 1. The Interpretation Ordinance shall apply to this Ordinance and subject thereto this Ordinance shall be interpreted in accordance with the principles of legal interpretation obtaining in England, and expressions used in it shall be presumed, so far as it is consistent with their context, and except as may be otherwise expressly provided, to be used with the meaning attaching to them in English law and shall be construed in accordance therewith.

This provision played a central role in the formation stage of the tort of negligence in Israeli law. The courts, eager to adhere to the explicit reference to English law and enthusiastic to be guided by the rich history of the English common law, turned to English jurisprudence even in cases where the written provision of the Ordinance explicitly diverted from English case law and even when the text of the Ordinance clearly avoided the English interpretations.

Thus, whereas section 38 of the Ordinance, following the English *Rylands v. Fletcher*[22] rule, allows the plaintiff to shift the burden of proof to the defendant when the harm to the plaintiff was caused by a dangerous object owned by the defendant, the Israeli Supreme Court read into this section an additional extra term, that was "imported" from English precedents (that the dangerous object had escaped from the owner possession or was abandoned by him),[23] contrary to the explicit language of the law and the implicit intention of the legislator.

The case of pure economic loss caused by professional misstatements may supply an additional example.[24] Here, when the Supreme Court was faced with the duty-of-care issue in cases of pure economic loss and was trying to avoid a slippery slope by limiting the boundaries of the duty of care, instead of resolving the issue according to the exact wording of section 35-36 (negligence) the Court turned to American case law, mainly the famous case of Ultramares v. Touche[25] and humbly imported justice Cardozo's logic and tests on the matter into Israeli tort law. The Court applied Cardozo's well known dicta on the need to avoid "liability in an indeterminate amount for an indeterminate time to an indeterminate class"[26] to the case at hand. Justice Agranat thus adopted the American formula of liability for pure economic loss in professional misstatement cases.[27] This formula is still good law in Israel.

Pure ricochet emotional loss is the third example. In the leading Israeli case on this issue,[28] a 6-year-old child was hit by a car. He was taken to a hospital and died there 24 days later. During this whole period his parents, who did not witness the accident, never left his side. Following his death, the parents claimed that they were "victims" of a car accident and entitled to compensation for their emotional loss according to the strict liability regime applied by the Compensation for Road Accident Victims Law.[29] Since the parents suffered no physical harm, their categorization as "victims" of a car accident was dubious. Chief Justice Shamgar, realizing the problematic nature of the harm and the remoteness of the claiming "neighbors" and attempting to articulate a limiting liability formula, adopted the decision of the British Supreme Court in the tragic case of the 1969 Hillsborough stadium[30] and applied it to the case at hand.

This decision, although solidly supported by both English and American case law, is problematic. The Israeli Compensation for Road Accident Victims Law completely detaches liability for physical harm caused by car accidents from negligence issues.[31] Lord Oliver's decision in the *Hillsborough* case, on the other hand, speaks in negligence terms. The distinction Lord Oliver made between primary victims and secondary victims of negligence provides means to limit liability in negligence in certain cases where harm and/or proximity

and/or causation is problematic. Thus, in the case of secondary victims certain additional control mechanisms are needed. This leading decision can hardly supply a coherent definition of car accident victims that would entitle them to compensation according to an absolute liability regime.[32]

These close ties between English and Israeli case law were also maintained by the explicit provision of the Tort Ordinance that provided yet an additional link to the original source of Israeli tort liability. The Ordinance instructed that in case of discrepancy between the English text of any piece of legislation and the Hebrew or Arabic text, the English text would prevail.[33]

These two ties to the English law – the supremacy of the English language and the binding of English legal interpretation – had both been abolished by the Foundation of Law of 1980. Instead, Israeli courts are now referred to principles of freedom, justice, equity, and peace, in accordance with the Jewish heritage.[34] Article 46 of the King's Order in Council 1922, that aimed to turn Palestine/Israel into a common law system as "an Anglo-Israeli version of the common law"[35] was also abolished in 1980.[36]

C. CASE LAW AND ACADEMIC WORK [§8.8]

The early stages of Israeli negligence case law reflect the infusion of English negligence common law into Israeli negligence law through interpretation of the Civil Wrongs Ordinance in general and section 50 in particular. The language of the statutory tort coupled with the British heritage – following 31 years of British Mandate in Israel and the mindset of Israeli jurists at that time – may well explain the vast exception of *Donoghue v Stevenson* as the leading precedent in negligence law.

The best example of these aggregated factors may be found in one of the first Israeli Supreme Court decisions, *Pritzker v. Friedman*,[37] a ruling that is still good law in Israel today. Pritzker is a good example not only due to its being one of the most cited cases in Israeli private law but also due to the precision in which the two leading justices in this case – Justice Agranat and Justice Zilberg – deal with the elements of liability in negligence. The decision applies *Donoghue v Stevenson* in a manner that shows a deep understanding of the logic of Lord Atkin and the gist of the principle he articulated.

The circumstances of the case were the following: While Pritzker was reversing his truck in a narrow alley in downtown Haifa, Friedman was signaling him from behind the truck trying to help maneuver the truck out of the one-way alley. Pritzker was standing in a spot that Friedman, the reversing driver, could not have reasonably expected him to be under the circumstances. Pritzker hit Friedman and caused him fatal injuries. Friedman's family sued Pritzker, claiming negligence and breach of statutory duty. The Supreme Court denied the appeal of the decision of the district court that denied liability. Yet the interesting part of the case is that the two Supreme Court justices that gave the same decision on the liability issue gave different reasoning for their decisions. Justice Zilberg, citing *Donoghue v Stevenson* and *Bourhill v. Young*,[38] focused on the absence of breach on the part of Pritzker, the driver. According to Justice Zilberg, the defendant – the driver – *did* owe a duty of care towards the plaintiff whom he injured. But he did not breach it. From the defendant's point of view Friedman could be perceived as having been warned of the danger. The duty of care, owed by the plaintiff, was, thus, fulfilled. Justice Agranat, on the other hand, based his decision on the absence of duty of care. He too was following *Donoghue v Stevenson*. The multiple faces of *Donoghue* and the pure logic it conveys, as seen in *Pritzker*, might supply at least part of the reasons of why this case had been so widely applied and so extensively followed.

Pritzker v. Friedman marked the beginning of a long relationship between Israeli negligence law and *Donoghue v Stevenson*:

(1) Donoghue was cited 7 times in the leading textbook on Civil Wrong in Israel,[39] written by Israel's most prominent jurists: Prof. Gad Tedesky, Prof. Aharon Barak, Mishael Cheshin and Prof. Izhak Englard. They were all professors at the law faculty in Jerusalem University. Barak, Cheshin and Englard later served as Supreme Court judges (Barak presided over the Court).

(2) Donoghue was cited by Israeli courts 67 times.[40] Here are the statistics:

Civil liability – Tort – 62 cases:

- State liability- 25 (last one 27 April 2021)
- Private / commercial – 31 cases
- Insurance Company – 6 cases

Criminal liability – 3 cases

Public Law/ constitutional/Administrative – 2 cases

Context of citations:

- Civil liability (tort)- "Thou shalt love thy neighbor as thyself" (וְאָהַבְתָּ לְרֵעֲךָ כָּמוֹךָ)
- *Pritzker v. Friedmann*
- Criminal liability- *Fishman v. Attorney General*
- Extra care in "dangerous things" cases
- Shifting the burden of proof
- Public law- love your neighbor- balanced membership in a public body
- Professional liability (lawyers, physicians.)
- Product liability
- State / public bodies' liability

Donoghue v Stevenson undoubtedly helped shape Israeli negligence law. It had a material impact on the budding field of negligence in private law and beyond. The Israeli tort regime, a codified closed system, absent any legal history in this field of law – unlike other branches of law that were settled by Ottoman Law – was eager to adopt the English common law, an open system, and build on it. As previously mentioned, the Israeli Supreme Court was keen to import English and American precedents in various issues concerning negligence. Negligent professional misstatements and pure economic loss,[41] pure mental loss to secondary victims,[42] and *Res Ipsa Loquitur*[43] are just some of these examples.

D. TORT LAW IN THE MODERN ERA – THE PENDULUM SWAY [§8.9]

The 1980s and 90s marked the beginning of a significant change in Israeli tort law. Chief Justice Barak and his predecessor Chief Justice Shamgar embarked on a mission to reshape the way negligence is perceived, interpreted, and implemented. Loyal to the origins of Israeli tort law, they too turned to the English common law, now importing first the "two-stage test of the *Anns* model,"[44] and later[45] "the three-fold test" of the "*Caparo* model"[46] that supplemented the two original *Donoghue* tests – foreseeability and proximity – with the "fair, just and reasonable test." This threefold test is still popular in Israeli case law in rhetoric if not in principle. Yet, as we shall now explain, English case law gradually lost its leading role in Israeli tort law, and although decisions like *Caparo*,[47] *Alcock*,[48] *Hill*,[49] and *Murphy*[50] still hold an undeniable guiding status, the Israeli Supreme Court has departed from English case law

in various important clusters of fact situations as well as in leading policy considerations and values hierarchy.

The case of *Jerusalem Municipality v. Gordon*[51] may clearly mark the Israeli declaration of independence in negligence law and the start of a new era in the interpretation and implementation of sections 35 of the Tort Ordinance (New Version), namely, the duty issue in negligence.

The facts of the case are quite straightforward: Gordon sold his car. He duly informed the Jerusalem Municipality and asked that the records be changed accordingly. The municipality neglected to update the sale of Gordon's car. Thus, Gordon kept receiving parking tickets that were supposed to go to the new owner of the car. Gordon paid the first two, hoping the issue would be solved, yet when the third ticket arrived, he wrote the municipality – the first of a long line of letters – that they need to update their data. Although the municipality and its legal adviser were aware of the problem, the ownership records were not updated and eventually Gordon was arrested and imprisoned. He was released only after the fine was paid.

The negligence action Gordon filed against the municipality was challenging in both[52] the identity and nature of the defendant – a public body, *and* the nature and substance of the harm suffered by the plaintiff – a "mere harassment", as it was labelled by Chief Justice Barak. There was no relevant precedent before the Court and *Donoghue v Stevenson*, which was cited,[53] supplied a response that was too wide, too general and too bold for the Court at that time. Barak was clearly set to make this case a re-start of the duty-of-care issue in Israeli negligence law and to articulate a new, detailed, step-by-step formula that could present a more precise and particular answer than presented by *Donoghue v Stevenson* and by sections 35-36 of the Tort Ordinance (New Version).

The new duty formula, "the *Gordon* formula," is still based on foreseeability and proximity, yet it adopts a two-tiered duty: first, a general, notional duty, and then a concrete, particular and specifically circumstantial duty. The two combined, both based on foreseeability, are supposed to render a value-based decision, with ample freedom to apply policy considerations that may best suit the nature and structure of the Israeli society and adapt tort liability to a more modern way of reasoning.[54] Applying this formula on the *Gordon* circumstances,Chief Justice Barak took a remarkable decision and imposed liability on the Jerusalem Municipality for *Gordon*'s harm (a "mere harassment") and opened a new era in Israeli negligence law. Thus, during the last few decades, liability in negligence has expanded. Public authorities' liability,[55] autonomy protection,[56] administrative liability,[57] pure economic loss liability,[58] negligent defamation and breach of privacy,[59] negligent prosecution (*Jerusalem Municipality v. Gordon* is now the leading Israeli case on negligence),[60] are only few of the circumstances in which the courts were willing to impose a wider liability in negligence according to the model of *Jerusalem Municipality v. Gordon*.[61] It seems that the Israeli Supreme Court had been, until recently, willing to be more audacious and more "generous" in finding a duty of care in new and challenging situations than the English Courts.[62]

E. *DONOGHUE V STEVENSON* – ISRAELI PRODUCT LIABILITY LAW AND CONSUMER PROTECTION LAW [§8.10]

Donoghue v Stevenson is basically a case of a consumer seeking compensation from a negligent producer/supplier, much like the Australian case of *Grant v. Australian Knitting Mills Ltd.*,[63] the Canadian case of *Martin v. T.W. Hand Fireworks Co.*,[64] Justice Cardozo's famous *MacPherson v. Buick Motor Co.*[65] and even *Ultramares v. Touch*,[66] which usually serves as an example to negligent misstatements and services.

Israeli tort law has dedicated two separate statutes to this unique and fast-evolving branch of law: the Manufacturer's Liability Law for Defective Products,[67] that applies strict liability

in cases of bodily harm, and the Consumer Protection Law.[68] In both laws, contractual connection is not required.

Relating to *Donoghue v Stevenson*, the Israeli Consumer Protection Law calls for an additional short explanation.

The Consumer Protection Law was hardly noticed by Israeli consumers for a few decades even though it offers an "upgraded protection" of strict liability, coupled with an administrative and regulatory toolbox that makes the whole regime particularly consumer friendly. Yet the real "booster" that turned the consumer's action against a product/service supplier into one of the most popular actions in Israel was the fast development of class action practices and the major role – in fact the leading role – that the Consumer Protection Law was given by the Class Actions Law.[69] The Class Actions Law allows consumers to file petitions for a class action only if the cause of action is listed in the Law's Appendix. The first and most common one is the action based on the Consumer Protection Law. This is why to date consumer protection class actions are the most common class actions in Israeli courts.

Consumer protection class actions have been the subject of proliferating case law by the Israeli Supreme Court. The most important ones are the definition and status of the class-plaintiff; the relations between the Law (a "particular cause of action") and the overreaching Tort Ordinance (causation and harm are required to enable compensation even though not mentioned by the Law);[70] the nature of causation and nature of harm – mainly autonomy harm caused by lack of informed consent.[71] In fact, most of the consumer protection class actions of the last few decades (mostly against food and services suppliers that failed to disclose material information) are based on consumers' harm to autonomy.[72]

Going back now to the 2022 Israeli case of the decomposed snail with which we opened this paper, we may assume that being a class action, *Donoghue v Stevenson* will be of less importance. Yet, in case some consumers will opt to sue separately: they will use either the underrated Manufacturer's Liability Law for Defective Products (subject to showing bodily harm) or the tort of negligence. *Donoghue v Stevenson* – at the core of section 35 of the tort of negligence – might resurface. Yet its real effect and force is – as we have shown above – in "pure" negligence cases. Even the codified version of Israeli private law that Israeli academia was trying to promote during the last few decades still mirrors Lord Atkin's principles in both rhetoric and substance.

VI. CONCLUSION [§8.11]

Donoghue v Stevenson is entirely and thoroughly embedded in Israeli tort law. Every second-year law student knows Mrs. Donoghue and the sorry encounter she had with the decomposed snail in her ginger beer. Lord Atkin's dicta is part of one of the most important laws in Israel. Courts still cite the case in both negligence and product liability cases and will continue to do so. The 2022 Israeli case of the snail in the frozen package of the green beans, recently filed as a class action,[73] (and thus a consumer protection case rather a negligence case) will most probably correspond with its 96-years-old version.

Yet times have changed, and new legal thinking is replacing old familiar thinking. The story behind *Donoghue v Stevenson* will undoubtedly stay alive. The formula will certainly be revisited. Modifications and alterations have already been adopted and will be adopted in the future. After all, "… the categories of negligence are never closed,"[74] and Israeli courts, just like other courts around the globe, will keep on searching for the right formula, the right principles, and the right approach to best implement the ever-evolving tort of negligence.[75]

NOTES

1 M'Alister (or Donoghue) v Stevenson [1932] AC 562 (HL).

2 Tnuva is now owned by Bright Food (Group) Co. Ltd a Chinese Company.

3 Dorset Yacht Co. v Home Office [1970] AC 1004 (HL), per Lord Reid.

4 Anton Fagan, "Negligence" in Reinhard Zimmermann, Daniel Visser & Kenneth Reid (eds), *Mixed Legal Systems in Comparative Perspective: Property and Obligations in Scotland and South Africa* (Oxford University Press and Juta 2004); Vernon V. Palmer (ed), Mixed Jurisdictions Worldwide: The Third Legal Family (2nd ed. Cambridge 2014) [Mixed Jurisdictions Worldwide].

5 "Thou shalt not take vengeance, nor bear any grudge against the children of thy people, but thou shalt love thy neighbor as thyself: I am the LORD" 19 Leviticus 18.

6 CA 88/30 Municipality of Haifa v Khoury [1932] 4 Rotenberg 1343 (Mandatory Palestine); CA. 29/47 London Society for Promoting Christianity Among the Jews v. Orr [1947] 14 P.L.R. 218 (Mandatory Palestine).

7 https://www.nevo.co.il/law_word/law160/laws%20of%20the%20state%20of%20israel%20new%20version-nv2.pdf.

8 The 1959 version is available at: https://www.sbaadministration.org/home/legislation/01_02_09_01_COLONIAL_CAPS_1959/01_02_01_04_Caps-125-175A/19600101_CAP148_u.pdf.

9 Yitzhak Englard, 'Twenty-Five Years of the Tort Ordinance – Problems and Trends' (1972) 5 MISHPATIM L. Rev. 564.

10 Article 46 of the Palestine Order in Council, 1922-1947, Laws of Palestine vol. III, p. 2569 (Isr.) . <https://ecf.org.il/media_items/1468> accessed September 18, 2022.

11 Tamar Gidron, "Israel" in Mixed Jurisdictions Worldwide, supra note 4 at 577.

12 Izhak Ben Zvi and David Ben Gurion studied law at the Kushta University.

13 Prof. Gad Tadeschi, the author of the leading textbook on Israeli tort law, read law in Rome and was already well known in Europe when he immigrated to Israel.

14 Haim Cohen, who was later appointed as State Attorney, legal adviser to the Israeli government, Yoel Zusman studied in Berlin and then in Cambridge U. K. Alfred Vitkon studied in Berlin. They all later became justices of the Supreme Court and had an important part in building Israeli modern law.

15 Chief Justice Shimon Agranat.

16 Israel Gilead, 'Israeli', *The International Encyclopedia of Laws* (Kluwer Law International 2003).

17 Tamar Gidron, "Israel" in Mixed Jurisdictions Worldwide, supra note 4 at 577.

18 Mandatory Civil Wrongs Ordinance of 1944, No. 36 of 1944, The Palestine Gazette No. 1380 of 28th December 1944 (Isr.).

19 Tort Ordinance 1968 [New Version] [Tort Ordinance (New Version)].

20 Id.

21 Chapter 148 of the Laws: Civil Wrongs (originally 1932).

22 Rylands v Fletcher [1868] LR 3 HL 330.

23 Id.

24 Tamar Gidron, 'Israel' in Vernon V. Palmer & Mauro Bussani (eds.), Pure Economic Loss: New Horizons in Comparative Law (Routledge-Cavendish 2009)

25 Ultramares Corporation v. Touche [1932] 174 N.E. 441.

26 Id. at 444.

27 LCA 106/54 Weinstein v. Kadima Cooperative Water Supply Association Ltd. 8 PD 1317 (1954) (Isr.).

28 LCA 444-87 Elsocha v. Dahan Estate [1990] 44(3) PD 397 (Isr.).

29 Road Accident Victims Compensation Law 1975 (Isr.).

30 Alcock v Chief Constable of South Yorkshire Police [1992] 1 AC 310 (HL).

31 Id. Sec. 8.

32 In CA 642-89 Schneider Estate v. Haifa Municipality 46(1) PD 470 (Isr.) the Supreme Court correctly applied Hillsborough on a negligence case.

33 Sec. 34 of the Civil Wrongs Ordinance 1944

34 Foundation of the Law 5740-1980 SH 978 (Isr.).

35 Article 46 of the Palestine Order in Council (Isr.).

36 Gad Tedeski, 'The Abolition of Sec. 46 and its Powerful Impact' (1976) 8 MISHPATIM L. Rev. 180 (Isr.).

37 CA 224/51 Pritzker v. Friedman [1953] 7 PD 674 (Isr.). Pritzker v. Friedman appears in 31 Israeli cases in reference to duty of care, burden of proof, breach proximity and causation (according to Pador Legal Database); See also Pierre Widmer (ed.), *Unification of Tort Law: Fault* (Kluwer Law International 2005). Daniel Friedman, 'Infusion of the Common Law into the Legal System of Israel (1975) 10 Isr. L. Rev. 324.

38 [1943] AC 92 (H.L.).

39 Aharon Barak, Mishael Cheshin and Izhak Englard, *The Law of Civil Wrongs: The General Part* (Gad Tedeschi ed. 1969).

40 Based on the results received from "Data Law" website – search for the term using the term "Donoghue & Stevenson" and the equivalent term in Hebrew "דונוהיו / סטיבנסון".

41 Supra note 25.

42 Supra note 27. The decision is based on the judgments given in the Hillsborough case.

43 Supra note 37.

44 Anns v Merton London Borough Council [1978] AC 728 (H.L.), labelled as "the two -stage test". The case was overruled by the decision in Murphy v Brentwood District Council [1991] 1 AC 398 (H.L.).

45 First cited by Justice Shamgar in CA 915/91 State of Israel v. Levi [1994] 48 (3) PD 45 (Isr.).

46 Caparo Industries PLC v Dickman [1990] UKHL 2 (H.L.).

47 Id.

48 Supra note 30.

49 Hill v Chief Constable of West Yorkshire [1989] AC 53.

50 Supra note 44.

51 CA 243-83 Jerusalem Municipality v. Gordon [1985] 39(1) PD 113 (Isr.).

52 There were additional legal problems such as the relations between the general negligence tort and the special tort of 'malicious prosecution", Sec. 60 of the Tort ordinance. Sec. 60 demands malice in order to claim damages, yet it was apparent the Municipality's interactions with Gordon was devoid of malice. The second main issue was whether the court is free to impose liability in cases of negligent prosecution" when the Ordinance refers only to malicious prosecution.

53 Fifteen English cases and one American case were cited by the Court.

54 Two additional tests, the one in CA. 4486/11 John Doe v. Clalit Health Services [2013] 66(2) 682 by Justice Amit and the other in CA 3521-11 Vagner v. Abadi [2014] 67(1) PD 84 (Isr.) by Justice Hendel did not gain support from lower courts.

55 CA 2906-01 Municipality of Haifa v. Menora Mivtachim Holdings Ltd. [2006] Nevo Legal Database (Isr.); CA 1617/04 Chim-Nir Flight Services Ltd. v. The Tel Aviv Stock Exchange [2008] Nevo Legal Database (Isr). The court ruling was translated to English due to the imported issues it raises, https://supremedecisions.court.gov.il/Home/Download?path=EnglishVerdicts/04/170/016/b10&fileName=04016170_b10.txt&type=2; Max Loubser & Tamar Gidron, 'Liability of the State and Public Authorities in Israel and South Africa' (2013) European Journal of Comparative Law & Governance 727.

56 Autonomy in medical care see CA2781-93 Da'Aka v. Carmel Medical Center [1999] 53(4) PD 526; Autonomy in professional legal misstatement see CA 2526-02 Nahum v. Dorenbaum [2004] 58(3) PD 385; Consumer autonomy see CA 6339/09 Tnuva Central Coop. For the Mktg. of Agr. Prod. In Israel Ltd. v. Rabi Estate [2011] Nevo Lega l Database) Isr.).

57 LCA 2063-16 Glick v. Israel Police [2017] Nevo Legal Database (Isr.).

58 3464/05 Paz Oil Comp. v. The State of Israel [2006] Nevo Legal Database (Isr.) (per Justice Rivlin).

59 CA 1139-17 Miller v. Ha'Aretz Newspapers Ltd. [2017] Nevo Legal Database (Isr.) (per Justice Solberg.). Liability was eventually denied yet the court did opine that negligent defamation might be a viable cause of action in Israeli tort law.

60 Supra note 51.

61 Id.

62 Seen for example in the issue of duty in pure economic loss cases and in state liability in negligence.

63 [1936] AC 85 (Australia).

64 [1963] 1 O.R. 443 (H.C.).

65 217 N.Y. 382, 111 N.E 1050 (1916).

66 Supra note 25.

67 SH 964 (1980) 86 (Isr.).

68 SH 248 (1981) 298 (Isr.).

69 Even before the Law came into force and clustered all types of class actions into one Act, the original Consumer Protection Law allowed class actions.

70 LCA 5712-01 Barazni v. Bezeq The Israeli Telecommunication Corp Ltd. [2003] 57(6) PD 385 (Isr.).

71 CA 6339/09 Tnuva Central Coop. For the Mktg. of Agr. Prod. In Israel Ltd. v. Rabi Estate, supra note 56.

72 Tamar Gidron & Elad Shcild, 'Protection of Patient Autonomy via Consumer Protection Litigation: The Israeli Eltroxin Class Action as a Case Study' (2021) THEORIA 1.

73 The class action, in the amount of approximately NIS 250,000 was filed on behalf of three plaintiffs against Sunfrost Ltd. (a private company owned by Tnuva International) arguing, inter alia, that the company did not duly notify the plaintiffs that they were exposed to products that contained parts of a mouse or a snake.

74 Per Lord MacMillan in Donoghue v Stevenson [1932] AC 562 at 619.

75 Vines, Prue, 'The Needle in the Haystack: Principle in the Duty of Care in Negligence' (2000) 23(2) UNSW Law J 25; Iris Canor, Tamar Gidron & Haya Zandberg, 'Litigating Human Rights Violations Through Tort Law: Israeli Law Perspective in Ewa Baginska (ed.) *Damages for Violations of Human*

Rights (Springer 2016); Ariel Porat, 'The Many Faces of Negligence' (2003) 4(1) Theoretical Inquiries in Law 105; Daniel Mor, 'The Boundaries of Negligence' (2003) 4(1) Theoretical Inquiries in Law 339.

Part 7—South Africa

CHAPTER 9

Donoghue v Stevenson in South Africa

I. AUTHOR BIO [§9.1]

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II. INTRODUCTION [§9.2]

Is *Donoghue v Stevenson*[1] still relevant in modern South African law? That is the question put to me by the organisers of this event celebrating the case's 90th anniversary. Unfortunately, my ungracious answer to my hosts is "no, not really". Despite *Donoghue*'s supreme importance in the common-law world, and although the South African law of delict owes a great debt to the common law, the case barely appears in our leading delict textbooks.[2] And that is not only because South Africa, like many other jurisdictions, has enacted strict product liability by statute,[3] thus side-lining the common-law principles for most practical purposes. Even before that, *Donoghue* made a very limited impression on us. The only favourable discussion of the judgment you will find in the *South African Law Journal*, for example, is in three case comments reprinted from the *Canadian Bar Review* (one of them by Bora Laskin) about the application of the case in 1930s Canada;[4] and an irreverent three-page report in 1991[5] about the then-recent "Pilgrimage to Paisley" (which was co-organised by our hosts today, the Scottish Law Society).[6]

Why was *Donoghue*'s reception in South Africa so indifferent? The basic reason is that South Africa has a mixed legal system: as a result of our unusual history, our law is a blend of civilian and common-law elements.[7] And it is Roman-Dutch law, comprised mainly of Netherlandish jurists' commentaries upon the *Corpus Juris Civilis*,[8] to which we trace the fundamentals of our law of delict.[9] Roman-Dutch law was brought to the territory that would later become South Africa in 1652, thus predating, by some 150 years, the arrival of the common law. After the British arrived in 1806, the influence of the common law would be enormous.[10] But the foundations of South African private law undoubtedly were, and still are, Roman-Dutch. To be sure, South African judges steadily broadened the scope of negligence liability over the course of the twentieth century,[11] in a manner that common lawyers all around the world would recognise. And in the course of doing so, our judges frequently followed English

precedents. Yet, despite all this, the impact of *Donoghue* on our shores was very limited. Our judges almost never relied upon it. In virtue of our law's Roman-Dutch substrate, they did not need it.

III. *PERLMAN V ZOUTENDYK* [§9.3]

A key feature of the civilian approach is that it tends to seek general principles of liability. Whereas the English law of torts, famously, or perhaps infamously, deploys a number of separate liability formulae deriving from the forms of action, the civilian tradition has long sought principles that unite the whole field.[12] Hugo Grotius, to take a preeminent example, wrotethat all harm to others culpably caused should, unless justified, be made good.[13] The natural lawyers' approach laid the foundation, as is well-known, for French tort law's "general clause", Article 1382 (now Article 1240) of the *Code Civil*.[14] And one can almost hear Grotius speaking, through the mouth of one of South Africa's great judges, E. F. Watermeyer,[15] in the canonical case of *Perlman v Zoutendyk*,[16] dating from 1934. Watermeyer J decided the case by application ofthe "general principle", which he regarded as deeply rooted in South African law, "that all damage caused wilfully or negligently is actionable unless it can be justified or excused".[17] Guided by this Grotian principle, he was willing to impose liability upon a valuer of property whose negligent valuation had caused pure economic loss to the plaintiff mortgagee when he relied upon it to lend money to the property's owner.[18] He was undeterred by the fact that the loss was purely economic, or by the fact that the valuer had no contract with the plaintiff, but had dealt only with the third-party mortgagor. He also side-lined English authorities, like *Le Lievre v Gould*[19]and *Derry v Peek*,[20] which would have denied liability in the same circumstances. This was because "Roman-Dutch law parts company with the English law as laid down" in those cases; the circumstances in which a duty will arise in South Africa, he said, "are considerably wider".[21]

In Watermeyer J's view, the systems' difference of approach had deep roots, going to basic questions of legal method. In England, it was commonly held "that there is no general principle of liability for damage caused to another, but that there exists … a catalogue of acts or omissions which are actionable".[22] But "this idea of a catalogue of torts", though it greatly influenced legal development in England, "is opposed in principle to other European systems of law", which proceed from the aforementioned general principle.[23] In *Derry v Peek*, for example, a result of non-liability was reached because the facts could not be squeezed into the nominate tort of deceit.[24] But in South Africa that is simply not the sort of question one asks; we have "a different method for approaching a new problem".[25] A duty of care is established by application of a simple unifying criterion, and, that done, the remaining question is only one of showing that the defendant behaved with *culpa*.

In short: if *Perlman* is to be believed, then South Africa had no need for Lord Atkin's neighbour principle. For it was intrinsic to our Roman-Dutch legal heritage, and its commitment to wholesome general principles, that "[t]he categories of negligence are never closed",[26] or rather that it does not operate in categories at all. And hence we had already gone past English law in our willingness to generalise the duty of care, and to impose liability in circumstances such as those in *Donoghue*. Indeed if *Perlman* is right, we had by the 1930s already gone past *Hedley Byrne*,[27] since Watermeyer J applied Grotius's maxim to a case of pure economic loss caused by negligent misstatement.[28]

But should *Perlman* be believed? *Donoghue* had, of course, been decided two years earlier, and Watermeyer J was intensely aware of it.[29] His judgment in facthas a coda discussing *Donoghue*, which quotes in complimentary terms the celebrated passage from Lord Atkin's judgment.[30] True, as Watermeyer J presents this discussion, *Donoghue* merely brought English law around to the position that had long prevailed in South Africa, and relied for his own reasoning not on English law but on Roman-Dutch. One might again ask, however, whether his presentation is

plausible. After all, it is a running theme of South African legal historiography that our courts often hewed closely to developments in England even while professing to be motivated by "authentic" principles of our own.[31] So perhaps *Perlman* is another instance of this kind of window-dressing, with Watermeyer J garlanding in Roman-Dutch decorations a decision that, in substance and in truth, would not have happened but for *Donoghue*. And it hardly needs saying that Watermeyer J's account of the contrasting English and Roman-Dutch approaches itself involved some overstatement and idealisation.

And yet these lines of thought should not be taken too far. Watermeyer J's claim that South African law had long been occupying the position staked out by Lord Atkin was not an empty boast. The scope of liability in South Africa was indeed more expansive than in England, and this tendency had its own Romanist logic. As far back as 1886, Chief Justice John Henry de Villiers, the premier South African judge of the age,[32] had held (admittedly *obiter*) that a clerical official would be liable, quite apart from contract, to third parties who had been caused pure economic loss because they relied upon his negligent misrepresentation.[33] For this principle, De Villiers CJ relied, characteristically, upon the Roman-Dutch writer Johannes Voet's *Commentaries* on the Roman *lex Aquilia*, and rejected as unduly narrow the English authorities confining liability to cases of fraud.[34] He concluded, redolently of Grotius, that the Aquilian law had over the course of time been "extended", far beyond its initial confines, "to *every* kind of loss sustained by a person in consequence of the wrongful acts of another";[35] the case before him therefore raised no special challenges.[36]

Admittedly it might be said that pure economic loss raises issues different from that in *Donoghue*. But what then is the true issue? If the import of *Donoghue* is that it exploded the "privity fallacy" from *Winterbottom v Wright*,[37] then that again seems irrelevant in South Africa, where the privity fallacy did not take hold. This can be seen in the famous case of *Van Wyk v Lewis*,[38] decided 12 years before *Donoghue*, in which the existence of a contract between the plaintiff patient and defendant surgeon was no obstacle to the recognition of a delictual duty based on *culpa*.[39]

If, instead, we confine ourselves to product liability, then the case that springs to mind is *Lennon Ltd v British South Africa Co*,[40] decided in 1914, in which the judges of the Appellate Division thought it indisputable, based once again on Voet and the *Digest* 9.2, that "there is a duty cast upon the vendor of poisonous articles to exercise reasonable care and skill in the manner of supplying [them]".[41] "[T]hat liability would be founded, not on any breach of contract, but on *culpa*", in having delivered to the customer a product "with directions which were wrong and misleading".[42] The plaintiff there had a relationship with the defendant supplier, but that was not considered significant by the Appellate Division, which thought the logic of *Lennon* obviously covered a remote user of the defective product when it decided *Cooper & Nephews v Visser* six years later.[43]

The South African cases thus went further than English cases like *Langridge v Levy*,[44] since there was no suggestion at all of defendant fraud, and in fact our judges expressly based their holding upon *culpa.* Yet it might be objected, with some plausibility, that the principle stated by them was confined to products "poisonous" or "dangerous" in themselves;[45] and so perhaps South African law was still some way away from the step taken in *Donoghue* and *MacPherson v Buick Motor Co*,[46] whose broadening of liability depended on their rejection of the same limitation.[47] On balance, however, it seems very unlikely that the South African courts would have stopped short of imposing a legal duty had the product been dangerous not in its essential nature, but because it had, say, a snail in it. The generalising tendency of South African law, which *Perlman* underscored, was real, and long predated *Donoghue*.

IV. *CAPE TOWN MUNICIPALITY V PAINE* [§9.4]

Nowhere was this more powerfully illustrated than in the duties of owners of land towards those who come upon it. In a powerful line of cases decided in the early years of the twentieth century,[48] the South African Appellate Division, led by its Chief Justice James Rose Innes, held that the issue was governed by a simple general principle, which he derived directly from Roman texts. The culmination of these was *Cape Town Municipality v Paine*,[49] in which the plaintiff sought to hold the municipality liable for an injury he had suffered when visiting an athletics track in Cape Town; his foot had broken through a rotten plank in the poorly maintained grandstand. The municipality had erected the seating, but was not the occupier of the venue, which it had leased to a local civic association. Could a landlord be liable, then, for its failure to maintain the leased premises? English authorities such as *Cavalier v Pope*[50]clearly said "no", and these were cited to the court by the defendant.[51] On the other hand, Mr Paine's counsel could draw upon a seam of principle that had emerged in Innes's own earlier judgments, which had held that, in determining the delictual duties of landowners, the fundamental criterion is what a *diligens paterfamilias* (or, as we would now say, a reasonable person)would have foreseen in the same circumstances.[52]

Innes CJ had been relying here on a series of examples in the *Digest* in which liability would, or would not, have been imposed upon an owner of land who allowed harm to be caused to a person who came upon it.[53] These passages could be explained by the drawing of categorical distinctions — Was the plaintiff a trespasser or invitee? Was the land public or private? — but that was not how Innes CJ's saw them. He saw them, instead, as but instances of a general principle, namely that the landowner will be liable if the harm that befell the plaintiff was one that he ought reasonably to have foreseen and prevented. He was given impetus in doing so by the writings of the German jurist Erwin Grueber, who in his 1886 book on the *lex Aquilia* had subsumed the different examples given in the *Digest* into one general question, namely what a reasonable person in the position of the defendant would have anticipated.[54] As Innes CJ put it in a now-celebrated passage:

> Every man has a right not to be injured in his person or property by the negligence of another, and that involves a duty on each to exercise due and reasonable care. The question whether, in any given situation, a reasonable man would have foreseen the likelihood of harm and governed his conduct accordingly, is one to be decided in each case upon a consideration of all the circumstances. Once it is clear that the danger would have been foreseen and guarded against by the *diligens paterfamilias*, the duty to take care is established, and it only remains to ascertain whether it has been discharged.[55]

On this basis, Innes CJ cut through the inhibitions on liability that prevailed in England, namely the "absence of contractual privity between the landlord and the person injured and absence of control on the part of the [defendant] landlord".[56] As Innes CJ explained, "there is an advantage in adhering to the general principle of the Aquilian Law and in determining the existence or nonexistence of *culpa* by applying the test of a reasonable man's judgment to the facts of each case".[57] This was better, he said, than being "restrict[ed] within the more rigid limits of the English rules";[58] with us, "the general principle of the Aquilian law" holds the key.[59] The only English case Innes CJ did find helpful was *Heaven v Pender*.[60] Though Brett MR's judgment was then in a state of disfavour in its native country,[61] Innes CJ considered it "to be in accordance with the principles of [South African] law", which "applies a wider test of liability than is recognised by English courts".[62] Applying that wide test, Innes CJ held the municipality liable. It "ought to have realised the danger to occupants of the stand" if it did not carry out adequate maintenance, he said, and "should have taken due steps to guard against it".[63] And that was that.

As is perhaps obvious by now, Watermeyer J relied heavily on *Paine*'s crucial statement of principle in *Perlman*.[64] The directive from Innes CJ was, he wrote, "clear and unmistakable",[65] and meant English law's approach was of no assistance, and that its more cramped precedents

on the question of negligence misstatement, like *Le Lievre*, could be safely ignored.[66] *Paine* provided the South African expression of Grotius's general principle, and thus the major premise that could be applied across the whole field of Aquilian liability, including in novel cases like *Perlman*. And *Paine*'s general formula would surely have been applied to harm caused by defective products, had such cases arisen, and yielded a broad principle of liability to which *Donoghue* would have had little to add.[67] This was recognised by the Witwatersrand Local Division when the issue finally did arise in 1975: Coetzee J applied the formula of *Paine*, with little hesitation,regarding it as applicable to all cases "of Aquilian liability for unintentioned injury".[68]

In short, *Paine* was South Africa's *Donoghue*. And it meant that, when *Donoghue* itself was decided some years later, there was no space left for it to fill. The duty of care already had its general formula. This formula, like Lord Atkin's, instated foreseeability as the central criterion. But it was based upon the Roman sources and the writing of a German scholar on the *lex Aquilia*.

Indeed, *Paine*'s prefiguring of Lord Atkin's famous speech raises an intriguing further question. Was there some underappreciated civilian influence upon *Donoghue*? It has recently been argued that the similarity between Lord Atkin's 'neighbour principle' and Innes CJ's *culpa*-centred account of *Digest* 9.2 may not be coincidental.[69] Though it is probably a stretch, as these writers accept, to say that Lord Atkin had read the South African cases, some indirect influence of the sources on which Innes CJ relied is quite possible. We know that Lord Atkin used the word "*culpa*", expressly adverting to the position in other, presumably civilian, systems.[70] And he was almost certainly influenced by the work of Frederick Pollock, for example, who for decades had been advocating a "neighbour principle" of his own.[71] Pollock's textbook (like the others of the time) was replete with discussion of Roman law, and he praised the *Digest*'s discussion of Aquilian liability as a model for English lawyers.[72] And we also know that Pollock devised his neighbour principle just after the publication by his colleague, Erwin Grueber, of his book on Aquilian liability, which Pollock warmly reviewed.[73] The upshot is that a generalised, Romanist notion of negligence was in the air, so to speak, and it is quite possible that it might have found its way to Lord Atkin. True, this would still not account for the most striking feature of his speech in *Donoghue*, namely its integration of the generalised notion of *culpa* into the duty of care concept. But since that had been done by Innes CJ, why not also by Lord Atkin?

To be clear, it was *Heaven v Pender* that Pollock cited for his neighbour principle, not Grueber or the *Digest*; and the point is certainly not to deny the indisputable and widely recognised influence on *Donoghue* of sources internal to the common law. The point is only that, as so often, it may be a mistake to treat these as sealed off from the civilian tradition. We already know, thanks to Alan Rodger, that Lord Macmillan's draft speech in the case had relied upon the writings of the Scottish civilians; and that he suppressed these, probably at Lord Atkin's insistence, because he wanted the judgment to gain acceptance in England.[74] But perhaps the civilian influence upon *Donoghue* does not stop there. Just as Innes CJ drew upon both the speech of Brett MRand the generalised notion of *culpa* deriving from the *Digest*, so we might see the same process of mutual reinforcement at work behind Lord Atkin's neighbour principle.[75]

V. AFTER *PERLMAN* [§9.5]

As far as South African law goes, in any event, the impression given by *Perlman* seems about right. Our law of delict had already reached the stage, through the generalisation of its central Roman and Roman-Dutch principles, that the existence of a duty of care turned on whether a reasonable person in the position of the defendant would have foreseen the danger that befell

the plaintiff. And this is the basic reason why *Donoghue* had such a limited impact in South Africa.

Certainly that was true when *Donoghue* was decided. But there remains the question of what came after. And I do not mean to suggest that the legacy of *Perlman* (or of *Paine*) was a simple or uncontroversial one. Quite the contrary. The decision was celebrated, as one might expect, by civilian-inclined lawyers, above all Tom Price, Professor of Roman-Dutch Law at the University of Cape Town.[76] "The civilian naturally reasons from principles to instances, the common lawyer from instances to principles", wrote Price, quoting the Scottish judge Lord Cooper;[77] and he saw *Perlman* as "a classic example of the method of Roman-Dutch law".[78] "The general principle having been analysed, it is then applied to the facts, without any attempt to divert the course of justice and logic" by "arbitrary", "artificial", "illogical", and "hair-splitting" distinctions of the kind that so entrance the English.[79] But the judgment was deplored, again as one might expect,[80] by Price's nemesis Robin McKerron, who had recently returned to South Africa from Oxford, and who thought *Perlman* showed the obvious perils of *over* generalising: the principle that had been stated in *Paine* was confined to cases involving harm to person or property, and it was going much too far to apply it to conduct causing pure economic loss.[81] McKerron later wrote that *Perlman* had espoused "the leading heresy in the law of delict"[82]—though his criticism was condemned, in turn, by another leading delict scholar as "one of the most absurd statements ever uttered in South African legal literature".[83]

The question of liability for pure economic loss thus became the focus of fevered debate, and one whose implications went wider. For Price, cases like *Paine* and *Perlman* helped to show that there was no need for the duty of care concept at all. Just as Winfield[84] and Buckland[85] had famously argued, in the wake of *Donoghue*, that the duty of care was duplicatory and dispensable, Price argued that the duty of care was not an ingredient of liability in our law (as *Perlman* showed)[86] or that the term was used "tautologous[ly]" to restate the test for *culpa* (as in *Paine*).[87] Indeed Price took this argument further than had Winfield and Buckland, and certainly expressed it more crossly.

Remarkably, Price's position won a limited acceptance in South Africa's appellate courts.[88] But the main current of judicial opinion was that the duty of care element is plainly necessary,[89] and it has nowadays become all the more important (under its preferred name of wrongfulness[90]) as a policy-based "control device"[91] or "brake on liability".[92] To that extent, the basic features of our approach would be instantly familiar to lawyers elsewhere in the common-law world.[93] Yet our wrongfulness element has ebbed and flowed according to its own distinctive rhythm, and one largely unaffected by *Donoghue*. The process of legal development in South Africa was put on its own course, and has continued to enjoy relative autonomy, because of our basic indebtedness to the law of the Roman-Dutch.

NOTES

1 *Donoghue v Stevenson* [1932] AC 562.

2 J Neethling, JM Potgieter and PJ Visser, *Law of Delict* (7th ed, LexisNexis 2015); Anton Fagan, *Aquilian Liability in the South African Law of Delict* (Juta & Co Ltd 2020) never mention it. In JC Van der Walt and JR Midgley, *Principles of Delict* (4th ed, LexisNexis 2016) it is mentioned once, buried in a footnote.

3 Consumer Protection Act 68 of 2008, section 61.

4 FC Underhay, 'Tort Liability of Manufacturers' (1933) 50 South African Law Journal 339; 'Manufacturers' Liability: Recent Developments of *Donoghue v Stevenson*' (1937) 54 South African Law Journal 52; Bora Laskin, 'Application of *Donoghue v Stevenson* to Realty' (1940) 57 South African Law Journal 368.

5 Ellison Kahn, 'A Pilgrimage to Paisley, Scene of the Snail-in-the-Bottle Case' (1991) 108 South African Law Journal 170. But see also T. W. Price's denunciation of the case in 1949, discussed at n 87 below.

6 The proceedings resulted in a book, Peter T Burns and Susan Lyons (eds), *Donoghue v Stevenson and the Modern Law of Negligence: The Paisley Papers* (CLE Society of British Columbia 1991), which is the ancestor of the present volume.

7 Reinhard Zimmermann and Daniel Visser, 'South African Law as a Mixed Legal System' in Reinhard Zimmermann and Daniel Visser (eds), *Southern Cross: Civil Law and Common Law in South Africa* (Oxford University Press 1996); CG Van Der Merwe and others, 'The Republic of South Africa' in Vernon Valentine Palmer (ed), *Mixed Jurisdictions Worldwide: The Third Legal Family* (2nd edn, Cambridge University Press 2012).

8 See classically JW Wessels, *History of the Roman-Dutch Law* (African Book Co 1908).

9 Our use of this Germanic name, rather than the common lawyer's favoured "tort", is telling.

10 HR Hahlo and Ellison Kahn, *The South African Legal System and Its Background* (Juta 1968) ch XVII gives a well-known overview.

11 A superb chapter-length account is provided by Dale Hutchison, 'Aquilian Liability II (Twentieth Century)' in Reinhard Zimmermann and Daniel Visser (eds), *Southern Cross: Civil Law and Common Law in South Africa* (Oxford University Press 1996).

12 See for classic treatment Pierre Catala and Tony Weir, *Delict and Torts: A Study in Parallel* (Institute of Comparative Law of Tulane University 1965).

13 Hugo Grotius, *De Jure Belli Ac Pacis* (1625) 2.17.1. My statement in the text is, at any rate, how the effect of this passage is often summarised. See for more careful treatment Joe Sampson, *The Historical Foundations of Grotius' Analysis of Delict* (Brill Nijhoff 2017) ch 2.

14 See eg Konrad Zweigert and Hein Kötz, *Introduction to Comparative Law* (Tony Weir tr, 3rd edition, Clarendon Press 1998) 615–616. Jean Domat was a crucial intermediary.

15 He later became South Africa's Chief Justice. See for a brief biography Stephen D Girvin, 'The Architects of the Mixed Legal System' in Reinhard Zimmermann and Daniel Visser (eds), *Southern Cross* (Oxford University Press 1996) 125–126.

16 *Perlman v Zoutendyk* 1934 CPD 151.

17 *Perlman* (n 17) 155.

18 Watermeyer J did not have to resolve finally the issue of liability; he decided only that, since there was a duty of care, the claim should proceed to trial. After trial, Watermeyer J dismissed the claim for want of legal causation and because of the plaintiff's contributory negligence: *Perlman v Zoutendyk (No. 2)* 1934 CPD 328.

19 *Le Lievre v Gould* [1893] 1 QB 491.

20 *Derry v Peek* (1889) LR 14 App Cas 337.

21 *Perlman* (n 17) 157–158.

22 *Perlman* (n 17) 155.

23 *Perlman* (n 17) 155.

24 *Perlman* (n 17) 155–156.

25 *Perlman* (n 17) 155.

26 *Donoghue* (n 1) 619 (Lord Macmillan).

27 *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465.

28 The facts and result of *Perlman* are essentially those of *Smith v Eric S Bush* [1990] 1 AC 831, decided by the House of Lords five decades later.

29 It was cited to him by the plaintiff, and indeed he had interjected during the defendant's argument to say that the English authorities he relied upon had been overtaken by *Donoghue*: see *Perlman* (n 17) 152.

30 *Perlman* (n 17) 159–161.

31 Hutchison (n 11) makes this point particularly compellingly.

32 Eric A Walker, *Lord de Villiers and His Times: South Africa, 1842–1914* (Constable & company 1925); Girvin (n 15) 119–121.

33 *Cape of Good Hope Bank v Fischer* (1886) 4 SC 368.

34 *Fischer* (n 34) 377.

35 *Fischer* (n 34) 376 (emphasis added).

36 The claim, like that in *Perlman*, ultimately failed for want of legal causation (again by application of Voet).

37 *Winterbottom v Wright* (1842) 10 M&W 109.

38 *Van Wyk v Lewis* 1924 AD 438.

39 See also the text below at n 57.

40 *Lennon Ltd v British South Africa Co* 1914 AD 1.

41 *Lennon* (n 42) 6 (De Villiers CJ).

42 *Lennon* (n 42) 15 (Innes JA).

43 *Cooper & Nephews v Visser* 1920 AD 111.

44 *Langridge v Levy* (1837) 150 ER 863.

45 This view is taken by JC van der Walt, 'Die Deliktuele Aanspreeklikheid van die Verbaardinger vir Skade Berokken deur Middel van Sy Defekte Produk' (1972) 35 Tydskrif vir Hedendaagse Romeins-Hollandse Reg 224. But he takes no account of *Button v Bickford, Smith & Co* 1910 TH 52, for example, which seems incompatible with this limitation.

46 *MacPherson v Buick Motor Co* 217 NY 382 (1916).

47 *Donoghue* (n 1) 595 (Lord Atkin); *MacPherson* (n 47) 387, 394.

48 The cases are analysed in Helen Scott, 'The History of Foreseeability' (2019) 72 Current Legal Problems 287, 297–302, to which my discussion in this section is indebted.

49 *Cape Town Municipality v Paine* 1923 AD 207.

50 *Cavalier v Pope* [1906] AC 428.

51 *Paine* (n 50) 208–209.

52 *Paine* (n 50) 209, quoting *Farmer v Robinson Gold Mining Co Ltd* 1917 AD 501.

53 The central passage is D. 9.2.31, but others are also relevant, namely D. 9.2.28 and Institutes 4.3.5.

54 Erwin Grueber, *The Roman Law of Damage to Property* (Clarendon Press 1886) 225.

55 *Paine* (n 50) 216–217.

56 *Paine* (n 50) 215.

57 *Paine* (n 50) 217.

58 *Paine* (n 50) 217.

59 *Paine* (n 50) 217.

60 *Heaven v Pender* (1883) 11 QB 503, discussed in *Paine* (n 50) 215–216.

61 *Le Lievre* (n 20), in particular, had of course viewed it with disfavour.

62 *Paine* (n 50) 216.

63 *Paine* (n 50) 219.

64 *Perlman* (n 17) 158, 161–162.

65 *Perlman* (n 17) 158.

66 *Perlman* (n 17) 159.

67 It might have proved telling that Innes CJ had cited *Heaven v Pender* (n 60), a prototypical case of product liability, with approval, and seen it as governed by the same principle as *Paine* itself.

68 *Gibb & Son (Pty) Ltd v Taylor & Mitchell Timber Supply Co (Pty) Ltd* 1975 (2) SA 457 (W) 464C. To be sure, Coetzee J was fortified by a lengthy discussion of English and American law, including *Donoghue* (n 1) and *MacPherson* (n 46), and said he found them "instructive" and "very helpful"; but this was because "there was hardly a difference in principle" between the law of South Africa, as settled in *Paine*, and that of England and America. See 464G–H.

69 See especially Scott (n 48). This expands the argument sketched in Robin Evans-Jones and Helen Scott, 'Lord Atkin, *Donoghue v Stevenson* and the Lex Aquilia: Civilian Roots of the "Neighbour" Principle' in Paul J du Plessis (ed), *Wrongful Damage to Property in Roman Law: British Perspectives* (Edinburgh University Press 2018). Hutchison (n 11) 616 had noted the similarity between *Paine* and *Donoghue* in passing.

70 *Donoghue* (n 1) 580.

71 Frederick Pollock, *The Law of Torts* (Stevens and Sons 1887) 353: "[W]e arrive at the general rule that everyone is bound to exercise due care towards his neighbours in his acts and conduct, or rather omits or falls short of it at his peril; the peril, namely, of being liable to make good whatever harm" And note the edition of Pollock's textbook that would have been current when *Donoghue* was decided, namely *The Law of Torts* (13th ed, Stevens and Sons 1929) 1: "All members of a civilized commonwealth are under a general duty towards their neighbours to do them no hurt without lawful cause or excuse." It is a well-known irony, however, that Pollock himself did not expect the Lords to decide *Donoghue* as they did: see his 'Manufacturers' Liability for Dangerous Condition of Goods' (1929) 45 Law Quarterly Review 421, 422.

72 See again Scott (n 48) 295.

73 ibid.

74 Alan Rodger, 'Lord Macmillan's Speech in Donoghue v. Stevenson' (1992) 108 Law Quarterly Review 236. T. B. Smith had proclaimed the importance to *Donoghue* of Scottish law many years earlier in his *British Justice: The Scottish Contribution* (Stevens & Sons 1961) 51–52.

75 The enquiry may then be pushed back a step. Was there any civilian influence upon *Heaven v Pender*? And when, in *Paine*, Innes CJ professedly relied upon civilian sources, was he understating the central influence of Brett MR's speech? For these and other reasons, then, my brief discussion in this section is far from conclusive.

76 TW Price, 'Aquilian Liability for Negligent Statements' (1950) 67 South African Law Journal 411.

77 TW Price, 'Civil Law and Common Law: Two Ways of Thinking' [1966] Acta Juridica 47, 50, quoting Thomas Mackay Cooper, 'The Common and the Civil Law—A Scot's View' (1950) 63 Harvard Law Review 468, 471.

78 Price, 'Aquilian Liability for Negligent Statements' (n 76) 414.

79 ibid.

80 For the background to the rivalry between Price and McKerron and their respective visions of South African law see PQR Boberg, 'Oak Tree or Acorn?—Conflicting Approaches to Our Law of Delict' (1966) 83 South African Law Journal 150.

81 RG McKerron, 'The Duty of Care in South African Law' (1952) 69 South African Law Journal 189, 194–195. The same point had been made earlier in LB Behrmann, '*Perlman v Zoutendyk*' (1941) 58 South African Law Journal 25 and was found persuasive in *Alliance Building Society v Deretitch* 1941 TPD 203.

82 RG McKerron, 'Liability for Mere Pecuniary Loss in an Action under the Lex Aquilia' (1973) 90 South African Law Journal 1, 1.

83 JC van der Walt, 'Nalatige Wanvoorstelling en Suiwer Vermoenskade: Die Appelhof Spreek 'n Duidelike Woord' [1979] Tydskrif vir die Suid-Afrikaanse Reg 145, 151 (my translation).

84 Percy H Winfield, 'Duty in Tortious Negligence' (1934) 34 Columbia Law Review 41.

85 WW Buckland, 'The Duty to Take Care' (1935) 51 Law Quarterly Review 637.

86 Price, 'Aquilian Liability for Negligent Statements' (n 76).

87 TW Price, 'The Conception of Duty of Care in the Actio Legis Aquiliae' (1949) 66 South African Law Journal 277, 292. Price had criticised and rejected Lord Atkin's approach in *Donoghue* in this article's prequel, 'The Conception of Duty of Care in the Actio Legis Aquiliae' (1949) 66 South African Law Journal 171, 180–185.

88 See especially *Bester v Commercial Union Versekeringsmaatskappy van SA Bpk* 1973 (1) SA 769 (A), in which the Appellate Division cited *Paine* (at 777) and then the expansive view of it defended by Price (n 87), in the course of imposing liability for psychological injury caused to (what we would now call) a "secondary victim". Though the Court had never imposed liability on such facts before, it held that the case could be resolved by application of our existing principles, which it construed very broadly.

89 The loss of faith in *Perlman*'s broad approach was clearly apparent in *Herschel v Mrupe* 1954 (3) SA 464 (A), where a majority refused to impose liability in a negligent misstatement case and approached Watermeyer J's judgment with scepticism. (Centlivres CJ, dissenting, had no such inhibitions.) See again, for the full twentieth-century history, Hutchison (n 11).

90 Our wrongfulness element and the English duty of care concept are not co-extensive: compare *Knop v Johannesburg City Council* 1995 (2) SA 1 (A) 27B–G. This leads to a rather tiresome debate among South African lawyers about whether analogies between the two can be drawn. But it seems to me that the function I refer to in the text is undoubtedly common to both.

91 Compare *AB Ventures Ltd v Siemens Ltd* 2011 (4) SA 614 (SCA) para 8 and the authorities cited there. The phrase derives from MA Millner, *Negligence in Modern Law* (Butterworths 1967) 26–27.

92 *Country Cloud Trading CC v MEC, Department of Infrastructure Development, Gauteng* 2015 (1) SA 1 (CC) para 20. For a summary of this element by the main judicial architect of our current approach see *Trustees for the Time Being of Two Oceans Aquarium Trust v Kantey & Templer (Pty) Ltd* 2006 (3) SA 138 (SCA) paras 10–12; FDJ Brand, 'Aspects of Wrongfulness: A Series of Lectures' (2014) 25 Stellenbosch Law Review 451.

93 The views of two scholars of the common law, namely M.A. Millner and John Fleming, were pivotal in the developments of the South African approach. See again *AB Ventures* (n 90) para 8 for the key authorities, above all *Administrateur Natal v Trust Bank van Afrika Bpk* 1979 (3) SA 824 (A), which quotes both authors.

Part 8—United Kingdom

CHAPTER 10

Reflections on the Relationship between the Court of Session, the House of Lords and the UK Supreme Court

I. AUTHOR BIO [§10.1]

The Right Honourable Lord Carloway was appointed as Lord President of the Court of Session and Lord Justice General of Scotland in December 2015. He has been a Senator of the College of Justice since February 2000. He was appointed to the Second Division of the Inner House in August 2008, before becoming Lord Justice Clerk in August 2012. His report into criminal law and practice was published in November 2011.

He is a graduate of Edinburgh University (LLB Hons) and was admitted to the Faculty of Advocates in 1977. He served as an advocate depute from 1986 to 1989 and was appointed as a Queen's Counsel in 1990. From 1994 until his appointment as a judge he was Treasurer of the Faculty of Advocates.

Lord Carloway is an Honorary Bencher of Lincoln's Inn in London and King's Inn in Dublin. He is a Fellow of the Royal Society of Edinburgh.

He is an assistant editor of "Green's Litigation Styles" and contributed the chapters on "Court of Session Practice" to the Stair Memorial Encyclopaedia and "Expenses" in Court of Session Practice. He was the joint editor of "Parliament House Portraits: the Art Collection of the Faculty of Advocates" and is a former president of the Scottish Arts Club.[1]

II. INTRODUCTION [§10.2]

Thank you for inviting me to speak to you today, at this anniversary in the life of what is perhaps the most important and influential snail ever to have travelled the road and the miles from Paisley via Edinburgh to London. Coincidentally, last week marked the 490th anniversary of the Act of Parliament[2] which committed James V to establishing a permanent judiciary in Scotland, to be known as the College of Justice and, in particular on the civil side, the Court of Session. The passing of these two anniversaries calls for some reflection upon the relationship between the Court of Session, on the one hand, and the House of Lords and its successor, the UK Supreme Court, on the other, and on their respective roles in the Scottish civil law tradition.

A. ESTABLISHING A CENTRAL CIVIL COURT IN SCOTLAND [§10.3]

The Court of Session evolved out of the King's Council. The Council was the king's own court and consisted of the monarch and the Lords of Council. The King was the fount of all law and justice. Direct access to his court in the event of a civil wrong was, in theory, a right inherent in the feudal system.[3] Subjects could also appeal to Parliament by the sadly missed process of falsing the doom.

Efforts to create a central court were being made by James I as early as 1425 after his release from England. He had been captured in 1406, aged 11, by English pirates on his way to safety, away from his Scottish predators, in France. The king had no fixed seat, although Scone near Perth was the favourite. He moved constantly throughout the realm until he was assassinated in Perth in 1437. It was then that Edinburgh became Scotland's capital.

The itinerant nature of the government had made matters difficult for litigants. James I had established what came to be known as the Auld[4] Session in 1425 as a central, static successor to the older King's Council, but without the King. It had universal jurisdiction to hear and determine all causes which could have been brought before the Council.[5] For reasons which are unclear, the Council fell into desuetude in about 1468.[6] The term the "Lords of Council and Session", which persists to this day in Scottish extract decrees, was coined in 1491 under James IV, when the Sessions Act was passed. This provided that the Lords of Council or the Lords of Session would sit with the Chancellor three times per year to administer civil justice.

The next attempt at establishing a central and permanent civil court in Edinburgh is the one that persisted. A college of "cunning and wise" men, as it was phrased in the statute, was established under James V for the purposes of doing justice in all civil actions.[7] We are still here, with the added advantage of some cunning and wise women. The College of Justice was inaugurated by the king on 27 May 1532. The first session of the court commenced.[8] It sat in the Old Tolbooth, which has since been demolished, but which was situated on the High Street in Edinburgh only a few yards away from where the Court of Session now sits in the old Parliament House.[9] The word Session distinguished the centralised court from the King's peripatetic version and from the church courts.

B. THE DEVELOPMENT OF THE APPELLATE JURISDICTION OF THE COURT OF SESSION [§10.4]

The 1532 Act did not confer a specific power on the new Court to review decisions of the many diverse, often feudal, local courts, but this developed over time as the Court took over the jurisdiction of the King's Council and the Parliament.[10] Early in the life of the Court, a practice developed whereby one of its judges would be delegated with the task of hearing evidence.[11] This would be done in an outer room of the Tolbooth. The judge would report back to his colleagues, who would be sitting in an inner room of the Tolbooth.[12] After the Union with England in 1707, the Court moved into Parliament House. The practice of sitting in Outer and Inner rooms persisted; aided by the use of partitions to separate them.[13] Hence the terminology which other jurisdictions may think as strange or quaint; the Inner House and Outer House jurisdictions. The Court of Session Act 1810 formalised this[14] and established that the Inner House[15] had the power to review the findings of a single Outer House judge.

After the Court's constitution, a question remained of whether the Scottish Parliament, which had survived the Union of the Crowns in 1603, retained any judicial powers; that is whether it had appellate jurisdiction over the Court's decisions. This sparked an extraordinary crisis in 1674. The Court had dismissed an attempted appeal to Parliament from a judgment of the Court as incompetent. It notified King Charles II.[16] Charles issued a letter disapproving the practice of appealing from the Court to the Parliament. The King's interest in doing this flowed from his power to nominate the judges, or, as they are still called, the Senators of the

College of Justice. Appeals to the Scottish Parliament would threaten royal influence over civil litigation.[17]

The Lord President, Viscount Stair, disbarred nearly fifty members of the Faculty of Advocates (the Scottish Bar), who had refused to disavow the competency of such appeals to Parliament[18]. The ousted advocates were only re-admitted when they lodged petitions which disowned all appeals to Parliament and declared that they would not advise upon or countenance any such appeals ever again.[19] Matters remained in that state until resolved by the Claim of Right of 1689. This both prohibited the King's practice of sending letters to the courts and gave all subjects the formal "right and privilege" to protest the decisions pronounced by the Court to the King and Parliament.[20] Thus a formal right of appeal to the Scottish Parliament from the Court of Session was established. As is often the case, unintended consequences would shortly follow from what appeared to be a good idea at the time.

III. HOW THE HOUSE OF LORDS CAME TO HEAR SCOTTISH APPEALS [§10.5]

The Treaty of Union with England in 1707 created a combined Parliament of Great Britain.[21] It ended, for centuries, the Parliament of Scotland. There is some material that suggests that the Scottish Parliament had envisaged that its power as Scotland's ultimate court of appeal would be transferred to the House of Lords.[22] The Treaty of Union did not set this out explicitly or indeed at all. The phraseology in the Treaty, and the subsequent Act, which subsists to this day, declared that "no causes in Scotland be cognoscible by the Courts of Chancery, Queen's Bench, Common Pleas or any other Court in Westminster Hall".[23] There was a glaring omission from that list; the House of Lords. It did not sit in Westminster Hall. It remains a question of fierce debate whether this ambiguity was left by design or through negligence.

Soon after the Union, in 1709, a highly contentious situation arose in Edinburgh. The Reverend James Greenshields, a Scotsman and ordained a Presbyterian, decided to open a private chapel and teach the English Book of Common Prayer. Those familiar with the demise of Charles I will understand that this was an exceedingly dangerous thing to do in Scotland. The Reverend Greenshields was duly prohibited from preaching by the Presbytery of Edinburgh. He refused to comply and was duly imprisoned by the Magistrates. He brought a bill of suspension in the Court of Session, but it was refused. He then tried to take his case to the House of Lords in London.

The Magistrates argued that the House of Lords had no jurisdiction to hear the appeal because, prior to the Union, there had been no right of appeal from the church courts to the Parliament of Scotland. The Lords held that the "petition and appeal [was] regularly and properly before the house".[24] The decision confirmed, or perhaps created, the House of Lords' jurisdiction to hear appeals from the Court of Session,[25] even where the case concerned a religious matter.[26] The question had been settled definitively for all civil, but not criminal, cases. The situation with crime was settled in the opposite way only as late as 1876 in *Mackintosh v Lord Advocate*[27] and conclusively so by the Criminal Procedure (Scotland) Act 1887[28] whose terms are still reflected in the modern legislation[29]. Just to add to the nomenclature confusion, criminal cases in Scotland are heard by the High Court (of Justiciary). It has its own unique historical origins. As a generality, no appeal lies from the High Court.

So matters rested until the devolution era, which commenced with the Scotland Act 1998. This revived, or some would say recreated, the Scottish Parliament but reserved certain areas of law to the UK Parliament. One effect was the introduction of a limited jurisdiction to the Privy Council to hear appeals in criminal cases where it was alleged that there was a breach of the European Convention on Human Rights; so called "devolution issues".[30] Their history and significance are not within the scope of this paper.

IV. THE MODERN RELATIONSHIP BETWEEN THE UKSC AND THE COURT OF SESSION [§10.6]

A. PERMISSION TO APPEAL [§10.7]

Prior to 22 September 2015, an appeal to the UK Supreme Court from a final judgment of the Court of Session was as of right. It did not require leave of either court,[31] provided that the issue was not relating only to expenses[32] or otherwise prohibited by statute.[33] The only requirement was that two Scottish counsel certified that the appeal was "reasonable".[34] It was the responsibility of counsel to decide whether an appeal was reasonable; including whether it raised a question of law of at least some importance.[35]

With interlocutory decisions, an appeal could only be taken where there was a difference of opinion in the Court of Session[36] or where the decision dismissed the action, as was the position in the case of the snail.[37] Otherwise leave of the Court was required. It would be given only where the decision raised "an issue of law of general or public importance".[38] Where the law was well settled, and "no new point of difficulty or importance…[arose]", leave would be refused.[39] Leave would not be granted where the issue before the court was one of Scottish practice and procedure.[40]

In a trilogy of Scottish appeals, the absence of any issue of law of general public importance in appeals which had been certified as reasonable by Scottish counsel had been criticised by the judges of the House of Lords and the UK Supreme Court. [41]The system of certification was not always serving the public interest. The House of Lords, or the UKSC, was, on occasion, being asked to analyse the import of evidence which had been heard by a court of first instance[42] or to interpret documents peculiar to the case.[43] The Scottish Government sought to alleviate this problem by introducing a test for permission to appeal in the Courts Reform (Scotland) Act 2014.[44]

The 2014 Act instituted a new regime for appeals by amending the Court of Session Act 1988[45]. A party seeking to appeal any decision[46] to the UK Supreme Court now requires permission to do so. Permission must be sought first from the Court of Session. If that is refused, permission to appeal against final judgments can be sought from the UK Supreme Court.[47] Permission cannot be sought directly from the UK Supreme Court. It may be granted "only if the… [court] considers that the appeal raises an arguable point of law of general public importance which ought to be considered by the Supreme Court at that time".[48] Interlocutory decisions may be appealed in limited circumstances but only with the permission of the Court of Session.[49]

The approach of the Court of Session when determining applications for permission to appeal is different to that of the Court of Appeal in England and Wales, which will normally refuse leave in order to allow the appeal panel of the UK Supreme Court to select the cases which it wishes to hear.[50] The relatively small nature of the Scottish jurisdiction means that novel or unusual points of law may not arise again for some time. It is not unreasonable or disrespectful to say that the Court of Session is best placed to determine in the first instance what falls into the category of a point of general public importance where the views of the UK Supreme Court will be particularly valuable. Cases involving UK revenue or other statutes with a UK scope are one example. Those with an international or general human rights dimension are another. A separate category are challenges to the competency of Acts of the Scottish Parliament in the context of the devolution settlement.

For these reasons, the Court of Session does not refuse permission solely to allow the UK Supreme Court to select its own cases. There is a public interest in the development of Scots law; at least where the law is unclear. That is not to say that there will not be cases where it

may be appropriate to let the UK Supreme Court decide whether to grant permission. The principles developed under the old provisions for permission continue to be relevant.

The judges in the Divisions of the Court of Session adopt a highly objective view in permission applications. Permission will not normally be granted where the decision is a preliminary or an *interim* one and where an application for permission would best be made at the end of the case.[51] Leave will not be granted where the issue is one of uniquely Scottish practice and procedure, or allows a party to advance an argument which was not advanced before the Court, unless in exceptional circumstances. In general, the UK Supreme Court has refused leave where it has been refused by the Court of Session,[52] but there will be exceptional cases.[53]

B. THE RELATIONSHIP BETWEEN THE SUPREME COURT AND THE COURT OF SESSION [§10.8]

The development of the test for permission is important to any understanding of the circumstances in which an appeal can be taken from the Court of Session to the UK Supreme Court. It is necessary in order to appreciate the relationship between the two courts which has been developed over time. From the Court of Session perspective, the function of the UK Supreme Court is to be found within the wording of the test itself; it is there to hear those cases which are of general public importance. Recent cases before the UK Supreme Court and which have emanated from Scotland have thus been those considering the proper interpretation of a UK statute;[54] and the compatibility of Scottish statutes either with the European Convention on Human Rights[55] or European Union law.[56]

The word "arguable", in connection with a point of law within the test for permission to appeal from the Court, makes it clear that it is the UK Supreme Court's role to settle, with finality, points of law which are undetermined. Unlike the Court of Session, it does not normally hear a case in order to determine how settled law should be applied to a particular dispute. Indications of an arguable point of law include the existence of a dissenting opinion, different decisions having been reached at different court levels or a divergence of opinion on a question of law between the courts in the different jurisdictions of the United Kingdom.[57] Permission has been granted where the Court of Appeal and the Court of Session have placed different interpretations on a statutory provision[58].

Although the Court of Session hears many cases which are of general public importance, it hears a much greater number which are of concern only to the parties. Because of its historical origins as a collegiate body, the Court operates both as a court of first instance and one of review or appeal; except it is not quite as simple as that. Although the Court can, and occasionally does, sit en banc with up to 15 judges present, since 1808 it has generally sat in the two Divisions consisting of three judges.[59] The Divisions hear appeals from many tribunals, including the intermediate Sheriff Appeal Court which intercepts the many appeals from Scotland's local sheriff courts in which all cases with a value of under £100,000 are decided. The Divisions review (I use the term loosely) the decisions of the Outer House; that is the first instance cases raised in the Court of Session. These include all judicial reviews and many commercial and reparation cases with a value of more than £100,000. These reviews are not strictly appeals. The judges are all members of same court. The single first instance judges act as pointsmen, delegated to blow the first, but often not the last, notes on the bugle. For present purposes this is the structure into which the snail was cast. It is a popular quiz question to ask in what court was the case commenced. Many opt erroneously for Paisley sheriff court but it was in the Court of Session where it was heard initially by the Lord Ordinary (Lord Moncrieff) before it was reclaimed, as is the correct term, successfully to the Second Division of the Inner House.

There is an automatic right to seek a review by a Division of an interlocutor of a Lord Ordinary which disposes of the merits of a cause.[60] This power in reclaiming motions is a wide appellate

jurisdiction enabling the review of: findings of fact, where the Lord Ordinary was plainly wrong;[61] inferences drawn from primary findings of fact; the application of law to the facts; as well as questions of pure law. An error of law is not the sole basis for an appeal.[62] Put simply, the Divisions may review the whole merits of the case. Traditionally, it did just that. Where, as was often the case, evidence had been heard, even within living memory, the procedure in the Divisions was for junior counsel to read out the written pleadings and then a transcription of the whole testimony before starting on submissions. The case was effectively reheard. The speeches by senior counsel were succinct and focused. There was, of course, no proof ever heard to see if a snail had actually been in the bottle, and, if so, why. The decisions taken were purely ones of law; an assessment of the relevancy of the pursuer's written pleadings.

The last difference which is worth highlighting is best emphasised by reference to the case of the snail itself. Would *Donoghue v Stevenson*[63] have had the international impact, and found the international renown that it enjoys today, if it had been decided in Mrs Donoghue's favour solely by the Court of Session or if it had been a case raised in England which had ended its life in the Court of Appeal? The UK Supreme Court has, and the House of Lords had, the power to bind or at least heavily influence all other civil courts within the UK. Internationally, it has a high degree of visibility throughout the Commonwealth. It is therefore not always desirable from the perspective of legal systems across the globe that claims, which are novel and raise a point of importance to the public, should stop before they reach the UK Supreme Court.[64]

We should all therefore be grateful to "poor" Mrs Donoghue and her advisers for their gumption. If she had not stayed the course, we may all have been deprived of the well-worn and loved principles of negligence to which we still adhere. We must also be thankful to what may still be the world's most famous mollusc[65] for its own special brand of gumption.

Hail to the snail!

NOTES

1 I am grateful to my law clerk, Ysabeau Middleton, for preparing the initial drafts of this paper.

2 College of Justice Act 1532.

3 *Courts and Competency* (2016), Stair Encyclopaedia (re-issue), para 5-91.

4 Ie "old"

5 Lords of Session Act 1425.

6 Walker: *A Legal History of Scotland III* at 502.

7 College of Justice Act 1532

8 Walker: *(supra)*, at 510.

9 Walker: *(supra)*, at 524.

10 *Courts and Competency (supra)*, para 5-101.

11 Walker: *(supra)*, at 525.

12 *Courts and Competency (supra)*, para 5-100.

13 *Ibid.*

14 Articles XXIX and XXXII.

15 The Inner House was divided into two divisions by the Court of Session Act 1808; the Lord President presiding over the First Division and the Lord Justice Clerk over the Second Division. The Court may still sit en banc in appropriate cases.

16 *Earl of Dumfermling v Earl of Callander and Lord Almond* (1674) Mor 579 at 580.

17 *Courts and Competency (supra)*, para 2-9.

18 *Joint Petition of the Advocates* (1675) Mor 345.

19 *Courts and Competency (supra)*, para 2-9.

20 Claim of Right 1689, 39, 40, 45, c.28.

21 Article III.

22 See Walker: *A Legal History of Scotland, IV*, at 596.

23 Article XIX.

24 [1710] Colles 427 at [432].

25 The popular view, that *Greenshields* established the House of Lords's appellate jurisdiction over the Court of Session, has been described as "erroneous". Maclean: *The House of Lords and Appeals from the High Court of Justiciary 1707 – 1887*, 1985 JR 192. The author does not give reasons for this criticism. It may be because the Magistrates' arguments focussed on the appeal being a challenge to a decision of the Presbytery, rather than the Court of Session.

26 Rogers: *The House of Lords and Religious Toleration in Scotland: James Greenshields's Appeal, 1709 – 11* (2020) Studies in Church History, Vol 56, 320 – 337 at 321.

27 (1876) R (HL) 34.

28 See also the Criminal Appeal (Scotland) Act 1926, s 1.

29 Criminal Procedure (Scotland) Act 1995, s 124(2).

30 Scotland Act 1998, s 98, sch 6.

31 Court of Session Act 1988 s 40(1)

32 "costs"; *Caledonian Railway Co v Barrie* (1903) 5 F (HL) 10

33 eg appeals from decisions of the Land Valuation Appeal Court (Land Valuation (Scotland) Act 1857, s 2), or the Election Petitions Court (Representation of the People Act 1983, s 146(5)), or the Scottish Land Court (Scottish Land Court Act 1993, s 1(7))

34 Supreme Court Practice Direction 1.2.25

35 *Wilson v Jaymarke Estates* 2007 SC (HL) 135, Lord Hope at 19.

36 eg *Davies v Scottish Commission for the Regulation of Care*, 2013 SLT 577, para 13

37 CSA 1988 s 40(1)(a)

38 *Massie v McCaig* [2013] CSIH 37 at para 7 (citing *G Hamilton (Tullochgribban Mains) v Highland Council* 2012 SLT 1148, Lord Walker at para 29); *Forbes v Strathclyde Partnership for Transport* 2014 SC 717 at para [15].

39 *Costain Building v SRU* 1993 SC 650, Lord Hope at 663

40 *Girvan v Inverness Farmers Dairy* 1998 SC (HL) 1; *McIntosh v BRB* 1990 SC 338 Lord President (Hope) at 346

41 *Wilson v Jaymarke Estates* (*supra*), Lord Hope at 17 and 20; *G Hamilton (Tullochgribban Mains) v Highland Council* (*supra*), Lord Walker at 29; *Uprichard v Scottish Ministers* 2013 (UKSC) 219, Lord Reed at 58 and 63

42 *Wilson v Jaymarke Estates (supra).*

43 *Uprichard (supra).*

44 Explanatory Notes to the CRSA 2014, paragraph 228.

45 Sections 40 and 40A

46 The old rules apply to any decision of the Inner House which was pronounced before that date, Article 5, Court Reform (Scotland) Act 2014 (Commencement No. 3, Transitional and Saving Provisions) Order 2015/247.

47 CSA 1988, s 40(1).

48 CSA 1988 s 40A(3).

49 CSA 1988 s.40(2)(d).

50 *Uprichard v Scottish Ministers* (*supra*), Lord Reed at 59.

51 eg *BAM TCP Atlantic Square v British Telecommunications* [2021] CSIH 44, where permission was applied for prior to the hearing of evidence.

52 Including *SALT International v Scottish Ministers* 2016 SLT 82; *RSPB v Scottish Ministers* 2017 SC 552.

53 *VS (Lithuania) v Secretary of State for the Home Department* 2018 SC (UKSC) 38.

54 e.g. *MacDonald v Carnbroe Estates* 2020 SC (UKSC) 23.

55 *In XY (AP) v Principal Reporter* 2020 SC (UKSC) 47.

56 *Scotch Whisky Association v Lord Advocate* 2018 SC (UKSC) 94.

57 See eg *Vermilion Holdings v Commissioners for Her Majesty's Revenue and Customers* 2022 SC 41, where all three of these indications were present and permission to appeal was granted.

58 *Inspector of Health and Safety v Chevron North Sea* 2018 SC (UKSC) 132.

59 Previously, when the Division were composed of the chair and three other judges, it was common for there to be a bench of four, if all members were available and not sitting as first instance criminal judges in the High Court.

60 RCS 38.1(2) and 38.2(1).

61 *Woodhouse v Lochs and Glens (Transport)* 2020 SLT 1293at para [32].

62 *PA v Secretary of State for the Home Department* 2020 SC 515, Lord President (Carloway) at 32.

63 As reported in England in [1932] AC 562; cf 1932 SC (HL) 31.

64 See Lord Reed in *R (UNISON) v Lord Chancellor* [2020] AC 869 at para 69.

65 Might the *Magic Roundabout*'s Brian have a claim here?

CHAPTER 11

Donoghue v Stevenson: A View from the United Kingdom Supreme Court

I. AUTHOR BIO [§11.1]

Robert John Reed, the Right Honourable Lord Reed of Allermuir took up appointment as President of the Supreme Court on 13 January 2020, succeeding Lady Hale of Richmond. Upon this appointment, Lord Reed became a life peer.

Prior to his appointment as President, Lord Reed previously served as Deputy President of the Supreme Court from 7 June 2018 and was originally appointed as a Justice on 6 February 2012.

He studied law at Edinburgh University and undertook doctoral research in law at the University of Oxford. He qualified as an advocate in Scotland and as a barrister in England. He practised at the Scottish Bar in a wide range of civil cases, and also prosecuted serious crime.

He served as a senior judge in Scotland for 13 years. From 2008 to 2012 a member of the Inner House of the Court of Session, and from 1998 to 2008 a member of the Outer House of the Court of Session, where he was the Principal Commercial Judge.

As well as sitting on the Supreme Court and the Judicial Committee of the Privy Council, he is also a member of the panel of ad hoc judges of the European Court of Human Rights, and is a Non-Permanent Judge of the Court of Final Appeal in Hong Kong. He is also the Visitor of Balliol College, Oxford. [1]

II. INTRODUCTION [§11.2]

When *Donoghue v Stevenson* came before the Appellate Committee of the House of Lords, Lord Atkin suggested that it raised the most important question they had ever been asked to consider.[2] Now on its ninetieth anniversary, we can say with confidence that *Donoghue* was, at the very least, one of the most important cases of the twentieth century, for it laid the foundation of the modern law of tort. Over the course of today's conference, others will speak about the impact of *Donoghue* on the substantive law, both here and abroad. I have been asked to consider the case, instead, from the perspective of the UK Supreme Court, as the successor to the Appellate Committee, and the sister court on which I also sit, the Judicial Committee of the Privy Council.

III. LESSONS FROM *DONOGHUE V STEVENSON* [§11.3]

It seems to me that there are a number of lessons that this casecan teach us about how our highest courts functioned in the last century and how they continue to function today. In the limited time available to me, I will pick out only three.

The first concerns the influence of Scots law. As is well-known, *Donoghue v Stevenson* began life in Scotland. Mrs Donoghue drank the famous bottle of ginger beer at a café in Paisley and commenced her action against its manufacturer in Edinburgh. She was successful before the Outer House at first instance, but the manufacturer succeeded before the Inner House on appeal. Mrs Donoghue appealed to the House of Lords in London, which was at that time, as the Supreme Court is now, the only court exercising jurisdiction across the whole of the UK. As the highest court for all three jurisdictions, one of its functions is to ensure that a consistent approach is followed in those areas of the law that are shared across the UK.[3] The question of whether there should be consistency across the Anglo-Scottish border came to the fore in *Donoghue*. We know from his diaries that, from the outset, Lord Atkin saw *Donoghue* as a case concerned with what he called "British law".[4] He prepared for the hearing by "organis[ing] the [authorities]… without regard to country of origin and go[ing] through them in [chronological] order".[5] In his judgment, he reviewed the Scottish and English authorities alongside each other, before concluding that a duty of care was imposed "by Scots and English law alike"[6]. The two Scottish Law Lords who heard the appeal, Lords Thankerton and Macmillan, were initially inclined to reach a decision "based only on Scots law", but it appears that Lord Atkin persuaded them to take a broader approach.[7] By forming this "Celtic majority",[8] Lords Atkin, Thankerton and Macmillan were able to "override the scruples of [their] English colleagues [Lords Buckmaster and Tomlin] who could not emancipate themselves from the pressure of a supposed current of authority in English Courts" (as Sir Frederick Pollock observed in 1933).[9] *Donoghue v Stevenson* accordingly stands as the most famous example of the Appellate Committee's ability to "Scottif[y] English law"[10]. This was not a new phenomenon, nor one that ended in 1932. In the years that followed, much of the English law of negligence was developed in Scottish appeals to the House of Lords, and that has continued since the establishment of the Supreme Court.[11]

We also know from his diaries that Lord Atkin, while preparing for the hearing in *Donoghue*, cast his eye across the Atlantic. Although no reference was made to it by counsel, Lord Atkin found his way[12] to the American case of *MacPherson v. Buick Motor Co*.[13] Lord Atkin considered Cardozo J's judgment in that case to "shin[e] much-needed light on the whole area",[14] and he expressed an eagerness to "figure out a way to use [it] in a way that [wouldn't] offend English sensibilities."[15] In the end, *MacPherson* was worked into the majority[16] judgments of Lords Atkin[17] and Macmillan,[18] alongside an earlier decision of the New York Court of Appeals.[19] This provides a second lesson: that much is to be gained[20] from looking at the case law of other common law courts. Since *Donoghue*, in many cases – including a more recent Scottish appeal concerning negligence, *Montgomery v Lanarkshire Health Board*[21]– the Supreme Court has looked to the doctrine of other common law jurisdictions as a possible guide to the development of our own.[22]

This brings me to the third lesson: that judgments of the highest court in this country not only are influenced by, but also have an influence on, the case law of other common law courts. This was especially true at one time of the Privy Council. Three years after *Donoghue*, five Law Lords sat as members of the Privy Council in the case of *Grant v Australian Knitting Mills*.[23] This Australian case concerned not a bottle of ginger beer, but a pair of long johns. Dr Grant purchased two pairs from a shop in Adelaide and, after wearing them, developed severe dermatitis. It was found to have been caused by a chemical irritant present in at least one of the pairs. The Privy Council decided that Dr Grant's claim against the manufacturers "c[a]me within the principle of *Donoghue's* case".[24] Contrary to arguments made on behalf of the manufacturers, *Donoghue* could not be distinguished on the basis that it concerned only

"food or drink to be consumed internally" (and not "pants… to be worn externally"), or that it concerned only products contained in "stoppered and sealed bottles" (and not those contained in "paper packets").[25] The Privy Council clarified, amid some confusion,[26] that negligence was "a specific tort in itself, not simply… an element in some more complex relationship or in some specialised brand of duty."[27] It would be thirty years before *Donoghue* would be accepted as authority for a wider proposition in *Hedley Byrne*,[28] but the Privy Council's decision in *Grant* was an important step along the way, and one with implications far beyond Paisley.[29]

Ninety years on, *Donoghue v Stevenson* stands as both a product and source of cross-border development of the common law. As Matthew Chapman put it in his book *The Snail and the Ginger Beer: the Singular Case of Donoghue v Stevenson*: "These days the vocabulary of the neighbour principle and its successors – the duty of care and its constituents, foreseeability, proximity and so forth – forms part of the common language of the law used in courts from Aberdeen to Cape Town and from London to Vancouver. The fact that tort lawyers around the world can speak to each other in a language all can understand owes much to *Donoghue v Stevenson*."[30] I am delighted that this shared language has brought us together today.

NOTES

1 This short lecture was delivered as part of the Donoghue v Stevenson 90th Anniversary Conference, The Immortal Snail, organised by the Law Society of Scotland and involving speakers from around the common law world, held on 26 May 2022. I am indebted to Isabella Buono for her assistance in the preparation of the lecture.

2 *Donoghue v Stevenson* [1932] A.C. 562 at 579.

3 See Lord Reed, 'The Supreme Court Ten Years On' (Bentham Association Lecture, 6 March 2019).

4 J. C. Kleefeld, 'The *Donoghue* diaries: Lord Atkin's research notes in *Donoghue v Stevenson*' (2013) Juridical Review 375, p. 425. As early as June 1931, Lord Atkin predicted that *Donoghue* would provide "the venue to develop a more general duty principle in the law of negligence". For that reason, he considered speaking to the Lord Chancellor "about sitting on the panel": Entry for 9 June 1931, p. 377.

5 Entry for 29 July 1931: 'The *Donoghue* diaries', op. cit., p. 380.

6 *Donoghue v Stevenson* [1932] A.C. 562 at 599.

7 Entry for 23 March 1932: 'The *Donoghue* diaries', op. cit., p. 443. In its March 1932 iteration, Lord Macmillan's judgment purported to decide the case purely on the basis of Scots law. The final version of his judgment proceeded on the basis that there was "no specialty of Scots law involved, and that the case [could] safely be decided on principles common to both systems": [1932] A.C. 562 at 621. Lord Rodger speculated that it was Lord Atkin who persuaded Lord Macmillan to make this change: 'Lord Macmillan's speech in *Donoghue v Stevenson*' (1992) 108 Law Quarterly Review 236.

8 See P. A. Landon, 'Notes' (1941) 57 Law Quarterly Review 179, 181 and R. F. V. Heuston, '*Donoghue v Stevenson* in Retrospect' (1957) 20(1) Modern Law Review 1, 3. As to the composition of the "Celtic majority", see M. Chapman, *The Snail and the Ginger Beer: The Singular Case of Donoghue v Stevenson* (Wildy, Simmonds & Hill Publishing, 2010), p. xi: "There were two Scottish Law Lords in *Donoghue v Stevenson*: Lord Thankerton and Lord Macmillan. Lord Atkin (of Aberdovey) was born in Brisbane, Australia, but raised in Merionethshire, Wales. Much of his ancestry was Irish, but he always considered himself a Welshman."

9 F. Pollock, 'The Snail in the Bottle, and Thereafter' (1933) 49(1) LQR 22. Lord Denning characterised the division in similar terms in *Candler v Crane Christmas & Co* [1951] 2 K.B. 164 at 178: "On the one side there were the timorous souls who were fearful of allowing a new cause of action. On the other side there were the bold spirits who were ready to allow it if justice so required."

10 See Lady Hale, 'The Contribution of Scottish Cases to Developing United Kingdom' (Society of Scotland Annual Conference, 26 October 2018).

11 See, in particular, *Glasgow Corporation v Muir* [1943] A.C. 448; *Hughes v Lord Advocate* [1963] A.C. 837; *McGhee v National Coal Board* [1973] 1 W.L.R. 1; *Junior Books Ltd v Veitchi Co Ltd* [1983] 1 A.C. 520; and *MacFarlane v Tayside Health Board* [2000] 2 A.C. 59.

12 Lord Rodger, op. cit., pp. 244-245, speculated that Lord Atkin learned of *MacPherson* from an article in the Law Quarterly Review. In his diary entry for 9 November 1931, Lord Atkin states that he was "alerted" to an article in that journal by Lord Macmillan: 'The *Donoghue* diaries', op. cit., p. 427.

13 (1916) 217 N.Y. 382.

14 Entry for 9 November 1931: 'The *Donoghue* diaries', op. cit., p. 426.

15 Entry for 16 January 1932: 'The *Donoghue* diaries', op. cit., p. 438.

16 Lord Buckmaster also referred to *MacPherson*, only to dismiss it, at [1932] A.C. 562, 677.

17 In *Donoghue v Stevenson* [1932] A.C. 562 at 597, before referring to *MacPherson*, Lord Atkin said: "It is always a satisfaction to an English lawyer to be able to test his application of fundamental principles of the common law by the development of the same doctrines by the lawyers of the Courts of the United States. The mouse had emerged from the ginger-beer bottle in the United States before it appeared in Scotland, but there it brought a liability upon the manufacturer." In fact, before *Donoghue*, at least eight "mouse-in-a-bottle" claims had been brought against the Coca Cola Company alone: see J. Miller, 'The mouse in the bottle: an historical survey of some legal responses' (1998) 20(4) Advocates' Quarterly 483.

18 Lord Macmillan referred to *MacPherson* at [1932] A.C. 562, 617. In an earlier draft of his speech, Lord Macmillan also referred to *Boyd v The Coca Cola Bottling Works* 177 S.W. 80 (1915), "a more obscure case from Tennessee about a bottle of Coca Cola which contained a cigar stump", but this did not make it into the final draft: see Lord Rodger, op. cit., p. 244.

19 *Thomas v Winchester* 6 N.Y. 397 (1852). Unlike *MacPherson*, *Thomas* was referred to in argument before the court: see: 'The *Donoghue* diaries', op. cit., p. 397 and *Donoghue v Stevenson* [1932] A.C. 562 at 577 (Lord Buckmaster).

20 Lord Atkin went so far as to say that Cardozo J "rescued [him] from [a] Slough of Despond": 'The *Donoghue* diaries', op. cit., p. 425.

21 [2015] UKSC 11.

22 See Lord Reed, 'Comparative Law in the Supreme Court of the United Kingdom' (Centre for Private Law, University of Edinburgh, 13 October 2017).

23 [1936] A.C. 85.

24 [1936] A.C. 85 at 108 (Lord Wright).

25 [1936] A.C. 85 at 106 (Lord Wright). It was not only the Australian Knitting Mills which took a narrow approach to the ratio in *Donoghue*. It was suggested in *Salmond on the Law of Torts* (8th ed, 1934) that it be confined only to food and drinks manufacturers. According to A. M. Linden, op. cit., at 81-82: "the prize for the narrowest view of *Donoghue v Stevenson*... goes to the Solicitors Journal [(1932)] which, in apparent seriousness, suggested that "[t]here might be a distinction between draft and bottled beer, the former falling without and the latter within the present case"."

26 See Heuston, op. cit., pp. 9 and 13.

27 [1936] A.C. 85 at 103 (Lord Wright).

28 As Lord Atkin's biographer suggests: "[t]he revolution brought about by *Donoghue v Stevenson* was… quiet…; and its true nature was perhaps not fully understood even by the profession until Lord Devlin's speech in 1963 in the *Hedley Byrne* case": G. Lewis, *Lord Atkin* (Butterworths, 1983), p. 67.

29 The Privy Council has, in the years since, continued to broaden *Donoghue*'s reach, citing it in judgments on appeals from Hong Kong (*Yuen Kun Yeu v Attorney-General of Hong Kong* [1988] A.C. 175), Australia (*Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co. Ltd (The Wagon Mound)* [1961] A.C. 388; *Commissioner for Railways v Quinlan* [1964] A.C. 1054; *Commissioner for Railways v McDermott* [1967] 1 A.C. 169; *Distillers Co. (Biochemicals) Ltd v Thompson* [1971] A.C. 458; and *Southern Portland Cement Ltd v Cooper* [1974] A.C. 623) and elsewhere (eg *Attorney General of the British Virgin Islands v Hartwell* [2004] 1 W.L.R. 1273).

30 M. Chapman, op. cit., p. 144.

CHAPTER 12

Donoghue v Stevenson: A View from Northern Ireland

I. AUTHOR BIO [§12.1]

The Right Honourable Dame Siobhan Keegan was appointed as a High Court Judge in October 2015. Dame Siobhan was sworn in as Lady Chief Justice of Northern Ireland on 2 September 2021. She became an Honorary Bencher of King's Inns in 2022.

Prior to becoming a judge, Dame Siobhan, a Queen's University alumna, graduating with LLB Honours in 1993, was called to the Bar of Northern Ireland in 1994 and became a Queen's Counsel in 2006.

During her career at the Bar, Dame Siobhan served as Vice Chair of the Bar of Northern Ireland, Chair of the Young Bar, Chair of the Family Bar Association, Chair of the Bar Charity Committee and she was a long standing member of the Bar Professional Conduct Committee.

Dame Siobhan was the Judge in Residence at the Queen's University of Belfast from November 2015 until August 2021. She became a Bencher of the Northern Ireland Inn of Court in 2015 and an Honorary Bencher of Gray's Inn in 2020. Dame Siobhan was a member of the Judicial Studies Board (JSB) from April 2016 until August 2021. She was also the Northern Ireland representative on the Franco-British-Irish Judicial Cooperation Committee.

Dame Siobhan was appointed as a Coroner in July 2017 and was the Presiding Coroner from September 2017 until September 2020. She was assigned to hear Judicial Reviews from 2017 until 2020. Dame Siobhan was the Senior Family Judge in the High Court of Northern Ireland from April 2020 until her appointment as Lady Chief Justice. During her tenure in the Family Division she was also the designated Northern Ireland judicial member of the International Hague Network of Judges.

Dame Siobhan was a Commissioner in the Northern Ireland Judicial Appointments Commission (NIJAC) from November 2018 until August 2021 and took on the role of Chair on her appointment as Lady Chief Justice.

II. INTRODUCTION [§12.2]

I am very pleased to be here virtually with my UK colleagues and to be able to extend my own welcome to our common law colleagues throughout the world. The case of *Donoghue v Stevenson*[1] was one of the first and most memorable tort cases that I learned about when studying law at Queen's University, Belfast. I am sure that experience that is common to many of us here today.

III. IMPACT OF *DONOGHUE V STEVENSON* IN NORTHERN IRELAND [§12.3]

In Northern Ireland, our courts, in common with those in our neighbouring common law jurisdiction of England and Wales, initially embraced *Donoghue v Stevenson*. They moved on to apply the two-stage test of duty in accordance with *Anns v Merton LBC*[2] and are now applying *Caparo v Dickman*[3], as refined by the UK Supreme Court in *Robinson*[4] in 2018.

Northern Ireland was still a relatively new jurisdiction, just over a decade old, when *Donoghue v Stevenson* was decided in 1932. Over the next forty years, references in the Northern Ireland law reports to *Donoghue v Stevenson* are scarce. Indeed, the first such reference did not appear until 1953, in the case of *Smith v Howdens*. The appellant, the mate on a sea-going vessel belonging to the respondent, suffered a finger wound while on a voyage of about 18 hours' duration. The appellant alleged that there was not adequate medical equipment on the vessel. Arguments were made by reference to *Donoghue v Stevenson* on the question of 'who in law is my neighbour?'. In giving judgment, the Chief Justice, Lord MacDermott, described *Donoghue v Stevenson* as a case which "stands on the frontiers of actionable negligence", however, he did not regard it as intending "to afford guidance on the obligations arising from a relationship so well-known to our jurisprudence and so long the subject of judicial consideration as that of employer and workman."

As an aside, in that case, Lord Justice Black's opinion was *dubitante*, which is notable due to its thankfully rare occurrence in our jurisdiction.

The next reference in the Northern Ireland law reports to *Donoghue v Stevenson* did not come for some twenty years, in the 1973 case of *McIlveen v Charlesworth Developments*[5]. That was a manufacturer's liability case, concerning a folding push-chair that had been purchased by the appellant. On the second occasion she used it, it collapsed unexpectedly, she lost her balance, fell sideways and broke her arm. In his judgment, the Chief Justice, Lord Lowry, gave a whistle-stop tour of the development of the law since *Donoghue v Stevenson*. Noting that, prior to *Donoghue v Stevenson*, the law governing liability in tort for negligence "lay in the shadow of the law of contract", he stated –

> Lord Atkin's famous question, "Who is my neighbour?" effected the release from its bondage of the law of liability for negligence, but, to begin with, the escape was made not openly but by stealth: doctrines were created, such as the impossibility of intermediate examination, in order to lend an air of respectability to the revolutionary idea that a manufacturer could be liable to a consumer who had entered into a relationship known as a contract with a different person altogether. As judicial boldness increased, impossibility of intermediate examination was joined by improbability of such an inspection before use as would have been likely to reveal the defect. These tests were used as criteria of the existence of a cause of action.

We see the breadth of reach of *Donoghue v Stevenson*, and its impact in Northern Ireland, in the case of *Farrell (formerly) McLaughlin v SOS for Defence*[6]. Three civilians, whom it appeared subsequently were attempting a robbery at a night safe outside a bank, were shot by members of the security forces who had been deployed to the area on the basis of information that the bank was to be the subject of a bomb attack. There followed a claim for a breach of statutory duty and negligence by the security forces. While ultimately the case did not turn on it, *Donoghue v Stevenson* was raised in arguments regarding whether, when planning operations, a duty of care was owed by the security forces to the public and to suspected criminals.

More recently, in 2010, *Donoghue v Stevenson* was brought to bear in the Northern Ireland case of *A and B v A Health and Social Services Trust*[7]. The plaintiffs in that case were children born to Caucasian parents through IVF and sperm donation. The parents had been anxious that their children should share their ethnicity, however, a labelling error had resulted in both children having darker skin than their parents. The children were subsequently the subject of

racial abuse causing emotional upset. Arguments regarding duty of care were made relying upon *Donoghue v Stevenson* and *Caparo Industries*. One of the questions before the court was whether or not the plaintiffs had sufficient status to be owed a duty of care and there was argument about the point at which any such duty of care would begin. This led the first instance court to observe that it was "being asked to venture into the complexities of the creation of life", a matter that the judge considered to be for the legislature. Ultimately, the Court of Appeal determined that there was no damage in law – skin colouring not being a form of damage – and therefore there was no need to determine whether there was a duty of care.

In closing, I want to go back to the first ever reference to *Donoghue v Stevenson* in the Northern Ireland law reports, that of *Smith v Howdens* in 1953. In that judgment, Lord MacDermott made the following observation:

> ...when dealing with circumstances which are novel, in the sense that they have not been adjudicated upon before, it is well to remember the warning conveyed by Lord Macmillan's memorable words: "The criterion of judgment must adjust and adapt itself to the changing circumstances of life. The categories of negligence are never closed".

This was a prescient statement indeed and one that contains perhaps the best summary of the impact of *Donoghue v Stevenson* in Northern Ireland - and beyond.

NOTES

1 *Donoghue v Stevenson* [1932] A.C. 562

2 *Anns v Merton LBC* [1978] A.C. 728

3 *Caparo Industries Plc v Dickman* [1990] 2 A.C. 605

4 *Robinson v Chief Constable of West Yorkshire Police* [2018] UKSC 4

5 *McIlveen v Charlesworth Developments* [1973] NI 216

6 *Farrell (formerly) McLaughlin v SOS for Defence* [1980] NI 55

7 *A (a minor) and B (a minor) by C their mother and next friend v A Health and Social Services Trust* [2010] NIQB 108

CHAPTER 13

Cinderella's Contribution: Negligence and the Northern Ireland Jury

I. AUTHOR BIO [§13.1]

John E. Stannard is a Senior Lecturer, School of Law, Queen's University Belfast.

II. INTRODUCTION [§13.2]

Northern Ireland is, in many ways, the Cinderella of the four main jurisdictions in the British Isles. Certainly it is by far the smallest, covering an area not much bigger than Yorkshire[1] and a population considerably less.[2] When the Northern Ireland jurisdiction first came into being in 1921 there were only five judges of the High Court, and even today there are no more than a dozen.[3] This leaves very little room for specialisation, and though decisions of the higher courts from other jurisdictions are not strictly binding, the tendency is to follow English decisions, at least in relation to issues where the law is the same.[4] One would therefore not expect to see Northern Ireland making much of a distinct contribution to the development of the law of negligence, but nevertheless as will become clear it does have something to offer, the main reason being the persistence of jury trial in personal injury actions long after it had departed from the scene in England and Wales. In the pages which follow we shall trace how the case of *Donoghue v Stevenson* has been applied in Northern Ireland up to the present before asking to what extent the use of juries has affected the approach taken to the law of negligence in that jurisdiction.

III. *DONOGHUE V STEVENSON* IN NORTHERN IRELAND [§13.3]

It would be fair to say that *Donoghue v Stevenson* did not make very much impression on the courts of Northern Ireland in its first twenty years. The first reported reference to the decision appears to be in 1953, in a Court of Appeal case called *Smith v Howdens Ltd*.[5] This was a case involving a claim by a member of a ship's crew for damages following an accident on board, the essence of the complaint being that the employers had failed to provide adequate medical equipment and had thus contributed to the extent of the injuries resulting from the accident. There being no direct authority on the point, reference was made to *Donoghue v Stevenson*, but this was brushed aside by Lord MacDermott LCJ, who said that the case was of no direct relevance to the issues before the court. In the words of Lord MacDermott:[6]

> In this absence of direct authority it was perhaps to be expected that we should hear in the course of the argument more than a passing reference to Lord Atkin's observations in Donoghue v. Stevenson … on "Who, then, in law is my neighbour?" That most important decision, however, stands on the frontiers of actionable negligence and I do not regard it as intended to afford guidance on the obligations arising from a relationship so well-known to our jurisprudence and so long the subject of judicial consideration as that of employer and workman.

However, the Court of Appeal were obliged to come properly to grips with the decision eight years later, in the leading case of *Gallagher v McDowell*.[7] This was an action against the builder of a house for injuries sustained by the wife of a tenant by reason of a defective floor. The trial judge, Curran LJ, had withdrawn the case from the jury on a number of grounds, the most significant being that on the basis of *Cavalier v Pope*[8] and other similar cases no duty in tort was owed to the claimant, and that the doctrine in *Donoghue v Stevenson* had no application to defects in real property. Once more the case was presided over by Lord MacDermott LCJ, who held on this occasion that the case fell directly within the ambit of the 'neighbour principle', and that it should be applied unless there was some reason why it should be held inapplicable. In the words of Lord MacDermott LCJ:[9]

> The fact seems to be that the concept of negligence as a separate cause of action developed too late to avoid certain anomalies. The flood it begot submerged parts of the older law but it had to eddy round and leave intact other parts that derived from the forms of action and the notions of an earlier age.

Turning to the cases, Lord MacDermott conceded the continuing existence of the immunity in *Cavalier v Pope*, but declined to give it the wide ambit proposed by the defendants in the case:[10]

> In my opinion, the cases since Donoghue v Stevenson … show that the land-owner's immunities, which I have described as settled before that decision, have not been disturbed by it. But the fact that these immunities arise in relation to defects and dangers on land does not mean that the law imposes no neighbourly duty of reasonable care as respects defects and dangers of that kind. The immunities attach to land-owners as such, and I do not think one is at liberty to jump from that to saying that the law of negligence in relation to what is dangerous draws a clear distinction between what are chattels and what, by attachment or otherwise, from part of the realty. Why should it? Such a distinction does not justify itself, and it is not required by the immunities I have mentioned when one is not dealing with land-owners as such.

The other members of the court, Black LJ and Sheil J, agreed with Lord MacDermott on this point. In the words of Black LJ:[11]

> After fully considering the English authorities I do not see that any of them should preclude us from holding that the respondents as builders of the house were under a liability on the lines of Donoghue v Stevenson … to those who would eventually occupy the house and to their servants and guests in respect of any defects in the construction of the house which would not have been discoverable on such examination as the builders would reasonably have contemplated….

Another significant case worth citing in this connection is *McIlveen v Charlesworth Developments*,[12] an action for injuries sustained following the collapse of a child's pushchair. Once again the case was withdrawn from the jury by the trial judge, Jones J, this time on the ground that the claimant had examined the pushchair before using it, so bringing the case outside the ambit of the doctrine in *Donoghue v Stevenson*. However, the Court of Appeal, while certainly conceding the relevance of the point, declined to elevate it into a rule of law. In the words of Lowry LCJ:[13]

> In my opinion one has to decide who is the manufacturer's neighbour by seeing in what consumer's hands the article is likely to be used in the state in which it leaves the factory. There can be more than one class of neighbour, both the hairdresser and the customer, when a hair-dryer is being used or a shampoo applied; the pusher and the child in the case of a pram; the driver, the passengers and the passers-by in the case of a motor-car. Once the relationship with "my neighbour" is established, the duty arises; a duty to take reasonable care to protect the neighbour from risks of injury which can reasonably be foreseen. That duty does not cease to exist because there is a possibility or probability of inspection by an intermediary or by the neighbour himself before the article is taken into use. If an inspection is certain and will reveal the defect and the person making the inspection will appreciate the danger, then no doubt a risk to the neighbour is not reasonably foreseeable, but such considerations raise questions of fact which will usually be questions for the jury.

What we see in these cases is an approach not dissimilar to that promulgated by Lord Reid in *Dorset Yacht Co v Home Office*[14] and by Lord Wilberforce in *Anns v Merton London Borough Council*,[15] whereby the principle in *Donoghue v Stevenson*, whilst not conclusive, is taken as a recognised starting point that should be applied unless there are good reasons to the contrary. That said, the retreat from the principle in later years is equally clearly reflected in the Northern Ireland decisions, most notably that of the Court of Appeal in *Robinson v Edgar*.[16] This was a case in which the owner and driver of a car sought to claim against a Department of Environment vehicle inspector for negligently issuing a MoT certificate. The brakes of the car subsequently failed, causing injury to the claimant, but the Court of Appeal declined to extend liability in this case, saying that the purpose of the MoT testing regime was to protect other road users, not the owner of the vehicle in question. The case involved some discussion of the current state of the law of negligence in general and of *Donoghue v Stevenson* in particular. In this connection Kelly LJ drew particular attention to the problems inherent in the approach of Lord Wilberforce in *Anns*, concluding that it had had its day, and that:[17]

> The preferred test appears to be in more general terms and it can be stated as whether taking all the relevant circumstances of the case into account, it is just and reasonable that the particular defendant owed the particular plaintiff a duty of care of the scope contended for.

What we see here is the tendency mentioned earlier, whereby the Northern Ireland courts follow the lead of their English counterparts in areas where the law of the two jurisdictions is the same. Thus there are cases where we see the Northern Ireland courts applying the then-current three stage approach in *Caparo Industries plc v Dickman*,[18] and no doubt if and when the issue comes up again the Northern Ireland courts will, as is their custom, take on board other more recent developments in the English courts.[19]

IV. THE ROLE OF THE JURY [§13.4]

So far then, there would be little to distinguish the approach taken in Northern Ireland to that taken in England and Wales. However, what is worth noting in the present connection is the extent to which, at least in its heyday, the approach to *Donoghue v Stevenson* in this jurisdiction was affected by the continuing use of juries for personal injury actions.[20] What this meant was a much more structured approach in which judges had to be careful to preserve the proper role of the jury in relation to questions of fact, the general rule being that it was for the judge to decide whether there was evidence of negligence on the defendant's part fit to go to the jury, and then (assuming this to be the case) for the jury to decide whether on the facts the defendant had been negligent.[21] It has been said that whether or not a duty of care exists on the basis of given facts is a question of law,[22] but this is something of an over-simplification, at least as far as Northern Ireland is concerned. On the contrary, the jury historically had an important role in dealing with the issue of proximity. Thus in *Gallagher v McDowell*[23] one of the grounds relied on by the defendant was that there was no evidence to show that the injury

to the claimant was foreseeable, but this was abandoned on appeal,[24] Black LJ remarking that this was essentially a matter for the jury.[25] The question was also particularly prominent in *McIlveen v Charlesworth*,[26] where it was argued by the defence that the opportunity of intermediate examination prevented the duty from arising.[27] In his judgement Lowry LCJ took particular exception to this, saying that the presence or absence of such an opportunity might indeed be relevant, but that the question was one for the jury at the end of the day.[28] In this connection he then went on to deprecate the tendency to embroider what he called the 'true and pure doctrine'[29] of *Donoghue v Stevenson* with 'a spurious set of rules of law'[30] which were in truth only matters to be taken into account by the jury in deciding whether the necessary degree of proximity existed. Indeed, this fact based approach can even be seen in later cases. One example is *Maguire v Fermanagh District Council*[31] in 1996, a case involving injuries incurred by someone who dived into the shallow end of the defendant's swimming pool. In addressing the issue of whether the necessary degree of proximity had been shown, Lord Hutton LCJ followed the approach of the Privy Council in *The Wagon Mound (No 2)*[32] and of the High Court of Australia in *Wyong Shire Council v Shirt*,[33] citing with approval the following passage from the judgement of Mason J:[34]

> In deciding whether there has been a breach of the duty of care the tribunal of fact must first ask itself whether a reasonable man in the defendant's position would have foreseen that his conduct involved a risk of injury to the plaintiff or to a class of persons including the plaintiff. If the answer be in the affirmative, it is then for the tribunal of fact to determine what a reasonable man would do by way of response to the risk.

V. SIGNIFICANCE [§13.5]

As far as the present approach of the Northern Ireland courts is concerned, all of this is largely a matter of past history. However, it is worth asking what difference it might have made if juries had been retained in Northern Ireland for personal injury actions. The answer seems to be that it would have made a difference in relation to three key sets of players in the legal system, the first being judges, the second litigants and the wider public, and the third textbook writers and students.

As far as judges are concerned, a good starting point for our analysis is the famous observation of Denning LJ (as he then was) in *Roe v Ministry of Health*[35] that the basic elements of negligence overlap to a considerable degree, and that they are simply three different ways of looking at the one and the same problem.[36] Some years later, as Master of the Rolls in *Spartan Steel & Alloys Ltd v Martin*,[37] a case involving recovery of economic loss, he suggested that at the end of the day it did not matter whether the question of recovery was couched in terms of duty or remoteness, saying:[38]

> The more I think about these cases, the more difficult I find it to put each into its proper pigeon-hole. Sometimes I say: "There was no duty." In others I say: "The damage was too remote." So much so that I think the time has come to discard those tests which have proved so elusive. It seems to me better to consider the particular relationship in hand, and see whether or not, as a matter of policy, economic loss should be recoverable, or not.

This may or may not be a helpful approach, but it is certainly not an approach that can be applied in the context of a jury-based system, where the functions of judge and jury, as in the more serious criminal cases, have to be kept separate. Indeed, it might very well be said that whereas in England and Wales from 1933 onwards personal injury actions were *decided* by the judge, the judge in Northern Ireland prior to 1987 was merely a *gatekeeper*, his or her function being merely to filter out the hopeless cases and to leave the others for the jury to decide.

What of litigants and the wider public? In 1987, on the eve of the abolition of the civil jury for personal injury actions in Northern Ireland, the Solicitor General (Sir Nicholas Lyell)

delivered a report to the House of Commons discussing the impact of the forthcoming reform.[39] In this he observed that most such cases were still set down for jury trial, though the vast majority of these were settled out of court. He then added that the abolition of jury trial for these cases was opposed by the legal professions and by the trade unions, but that it was supported by other organisations, including the insurance industry. This ties in well with two well-documented perceptions,[40] one being the existence of a 'compensation culture' in the UK[41] and the other a more generalised fear of excessive and arbitrary awards of damages by juries.[42] Mark well that the first of these persists here even in the absence of jury trial; one can only imagine how much worse it would be in the context of a jury based system such as that seen in Northern Ireland prior to 1987 and in other parts of the common law world to this day.

Finally, we have textbook writers and students. One striking feature for the researcher is the amount of space that is devoted by old tort textbooks to the dividing line between issues of fact and issues of law,[43] a tendency that can still be seen in those jurisdictions which continue to use civil juries for personal injury actions.[44] At first glance this might seem to suggest that students of the subject might have an easier task in the context of the current system, but this does not necessarily follow: indeed, it has been said that students find negligence difficult because of its 'vagueness', a factor which stems from the lack of a clear dividing line between the different concepts involved and the overarching influence of policy considerations.[45] This is certainly something with which those of us who have taught in the area can well identify.

VI. CONCLUSION [§13.6]

Be that as it may, a law of negligence based on the Northern Ireland model would certainly work in a different way to that of England and Wales. Whether the courts would reach different conclusions is another matter, but to a certain extent the practice of law is as much an art as a science,[46] in which appearance can be as important as reality.[47] By all accounts the jury-based system in Northern Ireland seems to have worked reasonably well, and to that extent it still provides a different model to the one to which we have now become accustomed in these islands. On this basis one can conclude that Cinderella has certainly made her own modest but distinct contribution to the debate, and therefore well deserves her ticket to the *Donoghue v Stevenson* ball.

NOTES

1 Northern Ireland covers 14,130 square kilometres and Yorkshire 11,903.

2 The population of Northern Ireland currently stands at about 1.85 million, as opposed to over 5 million in Yorkshire.

3 This information can be seen from the Northern Ireland Law Reports.

4 Decisions of the UK Supreme Court are binding, but not those of the higher courts in England and Wales or in Scotland: Dickson, Brice, *Law in Northern Ireland* (2nd edn, 2013), para 4.41.

5 [1953] NI 131.

6 [1953] NI 131 at 137.

7 [1961] NI 26; cf *McCutcheon v McCaw and Anor* [1992] NI 337.

8 [1906] AC 428.

9 [1961] NI 26 at 32; cf *Brady v NIHE* [1990] NI 200.

10 [1961] NI 26 at 38.

11 [1961] NI 26 at 56.

12 [1973] NI 216.

13 [1973] NI 216 at 221.

14 [1970] AC 1004 at 1077.

15 [1978] AC 728 at 751-752.

16 Unreported Judgment, [1989] Lexis Citation 3614.

17 Above, n 16.

18 [1990] 2 AC 605; *O'Dwyer and Others v Chief Constable (RUC)* [1997] NI 403; *Connolly v PSNI* [2006] NIQB 98. Cf *McKinley v Montgomery and Others* [1993] NI 93 (no 'undertaking of responsibility' by club committee).

19 As in *Robinson v Chief Constable of West Yorkshire* [2018] UKSC 4, [2018] AC 736; *Darnley v Croydon Health Services NHS Trust* [2018] UKSC 50, [2019] AC 831, *Poole Borough Council v GN* [2019] UKSC 25, [2020] AC 780 and other cases discussed elsewhere in this volume.

20 The right to jury trial in personal injury cases survived in Northern Ireland until it was removed by article 2 of the Jury Trial (Amendment) (NI) Order 1987: McClean, J A L, 'The Supreme Court of Judicature of Northern Ireland: Some Developments since 1921' (1972) 23 *Northern Ireland Legal Quarterly* 82. The position was much the same in Ireland south of the border up until 1988: see section 1 of the Courts Act 1988. In England and Wales, by contrast, it was removed by section 6 of the Administration of Justice (Miscellaneous Provisions) Act 1933, and though it can still be ordered by the judge, this should only be done in exceptional cases: see *Ward v James* [1966] QB 273; Lloyd-Bostock, Sally and Cheryl Thomas, 'Decline of the "Little Parliament": Juries and Jury Reform in England and Wales' (1999) 62 *Current Legal Problems* 7. Trial by jury in civil cases was introduced into Scotland in 1815, but was never very popular: see Fleming, Rufus, 'Scottish Jury Landmarks in the History of Jury Trial' (1906-7) 5 *Michigan Law Review* 520; Smith, TB, 'Civil Jury Trial – a Scottish Assessment' (1964) 50 *Virginia Law Review* 1076. It is still available there, however, and has recently even been extended from the Court of Session to the Sheriff Court by section 63 of the Courts Reform (Scotland) Act 2014.

21 *Bridges v North London Rly Co* (1874) LR 7 HL 213; *Beven on Negligence* (4th edn, 1928), pp 141-164.

22 See *Charlesworth and Percy on Negligence* (13th edn, 2014), para 2.01 and the cases cited there.

23 Above, n 7.

24 [1961] NI 26 at 29.

25 [1961] NI 26 at 46. The position seems to have been that the existence of a 'notional duty' was a question of law, but that it was for the jury to decide whether a duty arose on the facts of the case: *Clerk and Lindsell on Torts* (20th edn, 2010) at paras 8.06-8.07.

26 Above, n 12.

27 [1973] NI 216 at 218.

28 [1973] NI 216 at 221.

29 Above, n 28.

30 [1973] NI 216 at 222.

31 [1996] NI 10 (Lord Hutton LCJ and McCollum LJ, Girvan LJ dissenting).

32 *Overseas Tankship UK Ltd v Miller Steamship Co Pty* [1967] 1 AC 617.

33 (1980) 146 CLR 40.

34 (1980) 146 CLR 40 at 47-48; [1996] NI 110 at 120.

35 [1954] QB 66.

36 [1954] QB 66 at 86.

37 [1973] QB 27.

38 [1973] QB 27 at 37.

39 Hansard, HC Deb 07 July 1987 vol 119 cc 316-314.

40 Whether these perceptions are accurate is neither here nor there, though the research cited below suggests that for the most part they are not.

41 See for instance Williams, Kevin, 'State of fear: Britain's "compensation culture" reviewed' (2005) 25 *Legal Studies* 499; Lewis, Richard, Annette Morris, and Ken Oliphant, 'Tort personal injury claims statistics: Is there a compensation culture in the United Kingdom?' (2006) <papers.ssrn.com>; Quill, Eoin and Raymond Friel (eds), *Damages and Compensation Culture: Comparative Perspectives* (2016).

42 See for instance Levett, Lora M, et al 'The Psychology of Jury and Juror Decision Making' (2005) <apa.psychnet.org>; Litan, Robert E (ed), *Verdict: Assessing the Civil Jury System* (2011); Bornstein, Brian and Edie Greene, *The Jury under Fire: Myth, Controversy and Reform* (2017), chapter 10.

43 See for instance *Beven on Negligence* (4th edn, 1928), pp 141-164; *Pollock's Law of Torts* (14th edn, 1939), pp 353-366.

44 For the United States see Green, Leon, *Judge and Jury* (1930); Harper, Fowler V and Fleming James, *Law of Torts* (1956), chapter 15; Fleming, John G, *The Law of Torts* (6th edn, 1983), chapter 13; Fleming, John G, *The American Tort Process* (1988), chapter 4.

45 Hedley, Steven, *Tort* (7th edn, 2011), p 20. In the context of legal analysis this also means that there is no opportunity for the more perceptive student, as in the context of criminal law, to sideline issues of fact and concentrate on those of law.

46 There is a considerable literature on this topic, but see Bagnall, Gary, *Law as Art* (1996); Douzinas, Costas, and Lynda Nead. *Law and the Image: the Authority of Art and the Aesthetics of Law* (1999); Ben-Dor, Oren (ed) *Law and Art* (2012).

47 As with the Parthenon in Athens, where the columns bulge to make them look straight!

CHAPTER 14

The Snail and Crime

I. AUTHOR BIO [§14.1]

Lady Paton was appointed chair of the Scottish Law Commission in 2019. She was appointed as a judge in January 2000 and as an appeal court judge and privy counsellor in April 2007.

She is a graduate of Glasgow University (MA, LLB) and was admitted to the Faculty of Advocates in 1977. She was appointed Queen's Counsel in 1990.

She was Standing Junior Counsel to the Queen's and Lord Treasurer's Remembrancer from 1979 to 1981, and to the Office of Fair Trading from 1981 until 1985. She served as an advocate depute from 1992 to 1994. Lady Paton was a member of the Criminal Injuries Compensation Board and a director of the Scottish Council of Law Reporting from 1995 until her appointment as a judge. She was a member of the Parole Board for Scotland from 2003 until 2007 and chaired the Personal Injuries User Group in the Court of Session (2003 to 2008).

Her publications include "Damages for Personal Injuries in Scotland" (2nd Edition, 1989), and she was an assistant editor on the 8th, 9th and 10th editions of Gloag and Henderson, "The Law of Scotland". She chaired the Judicial Studies Working Party in Scotland, responsible for the Scottish Equal Treatment Benchbook: guidance for the judiciary (1st edition 2002; 2nd edition 2008).

II. THE SNAIL'S TRAIL IN CRIMINAL LAW [§14.2]

The famous case of the snail in the bottle[1] influenced not only civil law, but also criminal law. A whole jurisprudence of criminal negligence developed. Traditional concepts underpinning criminal law, such as evil intent, violence, and dishonesty, were expanded to include criminal offences committed by negligence, by failing to show the appropriate care for one's neighbour.[2] Judges developed the criminal law using neighbour principles and policy; legislative bodies passed criminal law statutes incorporating the neighbour ethos.

However, the "snail" criminal law evolved differently in different jurisdictions. One very clear illustration is the contrast between the criminal law of England and Wales and that of Scotland.

III. GROSS NEGLIGENCE MANSLAUGHTER IN ENGLAND AND WALES [§14.3]

In England and Wales, if negligence results in a death, there may be a prosecution for the criminal offence of "gross negligence manslaughter". Such prosecutions might occur where a person carrying out a job requiring special skill or care, such as a doctor, a consultant (for example, an anaesthetist), a pharmacist, an optometrist, an electrician, a gas installer, a policeman, a prison officer, or a ship's captain, failed to meet the expected standard and as a result caused a death.[3] The offence may be one of omission, where a duty of care was owed to an individual, the duty was neglected, and the individual died.[4] A civil practitioner might be forgiven for thinking that the foregoing brief summary must be referring to a civil claim, but these were criminal prosecutions.

Some recent decisions illustrate the wide reach of, and the broad "neighbour" principle underlying, the English offence of gross negligence manslaughter.

The leading case of *R v Adomako* [1995] 1 AC 171 concerned an anaesthetist who failed to notice that a tube had become disconnected from a ventilator. The patient suffered a cardiac arrest and died. The jury convicted of gross negligence manslaughter. The anaesthetist appealed. The House of Lords held that the ordinary principles of the law of negligence applied to ascertain whether the defendant had been in breach of a duty of care owed to the victim. However, the question whether a breach of duty was "gross" (and therefore a crime) was left entirely to the jury: it was for the jury to decide whether, having regard to the risk of death involved, the defendant's conduct was so bad in all the circumstances as to amount to a criminal act or omission. The anaesthetist's appeal was dismissed.

In another case decided in the Court of Appeal in 2019, *R v Kuddus* [2019] 1 WLR 5199, a takeaway company received an online order where the consumer had entered "nuts, prawns" in the allergy section. The food supplied caused an allergic reaction, and the consumer died. The sole director of the company (who was also the chef) was convicted of gross negligence manslaughter by a jury. He appealed. The Court of Appeal accepted that the chef/director had a duty to take reasonable steps not to injure members of the class of nut allergy sufferers; but since the defendant had apparently not been told about the allergy, a reasonable person in his position would not have foreseen an obvious and serious risk of death by serving the food he did; and, therefore, the trial judge's direction concerning knowledge rendered the defendant's conviction unsafe. The appeal was allowed, and the conviction was quashed.

And in a third case, a recent Court of Appeal decision in *R v Broughton* [2021] 1 WLR 543 concerned the death of a young girl at a music festival. She suffered a reaction to class A drugs, supplied by her boyfriend. The prosecution argued that the defendant, having supplied the drugs and remained with her, owed her a duty of care to secure timely medical assistance when her condition deteriorated to the point where her life was obviously in danger. A jury convicted him of gross negligence manslaughter. The boyfriend appealed. The Court of Appeal held that the medical evidence led by the prosecution had been incapable of proving causation to the criminal standard of proof. The appeal was allowed, and the conviction quashed.

In all those criminal cases, the neighbour principle first enunciated by Lord Atkin lay at the heart of the courts' reasoning. *Adomako* is concerned with the degree of negligence; *Kuddus* with the necessary knowledge; and *Broughton* with causation: all akin to civil law type issues, often arising in reparation claims for which *Donoghue v Stevenson* was a foundation stone.

IV. NO CLEAR EQUIVALENT OFFENCE IN SCOTLAND [§14.4]

By contrast in Scotland, it is less clear whether there is, or even whether there should be, a category of crime equivalent to gross negligence manslaughter. Criminal prosecutions of

persons carrying out jobs requiring special skill or care are rare. While there was a period in the 19th century when criminal prosecutions proceeded on the basis of careless behaviour, the development of that particular jurisprudence appears to have come to a halt, partly as a result of the emergence of health and safety legislation, partly due to discretionary decisions taken by the Lord Advocate in the Crown Office, and partly due to the general policy being adopted by the government.

V. CONTENTIOUS QUESTION: TO WHAT EXTENT SHOULD NEGLIGENCE BE CRIMINALISED? [§14.5]

In the civil law context, *Donoghue v Stevenson* opened the door to a new era of reparation claims based on the neighbour principle. An injured person could seek to recover damages from the wrongdoer despite the lack of a contract or other traditional ground for such a claim. But this significant decision was not an easy one. The decision was by a majority of 3 to 2. The minority comprised Lord Tomlin and the chair of the court, Lord Buckmaster, who had serious reservations about the path being followed by the majority. Quoting from two established authorities,[5] his view was that:

> … The only safe rule is to confine the right to recover [damages] to those who enter into the contract; if we go one step beyond that, there is no reason why we should not go fifty … In a case like the present, where the goods of the defenders are widely distributed throughout Scotland, it would seem little short of outrageous to make them responsible to members of the public for the condition of the contents of every bottle which issues from their works …[6]

Thus, the major development which *Donoghue v Stevenson* represented emerged from a serious disagreement amongst the most respected jurists of the day.

The same polarisation of views can be detected when it comes to the question of criminalising negligent behaviour.[7] Some take the view that it is not appropriate, in a civilised society, to have the threat of a criminal prosecution hanging over professionals or others with special skills if they fail to meet the standard expected of them by their profession or trade. It might be suggested that such professionals and others are endeavouring to give society the benefit of their training and skills, an approach and motivation in complete contrast to that underlying offences of violence and dishonesty. While civil claims for damages in reparation might be expected, criminal prosecutions and criminal convictions would not be appropriate and could be positively harmful. Moreover, the definition in *Adomako* is criticised as being circular: the jury must convict if they think that any breach of duty was so serious that it should be judged criminal.

In this context the Law Society of Scotland, in their response to the Dame Clare Marx Review of gross negligence manslaughter and culpable homicide, noted the more pronounced criminalisation of cases involving the medical profession in England and Wales, and contrasted that with the situation in Scotland. In Scotland, there might be a Fatal Accident Inquiry, or a civil action for damages, or a disciplinary procedure of some sort,[8] or a statutory prosecution at a low level for breach of regulations. Only very rarely might there be a culpable homicide prosecution.[9]

VI. WHAT OF OTHER JURISDICTIONS? [§14.6]

The comparison between England and Wales on the one hand, and Scotland on the other, is just one example of the different approaches to the criminalisation of negligent behaviour being adopted in different jurisdictions. What is the approach in other jurisdictions such as New Zealand, Australia, the USA, Ireland, India, the Caribbean, Canada, Israel, Nigeria,

South Africa, and other countries? Comments would be welcome. This prestigious worldwide celebration of the Immortal Snail may offer an opportunity for comparison, exchange of ideas, and discussion. That would be a fitting tribute to the Snail in the Bottle, which has, despite its humble origins, become a star in the legal world.

NOTES

1 *Donoghue v Stevenson* 1932 SC (HL) 31, arguably the most important legal policy decision of the 20th century.

2 Lord Atkin in *Donoghue v Stevenson*: "The rule that you are to love your neighbour becomes in law, you must not injure your neighbour … You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour … [i.e.] 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."

3 See Law Commission, *Legislating the Criminal Code: Involuntary Manslaughter*, Law Com No 237 (1996) para 2.8 and following paragraphs.

4 *Ibid* para 2.22.

5 *Winterbottom v Wright*, 10 M & W 109, and *Mullen v Barr* 1929 SC 461.

6 It is perhaps some vindication of Lord Buckmaster's view that, following upon *Donoghue v Stevenson* in 1923,the courts have sought to limit or constrain the extent of its application, often on the basis of policy rather than strict logic or principle. To give two examples, it proved necessary to create "primary" and "secondary" victims in the law relating to nervous shock in order to limit the number of claims (*Page v Smith* [1961] AC 388); and in *Caparo v Dickman* [1990] 2 AC 605it was decided that reasonable foreseeability was not enough; an additional test (whether it is fair, just, and reasonable that a duty of care should be held to exist) was defined.

7 See, for example, Findlay Stark, *Culpable Carelessness* (2016).

8 For example, initiated by the General Medical Council.

9 A rare example of a criminal prosecution of a doctor occurred in 2017, when a doctor gave a friend a cocktail of painkilling drugs. The friend had a cardiac arrest the following day. The trial judge ruled that there was insufficient evidence, and the culpable homicide case did not reach a jury. The doctor was ultimately convicted of drugs offences, given community service, and suspended from practice for a year.

Part 9—Ireland

CHAPTER 15

The Impact of *Donoghue v Stevenson* on Legal Reasoning in Ireland

I. AUTHOR BIO [§15.1]

Ursula Connolly is a graduate of NUI, Galway and of the Katholieke Universiteit Leuven, Belgium, where she was awarded a masters degree specialising in European and International law in 1998. Following the completion of her masters she taught Labour Law at the University of Limerick (1999 – 2001). She has been a lecturer at the School of Law, NUI, Galway since September 2001 where she teaches primarily in the area of Tort Law.

Ursula's research interests focus on the application of traditional tort principles to emerging legal areas, in particular liability for mental injury and liability for internet wrongs. She has developed a postgraduate module on Internet Torts. She is also interested in damages in personal injuries actions and discrimination in employment. Her research is comparative in nature and she is or has been involved in a number of European projects in the areas of Disability Discrimination and European Private Law. She has also acted as a visiting lecturer at the University of Brescia, Italy on the topics of liability for mental injury and damages in personal injuries actions.

Ursula is currently completing a PhD on a part-time basis at the University of Bristol on the Regulation of Non-Discriminatory Occupational Harassment.

She has acted as an external examiner for the Dublin Institute of Technology from 2004 – 2009. She was a Visiting Scholar at the University of California, Berkeley during September 2009 and spent two months at the University of Otago, New Zealand during October and November 2009 researching New Zealand's Accident Compensation Corporation scheme.

II. INTRODUCTION [§15.2]

This paper will discuss how the case of *Donoghue v Stevenson*,[1] and in particular Lord Atkin's judgment, has influenced legal reasoning in Ireland in determining the duty of care question. To do this, I am going to discuss three things:

(1) The importance of *Donoghue v Stevenson* in Ireland: the early years.

(2) Modern jurisprudence: move towards policy and just and reasonable (revised general principles?)

(3) The current role of the 'general principles'.

III. THE IMPORTANCE OF *DONOGHUE V STEVENSON* [§15.3]

It is widely accepted that the approach in *Donoghue v Stevenson* represented a move away from the method of recognising instances of duty in specific contexts, and towards the application of general principles applicable to all situations. This, as we know, facilitated the recognition of a duty of care in all kinds of novel cases, arguably at a speed that would not have been possible without Lord Atkin's bold step.

Lord Atkin in his judgment was clearly inspired by Christian teachings and his life as a devout Christian, steeped in the church and its teachings, is well documented. In his judgment he took the biblical neighbour and what was morally desirable, and fashioned it into a set of general principles to describe what was legally required.

These general principles contained in-built limitations and qualifications, as we can see by the reference to questions of reasonableness and foreseeability. In a further balancing of the responsibilities of both parties, he also referenced the need to consider the possibility of intermediate inspection by the injured party.

The general principles in *Donoghue*, as is well documented, received further attention in the case of *Anns*,[2] with Lord Wilberforce famously endorsing Lord Atkin's general principles and adding the second consideration of whether there were 'any considerations which ought to negative, or to reduce or limit the scope of the duty..'. This support however for broad general principles received a less enthusiastic endorsement in the subsequent decisions of *Caparo*[3] and *Murphy*[4] in 1990 and 1991. These decisions as we know, favoured the more cautious approach adopted in the High Court in Australia, and introduced the additional consideration of whether it was 'fair, just and reasonable' to impose a duty, to the duty of care analysis.

In Ireland however, the progress of the 'snail' was slightly different. We witnessed an enthusiastic adoption of the general principles set out in *Donoghue v Stevenson* and later in *Anns*, right up to 2002, a decade after a narrowing of the approach in the English courts.

The first tussle between the Atkin formulation and pre-existing principles came in two cases heard by the Supreme Court, both involving injury to child trespassers. These were the cases of *Purtill*[5] in 1968 and *McNamara*[6] in 1975. Two things are noteworthy. The first is that they represented an adoption by the Supreme Court of the Atkin formulation. The second is that the adoption was relatively enthusiastic, with limited dissenting voices.

Adoption of the Atkin formulation was influenced in particular by one judge, Mr Justice Walsh. His own philosophy was steeped in the natural law tradition and the right to have an individual's inherent dignity protected by the law. Mr Justice Walsh, adjudicating in both cases, found that a duty was owed to the plaintiffs based on the principles of proximity and foreseeability. He stated simply but significantly in *Purtill*, that

> The duty to those in proximity is not based on any implied term of an invitation or a licence, or upon any warranty for safety which might be thought to be inherent in any such invitation or licence. Rather is it based upon the duty that one man has to those in proximity to him to take reasonable care that they are not injured by his acts.[7]

Highlighting the importance of foreseeability, he went on to say, 'when a danger has been created by a person and it was reasonably foreseeable that the danger might cause injury to those who were proximate to him, it is that person's duty to take care to avoid that injury'.[8]

Only one judge referred to the importance of 'certainty, continuity and predictability' in the law so as to enable people 'to arrange their conduct so as to avoid legal liability' but even

he favoured the adoption of the principles of *Donoghue v Stevenson* as representing a more appropriate law for 'modern social conditions'.[9]

There was no echo of the qualification in *Donoghue* of when the duty might be limited. As we know, Lord Atkin had referred to the relevance of the possibility of an independent examination in determining whether a duty of care would arise. In the Irish cases, there was little reference to what this might mean in property cases. A failure to so in these cases might have been due to the fact that the plaintiffs in both cases were children, with a more limited capacity to make determinations based on known or obvious risks.

So far, we were, to all intents and purposes, mirroring the experience of our neighbouring jurisdictions within the British Isles. This continued with our adoption of *Anns v. Merton London Borough Council*,[10] generally accepted to date from the Supreme Court decision of *Ward v. McMaster*[11]in 1988.

In the most influential of the judgments, that of Mr Justice McCarthy, we can see again affirmation of the use of general principles in deciding the duty of care issue. He cites with approval the High Court judgment in *Ward* where the focus was on proximity between the parties and foreseeability of injury. In terms of the second leg of the *Anns* formulation, he stated that 'there is nothing in the dealing between the parties which should restrict or limit that duty. In particular no warning against reliance on the proposed valuation was given'.[12]

As subsequently happened in *Caparo Industries plc v. Dickman*[13] the proposition of incremental growth as advanced by Justice Brennan in the High Court of Australia in *Sutherland Shire Council v. Heyman*[14] was considered. Unlike the *Caparo* case it was rejected however, with Mr Justice McCarthy stating that it 'suffers from a temporal defect – that rights should be determined by accident of birth'.[15]

With respect to the second leg of *Anns*, Mr Justice McCarthy refashioned this as follows:

> ..I prefer to express the duty as arising from the proximity of the parties, the foreseeability of the damage, and the absence of any compelling exemption based upon public policy.[16]

With respect to questions of public policy he stated that "…. such a consideration must be a very powerful one if it is to be used to deny an injured party his right to redress at the expense of the person or body that injured him".[17]

It is fair to say that this approach, focusing on the first general principles, with a limited role for policy, favoured a finding of the existence of a duty of care.

That approach continued, with no particular enthusiasm espoused for a rejection of the unifying principles of *Donoghue* and *Anns*, until 2002 and the case of *Glencar Exploration p.l.c. v. Mayo County Council (No.2)*[18]and it is to this decision that we next turn.

IV. MODERN JURISPRUDENCE [§15.4]

In what is considered 'the foundation stone of modern jurisprudence on the tort of negligence' in Ireland, Chief Justice Keane stated in *Glencar Exploration p.l.c. v. Mayo County Council (No.2)*[19] that in addition to proximity and foreseeability considerations, 'No injustice would be done if they were also to consider whether it was just and reasonable to impose a duty of care'. In essence, this was an endorsement of the developments in the United Kingdom and Australia, and a move to bring us in line with developments in those jurisdictions.

It also reflected an acceptance of the concerns expressed in other jurisdictions that the *Donoghue* and *Anns* formulations were overbroad, and could give rise to an unfettered extension of liability. This in turn would mean that parties would have to seek insurance

against such potential liability, and furthermore seek to recover that additional cost from their clients and customers, or risk claims and additional costs. Concerns were also raised that an overbroad formulation would interfere with other areas of the law, in particular contract law, although this concern is not widely reflected in the Irish caselaw.

Although the case of *Glencar* marked the introduction of the *Caparo* formulation into Irish law, there remained some confusion as to when the principles were to be applied. Were the principles of proximity and foreseeability, policy considerations and the further step of determining that it was fair, just and reasonable to impose a duty of care, to be applied in all situations? Or only in some? And in the cases where it was applied, what was the approach to be?

This confusion was resolved by the Supreme Court in 2014 in the case of *Whelan v. Allied Irish Bank*.[20]In that case, Mr Justice O'Donnell reversed the finding of the High Court and stated that the third step of considering whether it was fair, just and reasonable to impose a duty, would only be applied in novel situations where a duty of care had not hitherto been found to exist.

He also clarified how the fair, just and reasonable principle was to be determined. Affirming in an obiter statement, the statement by Lord Browne-Wilkinson in *Barrett v. Enfield Council*,[21]he stated that 'Questions of public policy and the question whether it is fair and reasonable to impose liability in negligence are decided as questions of law' by weighing up the detriment to the public interest from finding a duty of care against the detriment to would-be-plaintiffs if they were denied a claim.

In terms of what the inclusion of the 'just and reasonable' step means for claimants, it is broadly accepted as representing a rebalancing of the position between the plaintiff and the defendant and as representing a more conservative approach to resolving the duty of care question.

V. CURRENT APPROACH [§15.5]

The Irish Supreme Court has recently reiterated the necessity to apply these general principles when determining the extent of the duty of care in novel cases. The case, that of *University College Cork National University of Ireland v. The Electricity Supply Board*[22] is worthy of a brief moment of discussion for two reasons. It is one of the most significant cases to come before the Irish courts that deal with the question of when a duty is owed when the defendant has not directly caused the harm by a positive act, and where the defendant does not come within the established categories of those who owe a duty. The second point of note is that the judges were not ad idem as to the approach to be adopted.

In brief, the case involved the determination by an Irish court, for the first time, of the extent of the duty of care owed by a dam operator to avoid flooding to another party. The only statutory obligation of the dam operator was to maximise the generation of electricity. The court accepted on the facts that the dam operator 'did not worsen nature' by adding to the flow of water downstream. The 'do not worsen nature' principle has been influential in the US cases involving dam operators. Nor had the dam operator breached the 'do not harm' principle. Nonetheless, flooding occurred to the plaintiff's property downstream, and they argued that had the defendants managed the flow of water differently it would have reduced the damage caused by the floodwater, or prevented it entirely. It fell to be decided therefore whether the dam operators owed a duty to do so and what principles should be applied in determining the duty of care question when harm arises from a danger not created by the alleged wrongdoer.

The majority first stated that 'this Court must act in a way which is consistent with general principles and with the proper approach to the evolution of the common law'.[23] They then

went on to adopt the principle set out in *Robinson v. Chief Constable of West Yorkshire* that a duty of care can arise where the alleged wrongdoer has a 'special level of control' over the thing that does harm. As they determined this to apply in this case, a duty of care was found.

In the minority, the now Chief Justice referred to the general principles of proximity, foreseeability, and given the novelty of the case, whether it was fair, just and reasonable to impose a duty of care. Based on those principles, he did not find a duty of care. He considered the formulation adopted by the majority, but stated that even if that formulation was adopted, it could not be said that the dam operator was in control of the source of flooding.

It remains to be seen what will happen in subsequent novel cases where the question of a duty of care falls to be determined as to whether the characterisation of *Robinson* will be followed or whether the existence of a duty will be determined by reference to the general principles only.

VI. CONCLUSION [§15.6]

As final thoughts and in conclusion, *Donoghue v Stevenson* continues to exert a considerable influence. It led to an expansion of situations in which a duty was recognised at a speed unlikely to have been achieved otherwise. The Irish reluctance to curtail the expansion by reference to 'whether it was fair, just and reasonable' to do so, did not survive beyond the early part of this century. As with the position elsewhere, the general principles are now applied in novel cases, where the 'just and reasonable' step is understood to involve a balancing between the parties. More recently in Ireland, there is a pull towards the further refinement favoured in *Robinson* but it is not a refinement that has found universal support. That the support is least forthcoming from the current Chief Justice may be significant.

Notwithstanding these reflections, as we know there is not a student of law who will not be familiar with the case, and that, if nothing else, is a testament to its enduring legacy.

NOTES

1 [1932] AC 562

2 *Anns v Merton Urbon District Council* [1978] AC 728.

3 *Caparo v Dickman* [1990] 2 AC 605.

4 *Murphy v Brentwood District Council* [1991] 1 AC 398.

5 [1968] IR 205.

6 [1975] IR 337.

7 *Purtill v Athlone Urban District Council* [1968] IR 205, 212.

8 *McNamara v ESB* [1975] IR 337, [21] (Mr Justice Walsh).

9 *McNamara v ESB* [1975] IR 337, [23] (Mr Justice Henchy).

10 [1978] AC 728.

11 [1988] IR 337 (Supreme Court).

12 ibid 346, Mr Justice McCarthy citing Mr Justice Costello in *Ward v McMaster* [1985] IR 29, 52 (High Court).

13 [1990] 2 AC 605.

14 [1985] 157 CLR 424.

15 *Ward v McMaster* [1988] 1 IR 337, 347.

16 *Ward v McMaster* [1988] 1 IR 337, 349.

17 Ibid.

18 [2002] 1 IR 84.

19 [2002] 1 IR 84.

20 [2014] IESC 3, [2014] 2 IR 199.

21 [2001] 2 AC 550, 559-560.

22 [2021] IESC 21.

23 *University College Cork v Electricity Supply Board* [2022] IESC, [10.3] (Clarke CJ).

Part 10—Caribbean

CHAPTER 16

The Immortal Snail Itself: Why Does *Donoghue v Stevenson* Still Resonate? – A View from the Caribbean

I. AUTHOR BIO [§16.1]

The Honourable Mr. Justice Adrian Saunders, President, Caribbean Court of Justice, and a native of St. Vincent and the Grenadines, holds a Bachelor of Laws degree from the University of the West Indies (Cave Hill) in 1975 and a Legal Education Certificate from the Hugh Wooding Law School in Trinidad & Tobago in 1977. He began his legal career as a barrister and solicitor in private practice in his home country.

In 1990, he established the firm of Saunders & Huggins before being invited to join the Eastern Caribbean Supreme Court (ECSC) High Court Bench in 1996. On 1st May 2003, Mr. Justice Saunders was appointed to the ECSC's Court of Appeal and served as acting Chief Justice between 2004 and 2005.

While at the ECSC, Mr. Justice Saunders developed a passion for and was deeply involved in various judicial reform efforts. These included the introduction of court-connected mediation in the Eastern Caribbean and the development of that Court's first Judicial Code of Ethics.

He also served as Chairman of the ECSC's Judicial Education Institute from 2001 to 2004. His work in judicial education has continued with the Commonwealth Judicial Education Institute (CJEI). He earned a Fellowship of the CJEI in 1998 and, he is currently and has been for several years the Course Director of The CJEI's Intensive Study Programme. He is also one of the Institute's Directors.

In 2005, Mr. Justice Saunders was among the first cohort of judges to join the Caribbean Court of Justice (CCJ) bench. Mr. Justice Saunders has contributed greatly to regional judicial outreach and judicial education efforts. He is a founding member of the Caribbean Association of Judicial Officers (CAJO) and has served as the organization's Chairman since its inception in 2009.

Due to his active engagement in advancing judicial integrity, Mr. Justice Saunders has recently been appointed to serve on the Advisory Board of the Global Judicial Integrity Network by the United Nations Office on Drugs and Crime's (UNODC) Global Programme for the Implementation of the Doha Declaration.

Mr. Justice Saunders' interests also extend to the area of court administration where he has adopted an active role in the CCJ's public education and other strategic projects. He led the development of the Court's first Strategic Plan in 2012 and currently chairs the ongoing project to develop and execute the Strategic Plan for 2018-2023.

Mr. Justice Saunders has written many legal articles and publications and is a Consulting Editor of *The Caribbean Civil Court Practice* and a co-author of *Fundamentals of Caribbean Constitutional Law*. He serves as Chairman of the Caribbean Association of Judicial Officers which, in collaboration with UN Women, played a leading role in developing and promoting the adoption of Gender Sensitive Protocols for Judicial Officers for various Caribbean judiciaries. He also lectures part time at The UWI, St Augustine Faculty of Law on Constitutional Law.

At its 29th Intersessional Meeting in Port-au-Prince, Haiti, in February 2018, the Caribbean Community Heads of Government agreed to the recommendation of the Regional and Judicial Legal Services Commission (RJLSC) that the Honourable Mr. Justice Adrian Saunders be appointed President of the Caribbean Court of Justice. He became President of the Caribbean Court of Justice on 4 July 2018.

The huge assistance of Denys Barrow, Chumah Amaefule and Jacinth Smith are gratefully appreciated.

II. INTRODUCTION [§16.2]

The tort of negligence is a fundamental feature of the common law; that legal system that invites judges, incrementally, to shape and to expand the law, in partnership with the legislature. And since 1932, I reckon that every student of tort law throughout the Commonwealth, in their first semester, has come across, and been fascinated by the dispute involving the snail in the bottle. The striking nature of the gruesome facts, tersely recounted in the judgments; the magisterial analyses of the prevailing law and the simplicity of Lord Atkin's inspired deployment of the biblical injunction to 'love thy neighbour', so indelibly imprint themselves on one's senses that it takes some time before it is appreciated that the celebrated judgment does not itself reveal the answers to such questions as whether poor Mrs Donoghue (who is actually described in the heading of the case as a pauper) ultimately succeeded in her action. If she did, how much compensation did she receive? And were the damages obtained close to what she thought was satisfactory? Those were naturally critical questions, at least for the goodly lady; but, as students of the law, we were more enthralled by the ambitious, and for the most part successful, attempt at systematising and clarifying the law of negligence and the prospects the 'neighbour principle' opened up for expanding the liabilities of those who caused harm by their carelessness.

Yes, the 90th Anniversary of *Donoghue v Stevenson*[1] is an occasion worthy of celebration and I wish to thank the Law Society of Scotland for affording me the opportunity, no, the privilege to participate in today's commemoration. It has been a profitable experience. In a friendly chat held a few weeks ago among fellow presenters and our Scottish organisers, I learned for the first time the answers to *all* the aforementioned questions, and more, which their Lordships' judgment did not and could not reveal.

III. *DONOGHUE V STEVENSON* IN CARIBBEAN CASES [§16.3]

In preparation for today's event, I asked my court's Chief Librarian to run a search of *Donoghue v Stevenson* on a database that features Caribbean cases. Unsurprisingly, it turns out that over the last 10 years, the case was directly applied, or followed, or at least specifically cited, on dozens of occasions by judges of all stripes throughout the Caribbean region. And, in a Belizean case[2], a Mr Anthony Barnett suffered an experience that was eerily similar to that which confronted Mrs Donoghue.

Mr Barnett had purchased a bottle of Belikin stout at a restaurant. The bartender opened the bottle in his presence and handed it over. What occurred next is graphically captured in the law report[3] – the appellant,

> [T]ook one sip, then another, and tasted some 'slimy stuff' in it of which he complained to the bartender. They both went outside where the appellant poured out the contents of the bottle and there fell out what he described as 'a slimy thing about an inch and a quarter, shaped and coloured blackish brown like a toad'.

Barnett sued the brewery.

In considering the case, the trial judge actually did a visual inspection of the entire manufacturing process before deciding that the defendant was not negligent. The judge surmised that the bottle must have been previously opened at the restaurant and the cap manually replaced. The judge's decision was reversed. The Court of Appeal criticised the manner in which the visit to the factory was conducted and the evidence obtained there collected and deployed. Applying *Donoghue* and the Latin maxim *res ipsa loquitur*, the court held that the brewing company had not provided any facts to rebut the presumption that it had been negligent. As to the question of damages, the President of the Court of Appeal, Sir John Summerfield, expressly stated that he was influenced by the fact that, 'the modern approach to the equality of the sexes notwithstanding ,… a robust male police officer … [was] likely to be less sensitive' to such 'unpleasant' experiences than Mrs Donoghue was some 50 years earlier.[4] Mr Barnett's general damages were assessed at the equivalent of US$375.

The countries of the Commonwealth Caribbean do have enough in common with each other such that a shared approach to *Donoghue* and, generally, to the development of the tort of negligence should be feasible. The West Indian Reports collate, at least annually, many (though not all) of the salient judgments delivered by the courts of the various territories. Beginning in the 1970s most persons called to the Bar in the region have been trained at one of the region's three Law Schools, whether in Trinidad and Tobago, Jamaica or The Bahamas, all run by a single entity - the Council of Legal Education. Several Caribbean authored legal texts package and explain Caribbean law, including Professor Kodilyne's *Commonwealth Caribbean Tort Law*[5] which I gratefully drew on for today's exercise. In 2005, my court, the Caribbean Court of Justice or CCJ, was established, in part to replace the Judicial Committee of the Privy Council as a final court of appeal for the independent English-speaking States of the Caribbean.

Notwithstanding these developments, it would be an error to believe that, throughout the Anglophone Caribbean, the law has developed or is developing in a uniform manner. Only four States have to date availed themselves of the opportunity to make the Caribbean Court of Justice their final court of appeal. The majority, including the most populous States of Jamaica and Trinidad and Tobago, still use the Judicial Committee of the Privy Council. Hopefully, that will change over time. It really should, because appeals to a final court are pursued invariably in the cases where the law is uncertain; where interpretation admits of two or more rational answers; where the law is possibly out of step with the ongoing march of an advancing society. For a court, sited in London and comprising British judges who do not reside in the Caribbean, to continue to prescribe for the region in policy-laden circumstances is unfortunate. So far as the tort of negligence is concerned, if and when a precedent must be established as to whether a new duty situation must be held to arise, it helps if the precedent setting court comprised judges who are fully alive to the nuances of the prevailing social, economic and cultural context and, importantly, who experience for themselves the real life consequences of the precedent they set.

The CCJ, in one of its early cases of *Attorney General v Joseph*,[6] staked out a position on this issue of precedent. We emphasized that, and I quote:

> the main purpose in establishing the CCJ is to promote the development of a Caribbean jurisprudence, a goal which Caribbean courts are best equipped to pursue. In the promotion of such a jurisprudence, we shall naturally consider very carefully and respectfully the opinions of the final courts of other Commonwealth countries and particularly, the judgments of the JCPC which determine the law for those Caribbean states that accept the Judicial Committee as their final appellate court.[7]

Over the course of its 17-year existence, the Caribbean Court of Justice has had occasion to address only a few cases of negligence, none of which required a serious reconsideration of existing authorities. This has meant that, for the most part, Caribbean courts instinctively look to English decisions as a guide; but the manner of application of those decisions has been characterized by unevenness and inconsistency, especially given the refinements made in the United Kingdom to *Donoghue.* As many of us know, in *Anns v Merton London Borough Council,*[8]decided in 1977, it might be said that Lord Wilberforce opened further the doors of the tort and left it to the courts to determine how and when to close them. He articulated a two-stage test for establishing a duty of care. Firstly, proximity, or neighbourhood, coupled with reasonable foreseeability on the part of the defendant, and secondly, if the claimant crossed that first relatively straightforward threshold, an assessment as to whether there were considerations the court should weigh to deny the claimant.[9]

This approach was later frowned upon. It was said that the first stage was too easily satisfied, and that it allowed for the tort's incursion into traditionally contractual areas. The two stage test gave the courts too much work to do at the second stage. So, in a 1990 decision - *Caparo Industries plc v Dickman*,[10] considering the dicta of Justice Brennan in the High Court of Australia,[11] the House of Lords counseled that 'the law should develop novel categories of negligence incrementally and by analogy with established categories'.[12] It was decided that, after the reasonable foreseeability and proximity stages have been satisfied, in order to impose a duty of care, the court must find that the situation is one in which it is fair, just and reasonable to do so.[13]

Despite *Caparo*, several courts in the Caribbean region are still ostensibly applying *Donoghue* in its unvarnished state, some apply *Anns*, and some apply *Caparo*, thereby perhaps suggesting that, in most instances, the facts of the dispute all lead to the same legal result irrespective of which of these three precedents is applied. In April 1999, a trial judge in Trinidad and Tobago agreed with counsel that *Anns* had been overruled.[14] But in July of that year another Trinidadian trial judge held[15] that the applicable test for imposing a duty of care was properly laid down in *Anns*. In the latter case that specifically followed *Anns*, a police officer was held liable when, in hot pursuit of an armed man who had shot at the police, the officer's return fire struck a boy scout at a camp site, in circumstances where the police officer was aware that boys were camping in the area where the armed man was confronted.

Overarching policy in tort law is guided by efforts at the redistribution of loss in a fair, just and reasonable manner. In more affluent countries, where damages, if left unchecked, can run to exorbitant amounts, rendering it difficult to obtain adequate insurance to cover new areas of liability, a principal consideration of courts is to restrict the size of awards. It is said[16] that it was this consideration that accounted for the reining in of Lord Wilberforce's two-stage approach in *Anns*.

In less affluent States like those of the Caribbean, the main preoccupation may well be not so much the need to limit the extent of liability but rather, on a case by case basis, to adopt creative ways of managing the redistribution of loss; at identifying circumstances where it is reasonable and just that injured persons should be compensated and careless actors be made to 'cough up'. This might explain why, as Dr Amaefule has suggested that, despite *Anns* and *Caparo*, many Caribbean judges have remained 'faithful adherents to the neighbour principle as a touchstone for understanding the duty of care which a defendant owed a plaintiff to ground a claim in negligence.'[17]

In a presentation this brief, and on an occasion like this, it is hardly appropriate to attempt to explore the quicksand of relief for nervous shock and psychiatric illness; but I can share two heartbreaking cases, one from Barbados and the other from The Bahamas, that indicate a measure of consistency with the English authorities in this area.

In the first, *Alleyne v Attorney General*,[18] the claimant's baby girl was delivered on 10 June 1998. Tragically, the infant died four days later at the hospital, without any negligence on the part of anyone. The claimant appeared to be coping satisfactorily with her grief and was making arrangements for a funeral when she was told by the hospital authorities that the dead baby had been negligently incinerated. The claimant developed severe post-traumatic stress disorder and later filed suit. The trial judge combed through the main English authorities and began the dispositive part of her judgment by observing, fittingly, that if sympathy for the plaintiff was the main criteria here, her exercise would be an easy one. Ultimately, relying on *Alcock v Chief Constable of South Yorkshire Police*[19] the judge denied liability.

By contrast, In *Wilcombe v Princess Margaret Hospital*,[20] the plaintiff was discharged from the hospital after delivering her baby girl, but the hospital kept the baby for follow up treatment. For three days the mother went to and fro to breast feed the baby who appeared to be thriving. On the fourth day, when the parents arrived at the hospital for the mother to breast-feed, the baby was not where they expected to see her. A nurse said that a doctor was 'working on her'. The parents became anxious. They waited for two hours. Eventually they were allowed to see little Dominique lying on her back with several tubes attached to her throat and navel. Two doctors were indeed working feverishly on her. One operated a manual pump and the other was 'doing compressions'. But Dominique was not responding. The parents witnessed their baby die and both husband and wife developed serious psychiatric responses. The judge held that the hospital owed them a duty of care to shield them from the experience of witnessing medical procedures on their baby that could cause them distress. The reasonable foreseeability and proximity tests were satisfied and, according to the judge, where there is a duty of care to avoid causing personal injury to the plaintiffs, it did not matter that the injury sustained was psychiatric rather than physical.[21] Both parents were compensated for psychiatric illness!

IV. CONCLUSION [§16.4]

So, in summary, what is the view from the Caribbean on the case of the immortal snail? Well, firstly, the snail's legacy is still very much alive. Ninety years later, young Caribbean law students are just as fascinated by Mrs Donoghue's travails as they continue to be with those of a certain Mrs Carlill who took on the bombastic Carbolic Smoke Company. Secondly, that there does exist an untidy and unsettling measure of doctrinal uncertainty and inconsistency surrounding the application of the case. Greater acceptance of the CCJ by regional States might provide a better platform, ultimately, for driving a Caribbean approach to judicial policy on this issue; and finally, the prospects remain wide open for further evolution of the tort taking advantage of the collective wisdom of judges all across the Commonwealth.

NOTES

1 [1932] AC 562.

2 *Barnett v Belize Brewing Co Ltd* [1983] 35 WIR 136.

3 ibid,137.

4 ibid.

5 Gilbert Kodilinye, Natalie Corthésy, *Commonwealth Caribbean Tort Law* (6th edn Routledge, 2022).

6 (2006) 69 WIR 104, [2006] CCJ 3 (AJ).

7 ibid at [18].

8 [1978] AC 728, [1977] All ER 492.

9 ibid, 751; 498.

10 [1990] 2 AC 605, [1990] 2 WLR 358.

11 *Sutherland Shire Council v Heyman* (1985) 60 ALR 1.

12 *Caparo* (n 11), 618; 365.

13 ibid. Note as well, *Governors Peabody Donation Fund v Sir Lindsay Parkinson Ltd* [1984] AC 210, [1984] 3 All ER 529.

14 See *Gonzales v Trinidad Cooperative Bank Trust Co Ltd* (Trinidad and Tobago HC, 28 April 1999).

15 *Ramdeen v Attorney General* (Trinidad and Tobago HC, 30 July 1999).

16 Kodilinye (n 6) 77-78.

17 Unpublished Paper (2022) made available to the writer.

18 *Alleyne v Attorney General* (Barbados HC, 22 April 2005).

19 [1992] 1 AC 310.

20 *Wilcombe v Princess Margaret Hospital* (The Bahamas SC, 28 June 2002).

21 ibid at [26]. See also *Page v Smith* [1996] 1 AC 155.

Part II—Canada

CHAPTER 17

Donoghue v Stevenson: The View from Canada

I. AUTHOR BIO [§17.1]

Justice Russell Brown, of the Supreme Court of Canada, was born in Vancouver on September 15, 1965, and raised in Burns Lake, British Columbia. He holds degrees from the University of British Columbia (BA), the University of Victoria (LLB) and the University of Toronto (LLM, SJD). He was admitted to the Bars of British Columbia (1995) and Alberta (2008), and practiced at Davis & Company (now DLA Piper LLP) in Vancouver from 1995 to 1996 and at Carfra & Lawton (now Carfra Lawton LLP) in Victoria from 1996 to 2004. From 2008 to 2013, he was associate counsel to Miller Thomson LLP. From 2004 to 2013, Justice Brown was a member of the Faculty of Law at the University of Alberta, variously as professor and associate dean. His main areas of practice were commercial law, medical negligence, public authority liability, insurance law and trusts and estates.

Justice Brown is the author of a treatise on claims under negligence law for economic loss, a contributing author to a textbook on public authority liability, as well as the author or co-author of over 40 published law review articles, book chapters, review essays and forward essays on tort law, property law and civil justice. He is a regular contributor to academic and professional conference proceedings in Canada and internationally, and in Canadian judicial education seminars. Justice Brown presently serves on the editorial board of the *University of Toronto Law Journal* and the advisory board of the Legal Writing Academy at the University of Ottawa. Prior to his judicial career, he served on various committees of the Law Society of Alberta, including those on credentials and education, and civil practice, and was a member of the governing board of the Canadian Forum on Civil Justice. He also served as chair of the Health Law Institute of the University of Alberta, chair of the University Appeals Board and chair of the Professional Review Board at the University of Alberta.

He was appointed to the Court of Queen's Bench of Alberta on February 7, 2013, and to the Court of Appeal of Alberta on March 7, 2014. Justice Brown also served as a Judge of the Court of Appeal for the Northwest Territories and a Judge of the Court of Appeal of Nunavut. He was appointed to the Supreme Court of Canada on August 31, 2015.

II. INTRODUCTION [§17.2]

Good morning, good afternoon, and good evening. I'm honoured and delighted to have been invited to give "a view from Canada" to this distinguished gathering.

Nearly five years ago, my court heard the appeal of a defendant, one Rankin, from a judgment against him at the Court of Appeal for Ontario.[1] The facts were that the teenaged plaintiff and his friend, also a minor, had, after consuming alcohol and smoking marijuana at the friend's mother's home, wandered in the wee hours into the small village of Paisley – named in 1856

after the Renfrewshire town that was the stage for the momentous event in legal history we mark today. Their intention was to steal valuables from unlocked cars. Eventually making their way to Rankin's unsecured commercial car garage, they opened the doors to one of his customer's cars and found the keys in the ashtray. The friend decided to steal the car so that he and the plaintiff could go and pick up a third person in a nearby town. Within minutes, the friend crashed the car, causing catastrophic brain injury to the plaintiff.

The plaintiff's litigation guardian sued Rankin, alleging a breach of a duty of care, saying that he ought reasonably to have foreseen that his negligent act of leaving vehicles unsecured and unlocked with keys inside presented the risk of precisely what came to pass. Owing to the narrowing of the defence of illegality nearly 30 years earlier by the Supreme Court of Canada in *Hall v Hebert*,[2] it was held at trial that he, like his co-defendants, owed and breached a duty. Rankin's second instance appeal was dismissed, and the matter of whether he owed a duty of care fell to the Supreme Court to decide. There, the majority allowed the appeal, holding that Rankin did *not* owe a duty given what it described as the unforeseen risk that a young person may steal the car and drive negligently.

This result holds little if any precedential significance for the purposes of this conference; the majority and the dissent each saw the neighbour principle in *Donoghue v Stevenson*[3] as governing. What *is* striking, however, about the judgment in *Rankin* is that, in arriving at their respective views, members of the court *divided* on something that one would think should be settled law by now: the proper pathway to recognizing a duty of care. This makes *Rankin* of a piece with the court's other recent duty of care judgments, of considerably more significance than *Rankin*, and in which the Court found it necessary to expound on the *formulation* of a duty of care: *Deloitte & Touche v Livent*,[4] a 4 to 3 split which restated the preconditions for recognizing a duty in cases of negligent misstatement, and *Maple Leaf Foods Inc.*[5] – a 5 to 4 split, which, while narrowing the scope of liability for negligent supply of shoddy building structures and products, reconfigured the duty of care test generally (by reversing the analytical order of the proximity and foreseeability analyses). Ninety years after *Donoghue v Stevenson*, the duty of care formulation – or, more particularly, the terms which state the circumstances creating a duty of care –still attracts controversy.

III. THE SUPREME COURT'S JURISPRUDENCE ON DUTY OF CARE [§17.3]

Two difficulties in particular are evident in much of the Supreme Court's tort jurisprudence over the past 20 to 40 years. The first, which still persists, is the breakdown of an integrated conception of duty – its "*dis*integration", as Professor Ernest Weinrib has aptly called it.[6] The court's 2001 judgment in *Cooper v Hobart*[7] reconfigured the duty analysis around *categories* of recognized duties of care, usually according to the kind of harms caused by breach (for example, foreseeable physical harm) or by the negligent act itself (such as negligent misstatement). At the same time, it also reformulated the Canadian duty of care analysis from its rigid adherence to the *Anns* test,[8] which grounded a *prima facie* relationship of duty upon whether, in "the reasonable contemplation of the [defendant], carelessness on its part may cause damage to the [plaintiff]", to what we are now pleased to call the *Anns/Cooper* formulation, which breaks the *prima facie* duty inquiry down into two separate inquiries: reasonable foreseeability of harm, and proximity of relations between the defendant and the plaintiff.

The second difficulty for the Supreme Court has been its preoccupation with avoiding indeterminate liability – meaning, in the famous words of Chief Justice Cardozo in *Ultramares v Touche*, liability in an indeterminate amount, for an indeterminate time, to an indeterminate class,[9] which the Court has seen as a so-called "policy consideration" negating liability at the second stage of *Anns/Cooper*. The concern – which arises most often (but not exclusively) in cases of pure economic loss – is that a single act of negligence might have limitless

ramifications. As Justice Clarke (as he then was) of the Supreme Court of Ireland described in dissenting reasons in *Cromane Seafoods*,[10] like "chaos theory" in mathematics, "the true underlying difficulty stems from the fact that we live in a highly interactive world, where each of our fortunes are constantly affected, sometimes trivially, sometimes significantly, by decisions made or acts taken or avoided [by others]."[11]

Let me, then, elaborate on that first difficulty – the re-emergence of categories of duty. By way of background, the *Anns* test was adopted in Canada in 1984[12] and, for nearly 20 years thereafter, Canadian courts operated faithfully on its premise that, for the purposes of recognizing a duty of care, no distinction was to be drawn among different kinds of injury. All were to be taken as giving rise to a *prima face* duty of care, so long as it was a foreseeable result of the defendant's careless. Then, in *Cooper v Hobart*, the Supreme Court revised the *Anns* test by restoring proximity of relationships, as distinct from mere foreseeability of injury, as a condition for imposing a duty of care. This welcome redirection of judicial attention to the relationship between the parties was also, it is appropriate to note on this occasion in particular, a vindication of Justice Martin Taylor's earlier splendid judgment at the British Columbia Court of Appeal in *Kamahap Enterprises*,[13] which had declined to follow *Anns* and its principle that foreseeability of injury alone could ground a duty, focusing instead on the relationship between the defendant solicitors and the tenant of their landlord client.

But for present purposes, the significance of *Cooper v Hobart* is its direction that, in applying the duty framework, it should consider whether the alleged duty is a new duty or one that falls within a recognized *category* in which proximity and therefore a duty has already been recognized. Seven such categories were identified – one of which (misfeasance in a public office) did not even involve negligence. Of course, the utility of categorization depends on its nature. As Professor Stephen Perry has observed, "categories of cases are, after all, defined by principles stated at one or another level of generality."[14] There is a danger of stating categories at such a high level of generality that all sorts of relationships may be swept under it. Conversely, there is the danger of rendering categorization meaningless by expressing principles too narrowly.

Cooper v Hobart's categories present examples of each danger – in its recognized categories of, *broadly* stated, "foreseeable physical harm to the plaintiff or the plaintiff's property", and, *narrowly* stated, "governmental authorities who have undertaken a policy of road maintenance … to do so non-negligently", respectively. Competing preferences between broadly and narrowly stated categories loomed large in *Rankin*. The plaintiff argued he was owed a duty as having suffered "foreseeable physical harm", and the dissenters agreed. The majority preferred a more narrowly stated category of duties, pointing as examples to the duties owed by physician to patient, manufacturer to consumer, and motorist to highway user as responsive to the need to define duties which involve physical injury with some particularity.

These are, of course, pragmatic difficulties. A more fundamental objection has been that *Cooper v Hobart* conceives of the duties themselves as "particular species each of which represents its own specific considerations of policy and proximity."[15] Gone, then, is the concern for what Lord Atkin identified as "some element common to all cases in which [a duty] is found to exist", which was intended to *do away* with "classification of duties". We still cite to his speech, and quote all the right passages, but in substance we appear to have drifted from its unified conception of duty, applicable to *all* circumstances.

Why we took this pathway is, I confess, a puzzle to me. One of the reasons I believe that, 90 years later, the neighbour test of *Donoghue v Stevenson* still resonates, is its *general applicability*. It states, as it claims to state, a "general principle". And so, the Supreme Court's categories-based approach to duty in *Cooper v Hobart* may well have to be reconsidered. It has already created difficulties – in *Rankin*, for instance – and seems bound to do so in

future. Perhaps paradoxically, it is also leading us to unpredictable and inconsistent judgments on the question of duty. It is difficult to reconcile, for example, the existence of categories recording the duty of governmental authorities to discharge road maintenance policies non-negligently, or a "municipality's duty to prospective purchasers of real estate to inspect housing developments without negligence", with the refusal in *Cooper v Hobart* to impose a similar duty upon the Registrar of Mortgage Brokers to investors, on the reasoning that "the Registrar's duty is to the public as a whole … [and not to] individual investors."

As I mentioned earlier, the second point of difficulty at the Supreme Court in recent years has been overcoming a preoccupation with indeterminate liability. This was among Lord Buckmaster's and Lord Tomlin's objections in dissent in *Donoghue v Stevenson*, in respect of which the former repeated the words of Lord Anderson in *Mullen v Barr*,[16] that "where the goods of the defenders are widely distributed throughout Scotland, it would seem little short of outrageous to make them responsible to members of the public for the condition of the contents of every bottle which issues from their works."[17] And, after re-reading *Donoghue v Stevenson* last month with this in mind, I saw hints of an acknowledgment of this difficulty in the speeches of Lords Tomlin and MacMillan.

This concern has died hard in Canadian tort law, particularly (as I have already noted) in cases of pure economic loss. Indeed, for a time, it was a dominant concern, giving rise to various attempts to define the criteria for "cut-off points"[18] in different kinds of cases. For example, in its 1997 judgment in *Hercules Managements Ltd v Ernst & Young*,[19] a case of negligent misstatement, the Supreme Court, while recognizing a duty owed by an auditor to its corporate client in preparing a statutory audit, dismissed the plaintiff shareholders' claim for lost personal investments by resort to the second branch of the *Anns* test, requiring consideration of policy that negates or limits liability. If, thought the court, we don't stop at the actual client, then how far, how long, and in respect of what, could liability extend? If a prospectus is relied upon by an investor, can it recover? Can *its shareholders* recover? What about those who do business with those shareholders – can they recover, too?[20]

For several decades, Canadian common law judges came to allow indeterminate liability to become the policy consideration tail that wags the duty of care dog. But if we take *Donoghue v Stevenson* seriously, indeterminate liability really shouldn't have much to do with the duty of care at all. Recall the objection advanced by the dissenting Lords Buckmaster and Tomlin. While Lord Atkin did not answer it, Lord MacMillan did, and in a manner that suggests that Lord Atkin did not have to do so, since his neighbour principle itself contains the answer. "[I]t is not enough", Lord MacMillan explained, "to prove the respondent to be careless in his process of manufacture. The question is: Does he owe a duty to take care, and to whom …?" Here, it is owed "to those whom he intended to consume his products." The scope of those owed a duty flowed from the nature of defendant's activity, which "place[d] himself in a relationship with all the potential consumers of his commodities."[21]

In other words, the neighbour test analysis, properly applied, is *itself* the answer to the concern for indeterminate liability. Recently, in *Livent*, the Supreme Court recognized that, should a concern for indeterminate liability persist after a court finds a proximate relationship between the plaintiff and defendant, it may well be that the analysis should be re-done since, applied properly, it should almost always – and *I* would say *always* – obviate all concerns for indeterminate liability.[22] Indeed, Cardozo CJ in *Ultramares* did not think of indeterminate liability as a policy consideration negating a duty of care, but rather as an indication of a failed process of reasoning that had led to that result.[23]

This follows from an appreciation of what the neighbour principle connotes. And here, Lord MacMillan's stress on the parties' *relationship* suggests that the real problem in Canadian law was our slavish adherence to the *Anns* framework that grounded liability on mere foreseeability of harm, either exclusive of all considerations of relationship, or consigning

such considerations to the second stage realm of "policy considerations". He recognized that, under Lord Atkins' general conception of duty, indeterminate liability did not *negate* or *limit* a duty; rather, it was avoided by defining the scope of the duty in relational terms. The significance of the Supreme Court's restoration in *Cooper v Hobart* of proximity to the analytical framework is best seen in that light. In *Livent*, the court clarified that doing so re-introduced the importance of the *relationship* between the plaintiff and the defendant. And it did so in terms that would have been familiar to Lord Atkin. "Assessing proximity", we said, "entails asking whether the parties are in such a 'close and direct' relationship that it would be 'just and fair having regard to that relationship to impose a duty of care in law.'"[24] "To determine", we added, "whether th[at] 'close and direct' relationship … exists …, courts must examine all relevant 'factors arising from the relationship between the plaintiff and the defendant' …."[25] And it is that examination which filters out indeterminacy (or at least claims brought by "an indeterminate class").

At long last, then, on *this* issue, at least, we are back to where we started in Canada – at *Donoghue v Stevenson*. That is because a relational understanding of duty is surely what Lord Atkin conceived in his reference to a "neighbour" as a person being *in proximity* to the defendant. "Proximate" persons, he said in his clear and pithy prose *are*, after all, "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". That is, "closeness and directness" represents the meaning of proximity that supports a duty, because it describes the qualities of a relationship which ought to trigger in the defendant some mindfulness for the plaintiff when contemplating an act or omission.

The rest is all details. Of course, therein are the hard yards. Recall the dissent of Lord Justice Denning (as he then was) in *Candler v Crane*[26] in which he explained that the duty he would have recognized (and which the House of Lords substantially recognized 12 years later in *Hedley Byrne v Heller*[27]) would be owed not only to someone "to whom [the defendants] show the accounts", but also to someone "*to whom* they know [the accounts will be shown]".[28] What does it mean for the plaintiff to be someone to whom the defendant *knows* his or her statement will be conveyed? Is there a place, somewhere between a class of specifically known persons, and an unknown class of unforeseeable users, where one might fall within the relational category of "neighbour"? That is the subject of another paper, perhaps, God willing, on the centenary. My point is that, as the Supreme Court of Canada's peripatetic jurisprudence *on this very point* demonstrates, we do well when we avoid distractions like indeterminate liability and focus instead upon taking the neighbour principle seriously.

Thank you for your kind attention.

NOTES

1 *Rankin (Rankin's Garage & Sales) v J.J.*, 2018 SCC 19, [2018] 1 S.C.R. 587.

2 *Hall v Hebert*, [1993] 2 S.C.R. 159.

3 *Donoghue v Stevenson*, [1932] A.C. 562 (H.L.).

4 *Deloitte & Touche v Livent Inc. (Receiver of)*, 2017 SCC 63.

5 *1688782 Ontario Inc. v Maple Leaf Foods Inc.*, 2020 SCC 35.

6 Ernest J. Weinrib, "The Disintegration of Duty", in M. Stuart Madden, ed., *Exploring Tort Law* (Cambridge, 2005) 143.

7 *Cooper v Hobart*, [2001] 3 S.C.R. 537, 2001 SCC 79.

8 *Anns v Merton London Borough Council*, [1978] AC 728 (H.L.).

9 *Ultramares Corp. v Touche*, 174 N.E. 441 (N.Y. 1931), at p. 444.

10 *Cromane Seafoods Ltd. v Minister for Agriculture*, [2016] IESC 6, [2017] 1 I.R. 119.

11 *Cromayne*, at para 66.

12 *Kamloops v Nielsen*, [1984] 2 SCR 2.

13 *Kamahap Enterprises Ltd v Chu's Central Market Ltd.* (1989), 64 DLR (4th) 167 (B.C.C.A.).

14 S. R. Perry, "Protected Interests and Undertakings in the Law of Negligence" (1992), 42 U.T.L.J. 247, at 252.

15 Weinrib, "The Disintegration of Duty", at 170.

16 *Mullen v Barr*, 1929 S.C. 461.

17 *Ibid* at 479.

18 Perry, at 266.

19 *Hercules Managements Ltd. v Ernst & Young*, [1997] 2 S.C.R. 165.

20 "The most serious problem" of indeterminate liability was also determinative in Supreme Court's judgment in *Bow Valley Husky (Bermuda) Ltd. v Saint John Shipbuilding Ltd.*, [1997] 3 S.C.R. 1210 on a claim for what we taxonomize in Canadian law as "relational economic loss", being pure economic loss resulting from physical damage to the person or property of a third party.

21 *Donoghue v Stevenson*, at 619-20. He also saw the standard of care as also limiting the possible excesses of recognizing a duty of care: see p. 622.

22 *Livent*, at para. 44

23 I am grateful to Jason Neyers for this insight.

24 *Ibid.*, at para 25.

25 *Ibid.*, at para. 29.

26 *Candler v Crane, Christmas & Co* [1951] 2 KB 164 (CA).

27 *Hedley Byrne & Co Ltd v Heller & Partners Ltd.*, [1964] AC 465 (H.L.).

28 *Candler*, at 180.

CHAPTER 18

The Immortal Snail's Global Reach: Introducing the *Donoghue v Stevenson* Citation Project

I. AUTHOR BIO [§18.1]

John Kleefeld joined the University of New Brunswick as professor and dean of law in July 2017 (serving as dean from 2017–2020). He previously taught at the University of Saskatchewan, where he received the 2012 Provost's Award for Outstanding Innovation in Learning and the 2015 Brightspace/STLHE Innovation Award in Teaching and Learning. Before that, he was at the University of British Columbia, where he taught for eight years and directed the Legal Research & Writing Program.

He has been a visiting fellow at the Institute of Advanced Legal Studies in London, a visiting professor at Libera Università Internazionale degli Studi Sociali (LUISS) Guido Carli in Rome, and an instructor in the Common Law and Transnational Law Program at Université de Sherbrooke, the University of Western Ontario, and Osgoode Hall's Professional LLM Program.

John has an honours BA in economics and was an economic analyst and planner for Ontario Hydro and British Columbia Hydro before taking up law. After completing his degree at UBC, he practiced for eight years with the Vancouver firms of Lawson Lundell and Branch MacMaster, while completing his LLM in Alternative Dispute Resolution.

He is a member of the Law Society of British Columbia (non-practicing), a past member of the Law Society of Saskatchewan, and a mediator. He has represented clients at all court levels, including the Supreme Court of Canada.

John's research interests are wide-ranging and cross-disciplinary. His work on apology and law examines legislation that exempts apologies from admissibility into evidence for the purposes of proving liability, and considers the psychosocial research on what makes for effective apologies in a legal context.

This paper is based on a presentation at the *Donoghue v Stevenson* 90th Anniversary Conference | The Immortal Snail, held virtually on 26 May 2022. The research is ongoing, with more publications expected. Readers interested in collaborating or working with the dataset described herein may contact the author at john.kleefeld@unb.ca. I thank the following people

for their research help: Chloe Jardine (former UNB law student), Nikki Tanner and Heather Doherty (librarians at UNB's Gérard V La Forest Library), and Su-Lin Lee (Senior Librarian, CJ Koh Law Library, National University of Singapore). I also thank Tamar Gidron, a conference presenter and attendee, and her colleague Uri Volovelsky, for alerting me to the importance of *Donoghue v Stevenson* in Israeli law and for their remarkable assistance in collecting the Israeli cases, discussed in their paper in this collection. Finally, I thank Martin R Taylor, KC for his decades of leadership and inspiration in keeping alive the story and the authority of the case of "the immortal snail."

II. INTRODUCTION [§18.2]

It is well known that some cases—"landmark" or "watershed" cases—disproportionately influence the law's development. That *Donoghue v Stevenson*[1] is such a case seems beyond doubt, but how do we measure its reach, reception or influence? For example, how do we measure its effects: (i) in a given jurisdiction or across different jurisdictions; (ii) at a given level of court (e.g., trial, mid-level appeal, final appeal); (iii) compared to other cases, whether from the same jurisdiction or others; and (iv) over time?

In what follows, I outline the phases and early results of a research project aimed at answering such questions. I do so by collecting and organizing case citations to *Donoghue* in the years that have passed since a majority of the Appellate Committee of the House of Lords famously took the first of what turned out to be many more than 50 steps—by many more courts around the world—towards modernizing the law of negligence.[2] My hope is that lessons from this research will enhance the practice of citation analysis and help us better understand and depict how cases are adopted, transmitted and modified over time and across jurisdictions.

III. METHODOLOGY [§18.3]

The project's aims are to collect, index and organize judicial citations to *Donoghue*, wherever they have occurred and regardless of the field of law to which they relate; to depict or represent the data in accessible and informative tables and graphs; and to make the data available for further research and analysis through a publicly accessible dataset. The project thus provides a foundation for further study. The work can be seen as having four phases, all recursive (that is, requiring repeated application and refinement). The phases—data collection, data organization and cleaning, data representation, and data analysis—are outlined below.

A. DATA COLLECTION [§18.4]

The first stage is to collect all cases in which *Donoghue* is cited, directly or indirectly, by a judge or panel of judges when rendering a judicial decision. This excludes cases in which *Donoghue* is cited by counsel in argument (where the reported decision lists such cases) but is not mentioned in the reasons for decision.[3] Similarly, where the editors of a print report annotate the case and include a reference to *Donoghue*, that case is not included unless the court has also referenced *Donoghue*.[4] To that extent, the dataset may be seen as under-inclusive, since citation by counsel or by law report editors is still evidence of *Donoghue*'s reach, as is citation by scholars in law review articles and books. However, the project focus is on *judicial* citation analysis, a field that has been around for at least 150 years,[5] and for which methodologies have been developed through various studies, especially in the US[6] but also in at least one significant Canadian study commissioned by CanLII, the Canadian Legal Information Institute.[7] For something to count as a *judicial* citation, then, my criterion is that there must be some evidence that a court considered *Donoghue*, even if only in a fleeting or formulaic way, or even if only declaring that *Donoghue* did not apply to the facts at hand.

On the other hand, the dataset may be seen as over-inclusive because it includes cases in which *Donoghue* does not appear in a list of cited cases at the beginning or end of a judgment, or in a table of cases judicially considered in a print reporter or citator. Often, such lists do not show *Donoghue* as one of the cases cited in a law report, yet *Donoghue* appears in a citation to another cited case. The leading example is Lord Wilberforce's speech in *Anns*, referencing the "trilogy" of House of Lords cases for the proposition that a *prima facie* tort law duty of care exists in certain situations.[8] That passage has been widely cited, and is often followed by a discussion of the principles of proximity and foreseeability as expressed in *Donoghue* and other cases. Including such sub-citations casts a broader net than those methodologies that return results based only on whether a case lists *Donoghue* as having been followed, considered, distinguished, doubted or overruled (the terminology varies according to the methodology). My view is that to exclude *Donoghue* because it is cited only indirectly or because it has been distinguished or discounted would be to miss judicial treatment of the principles promulgated in the case.[9] I take comfort in knowing that this is also the philosophy behind AustLII's LawCite project[10] and reflects the approach used when noting up *Donoghue* in CanLII.[11]

Therefore, as well as using the noting-up features in various databases, I also performed Boolean or text searching (e.g., "Donoghue NEAR Stevenson" or "[1932] AC 562") and reviewed and reconciled the results with those obtained from citation searches using print resources or other digital resources that were available to me. This has been a challenging exercise. Until the late 1960s and early 1970s, and sometimes much later, *Donoghue* has often been indexed or cited as *M'Alister (or Donoghue) v Stevenson*[12] or *McAlister (Donoghue) v Stevenson*,[13] sometimes only as *M'Alister v Stevenson or McAlister v Stevenson*,[14] and sometimes only as *Donoghue's Case*.[15] It has also been cited with misspellings of both the pursuer's name[16] and the defender's name,[17] with search results suggesting that the most common misspellings have occurred in about five percent of citing cases.[18] In one case, the judge persistently, if overfastidiously, uses the pursuer's Irish forebears' surname, O'Donoghue.[19]

Apart from the technical challenges of electronic searching, a research project of this scope —spanning the world and dating to 1932—faces challenges of access and coverage. As I have learned, much of our law is still behind a proprietary paywall, and where public access exists through non-proprietary databases, coverage may be sparse. For instance, Singapore's courts have been citing *Donoghue* since at least 1973,[20] but case coverage in the civil courts through the Legal Information Institute databases yields only a few decisions from 2000 (Court of Appeal and High Court) or 2006 (District Court and Magistrates' Court).[21] Fortunately, through the generosity of the Singapore Academy of Law, I was able to close the gap with a short-term complimentary subscription to SAL LawNet, a proprietary database, and generate a set of nearly 60 decisions from all levels of the Singapore courts.

Print reports have also been valuable, particularly for cases predating the 1990s, and work is still underway to identify and access relevant reports. The COVID-19 pandemic has slowed this work: twice when I arranged to access materials at law libraries with foreign collections broader than those at my home institution, I learned that the libraries had gone into lockdown mode because of a resurgence in COVID-19 cases. In some cases, access to such reports is now being addressed through the scanning and uploading of early print reports. For example, while the research was underway, the Asian Legal Information Institute uploaded scanned versions of early law reports from India and from Burma (as it was then called). That led to finding two citing cases that were unavailable through other sources. The uploading of early print reports, and in some cases, typewritten judgments from court files, is a development that, while proceeding slowly, should aid those doing research such as is entailed by this project.

The lesson for those conducting citation analysis is that one must be creative and combine multiple search methods over multiple sources to ensure robust results when collecting citations.

B. DATA ORGANIZATION AND CLEANING [§18.5]

I used Excel to populate the dataset, starting with a CSV (comma-separated value) file downloaded from Westlaw in 2021 and comprising about 2200 cases citing *Donoghue*, chiefly from Canada, the UK, Australia and New Zealand. I supplemented this with electronic searches from 54 other databases, including LexisNexis, CanLII and all the other Legal Information Institute collections; 40 print report series (not all of which were complete); and several secondary sources such as books and articles. As of the date of writing (August 2022), the dataset had grown to 3170 cases, with more being added monthly. Table 1 summarizes the case counts in descending order by country or region—again, based on the research completed to date.

Table 1: Case Count by Country or Region for the *Donoghue v Stevenson* Dataset

Country or Region	Case Count
Canada (cases from all provinces, territories, and the federal jurisdiction)	1014
United Kingdom (cases from England and Wales, Scotland, and Northern Ireland)	678
Australia (cases from all states, territories, and the Commonwealth jurisdiction)	522
Africa (cases from Botswana, Eswatini, Ghana, Kenya, Malawi, Nigeria, Seychelles, Sierra Leone, South Africa, Tanzania, Uganda, Zambia and Zimbabwe)	259
Malaysia	118
Pacific Islands (cases from Cook Islands, Fiji, Kiribati, Papua New Guinea, Samoa, Solomon Islands, Tonga, and Vanuatu)	91
New Zealand	90
Israel	80
India (cases from Andhra Pradesh, Chhattisgarh, Gujarat, Himachal Pradesh, Karnataka, Kerala, Madhya Pradesh, Maharashtra, National Capital Territory of Delhi, Odisha, Punjab, Rajasthan, Tamil Nadu, Uttar Pradesh, West Bengal, and the federal jurisdiction)	65
Ireland	64
CARICOM (cases from Anguilla, Antigua and Barbuda, Barbados, Belize, British Virgin Islands, Dominica, Grenada, Guyana, Jamaica, Montserrat, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and The Grenadines, and Trinidad and Tobago)	57
Singapore	58
Hong Kong	35

Country or Region	Case Count
USA (cases from California, Delaware, Georgia, Indiana, Maryland, Massachusetts, Michigan, Missouri, New Jersey, New York, Oregon, Pennsylvania, South Carolina, Wyoming, and the federal jurisdiction)	34
Other	5
Total	**3170**

In the resulting spreadsheet, the citing cases are the unit of analysis; in other words, each case occupies one row of the Excel spreadsheet, and the first entry in a row is the case name. This includes individual instances of a case as it proceeds through appeal: each instance is treated as a separate case for the purpose of the dataset.

However, there is a great deal of information about a case beyond its name, such as the date, jurisdiction, level of court, and citations to law reports in which the citing case appears. In one study that analyzed over 16,000 Israeli Supreme Court cases of all types over a specific period, the dataset had 61 data items,[22] which gives a sense of how much information *could* be collected if one were inclined to do so. The question becomes what data items are manageable and useful for conducting citation analysis. For the initial dataset, I created fields for 16 data items. These are set out in Table 2 along with an explanation of each.

Table 2: Data Items (Fields) for the *Donoghue v Stevenson* Dataset

Data Item (Field)	Explanation
ID	This field, not yet populated, will have a unique numerical identifier for each case entry. It will facilitate precise case identification (particularly where a case may appear by the same name at multiple court levels) and allow for the dataset to become a full relational database.
Case	This is the style of cause of the citing case, rendered, where possible, in a recognized format for case names (e.g., McGill Guide, Bluebook or OSCOLA) and using the *sub nom* technique to identify potentially competing case names. An example is an Ontario Court of Appeal decision in which one defendant applied to add another in a claim relating to the failure of a car's brake system. The style of cause for the underlying case is *Stewart v Domingos*, and this is how both CanLII and LexisNexis cite the appeal decision that allowed the application to add the proposed defendant, one Heppel. Westlaw, on the other hand, cites the case as *Heppel v Stewart*, and this is also how the case was named on further appeal, where the Supreme Court of Canada reversed the decision. The case is therefore entered as *Heppel v Stewart*, *sub nom Stewart v Domingos*. In both Westlaw and CanLII, the same case turned up more than once owing to different case names, and the above method was used to eliminate the duplication.
Date	This is the date of the citing case as provided by Westlaw in the initial dataset (e.g., July 23, 2015).
Date (Revised)	This is the date of the citing case in numerical format (e.g., 2015-07-23). This allows for the creation of time-series data and other date-related analysis. In some cases, the date differs from the original Westlaw

Data Item (Field)	Explanation
	dataset. For example, a court may have rendered a decision on a motion or a trial as well as a subsequent decision on costs or a variation of the original order. Westlaw or other services may use the later of these dates as the reported date on the basis that this was the decision that brought the case to a close. But for determining whether *Donoghue* played a role in the decision, I have generally used the earlier date. An example is *Alberta Caterers Ltd v R Vollan (Alberta) Ltd*. Westlaw shows the date as December 8, 1977, but that is the date on which the costs decision was varied: (1977) 11 AR 181. In the dataset, the date has been changed to 28 October 1977 (1977-10-28), that being the date of the judgment: 10 AR 501, 1977 CanLII 1854 (AB QB). Where the year of a decision is available but not the precise date within the year, the dataset uses July 1 as the median date. For the Israeli cases (see below), the date was converted from the Hebrew calendar to the Gregorian calendar if that version of the date had not already been provided in the case.
Year	This field uses a formula to extract the year (1932–2022) from the **Date (Revised)** field, facilitating time-series and other date-based analysis.
Month	This field uses a formula to extract the month (1–12) from the **Date (Revised)**, facilitating time-series and other date-based analysis.
Westlaw Cite	This is the unique identifier assigned by Westlaw to the citing case.
Citations	This field is for parallel citations to the case, including a neutral citation or identifier from CanLII or other non-proprietary database, or an entry in a recognized format for unreported cases, with each entry separated by a comma—e.g., *Heppel v Stewart*, 62 DLR (2d) 282, [1967] 2 OR 37, 1967 CanLII 29 (ON CA).
NumCitations	This field sums the number of parallel citations in the **Citations** field, using a formula that counts the commas in that field. The idea is that the number of reported versions reflects the perceived importance of *that* case, at least when reported, which may in turn say something about the importance of *Donoghue*, the original case.
Jurisdiction (1)	For federal countries, this field holds the country name—e.g., Canada, Australia, USA. It also holds the name for those countries or regions that, while not federations, consist of political units within the country or region—e.g., the UK or the Pacific Islands.
Jurisdiction (2)	This field holds the sublevels of the entries under **Jurisdiction (1)**. For example, for Australia, it comprises Australian Capital Territory, New South Wales, Northern Territory, Queensland, South Australia, Tasmania, Victoria and Western Australia, as well as "Commonwealth" (i.e., for cases heard in federal courts). The same principle applies to Canada and the USA, with the designation "Federal" indicating the jurisdiction of the federal courts. For countries or regions that, while not federations, consist of individual political units, this field holds the names of those units. For example, for the UK, the dataset uses three sub-levels: (i) England and Wales

Data Item (Field)	Explanation
	(typically considered together for legal citation purposes), (ii) Scotland, and (iii) Northern Ireland.
Court	This field holds the name of the court that decided the citing case—e.g., "District Court," "High Court" or "Supreme Court." These courts can later be coded with a common identifier—e.g., "1," "2" or "3"—to indicate their status within the court hierarchy, thus facilitating comparisons between citing practices in those different court levels.
Coram	This field is for the deciding judge or judges, with each entry separated by a semi-colon.
URL	This field is for a uniform resource locator ("URL" or "hyperlink") to the citing case, where a publicly accessible URL exists.
Summary	This field is for a summary of the citing case and has only just begun to be populated.
Notes	This field is for notes on the citing case, such as its fate on appeal or memorable quotations from it, and has only just begun to be populated.

An example of how this might look for a single entry is provided in Table 3 for a recent decision of the Federal Court of Australia, with the row data converted to tabular form.

Table 3: Example of Completed Entry for the *Donoghue v Stevenson* Dataset

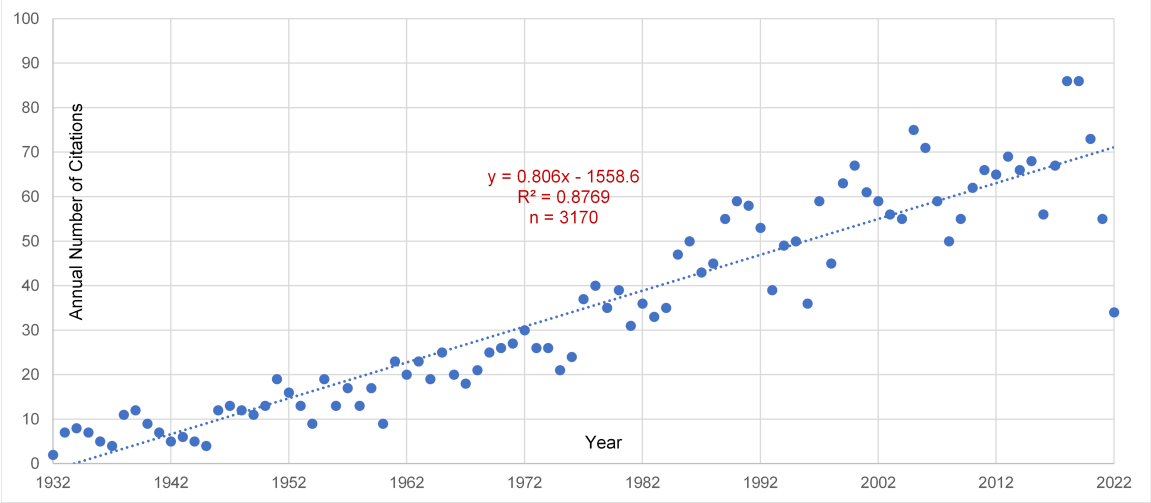
Data Item (Field)	Explanation
ID	To be assigned.
Case	Minister for the Environment v Sharma (*sub nom* Sharma v Minister for the Environment)
Date	2022-03-15
Date (Revised)	2022
Year	3
Month	2022 WL 765947
WestlawCite	[2022] FCAFC 35, 400 ALR 203
Citations	2
NumCitations	Australia
Jurisdiction (1)	Commonwealth
Jurisdiction (2)	Federal Court of Australia, Full Court
Court	Federal Court of Australia, Full Court
Coram	Allsop CJ; Beach J; Wheelahan J
URL	https://www8.austlii.edu.au/au/cases/cth/FCAFC/2022/35.html
Summary	The Federal Court of Australia, Full Court, overturned a single-judge FCA decision (Bromberg J) holding that the Minister for the

Data Item (Field)	Explanation
	Environment owed a duty of care to avoid the effects of climate change on Australian children when exercising her statutory powers to approve a coal mine expansion. In differing sets of reasons, the FCAFC unanimously held that no such duty should be imposed on the Minister.
Notes	At para 740: "Sufficient closeness and directness involves considering both the victim and type of damage. The expression 'so closely and directly affected' (*Donoghue v Stevenson* at 580) entails a consideration of both aspects. If one does not find sufficient closeness and directness, indeterminacy may be observed." For further proceedings, see *Minister for the Environment v Sharma (No 2)* [2022] FCAFC 65 (granting order that case not continue as a representative proceeding).

C. DATA REPRESENTATION [§18.6]

One of the goals is to represent research results in ways that are informative and that lend themselves to further analysis. For example, if we want to analyze the temporal aspects of citation data, the starting point is to graph a time series. Such a graph, also called a scatter plot, depicts data points at successive intervals of time, with each point correlating a time and a quantity being measured. Figure 1 does this with Excel's Chart feature by plotting the number of citations in the dataset (3170 so far) for each calendar year from 1932 to 2022 using the dataset's **Year** field (see above). These are the blue dots in Figure 1. At the time of writing, only a few months of data had been collected for 2022, which explains the low value for the final dot; the year 1932 is also not a full calendar year because *Donoghue* was decided on May 26, almost halfway through the year. Even with these minor discrepancies, the graph shows that the number of citations per year has generally increased, even if the number fluctuates from one year to the next. The question is how to model this trend. This can be done easily using Excel's Trendline feature, with the goal being to fit a line that best explains the existing data and that has strong predictive power. Is the trend linear (increasing at a steady rate), exponential (increasing at an increasing rate), logarithmic (increasing at a decreasing rate), or polynomial (a mix of two or more of these)? Excel can handle all these possibilities, but a linear representation appears to work very well. This is the simplest method and is shown by the blue dotted line in Figure 1.

Figure 1: Annual Citations to *Donoghue v Stevenson*, 1932–2022



Excel can calculate the equation for this line, called a simple regression equation, which for this data is y = 0.806x – 1558.6. Here, x is the year, y is the number of citations in the year, and 0.806, the x-coefficient, measures the line's slope. By comparing the slopes of different lines (for example, the lines for individual countries or regions or for citations to other cases over comparable periods), one can say something meaningful about *Donoghue*'s relative influence over time. That is, a steeper slope (higher coefficient) implies a stronger influence; a shallower slope (lower coefficient), a weaker influence—other things being equal.

Since a line can be made to fit any scatter plot, we are also interested in how well the line fits the data. For that, Excel calculates the R^2 ("R-squared") value, a statistical measure between 0 and 1. It represents the proportion of variance for a dependent variable (here, the number of citations) explained by an independent variable (here, the calendar year) in a regression equation. Figure 1 shows that R^2 is 0.8769, meaning that about 88% of the variability in annual citations can be explained by the passage of time. This is a high R^2 value, implying that the regression equation fits the data very well.

While this is a good start, more data collection and calculations are needed before robust conclusions can be drawn from this sort of data depiction. This is properly done at the data analysis phase, but it is worth mentioning some caveats here.

One is the standard warning that correlation does not imply causation. Changes in one variable may be *correlated* with changes in another, but that does not necessarily mean that changes in the one *cause* the changes in the other: they may be caused by another variable. To use a common example, ice cream sales and shark attacks may be positively correlated, but neither is the cause of the other; rather, warmer temperatures lead to both. Here, the advent of electronic databases may have increased the availability of case law that was previously hard to access, leading to finding more unreported cases over time.

Another caveat is that data may seem to fit a linear equation well, but the true relationship is non-linear. That relationship may not be immediately apparent from a dataset that is limited in geographic scope or time but may emerge when more data is collected. With case law, one might expect that the usefulness of cases as precedents may wane over time, and thus citations to them may also wane or decay. There is support, both theoretically[23] and empirically,[24] for such effects, and they need to be tested through further analysis.

Another approach to understanding and analyzing citation data is to depict cumulative, rather than annual, citations. Figure 2 does this for *Donoghue* by summing the citations in the dataset

by year, from 1932 to 2022, and graphing the results as a continuous curve instead of a scatter plot. The blue area beneath the curve depicts the cumulative citations at any point in time.

Figure 2: Cumulative Citations to *Donoghue v Stevenson*, 1932–2022

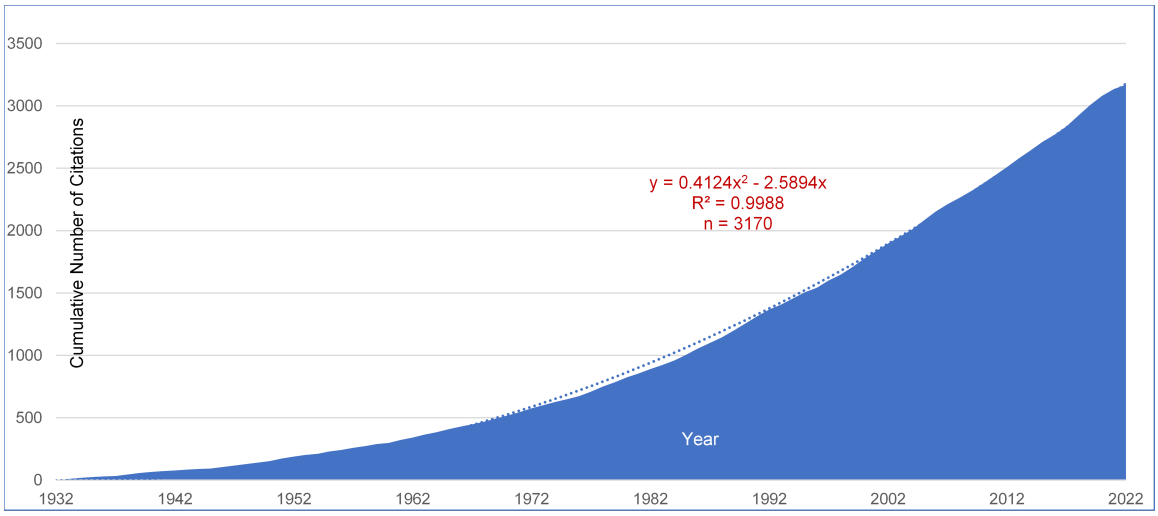
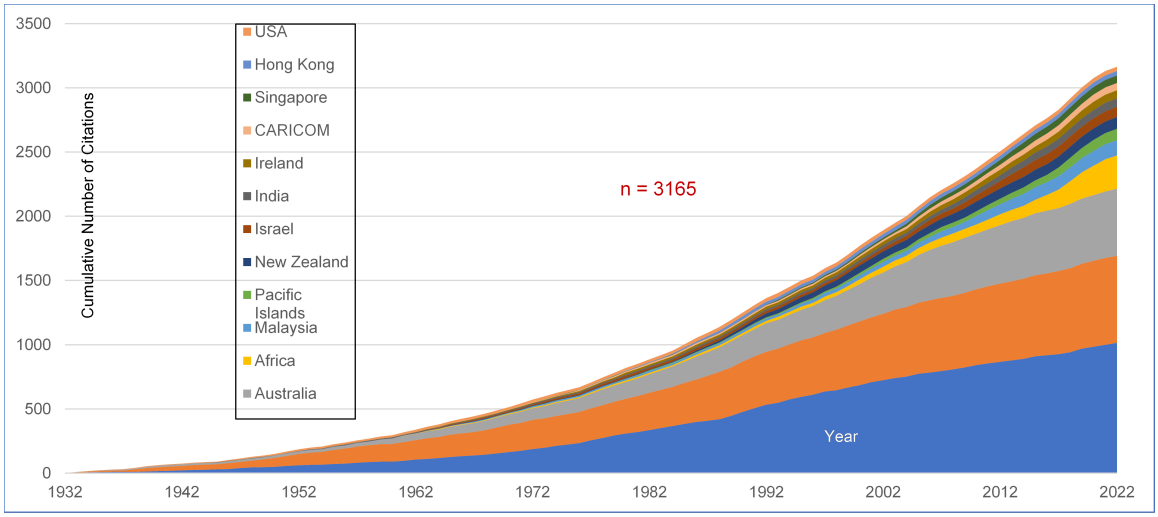


Figure 2 shows that the *cumulative* growth of citations to *Donoghue* has been moderately exponential for about the first 60 years (that is, until the early 1990s) and approximately straight-line since then. Again, this is based on the 3170 cases collected so far (with only a few months of data for 2022 at the time of writing), and the depiction may change once more cases are entered in the dataset. As with the annual citation data, we can generate an equation for the curve and use that to compare countries or regions or to compare citations to *Donoghue* with citations to other cases over comparable periods. Again, Excel makes this job easy. By modelling the cumulative citations curve as a polynomial trend, Excel generates the quadratic equation $y = 0.04124x^2 – 2.5894x$, with $R^2 = 0.9988$. The coefficients of the x-variables could then be compared those of other similarly constructed curves, which, other things being equal, would help to make quantitative statements about *Donoghue*'s relative influence.

Figures 1 and 2 are based on total citations, without regard to country or region. A way of adding such detail is shown in Figure 3.

Figure 3: Cumulative Citations to *Donoghue v Stevenson* by Country or Region, 1932–2022

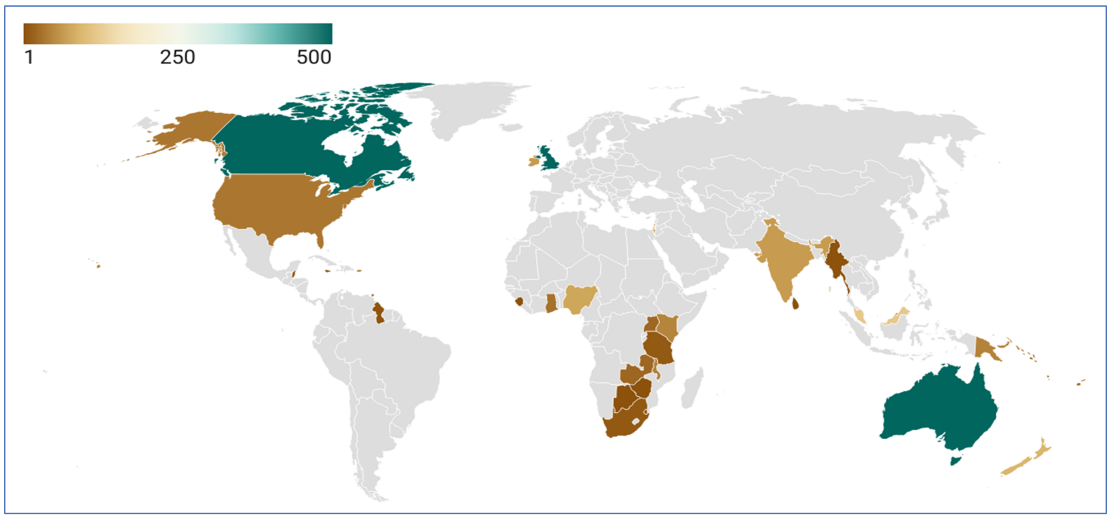


This graph, called a stacked area chart, depicts the country- or region-specific contribution to the curve. Each coloured area represents the cumulative citations for that country or region, with the areas stacked from largest to smallest. An accompanying legend shows the names of the countries or regions in the same order.

At 1014 cases and counting, Canada has the most citations to *Donoghue* (see discussion in the following section). The Canadian citations are thus represented by the blue area at the bottom of the curve. After that comes the UK (678 cases), Australia (522 cases), and so on, with the USA having the fewest citations (34) and therefore sitting at the top of the curve. Five cases from countries or regions other than those listed here are not shown because the depiction on this graph would be too small. Figure 3 is therefore constructed from 3165 cases instead of 3170 cases.

Another way of showing how citations are distributed geographically is by a choropleth map (*choros* 'area/region' + *plethos* 'multitude'), which uses colour intensity to show how a characteristic is distributed within spatial units. An example is a country's population density. Here, we want to show citation intensity. Figure 4, prepared with Datawrapper, an open-access software package, does that for the dataset as of the date of writing. An interactive version, which will be updated periodically, allows the user to hover over a country to see that country's name and citation count and to download the data.[25] Work is underway to prepare animated versions of these maps to show how citation intensity has changed each year from 1932 to the present. Versions can also be created to show citation intensity for different states within a country or countries within a region.

Figure 4: Choropleth World Map of Cumulative Citations to *Donoghue v Stevenson*



D. DATA ANALYSIS [§18.7]

Analyzing the data is, and will continue to be, the most interesting phase of the project, though more work is needed before in-depth analysis can take place. Even at this early stage, though, a few things can be said.

First, to return to a point made at the outset, *Donoghue* is clearly a disproportionately influential case—even a "super-precedent" of sorts—and it is also clear that its influence can be measured. Even with only a partial dataset, this study has shown that *Donoghue*'s reach extends to nearly 50 countries and that it is still being cited by courts more than 90 years after the decision, with little indication of the practice waning. In the CanLII study mentioned above, researcher Thom Neale found that Canadian cases "typically cease to be cited in 3

to 15 years, depending on the jurisdiction, with the exception of Supreme Court of Canada decisions, which persist for 50 years."[26] Considering this empirical finding, *Donoghue*'s persistence is remarkable.

Second, while *Donoghue* may often be cited in a formulaic way (for example, as support for the elements of a cause of action in negligence), the principles of foreseeability and proximity that it espouses continue to be debated as litigants seek to advance or defend new applications of the case. Climate change litigation, as in *Minister for the Environment v Sharma* (Table 3), is one such example: *Donoghue* is discussed nine times at first instance and seven times in the appeal decision, and the discussions are deep.

Third, while a great deal of this influence may be attributed to the spread of English law generally (with Figure 4 saying as much about the former British Empire as about *Donoghue*'s spread), this phenomenon alone cannot explain the global reach of the case. Other cases have played a significant role in helping to promote interest in *Donoghue*, advance or restrict its scope, and understand its principles. First among such "helper" cases is *Grant v Australian Knitting Mills Ltd*,[27] which arose in South Australia shortly after *Donoghue* and wound its way to the Judicial Committee of the Privy Council in 1935. Unlike *Donoghue*, the case involved skin irritation from sulphites in men's underwear rather than gastroenteritis from a snail in ginger beer, and unlike *Donoghue*, the case went to trial rather than being decided on a question of law. But the trial court readily found the manufacturer liable to Dr Grant, and while the judgment was reversed by the High Court of Australia, it was ultimately restored by the Privy Council. The Privy Council was, at the time, the final court of appeal for countries throughout what was then called the British Commonwealth. Thus *Grant* had a great influence in spreading the idea that a manufacturer of goods has a duty to the consumer to take care in the production of those goods; indeed, it has often been co-cited with *Donoghue*. However, it limited the effect of *Donoghue* to those situations: not a word of the "neighbour principle" is found in the Privy Council decision, and that principle did not really become famous until later case law rediscovered and reapplied *Donoghue* in other contexts. Thus *Grant* simultaneously propagated *Donoghue*'s message while tending to narrow its scope to the field of manufactured goods. Such "helper" cases—whether they be ones that expanded or restricted *Donoghue*'s scope—include *Pritzker v Friedman*,[28] *Hedley Byrne & Co Ltd v Heller & Partners Ltd*,[29] *Home Office v Dorset Yacht Co Ltd*,[30] *Anns*,[31] *Sutherland Shire Council v Heyman*,[32] and *Cooper v Hobart*,[33] to name just half a dozen cases spanning the first 70 years of *Donoghue*'s life as a precedent. Many more cases in many more countries have played such roles, and a full account of *Donoghue*'s longevity must involve analysis of them.

Fourth, in the plethora of citations to *Donoghue*, Canada occupies a special place. Canadian courts were early adopters of *Donoghue*, both in its narrow sense (the "manufacturer's rule")[34] and its broader sense (the "neighbour principle"),[35] as well as for other quotable propositions, like "[t]he categories of negligence are never closed,"[36] and the idea that courts must adapt law to meet the "ordinary needs of civilized society."[37] In 1934, a 3:2 majority of the Alberta Court of Appeal affirmed a trial judgment holding the University of Alberta liable for the "hazing" that caused a freshman student to go insane.[38] The hazing was done by other students without the permission of university officials, but with their knowledge that such things were taking place. "On the facts," said McGillivray JA, "it is a long cry from the case of a snail in a bottle to the case at bar, but the [neighbour principle], is, in my opinion, quite as apt as the basis of judgment in this case as it was in the snail case."[39] This early adoption was followed by a persistent practice of citing to *Donoghue* thereafter. There is good reason to think that the Canadian cases in the dataset so far represent only about two-thirds of Canadian citations to *Donoghue*,[40] but even that number is significant, considering Canada's relatively small size. Compare *MacPherson v. Buick Motor Co*.[41] Justice Cardozo's majority opinion in that case heralded an era of manufacturer liability in the US 16 years before *Donoghue* (and indeed, was cited by three of the law lords in *Donoghue*)[42] and has been cited in the US ever since. But despite its influence, the number of US citations in that time is less than 1200.[43] By that

metric, *Donoghue* has been even more influential in Canada than *MacPherson v. Buick Motor Co.* has been in the US.

IV. NEXT STEPS [§18.8]

To advance the *Donoghue v Stevenson* citation project, a great deal more work is needed. In particular, there is a need for:

- ongoing case collection, especially from sources available only in print or through proprietary databases;
- ongoing data cleaning and classification, including adding other metrics or data elements; and
- creation of other datasets to facilitate ongoing analysis, both intra-and inter-dataset.

To accomplish all this—to continue to reproduce and transmit the promise and the potential of "the immortal snail" to future generations—a collaborative effort and enhanced access to case law is needed. I hope that through this contribution, interested readers will come forward to help in that cause.

NOTES

1 *M'Alister (or Donoghue) v Stevenson*, [1932] AC 562 (HL), [1932] SC (HL) 31, [1932] All ER Rep 1, (1932) 101 LJPC 119, [1932] WN 139, (1932) 147 LT 281, [1932] SLT 317, (1932) 48 TLR 494, 76 SJ 396, (1932) 37 Com Cas 350, [1932] UKHL 100, 1932 CanLII 536 (FOREP) [*Donoghue*]. References are to the Sessions Cases (SC) report, a pleasantly formatted online version of which is provided by the Scottish Council of Law Reporting: https://www.scottishlawreports.org.uk/resources/donoghue-v-stevenson/case-report/.

2 Recall Lord Buckmaster's dissentient remark in *Donoghue*: "If one step, why not fifty?" (*ibid* at 42).

3 For example, Westlaw or LexisNexis searches may turn up decisions in the Appeal Cases or Weekly Law Reports that include arguments of counsel, including cases cited by them. Sometimes, *Donoghue* is cited in those arguments but not referenced by the court. I excluded such cases from the dataset on the principle that the aim was only to collect citations to *Donoghue* that appear to have influenced the decision.

4 See, e.g., *Poppe v Tuttle* (1980) 14 CCLT 115 (BC SC).

5 That is, starting with the 1873 publication of *Shepard's Citations*. For a history of legal citation analysis and an argument that the field goes back even farther than this, see Patti J Ogden, "'Mastering the Lawless Science of Our Law': A Story of Legal Citation Indexes" (1993) 85 Law Libr J 1, online: https://scholarship.law.nd.edu/law_faculty_scholarship/118. See also Laura C Dabney, "Citators: Past, Present, and Future" (2007, unpublished), online: https://depts.washington.edu/uwlawlib/wordpress/wp-content/uploads/2018/01/Dabney2007.pdf.

6 Good starting points are William M Landes & Richard A Posner, "Legal Precedent: A Theoretical and Empirical Analysis" (1976) 19 J Law & Econ 249 (generally viewed as signalling the modern field of legal citation analysis and treating case precedents as a depreciable stock of legal capital); William M Landes *et al*, "Judicial Influence: A Citation Analysis of Federal Courts of Appeals Judges" (1998) 27 JLS 271 (measuring the influence of federal appellate judges and circuit courts through citations and other judicial characteristics); Montgomery N Kosma, "Measuring the Influence of Supreme Court Justices" (1998) 27 JLS 333 (measuring the influence of 99 retired Supreme Court justices by analyzing citations to their opinions by subsequent justices); and Frank B Cross *et al*, "Citations in the U.S. Supreme Court: An Empirical Study of Their Use and Significance" (2010) 2 U Ill L Rev 489 (analyzing the role of citations in judicial opinions and "explain[ing] how they may be used as a test of *stare decisis* and the Court's projection of power and legitimation of its authority").

7 Thom Neale, "Citation Analysis of Canadian Case Law" (2013) 1 Journal of Open Access to Law 1, online: https://ojs.law.cornell.edu/index.php/joal/article/view/20. See also Simon Fodden, "CanLII Citation Analysis Available" (3 September 2013) Slaw blog post, online:https://www.slaw.ca/2013/09/03/canlii-citation-analysis-available/.

8 "Through the trilogy of cases in this House—*Donoghue v Stevenson* [1932] AC 562, *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 and *Home Office v Dorset Yacht Co Ltd* [1970] AC 104—the position has now been reached that in order to establish that a duty of care arises in a particular situation, it is not necessary to bring the facts of that situation within those of previous situations in which a duty of care has been held to exist. Rather the question has to be approached in two stages. First one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage there is sufficient relationship of proximity of neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter - in which case a prima facie duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise." *Anns v Merton London Borough Council* [1978] AC 728, [1977] 2 All ER 492, [1977] 2 WLR 1024, 75 LGR 555, [1977] 141 JP 527, 121 Sol Jo 377, [1977] 2 Lloyd's Rep 450, cited to AC at 751-52 [*Anns*].

9 See also William M Landes *et al*, *supra* note 6 at 273, referring to intercircuit citations: "We have not distinguished between favorable, critical, or distinguishing citations. Nor is it clear that we should."

10 Australasian Legal Information Institute, online: http://www.austlii.edu.au/LawCite/doc/overview.html (noting that treatment terms like "considered" or "applied" are at an entire decision level even though cases typically decide more than one issue, and that the treatment terminology varies considerably between systems.

11 Some examples illustrate the points made in this paragraph. When noting up *Donoghue* in CanLII, one of the results is *Cumby v Snow* (1986) 31 DLR (4th) 192, 60 Nfld & PEIR 299 (CA). In that case, Morgan JA says at para 17: "The principle of law applicable for the determination of the issues raised in this appeal are contained in the following excerpt from the judgment of Lord Wilberforce in [*Anns*]," and then cites the famous *Anns* passage (*supra*, note 8). After the *Anns* reference to *Donoghue v Stevenson*, CanLII has inserted its own case identifier (1932 CanLII 536 (FOREP)), which has the effect of returning *Cumby v Snow* as one of the citing cases. In contrast, noting up *Donoghue* in Westlaw does not return *Cumby v Snow* as a citing reference, which would appear to be because the Court did not cite it directly. But it would be incorrect to say that this is an approach that applies to all cases in Westlaw. For example, one of the cases that Westlaw returns when noting up *Donoghue* is *R v Bendall* (1977), 36 CCC (2d) 113 (Man CA). In that case, the Manitoba Court of Appeal refers at paras 84–86 to the speech of Lord Simon in *DPP v Withers* [1975] AC 842 (HL), to the effect that the "inductive, syncretic process" of judicial reasoning in *Rylands v Fletcher* and *Donoghue v Stevenson* "is apt to give a special dynamism to a rule of law." The Court adopts the *Withers* statements as "good guidance in the case now under appeal," but in the table of cases considered at the beginning of the decision, *Withers* does not appear, let alone *Rylands* or *Donoghue*. Westlaw's electronic search method nevertheless returns *R v Bendall* as a citing reference.

12 See, e.g., *Griffiths v Arch Engineering Co (Newport) Ltd* [1968] 3 All ER 217 (Assizes); *Doucet c Canadian General Electric Co*, [1975] RL 157, 1973 CanLII 993 (QC CQ); *Bognuda v Upton & Shearer Ltd*, [1972] NZLR 741 (CA); *Mapp v Dowding Estates & Trading Company Ltd; Mapp v Legault*, (1978) 32 WIR 99, (1978) 13 Barb LR 166; *Freeman v Home Office* (No 2) [1984] 1 All ER 1036 (CA) and *ACB v Thomson Medical Pte Ltd* [2017] SGCA 20.

13 See, e.g., *Brick Protection Corporation v Alberta (Provincial Treasurer)*, 2011 ABCA 214; *Harrison v XL Foods Inc*, 2014 ABQB 431; and *Muir v Volvo Canada Ltd*, 2000 BCPC 96.

14 See, e.g., *Gard v Board of School Trustees of Duncan*, [1946] 2 DLR 441, 1946 CanLII 232 (BC CA); *Coca-Cola Ltd v Cohen*, [1966] B.R. 813 (Que SC); *SS Samovar (The)*, 72 F.Supp. 574 (N.D. Cal. 1947); *Foley v. Pittsburgh-Des Moines Co.*, 363 Pa. 168; and *Buchanan v United Geophysical Co of America*, [1983] NWTR 358, 1982 CanLII 4958 (NWT SC).

15 See, e.g., *Grant v Australian Knitting Mills Ltd*, [1936] AC 85 [1935] All ER Rep 209 [1935] UKPCHCA 1, 54 CLR 49, 52 TLR 38 (Australia PC) (per Lord Wright); *Union Estates Ltd v Kennedy*, [1940] 1 DLR 662, 1940 CanLII 272 (BC CA); *Rogers v Clarence Hotel Co Ltd*, [1940] 3 DLR 583, 55 BCR 214 (CA) (per dissent of O'Halloran JA); and *McCarthy v Wellington (City)*, [1966] NZLR 481 (both the trial and appellate judgments, reported sequentially).

16 See, e.g., *Airtrade (Vanuatu) Ltd v Deou Motors Ltd* [2001] VUSC 3 (*Dangue v Stevenson*); *Young and Marten Ltd v McManus Childs Ltd* [1969] 1 AC 454 (HL), [1968] 2 All ER 1169 (All ER report spells the case as *Donaghue v Stevenson*); *Levesque v Day & Ross Ltd* (1976) 14 NBR (2d) 346 (QB) (*Donahue v Stevenson*); *Ibeanu v Ogbeide* (1994) JELR 43326 (CA) (Nig) (*Doneghue v Stevenson*); *Re Medical Defence Union Ltd* [1990] HKCFI 209 (*Donghue v Stevenson*); *Niger Mills Co plc v Agube* [2008] All FWLR (Pt 427) 86 (*Donoghoe v Stevenson*); *Savenda Management Services Ltd v Stanbic Bank Zambia Ltd*, [2018] ZMSC 413; *Chemitech Ltd v Stanbic Bank GH Ltd* (2017), JELR 69823 (HCG) (*Donogue v Stevenson*); *Lala v Sully* [2022] PGNC 141 (*Donohue v Stevenson*); *Roded Farm Cooperative Agricultural Association Ltd v Eliat Municipality*, CivC (DC) 5016/08 (2013) (Isr) (*Donoyo*); *Pesa Hamisi v PN Mashru Ltd*, [2020] eKLR Civil Appeal 17 of 2020 (Kenya) (*Doroghne v Stevenson*); and CivC (MC TA) 174111/02*Opcom 2000 Inc v Combers Systems Ltd* (2005) (Isr) (*Dungio v Stevenson*).

17 See, e.g., *Vermont Construction Inc v Beatson*, [1977] 1 SCR 758 67 DLR (3d) 95, 8 NR 271 (where the SCR report, at 768, spells the case as *Donoghue v Stevensen*) and *Brouwers v Street*, [2009] NZHC 1751 (spelling the case as *Donoghue v Stephenson*).

18 Based on searches in the "All Case Law Databases" of the Commonwealth Legal Information Institute (http://www.commonlii.org/) on 19 August 2022. The Boolean search "don*hue NEAR ste*ens*n" found most of the cases in CommonLII and yielded 941 apparently relevant cases. The search "don*hue NEAR ste*ens*n AND NOT donoghue NEAR stevenson" captured the most common spelling errors in the style of cause and yielded 51 apparently relevant cases. The ratio 51/941 = 5.4% is therefore an estimate of the incidence of the most common spelling errors when citing the case.

19 *Swan v Riedle Brewery Ltd*, [1942] 2 DLR 446, 1 WWR 577, 50 Man R 62, 1942 CanLII 419 (MB QB) per Donovan J. See also Rev Patrick Woulfe, *Sloinnte Gaedheal is Gall:Irish Names and Surnames Collected and Edited with Explanatory and Historical Notes* (Dublin: MH Gill & Son 1923), *sv*

"Ó Donnchadha," online at: https://www.libraryireland.com/names/od/o-donnchadha.php and The O'Donoghue Society, online: https://www.odonoghue.co.uk/.

20 See *KMA Abdul Rahim v The Lexa Maersk (Owners)* [1971-1973] SLR(R) 791.

21 Asian Legal Information Institute, Singapore: http://www.asianlii.org/resources/257.html.

22 Keren Weinshall, Lee Epstein & Andy Worms. The Israeli Supreme Court Database, 2018 version: http://iscd.huji.ac.il.

23 See William M Landes *et al*, *supra* note 6 at 280 (using the term "depreciation" and suggesting that "[d]epreciation means that the older the opinion, the fewer citations it should receive today").

24 See Neale, *supra* note 7 (reporting on the decay rate of citation to Canadian cases).

25 Available at https://datawrapper.dwcdn.net/3DoB2/1/.

26 Neale, *supra* note 7 at 1.

27 *Supra* note 15.

28 CivA 224/51, (1953) 7 PD 674 (Isr).

29 [1964] AC 465 (HL), [1963] 2 All ER 575, [1963] 3 WLR 101, [1963] 1 Lloyd's Rep 485, 8 LDAB 155, 107 Sol Jo 454.

30 [1970] AC 1004 (HL), [1970] 2 All ER 294, [1970] 2 WLR 1140, [1970] 1 Lloyd's Rep 453, 114 Sol Jo 375.

31 *Supra* note 8.

32 [1985] HCA 41, (1985) 157 CLR 424, (1985) 56 LGRA 120, (1985) 60 ALR 1, (1985) 59 ALJR 564, (1985) Aust Torts Reports 80-322, (1985) 2 BCL 119, (1985) NSW ConvR 55-251.

33 2001 SCC 79, [2001] 3 SCR 537, 206 DLR (4th) 193, 277 NR 113, 96 BCLR (3d) 36, 8 CCLT (3d) 26.

34 "If your Lordships accept the view that this pleading discloses a relevant cause of action, you will be affirming the proposition that by Scots and English law alike 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." *Donoghue*, *supra* note 1 at 57, per Lord Atkin.

35 "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." *Donoghue*, *supra* note 1 at 44, per Lord Atkin.

36 *Donoghue*, *supra* note 1 at 70, per Lord Macmillan.

37 "I do not think so ill of our jurisprudence as to suppose that its principles are so remote from the ordinary needs of civilized society and the ordinary claims it makes upon its members as to deny a legal remedy where there is so obviously a social wrong." *Donoghue*, *supra* note 1 at 46, per Lord Atkin.

38 *Powlett v University of Alberta*, [1934] 2 WWR 209, 1934 CanLII 488 (AB CA), cited to WWR.

39 *Ibid* at 245.

40 At the time of writing, noting up *Donoghue* in CanLII yielded 1134 cases; noting it up in Westlaw yielded 927 Canadian cases. However, a Boolean search (donoghue /3 stevenson) in Westlaw Edge Canada, which focuses solely on Canadian cases, yielded 1559 cases. Work is underway to combine and reconcile these separate sources to create a definitive subset of Canadian citations to *Donoghue*.

41 217 N.Y. 382, 111 N.E. 1050 (1916).

42 *Donoghue*, *supra* note 1 at 42 (Lord Buckmaster), 56 (Lord Atkin), and 69 (Lord Macmillan).

43 Based on Westlaw searches done on 30 August 2022. Noting up the case yielded 1180 cases; Boolean searching ("macpherson /3 buick" and "mcpherson /3 buick" yielded 1185 cases.

CHAPTER 19

A Message from Vancouver: The 'Festival', The 'Pilgrimage', The Movie, The Musical, The 'Irregulars'

I. AUTHOR BIO [§19.1]

The Honourable Martin Taylor is a retired Justice of the British Columbia Court of Appeal, Cayman Islands Court of Appeal and British Columbia Supreme Court.

Having some experience in the newspaper business, Justice Taylor eventually landed a job in Sarnia, Ontario as a police reporter. It was his first exposure to the law. He was impressed by the lawyers and judges with whom he interacted, and began to consider a legal career of his own.

Justice Taylor's employment with the Canadian Press eventually brought him to BC to cover an election. While in Vancouver, he had the opportunity to interview Norman MacKenzie, then President of UBC, who encouraged him to pursue his interest in a legal career.

As a law student, Justice Taylor was the editor of three issues of the UBC Law Review, and won the Alan Gregory Moot Award. On weekends throughout law school and during articling, Justice Taylor continued to work for the Canadian Press, and entered the bar without any student debt.

Upon graduating law school, Justice Taylor articled with Charles Brazier, QC, and worked for fifteen years as counsel in private practice. Subsequently he served on the BC Supreme Court for eleven years, on the BC Court of Appeal for six years, and thereafter part-time on the Court of Appeal for the Cayman Islands.

Justice Taylor has been involved with the graduating class of 1962 primarily as an organizer of events associated with the legal history of the law of negligence. The reunion for their 20th anniversary as a class coincided with the 50th anniversary of the famous *Donoghue v Stevenson* decision, which prompted the idea of a festival to mark the occasion. Professor J.C. Smith and Justice Allen Linden debated the enduring significance of the case to the modern law of negligence. The success of this festival stimulated subsequent discussions with the Old Paisley Society in Scotland, and led to a Pilgrimage to Paisley in 1990. It attracted 250 Canadian judges, lawyers and their companions.

The papers presented at the conference in Paisley were published in a book entitled 'The Paisley Papers', and have since been judicially considered in reported cases. The conference

also spawned a docu-drama entitled 'The Paisley Snail', which premiered in 1995 at the Commonwealth Law Conference in Vancouver.

In 2009, Justice Taylor was recognized by the Allard Law Alumni Association as the recipient of the Lifetime Achievement Award. This award recognizes an extraordinary alumna/alumnus who has set a high standard for volunteerism, philanthropy and/or professional accomplishment, and has been an example for all who follow.

II. INTRODUCTION [§19.2]

Here we are in Vancouver, and we can say that today's celebration of May Donoghue's great victory in the House of Lords has taken us across the Commonwealth common-law universe, all the way from Auckland in the lower right-hand corner to Vancouver in the upper left.

III. THE 'FESTIVAL' [§19.3]

It seems appropriate that the journey should end in Vancouver. It was here 40 years ago this week that the University of British Columbia Law Class of 1962 celebrated its 20th reunion and the 50th anniversary of the Great Paisley Snail case together in what was billed as *"The World's First- Ever Donoghue v. Stevenson Festival"*. The centrepiece was a debate between two leading Canadian torts scholars entitled *"The Good Neighbour on Trial"* and subtitled with a question that had been posed by Lord Denning: *"Has Too Much Been Done for the Sufferer?"*.

Mr. Justice Allen Linden, then of the Ontario Supreme Court, author of Canada's leading torts text, proclaimed Lord Atkin's judgment "the seed of an oak tree, a beacon of hope, a fountain of sparkling wisdom, a skyrocket bursting in the midnight sky".

From the opposite corner Professor Joe Smith delivered the more skeptical view. In a paper co-authored with Dean Peter Burns he lamented that Lord Atkin's judgment had led four years earlier to adoption by the House of Lords of the unworkable concept of an all-embracing *'prima facie duty of care'* in its decision in *Anns v Merton London Borough Council*.

Both papers appeared in the *UBC Law Review*. The Smith-Burns paper was published also in the *Modern Law Review*. In 1987 it was cited with approval in the pivotal House of Lords decision in *Curran v. Northern Ireland Co-operative Housing Association*. This achievement inspired us all in our quest for the full story of the case, its people and places, and in the venture which led three years later to the celebrated *1990 Pilgrimage to Paisley*.

IV. THE 'PILGRIMAGE' [§19.4]

The Pilgrimage followed the 1990 Canadian Bar Association annual meeting in London. It saw 250 Canadian lawyers, judges and guests march through Paisley behind one of Scotland's finest pipebands to the site of the long-gone Wellmeadow Cafe for the dedication there of a memorial park by the Lord Chancellor, Lord Mackay of Clashfern.

This was the climax of a two-day conference on the future of the law of negligence, addressed by the corps d'elite of the Commonwealth torts academia. It was taking place by extraordinary co-incidence only a few weeks after the decision in *Murphy v Brentwood Council*, a seismic event in which the House of Lords followed the trend established in *Curran* and subsequent cases and reversed its own decision of only 12 years earlier in *Anns*.

This is all we have to say from Vancouver today regarding the law in May Donoghue's case, spelled LAW. Everything else we have today is concerned with its lore, spelled LORE.

Oliver Wendell Holmes said that our legal system has "this final title to respect that it is not a Hegelian dream, but part of the lives of men". To which May Donoghue's case demands, of course, that we add: "and of women". The facts and history of the case, its people and places are as important to its fame as the vast jurisprudence that it has spawned—there are people here in Vancouver who for 40 years now have been thinking of little else.

In preparation for our 1982 Festival we took the considerable liberty of directing interrogatories to John Leechman, then principal of W.G. Leechman & Co. of Glasgow, who we found listed in the Appeal Cases as May Donoghue's solicitors. John replied most generously with copies from his father's file of the pleadings in the case, the material before the House of Lords, typewritten transcripts of the speeches, and a great deal more.

In 1983 John Leechman came to Vancouver and at a dinner in his honour he told us something of his father, Walter G. Leechman, and his father's view of the case. He said that his father was a meticulous solicitor who would not have taken the case without having closely interviewed May Donoghue and her friend, and satisfied himself they were telling the truth. He told us that her claim was settled by his father with Stevenson's executors for 200 pounds. He put to rest forever the story, said to have originated with Stevenson's counsel, Lord Normand, that the case was dismissed at trial for failure to establish the presence of the snail.

John Leechman did much more for us. He put us in touch with the historical Old Paisley Society. They had never before heard of the case. They immediately located for us the site of the long-demolished Wellmeadow Cafe, the descendants of its one-time proprietor Francis Minchella, the remains of David Stevenson's plant, and a great deal more.

In 1985 I had the pleasure of meeting its Chairperson, Mrs. Ellen Farmer, MBE, and her colleagues in Paisley. They showed me the desolate, rain-swept site at the corner of Wellmeadow Street and Lady Lane where the Wellmeadow Cafe had once stood. The air was suddenly full of electricity. Everyone was taken immediately by the idea of having an international conference on the modern law of negligence at its birthplace in Paisley.

The Old Paisley Society found for us Stevenson bottles and pictures of the Café. They found the paving stone that once stood at its front door—stepped on at least twice by May Donoghue and her friend—and had it cut into souvenir paperweights.

In no time at all, everyone was on board. The Canadian Bar Association, the Faculty of Advocates and Law Society of Scotland sponsored the event. Along with the Lord Chancellor at the head of the parade to the site were Mr. Justice Charles Gonthier and Madam Justice Bertha Wilson of the Supreme Court of Canada, Mr. Justice Gerard Brennan, later to become Chief Justice of Australia, and Lord Hope, President of the Scottish Court of Session.

Immediately after the ceremony the guests of honour were served with ginger beer by the great-grandson of the cafe owner Francis Minchella who had served May Donoghue and her friend. That evening everyone was served with consommé escargot at a dinner at the Town Hall hosted by the Provost of Paisley. We were entertained afterwards at a concert party headlined by Scotland's leading tenor, Peter Morrison, famed as 'the Singing Solicitor'.

I dare not name anyone else for fear of leaving out so many who made the first Paisley Pilgrimage such an enormous success.

V. THE BOOK, THE MOVIE, AND MORE [§19.5]

As soon as we got back to Vancouver work started on 'the book': '*Donoghue v. Stevenson and the Modern Law of Negligence: The Paisley Papers*', an illustrated account of the proceedings published in 1991 by the Continuing Legal Education Society of BC.

Next, of course, came 'the movie', '*The Paisley Snail*', brain-child of David Hay, distinguished Vancouver cinematographer and Queen's Counsel. It had its premiere at the 1996 Commonwealth Law Conference in Vancouver, was distributed world-wide before going on the internet where, as you will see today, it has caused the story of *Donoghue v Stevenson* to 'go viral'. The YouTube version alone has been viewed some 18,700 times.

As a result of the publicity generated by the movie David had a call from one of May Donoghue's granddaughters. He was given what became the first photograph of the common law world's most famous litigant that the public has ever seen. As with much more about the case, this can be found on the website of the Scottish Council of Law Reporting.

In 2012 British Columbia sent a formidable delegation, led by our Chief Justice Lance Finch, to the splendid conference celebrating the 80th anniversary organized from the new Paisley campus of the University of the West of Scotland.

Then came the *Donoghue v Stevenson* Display at UBC Faculty of Law, documents, pictures and priceless artifacts centered, of course, on the "brown bottle opaque bearing the inscription 'D. Stevenson, Glen Lane Paisley", its content "incapable of intermediate examination". Next a stirring bagpipe salute to May Donoghue by the pipe major of the Simon Fraser University pipe band. And now, the annual *Donoghue v Stevenson* law school essay competition.

In 2021 *Donoghue v Stevenson* swept a poll of lawyers conducted by the Scottish Council of Law Reporting for the greatest case ever decided by the Court of Session.

Yet to come to come is first night of 'the musical'—*May and the Paisley Snail*. The lyrics are by distinguished Vancouver counsel and author Bruce Fraser, QC. Its premiere performance has had to be adjourned *sine die* by the pandemic.

VI. THE 'IRREGULARS' [§19.6]

Deeply involved in everything mentioned have been members of the 'Paisley Irregulars'. It claims to be the only organization in the world devoted exclusively to perpetuation of the memory of the Great Paisley Snail Case. The Irregulars are based in Vancouver, where (pandemics permitting) they hold their regular annual dinner—for at least two good reasons in the month of May. But Irregulars are in fact to be found almost everywhere, in Kamloops and Kelowna, Edmonton, Ottawa, and New Brunswick, London and Scotland.

The Irregulars celebrate the decision of *Donoghue v Stevenson* in fact and fiction, myth and legend. They join in saluting the Law Society of Scotland, and particularly our friend Michael Clancy, OBE, and his colleagues Jim McKay, Natalia Shibli, Rachel Steer and Chris Tomlinson for bringing the whole world together virtually today to honour its 90th anniversary.