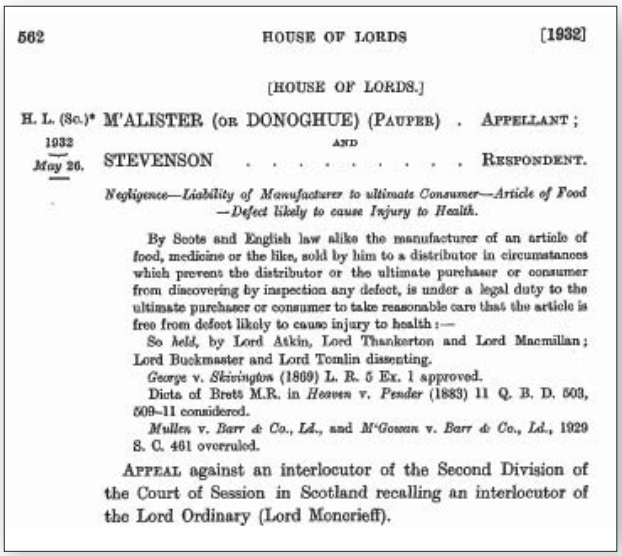
The diamond snail

By David Ash



562 HOUSE OF LORDS [1932]

[HOUSE OF LORDS.]

H. L. (Sc.)* 1932 May 26. M'ALISTER (or DONOGHUE) (PAUPER) . APPELLANT; AND STEVENSON . . . . . RESPONDENT.

Negligence—Liability of Manufacturer to ultimate Consumer—Article of Food—Defect likely to cause Injury to Health.

By Scots and English law alike the manufacturer of an article of food, medicine or the like, sold by him to a distributor in circumstances which prevent the distributor or the ultimate purchaser or consumer from discovering by inspection any defect, is under a legal duty to the ultimate purchaser or consumer to take reasonable care that the article is free from defect likely to cause injury to health:—

So *held*, by Lord Atkin, Lord Thankerton and Lord Macmillan; Lord Buckmaster and Lord Tomlin dissenting.

George v. *Skivington* (1869) L. R. 5 Ex. 1 approved.

Dicta of Brett M.R. in *Heaven* v. *Pender* (1883) 11 Q. B. D. 503, 509–11 considered.

Mullen v. *Barr & Co., Ld.*, and *M'Gowan* v. *Barr & Co., Ld.*, 1929 S. C. 461 overruled.

APPEAL against an interlocutor of the Second Division of the Court of Session in Scotland recalling an interlocutor of the Lord Ordinary (Lord Moncrieff).

The chief justice in the summer 2003/2004 issue of *Bar News* confessed that when *Perre v Apand*[1] was handed down, he for one 'became a little anxious and despondent about precisely how on earth I could predict not only the outcome of a case involving purely economic loss, but even the correct approach sanctioned by the High Court in dealing with the question. There appeared to be differences of approach that the court did not appear to have resolved by the time this judgment was handed down'.[2] For current purposes *Perre* interests for a different reason. It is an example - one among many - of the continuing and overarching relevance of *Donoghue v Stevenson*[3], a decision cited eight times in the judgment.

On 26 May 2007 it will be 75 years since the Australian Welshman Lord Atkin carried two Scots over two Sassenach Chancery men to disentangle the law of negligence from concepts of privity and contract. It was 'the Celtic majority'.[4] To mark the occasion, *Bar News* looks both to the decision and to its aftermath. For those needing to know more, there is an educational web site holding a 35-minute interview with Lord Denning and a 42-minute docudrama with Lord Atkin played by Sean Connery's brother Neil.[5]

A law of 'negligence'?

Prior to 1932, if a builder built a house negligently and as a consequence the ceiling fell and injured the occupier or someone else, the orthodox view was that no action lay by that relationship alone.[6] More generally, in any ordinary case, a manufacturer owed no duty to a consumer except by contract.[7] Whether such a result was fair, it was often illogical. For example, a car manufacturer would owe a duty to its dealer, yet it could be said 'with some approach to certainty' that the dealer would be the one person by whom the car would not be used.[8]

Negligence was not unknown to the ancient world. Under Babylonian law, a mental element in wrongs was recognized, with carelessness and neglect being severely punished, but an accident was not deemed an offence.[9] The English were not as generous, even as the industrial revolution unfolded, and use and consumption of goods manufactured in another town, county or country became commonplace. There were exceptions, of course, where the article was dangerous of itself, or where the article was rendered dangerous to the knowledge of the manufacturer.

In *Winterbottom v Wright*[10] a carriage was manufactured negligently, and Mr Winterbottom, a stranger to its manufacture and to its sale, was injured. The court held that he had no cause of action. As Alderson B said, 'The only safe rule is to confine the right to recover to those who enter into the contract; if we go one step beyond that, there is no reason why we should not go fifty.' [11] It was this case that was the starting point of the controversy, one which was referred to at length by subsequent judges including Brett MR in *Heaven v Pender*[12] - as to which see below - and by Cardozo J in *MacPherson v Buick Motor Company*[13], seminal judgments referred to at length in the Snail in the Bottle case.

By the by, one issue of which the case must be but an example is the myriad ways of referring to a judge when they have been further elevated between their judgment and the case in which their judgment is being referred to. In *MacPherson*, Cardozo J refers initially to 'Brett MR afterwards Lord Esher'.[14] However, when thereafter referring to Brett MR's judgment, he refers to Lord Esher only.[15] Is this anachronistic? Lord Buckmaster even cuts out the introductory clarification, referring to 'Lord Sumner in the case of *Blacker v Lake & Elliot Ltd*',[16] whereas Hamilton J was not elevated to the Lords until 1913.

For his part, Atkin is unfazed. He refers first to 'Brett MR in *Heaven v Pender*'[17] then to 'Lord Esher (then Brett MR)' [18], then to Lord Esher as the judge in *Le Lievre v Gould*[19] - by which time he indubitably was Lord Esher[20] - before returning to *Heaven v Pender*, wherein 'the judgment of Lord Esher expresses the law of England'.[21]

Meanwhile, Lord Macmillan refers to Lord Sumner as 'Hamilton J, as he then was...'[22] However, perhaps by way of Scottish shorthand, he later refers to 'Cardozo J, the very eminent chief judge of the New York Court of Appeals and now an associate justice of the United States Supreme Court...'. At the time of *MacPherson* - 1916 - Cardozo J was a puisne judge; he became Cardozo CJ on New Years' Day 1927, reverting to Cardozo J upon his elevation to the Supreme Court.

Whatever, the master of the rolls' dictum in *Heaven v Pender* was to prove vital to Mrs Donoghue's success:

> The proposition will stand thus: whenever one person supplies goods, or machinery, or the like, for the purpose of their being used by another person under such circumstances that every one of ordinary sense would, if he thought, recognise at once that unless he used ordinary care and skill with regard to the condition of the thing supplied or the mode of supplying it, there will be a danger of injury to the person or property of him for whose use the thing is supplied, and who is to use it, a duty arises to use ordinary care and skill as to the condition or manner of supplying such thing. And for a neglect of such ordinary care or skill whereby injury happens a legal liability arises to be enforced by an action for negligence. [23]

However, his colleague Cotton LJ, with whom Brett LJ concurred, was unable to accept the width of the proposition, preferring to restate the prevailing orthodoxy:

> In declining to concur in laying down the principle enunciated by the master of the rolls, I in no way intimate any doubt as to the principle that anyone who leaves a dangerous instrument, as a gun, in such a way as to cause danger, or who without due warning supplies to others for use an instrument or thing which to his knowledge, from its construction or otherwise, is in such a condition as to cause danger, not necessarily incident to the use of such an instrument or thing, is liable for injury caused to others by reason of his negligent act. [24]

One case of particular interest, given the development of the law of negligent misstatement, is *Le Lievre v Gould*.[25] There, mortgagees advanced moneys to a builder of the faith of certificates given by a surveyor. In consequence of the surveyor's negligence - but not fraud - the certificates contained untrue information, but it was held he owed no duty to the mortgagees. Interestingly, Lord Esher reflects on his earlier dictum:

> But can the plaintiffs rely upon negligence in the absence of fraud? The question of liability for negligence cannot arise at all until it is established that the man who has been negligent owed some duty to the person who seeks to make him liable for his negligence. What duty is there when there is no relation between the parties by contract? A man is entitled to be as negligent as he pleases towards the whole world if he owes no duty to them. The case of *Heaven v Pender* has no bearing upon the present question. That case established that, under certain circumstances, one many may owe a duty to another even though there is no contract between them. If one man is near to another, or is near to the property of another, a duty lies upon him not to do that which may cause a personal injury to that other, or may injure his property. [26]

The only authority directly in Mrs Donoghue's favour was the case of the harmful hairwash, *George v Skivington*.[27] Mr George had bought a bottle of hairwash for his wife from Mr Skivington. Mr Skivington knew that it was not the purchaser but his wife who would be laying her scalp to his care, and this seems to have been a deciding factor in the court finding for Mr George. As both Lord Atkin and Lord Buckmaster note, Cleasy B reasoned by analogy to fraud, earning from Lord Buckmaster a strong reproof and the dismissive observation, 'I do not propose to follow the fortunes of *George v Skivington*; few cases can have lived so dangerously and lived so long.'[28]

That ginger beer manufacture was a dangerous business was first evidenced in *Bates v Batey & Co Ltd*[29], where a bottle had burst as a result of a defect of which the defendants did not know but could by the exercise of reasonable care have discovered. Horridge J referred to the relevant authorities, and felt himself not bound by *George v Skivington*. (Although it seems Horridge J was a good draw for plaintiffs generally. Lord Morris of Borth-y-Gest recalls Lord Atkin gently chiding him for only getting £100 when he was appearing for a widow, against a bank, and was before Horridge J and a common jury.[30]) But it is *Mullen v Barr & Co*[31] which proves the more fascinating. As Lord Buckmaster puts it:

> In *Mullen v Barr & Co*, a case indistinguishable from the present excepting upon the ground that a mouse is not a snail, and necessarily adopted by the Second Division in their judgment, Lord Anderson says this: '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. It is obvious that, if such responsibility attached to the defenders, they might be called on to meet claims of damages which they could not possibly investigate or answer.' [32]

The case at bar

And so to May Donoghue. Among the more important qualities in life is luck, and Mrs Donoghue found hers by going to the appositely named Mr Walter Leechman. Mr Leechman must be the sine qua non of plaintiff lawyers, for it was no less than he that had acted for Mr Mullen when he took on the mouse. Indeed, he caused Mrs Donoghue's writ to issue less than three weeks after *Mullen v Bar & Co* was handed down.[33] The snail was to have the legs the mouse did not.

However, the event that brought her there cannot be thought lucky. On a Sunday evening, 26 August 1928, Mrs Donoghue visited a café in Wellmeadow Street at Paisley operated by Mr Francis Minchella. She

Among the more important qualities in life is luck, and Mrs Donoghue found hers by going to the appositely named Mr Walter Leechman.

visited the café in the company of a friend. She was separated, and the Wikipedia entry on the case is unchivalrous enough to suggest that she 'may have been illicitly meeting a male friend'.[34] Lord Macmillan has preserved her dignity for posterity, referring to the friend as a 'she'.[35]

The friend purchased for her a bottle of ginger beer, which bottle was made of dark opaque glass and bore the words 'Stevenson / Glen Land / Paisley'. Mr Minchella poured some but not all of contents into a tumbler, and Mrs Donoghue drank from it. When her friend came to pour the remainder, out came a decomposed snail. Mrs Donoghue would allege that she suffered shock and severe gastroenteritis.

In Scotland an action in the Court of Session begins by a summons on the part of the pursuer, to which is annexed a condescendence, containing the allegations in fact on which the action is founded. Mr Leechman issued Mrs Donoghue's writ, sparing nothing of Mr Stevenson's feelings: the plant was a place where 'snails and the slimy trails of snails were frequently found'.[36] The damages sought were £500.

The facts set out above are the facts averred by Mrs Donoghue. The matter was never heard. Instead, against the advice of counsel,[37] the defendant moved the Court of Session to dismiss the claim on the basis that it disclosed no cause of action. In modern parlance, the defendant sought summary judgment, assuming for the purpose of the application the correctness of the facts averred. In other words and as is the nature of such applications, the defendant was required to assume and the court required to accept the plaintiff's case at its highest.

The application failed before the lord ordinary, who held that the averments disclosed a good cause of action and allowed a proof. The Second Division - of which Lord Anderson's view is set out above - recalled the interlocutor of the lord ordinary and dismissed the action. And so it was from here to London. Before turning to the personalities of the case, there are two matters which have tweaked the curiosity of three generations of law students. They arise from Mrs Donoghue's descriptor in the Appeal Cases report, 'M'Alister (or Donoghue) (Pauper)'.

As to the alternative names, Lord Macmillan in *The Citation of Scottish Cases* said:

> Some confusion is apt to arise in the citation of Scottish decisions in consequence of the practice in Scotland of naming a married woman in legal documents and proceedings by her maiden name as well as by her married surname with the (infelicitous) disjunctive 'or' interposed. [38]

Macmillan, it must be said, had an obvious loyalty to his mother tongue. Most judges would have been content to say that the manufacturers in *Mullen's Case* had been absolved. For Macmillan, influenced no doubt by Sir Walter Scott, they were assoilzied.[39]

As to Mrs Donoghue's status as a pauper, her legal team was acting pro bono. She had to petition to be allowed to appear in forma pauperis before the house, to avoid having to put up security for costs. She is described by the law reporter as a shop assistant; by her affidavit in support of her petition, she avers after making clear that she no longer resides with her husband, 'That I am very poor, and am not worth in all the world the sum of five pounds, my wearing apparel and the subject matter of the said Appeal only excepted, and am, by reason of such my poverty, unable to prosecute the said Appeal'.[40]

Mrs Donoghue was represented by George Morton KC and W R Milligan, both of the Scottish Bar. Mr Milligan had earlier raced F E Smith around the Cambridge quadrangle known from the film *Chariots of Fire*,[41] and would later become lord advocate. One of the juniors for the respondent, J L Clyde, would become lord president of the Court Session. W G Normand, the solicitor-general for Scotland and later a law lord, led for the respondent, whose team also included the sole member of the English Bar, T Elder Jones.

The neighbourhood test

Before moving to the other judges' reasons, it is appropriate to set out Lord Atkin's test, as it has attracted the most attention through the years:

> At present I must content myself with pointing out that in English law there must be, and is, some general conception of relations giving rise to a duty of care, of which the particular cases found in the books are but instances. The liability for negligence, whether you style it such or treat it as in 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. [42]

The lawyer's question provoked Jesus to deliver the parable of the Good Samaritan, and to force the lawyer, ultimately, to answer his own question: the neighbour to the man left half dead by thieves was neither the priest nor the Levite who passed by on the other side of the road, but the Samaritan; in the words of the lawyer forced by

Jesus to answer his own question, the neighbour was 'He that showed mercy on him'. [43]

Like all analogies, it breaks down if taken to its logical end. One would have thought that the manufacturer would seem closer to the thieves than the passers-by, having created the evil, so that if the parable has applicability, it is that the duty ultimately imposed by the case is akin to a duty on the thieves not to leave their victims half dead. However, and in fairness to Atkin, he merely repeats the question, not the answer. The more interesting point is that this was not the first time Atkin had spoken in such terms. In 1931, six weeks before argument was heard, he remarked in a lecture at King's College, London:

> It is quite true that law and morality do not cover identical fields. No doubt morality extends beyond the more limited range in which you can lay down the definite prohibitions of law; but, apart from that, the British law has always necessarily ingrained in it moral teaching in this sense: that it lays down standards of honesty and plain dealing between man and man... He is not to injure his neighbour by acts of negligence; and that certainty covers a very large field of the law. I doubt whether the whole law of tort could not be comprised in the golden maxim to do unto your neighbour as you would that he should do unto you. [44]

The bench

Mention has already been made of the make up of the bench. It was no mediocre lot. Lord Buckmaster had been lord chancellor and would in 1933 be advanced to a viscountcy. He had been called to the Bar in 1884. He practised first on the common law side but later developed a large Chancery practice. A Liberal, he spoke frequently in the Commons and, after 1915, in the Lords, in favour of legal and social reform, including on the reform of the divorce laws, birth control and women's suffrage. However, his reforming impulse did not extend to his jurisprudence, and it was said by a biographer that 'Any temptation to find a construction of the law which would 'right a wrong' in the particular case or would mitigate a hardship caused by the law itself was resolutely resisted.'[45]

When asked 'Whom do you regard as the greatest colleague you have had?', Lord Dunedin gave the colourful reply:

> You will be surprised when I tell you-Buckmaster; I have not and I have never had any sympathy with Buckmaster's political ideas and performances and I think him to be a sentimentalist-unless he is sitting on his arse on the bench; there he is one of the most learned, one of the most acute, and the fairest judge I ever sat with; and he will leave much in the books. [46]

Lord Atkin was the next senior of the five, and, as Australian lawyers know, was born in Brisbane. He cemented his link to the Antipodes by marrying the daughter of William Hemmant, one time acting premier of Queensland. He read with the renowned common lawyer Sir Thomas Scrutton, and later sat with him on the Court of Appeal, where they and Bankes LJ formed what Lord Denning thought 'one of the strongest courts of appeal'.[47]

The third member of the bench was Lord Tomlin. He, too, had a distinguished master, this time in Lord Parker. He continued with Parker as his devil until Parker's elevation to the bench. (Parker, like Sir Hayden Starke in Australia, would take a place on his nation's highest judicial tribunal without taking silk.) Like Buckmaster, he practised in the Chancery Division, although he appeared in a wide variety of cases in both the House of Lords and the Privy Council. His biographer says:

> Tomlin's mind struck those who knew him best as being the incarnation of pure common sense, an uncommon quality. He never seemed to leave the firm ground of fact. He had but little of that speculative interest in the history and philosophy of the law which was so marked in the mind of his master Parker. The case to be dealt with was to Tomlin the matter of interest. [48]

This comment informs the reader's appreciation of Lord Tomlin's short - less than two-page - concurrence with Lord Buckmaster, in particular the observation:

> The alarming consequences of accepting the validity of [the proposition put by plaintiff's counsel in *Winterbottom* and urged by the appellant here] were pointed out by the defendant's counsel, who said: 'For example, every one of the sufferers by such an accident as that which recently happened on the Versailles Railway might have his action against the manufacturer of the defective axle.' [49]

Compare Lord Simonds' view - from the bench - that 'it is not seemly to weigh the pronouncements of living judges, but it is, I think, permissible to say that the opinion of few, if any judges of the past command greater respect than those of Lord Tomlin and Rowlatt J'.[50]

Lord Thankerton was the first of the two Scots. His father had been Baron Watson of Thankerton; in the peculiar humour that is the burden of the Scot, he explained that he refrained from taking the title assumed by him 'lest haply he should besmirch it'.[51] He said in a later case that 'There can be little question as to the proper function of the courts in questions of public policy. Their duty is to expound, and not to expand, such policy.'[52] In a four-page judgment, Thankerton does not expand, although he makes clear that Lord Atkin's judgment is one that he 'so entirely' agrees that he cannot usefully add anything to it. His judgment does, however, provide emphasis of the notion of duty. The 'essential element' of the case was the manufacturer's own action in bringing himself into direct relationship with the party injured.'[53]

Lord Macmillan was the final member of the House; his judgment, clearly enough, was for the plaintiff. It was to be his lot to have his judgment overshadowed by Lord Atkin's, but that is not to diminish the clarity of his language:

> The grounds of action may be as various and manifold as human errancy; and the conception of legal responsibility may develop in adaptation to altering social conditions and standards. The criterion of judgment must adjust and adapt itself to the changing circumstances of life. The categories of negligence are never closed...
>
> To descend from these generalities to the circumstances of the present case, I do not think that any reasonable man or any twelve reasonable men would hesitate to hold that, if the appellant

establishes her allegations, the respondent has exhibited carelessness in the conduct of his business... [He owes a duty] to those whom he intends to consume his products. [54]

The aftermath

Atikin's biographer records that a few days before judgment, Lord Wright wrote to Lord Atkin:

> Dear Atkin,
>
> I have been reading with admiration your magnificent and convincing judgment in the snail cases - also Macmillan's which is very good. I am glad this fundamental rule of law will now be finally established.
>
> It seems as if (alas!) I were fated to differ from old Scrutton in the first two cases from his court I have had to deal with!
>
> I hope you will have a pleasant vacation.
>
> Yrs.
>
> Wright
>
> I find Buckmaster on snails very disappointing. I have not seen Tomlin's efforts on the same subject. [55]

Wright, like Atkin, had been a pupil of Scrutton. It is condign that the first reference in CaseBase to *Donoghue v Stevenson* is a judgment of the Court of Appeal, in which Scrutton LJ was able perhaps to lecture his old student and colleague:

> English judges have been slow in stating principles going beyond the facts they are considering. They find themselves in a difficulty if they state too wide propositions and find that they do not suit the actual facts... [the instant case was authority for no more than] a manufacturer's liability to the ultimate consumer when there is no reasonable possibility of intermediate examination of the product. [56]

Meanwhile, from Australia, Mr Justice Evatt wrote to Atkin:

> ... The Snail Case has been the subject of the keenest interest and debate at the Bar and in the Sydney and Melbourne law schools: on all sides there is profound satisfaction that, in substance, your judgment and the opinion of Justice Cardozo of the USA coincide, and that the common law is again shown to be capable of meeting modern conditions of industrialisation, and of striking through forms of legal separateness to reality. There is an article in the *Canadian Bar Review* which expresses the Australian view as well as that of Canada.[57]

Across the way

In the footnotes, I refer to Professor Heuston's comments on the expression 'the Celtic majority'. He mordantly observes 'Oddly enough, apart from Trinity, Oxford, the only place in which this has been produced as a ground for doubting the authority of the decision has been the Irish High Court [in] *Kirby v Burke* [1944] IR 207'.[58] In that case, the judge said:[59]

> The much controverted 'Case of the Snail in the Bottle', while leaving subsidiary questions open, has settled the principle of liability on a similar issue finally against the manufacturer in Great Britain. But the House of Lords established that memorable conclusion only twelve years ago in *Donoghue v Stevenson*, by a majority of three law lords to two, 'a Celtic majority,' as an unconvinced critic ruefully observed, against an English minority. Where lawyers so learned disagreed, an Irish judge could assume, as I was invited to assume, as a matter of course, that the view which prevailed must of necessity be the true view of the common law in Ireland. One voice in the House of Lords would have turned the scale; and it is not arguable that blameworthiness according to the actual standards of our people depends on the casting vote in a tribunal exercising no jurisdiction over them. Hence my recourse to the late Mr Justice Holmes. His classic analysis[60] supports the principle of Lord Atkin and the majority. And to that principle I humbly subscribe.

One would expect an Irish judge who preferred the academic writings of a dead American, however learned, to the recent and considered views of the premier English court, a *fortiori* a Celtic bench in disguise, to be a true patriot. He was. He had been a Sinn Fein MP. He had appeared as counsel for Sir Roger Casement. He had rebelled against Lloyd George's requirement that references to the king had to be inserted in the draft Constitution of the Irish Free State, as well as an oath of allegiance. He was also, as George Gavan Duffy, half-brother of the Australian Chief Justice Frank.[61]

And across the world

Despite the misgivings of Atkin's former master and the mulling of the Irish, the generality of their lordships' decision had been put beyond doubt by the Privy Council in *Grant v Australian Knitting Mills Ltd.*[62] Dr Grant had had the misfortune to purchase underwear which caused him an acute general dermatitis. He sued both the retailer and the manufacturer, succeeded at first instance, but failed before the High Court on the evidence. Mr Justice Evatt in dissent would have applied the Lords' decision to hold the verdict.[63]

The matter came before the Privy Council[64] - which included Lords Macmillan and Wright - and it had little difficulty in reversing the High Court and applying the *Snail Case.* (It did not include Lord Thankerton, whose recorded hobby was knitting, 'at which he was very skilful'.)[65] Once again, the floodgates argument was raised, and once again it was dispatched. It is useful to set out the dispatch in full, if only to compare the view with what in fact happened and to emphasise that the case was determined under a different test for remoteness. The Privy Council says:

> Mr Greene further contended on behalf of the manufacturers that if the decision in *Donoghue's Case* were extended even a hair's breadth, no line could be drawn and a manufacturer's liability would be extended indefinitely. He put as an illustration the case of a foundry which had cast a rudder to be fitted on a liner: he assumed that it was fitted and the steamer sailed the seas for some years: but the rudder had a latent defect due to faulty and negligent casting and one day it broke, with the result that the vessel was wrecked, with great loss of life and damage to property. He argued that if Donoghue's Case were extended beyond its precise facts, the maker of the rudder would be held liable for damages of an indefinite amount, after an indefinite time and to claimants indeterminate until the event. But it is clear that such a state of things would involve many considerations far removed from the simple facts of this case. So many contingencies must have intervened between the lack of care on the part of the makers and the casualty that it may be that the law would apply, as it does in proper cases, not always according to strict logic, the rule that cause and effect must not be too remote: in any case the element of directness would obviously be lacking. [66]

Actionable misrepresentation

In the fourth edition of Spencer Bower's *Actionable Misrepresentation*,[67] Justice Handley of the New South Wales Court of Appeal includes as an appendix a 'Development of action for negligent misrepresentation 1889-1963', in other words, an overview from *Derry v Peek*[68] to *Hedley Byrne & Co Ltd v Heller & Partners Ltd*.[69] Of particular interest is *Candler v Crane, Christmas & Co*,[70] as Denning LJ's dissent was vindicated in *Hedley Byrne*. From the red corner, Denning LJ opined:

> If your read the great cases of *Ashby v White, Pasley v Freeman and Donoghue v Stevenson* you will find that in each of them the judges were divided in opinion. 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. It was fortunate for the common law that the progressive view prevailed. [71]

This led Asquith LJ - for the blue team, I think - to utter the memorable retort:

> In the present state of our law different rules still seem to apply to the negligent misstatement on the one hand and to the negligent circulation or repair of chattels on the other; and *Donoghue's Case* does not seem to me to have abolished these differences. I am not concerned with defending the existing state of the law or contending that it is strictly logical-it clearly is not. I am merely recording what I think it is. [72]
>
> If this relegates me to the company of 'timorous souls', I must face that consequence with such fortitude as I can command. I am of opinion that the appeal should be dismissed.

Apropos the Privy Council's dismissal of the concerns advanced by the respondents' counsel in Grant, it is interesting to note that one judge cautioning against liability for negligent words causing pure economic loss was none other than Cardozo CJ, who in *Ultramares Corporation v Touche* said '... what is released or set in motion [in such cases as *MacPherson*] is a physical force. We are now asked to say that a like liability attaches to the circulation of a thought or a release of the explosive power resident in words.'[73] There would be, he said, '... liability in an indeterminate amount for an indeterminate time to an indeterminate class'.[74]

Was there a snail?

Was there a snail? There was never a finding either way. The case settled, with Mr Stevenson's executors paying £200 to end the matter.[75] However, at least two judges have asserted that there was no snail. In 1942, Mackinnon LJ asserted that:

> To be quite candid, I detest that snail... when the law had been settled by the House of Lords, the case went back to Edinburgh to be tried on the facts. At that trial it was found that there never was a snail in the bottle at all! That intruding gastropod was as much a legal fiction as the Casual Ejector. [76]

Lord Normand - who was it will be recalled counsel for the respondent - wrote in the fashion of the seasoned advocate to Lord Macmillan:

> Privately I may say that I would all along have preferred a proof before answer. But I was instructed to fight the relevancy point at the risk of an appeal to the H.L. and did what I could. I personally thought that the H.L. would decide as they did in fact decide, but that we had a very strong case on the facts. If the case had gone to proof I think it would have been fought and possibly won on the issue whether there was a snail in the bottle, and I may have told Mackinnon this. [77]

Yet the myth persisted. In *Adler v Dickson*[78], Jenkins LJ said 'The House of Lords heard the preliminary issue in *Donoghue v Stevenson* and when the trial was finally held there was no snail in the bottle at all.'

Conclusion

The law of negligence - that is, the law relating to that single tort we now call negligence - has not been without critics. In the early years of this century, for example, Australian legislators were critical of what they saw not so much as a rule of law, but a rule of plaintiffs' lawyers. Whether this was true, or whether the actions put in train by those legislators addressed the issue, is for elsewhere. What that debate and other debates have shown is that the words of Lords Atkin and Macmillan have created the paradigm around which both the law's supporters and its critics must move. Such is the resilience of the decision.

1 (1999) 198 CLR 180.

2 At page 61.

3 [1932] AC 562.

4 In '"*Donoghue v Stevenson in Retrospect*"' (1957) 20 MLR 1, Professor Heuston attributes the expression to Landon (1942) 58 LQR 181: see fn 6. He - Heuston - mordantly continues 'Cf (1945) 61 LQR 206 ('Celtic ideology'). Oddly enough, apart from Trinity, Oxford, the only place in which this has been produced as a ground for doubting the authority of the decision has been the Irish High Court: *Kirby v Burke* [1944] IR 207'.

5 www.thepaisleysnail.com/information.shtml. For a snapshot of its relevance circa June 1991, see also Peter T Burns QC & Susan J Lyons (eds), *Donoghue v Stevenson and the Modern Law of Negligence - The Paisley Papers*, 1991, The Continuing Legal Education Society of

British Columbia. Sir Gerard Brennan is a contributor. For a crisp and thorough appraisal, one must still start with Heuston, op cit.

[6] [1932] AC, 578 per Lord Buckmaster.

[7] [1932] AC, 565 per W G Normand, counsel for the respondent, arguendo.

[8] [1932] AC, 565 per Lord Macmillan citing Cardozo J.

[9] See "Babylonian Law", Walker, *The Oxford Companion to Law*, 1980, Clarendon, p 105. A fact acknowledged by Lord Buckmaster: see [1932] AC 562, 577-578.

[10] 10 M&W 109.

[11] 10 M&W 109, 115.

[12] (1883) 11 QBD 503.

[13] (1916) 217 NY 382.

[14] 217 NY, 388.

[15] See eg 217 NY, 392.

[16] (1912) 106 LT 533.

[17] [1932] AC, 580.

[18] [1932] AC, 581.

[19] [1893] 1 QB 491.

[20] He was raised on 24 July 1885: *Dictionary of National Biography*, vol XXII, Supp, p 265.

[21] [1932] AC, 582.

[22] [1932] AC, 613.

[23] 11 QBD, 510.

[24] 11 QBD, 517.

[25] [1893] 1 QB 491.

[26] [1893] 1 QB, 497.

[27] (1869) LR 5 Ex 1.

[28] [1932] AC 570.

[29] [1913] 3 KB 351.

[30] Quoted in Geoffrey Lewis, *Lord Atkin*, 1983, Butterworths, p 14.

[31] [1929] SC 461, 479.

[32] [1932] AC, 578.

[33] Mr Justice Martin R Taylor, 'Mrs Donoghue's Journey', in Jones & Lyons, op cit, p 6.

[34] http://en.wikipedia.org/wiki/Donoghue_v_Stevenson.

[35] [1932] AC 562, 605.

[36] An averral appearing @ *Donoghue v Stevenson* [1932] SLT 317, but not, sadly, in the Appeal Cases report.

[37] See later in this article.

[38] "The Citations of Scottish Cases" (1933) 49 LQR 1.

[39] [1932] AC, 607. See Scott, *Ivanhoe*, ch 29, 'God assoilzie him of the sin of bloodshed!'

[40] Taylor, op cit, p 4.

[41] Taylor, op cit, p 7.

[42] [1932] AC, 580.

[43] Luke 10:25-37, particularly 29 and 37.

[44] Quoted in Lewis, op cit, pp 57-58.

[45] See for this reference and Lord Buckmaster's life generally Geoffrey Russell's entry in the *Dictionary of National Biography 1931-1940*, pp 119-121.

[46] Russell, op cit, p 120.

[47] Quoted by Lewis, op cit, p 91.

[48] The sketch of Lord Tomlin is drawn from Lord Uthwatt's piece in the *Dictionary of National Biography 1931-1940*, pp 865-866.

[49] [1932] AC, 600.

[50] *Government of India v Taylor* [1955] AC 491, 504.

[51] The sketch of Lord Thankerton is drawn from W Valentine Ball's piece in the *Dictionary of National Biography 1931-1940*, pp 929-930.

[52] Fender v Mildmay [1938] AC 1, 23.

[53] [1932] AC, 604.

[54] [1932] AC, 619.

[55] Quoted in Lewis, op cit, p 51.

[56] *Farr v Butters Bros & Co* [1932] 2 KB 606.

[57] Quoted to in Lewis, op cit, p 67. Lewis suggests that Evatt and Atkin were regular correspondents, and devotes Appendix 4 to a letter from Atkin to Evatt in 1940. In an otherwise excellent biography, the latter is designated '"Sir Herbert'.".

[58] See footnote iv, above.

[59] [1944] IR, 215.

[60] In *The Common Law*: see [1944] IR, 214.

[61] See generally en.wikipedia.org/wiki/George_Gavan_Duffy.

[62] *Australian Knitting Mills Ltd v Grant* (1933) 50 CLR 387.

[63] 50 CLR, 440-441.

[64] Grant v Australian Knitting Mills Ltd (1935) 54 CLR 49.

[65] W Valentine Ball, *Dictionary of National Biography* 1931-1940, p 930.

[66] 54 CLR, 67.

[67] Spencer Bower, Turner and Handley, *Actionable Misrepresentation*, 4th ed, 2000, Butterworths.

[68] (1889) 14 App Cas 357.

[69] [1964] AC 465.

[70] *Candler v Crane, Christmas & Co* [1951] 2 KB 178.

[71] [1951] 2 KB, 178.

[72] [1951] 2 KB, 195.

[73] (1931) 255 NY 441, 445.

[74] 255 NY, 444. See *Bryan v Maloney* (1995) 182 CLR 609, 618 per Mason CJ, Deane and Gaudron JJ.

[75] Taylor, op cit, p 18.

[76] Quoted in Lewis, op cit, p 52.

[77] Quoted in Lewis, op cit, p 53.

[78] [1954] 1 WLR 1482, 1483.