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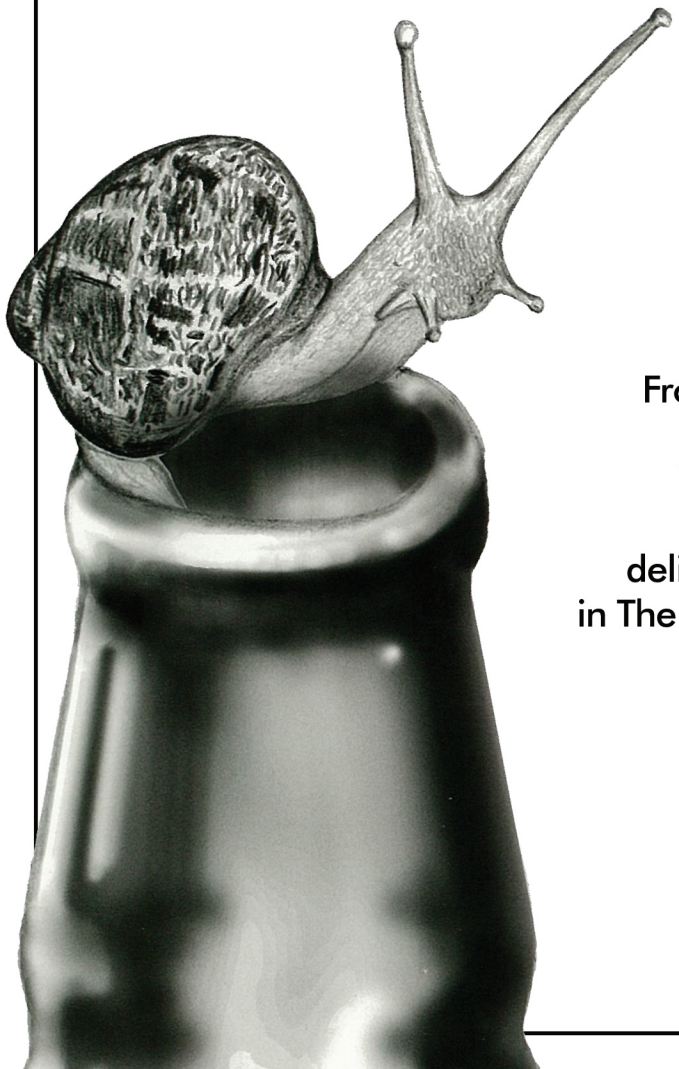
The Snail and the Ginger Beer:

The Singular Case of Donoghue v Stevenson

LECTURE TRANSCRIPT

by Matthew Chapman



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THE SNAIL AND THE GINGER BEER:

THE SINGULAR CASE OF DONOGHUE v STEVENSON[1]

By Matthew Chapman

Mrs May Donoghue travelled from Glasgow to Paisley on 26 August 1928: a Sunday which fell during the annual trades holiday for the working people of the city. She was, at that time, living with her brother in a flat at 49 Kent Street in the heart of Glasgow around 7 or 8 miles away. During her time in Paisley she entered the Wellmeadow Cafe. It was late in the evening. The proprietor of the cafe was Francis Minghella and he sold, among other things, ice cream and fizzy drinks. Every lawyer and law student can recall or, at least, thinks he or she can recall what happened next, but it is usually sensible to check one's recollection against the primary material. In this case you reach for a leather bound book in the Parliamentary Archives.[2] If you do this you will find the following pleading which reads:

> 'At or about 8:50 pm on or about 26th August 1928, the pursuer was in the shop occupied by Francis Minchella, and known as Wellmeadow Café, at Wellmeadow Street, Paisley, with a friend. The said friend ordered for the pursuer ice-cream, and ginger beer, suitable to be used with the ice-cream as an iced drink. Her friend, acting as aforesaid, was supplied by the said Mr Minchella with a bottle of ginger-beer manufactured by the defender for sale to members of the public. The said bottle was made of dark opaque glass, and the pursuer and her friend had no reason to suspect that the bottle contained anything else than the aerated water. The said Mr Minchella poured some of the said ginger-beer from the bottle into a tumbler containing ice-cream. The pursuer then drank some of the contents

[1] [1932] AC 562 (HL(Sc)).
[2] Vol 873. File reference HL/PO/JU/4/3/873.

of the tumbler. Her friend then lifted the said ginger-beer bottle and was pouring out the remainder of the contents into the said tumbler when a snail, which had been, unknown to the pursuer, her friend, or the said Mr Minchella, in the bottle and was in a state of decomposition, floated out of the said bottle. In consequence of the nauseating sight of the snail in such circumstances, and of the noxious condition of the said snail-tainted ginger-beer consumed by her, the pursuer sustained ... shock and illness ... .'[3]

And this is almost as much as we have. The solid research of Lord Rodger and others in the late 1980s[4] rescued the *Donoghue v Stevenson* litigants from what EP Thompson once called 'the enormous condescension of posterity'. We now know quite alot about the lives of Mrs Donoghue and of David Stevenson of the Paisley firm of fizzy pop manufacturers with the same name, but we know very little about what actually happened on the late August evening in 1928.

The facts of *Donoghue v Stevenson* themselves are ordinary, perhaps moderately amusing (if unpleasant for Mrs Donoghue), but the factual background is not the reason why we remember the case. It was, instead, the legal principle established when Mrs Donoghue's case reached the House of Lords and, specifically, something called the neighbour principle that ensured its place in history. The principal author of this, as we know, was Lord Atkin.

Mrs Donoghue's principal problem was the absence of a contract. Her friend had purchased the ginger beer from Mr Minghella: the cafe owner. Mrs Donoghue sued Mr Stevenson's firm: the manufacturer (in fact, she sued Mr Minghella as well, but discontinued the action against him at an early stage and paid his costs). As I have said, her problem was that she had no contract with Mr Stevenson. This was thought by most to be an insurmountable obstacle. Her action

[3] Condescendence II.

[4] See, Alan Rodger QC (Lord Rodger of Earlsferry), 'Mrs Donoghue and Alfenus Varus' (1988) 41 CLP 1 and Professor William M McBryde, '*Donoghue v Stevenson*: the Story of the "Snail in the Bottle" Case' in Gamble, AJ (ed) *Obligations in Context* (W Green, 1990).

was brought in tort and, on one reading, the decision in *Donoghue v Stevenson* and the neighbour principle to which it gave birth can simply be seen as the final stage in a centuries long process by which the tort of negligence was disentangled from the law of contract.

The presence of foreign bodies in Scottish ginger beer bottles was a surprisingly regular phenomenon in the late 1920s. The conjoined appeals in *Mullen v AG Barr & Company Limited*[5] concerned dead mice floating in the bottom of such bottles. The consumers of the mouse-flavoured ginger beer sued the manufacturer in negligence. One of the cases was successful at first instance and the other claim was dismissed. A conjoined appeal was heard by the Court of Session over the course of 3 days in early March 1929. The *Mullen v Barr* Claimants argued at first instance that negligence could be inferred from the mere presence of the dead mice in the ginger beer bottles. This argument failed decisively on appeal. A majority in the Court of Session[6] also held that even if the Claimants had been able to prove negligence on the part of the manufacturer, no duty of care would have been owed by the manufacturer to the ultimate consumer. It was held that, in the absence of a contract, a duty of care was not owed by a manufacturer putting a product on the market, except where: first, the manufacturer knew that the product was dangerous as a result of some defect and that fact was concealed from the purchaser (in which case the manufacturer would be guilty of negligence or, in appropriate cases, even fraud); or, second, where the manufacturer was the producer of goods which were dangerous *per se* (the judgments give the example of explosives) and failed to warn the purchaser of this fact. It is worthy of note that junior counsel for the *Mullen v Barr* Claimants sought, unsuccessfully, to persuade the Court of Session that the ginger beer manufacturer could be equated with a dealer in gelignite. Judgment in the *Mullen v Barr* appeals was delivered on 20 March 1929. Twenty days later Mrs Donoghue commenced

[5] 1929 SC 461.
[6] Lord Hunter dissented.

proceedings in the Court of Session in Edinburgh. Her solicitor, Walter Leechman, had acted as agent for the solicitors who acted for the losing Claimants in *Mullen v Barr*.

Unsurprisingly, Mrs Donoghue's case also came to grief in the Court of Session; the proceedings in Edinburgh took a little over nineteen months. She won her case at first instance before the Lord Ordinary: Lord Moncrieff. Lord Moncrieff picked his way fastidiously through the unsupportive judgments on appeal in *Mullen v Barr* and was persuaded to find for Mrs Donoghue primarily on the basis that danger was present in the subtle potency of risk presented by tainted food or drinks (which potency was increased by the distribution of bottles in sealed vessels destined for the purchaser: the ultimate consumer). Having won her case at first instance, Mrs Donoghue then lost decisively on appeal. The four man bench that heard Mr Stevenson's appeal in *Donoghue v Stevenson* was identical to that which had dismissed the *Mullen v Barr* claims. Predictably, the Court of Session upheld the appeal. But unlike the *Mullen v Barr* Claimants, Mrs Donoghue and her legal team decided to take their chances in the House of Lords.

Mr Stevenson's legal team were pessimistic about their client's prospects in the Lords. Leading counsel representing Mr Stevenson (Mr Normand KC) later wrote to Lord Macmillan, 'I personally thought that the HL 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 on the issue whether there was a snail in the bottle … .'[7] Mr Normand KC suggested that the Dean of the Faculty of Advocates also believed that Mr Stevenson would lose in the House of Lords. As Mr Normand KC indicates, Mrs Donoghue's case was taken through the Courts on a point of law: whether she had a claim in negligence. The messy and rather banal facts were not allowed to get in the way.

[7] This letter appears in Lord Atkin's private papers which are held by Gray's Inn (File Reference AK1/JUD/1/1), but is also referred to in Lewis, G *Lord Atkin* (Hart Publishing, 1999).

I think we now have reached the point where the neighbour principle has to be recited. We all know it. It is usually one of the first things that an undergraduate lawyer is taught. It is surprising that it has not – yet – been rewritten in rhyming couplets or set to music. Lord Atkin said this:

> '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 my contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.'[8]

As a result of the importance given to Lord Atkin's dictum in the decades since *Donoghue v Stevenson* was decided one might be forgiven for thinking that the neighbour principle arrived in 1932 quite unique and fully formed. In fact, there were of course a number of sources for Lord Atkin's approach. First, a passage in a mid-eighteenth century legal tract: *Law relative to Trials at Nisi Prius*.[9] The author of this has not been definitively identified, but Professor Baker believes

[8] [1932] AC 562, 580 *per* Lord Atkin (HL(Sc)).
[9] Baker, JH and Milson, SFC *Sources of English Legal History Private Law to 1750* (Butterworth, 1986), p 578.

that it was Lord Bathurst[10] (and that's good enough for me). Second, the decision of the Court of Appeal, and particularly Sir William Brett Master of the Rolls (later Viscount Esher), in *Heaven v Pender*,[11] decided at the end of the nineteenth century. Third, the work done by Justice Benjamin Cardozo in the New York Court of Appeals in *MacPherson v Buick Motor Company*.[12] Fourth, and most obviously, the Gospel and the parable of the good Samaritan;[13] it was to St Luke that Lord Atkin gave most (but not all) of the credit for his formulation of the duty of care in negligence.

The mid-eighteenth text to which I have referred – the *Law Relative to Trials at Nisi Prius* (printed in 1768 from a mid-eighteenth century manuscript) – has been said to contain a 'precocious generalisation'[14] which we might regard as the direct ancestor of Lord Atkin's neighbour principle. One hundred and eighty years or so before Lord Atkin's speech, the author of this tract wrote:

> '**Of injuries arising from negligence or folly**. Every man ought to take reasonable care that he does not injure his neighbour. Therefore, whenever a man receives any hurt through the default of another, though the same were not wilful, yet if it be occasioned by negligence or folly the law gives him an action to recover damages for the injury so sustained. … where the defendant, by uncocking his gun, accidentally wounded the plaintiff who was standing by to see him do it. If a man ride an unruly horse in any place much frequented (such as Lincoln's Inn Fields) to break and tame him, if the horse hurt another, he will be liable to an action; and it may be brought against the master as well as the servant, for it will be intended that he sent

[10] (1714 – 1794) (Solicitor-General, Attorney-General, Lord Chancellor from 1771 to 1778 and a contemporary of Lord Mansfield and Sir William Blackstone).
[11] (1883) 11 QBD 503 (QB).
[12] (1916) 217 NY 382.
[13] Luke 10:25 – 37.
[14] Cornish, WR & Clark, G de N *Law and Society in England 1750 – 1950* (Sweet & Maxwell, 1989), p 505.

the servant to train the horse there; or it may be brought against the master alone.[15]

Nearly all of the ingredients of what later became the neighbour principle are here. Even the vocabulary and its borrowing from the central New Testament teaching echoes what Lord Atkin would later say. A person ought to take reasonable care not to injure his neighbour. One's neighbour is the person who (it can be foreseen) will probably be injured as a result of one's failure to act with reasonable care.

This territory was also the setting for *Heaven v Pender*[16] which was reported in 1883. This concerned an accident at work at a time when health and safety considerations were regarded as much less important than today. Indeed, in one case decided at the end of the nineteenth century a very eminent Judge[17] had suggested that the employee's acceptance of a weekly wage was the *quid pro quo* for running the risk of being injured in the course of his work. At this time the law recognised certain factual situations – categories of case – where a duty of care existed which, if breached, might then give rise to a cause of action in negligence. If one's case did not fit into such category then there was no cause of action in law. In *Heaven v Pender*, the Claimant was employed by a ship painter. His employer had a contract with the ship owner. The ship owner, in turn, had a contract with the Defendant dock owner for the provision of premises and scaffolding to enable painting work to take place. The Claimant was injured in the course of his employment when a defective scaffold rope snapped. He sued the

[15] The case to which the author refers is *Mitchell v Allestry* (1676). This running down action concerned a woman knocked over by a carriage drawn by two 'wild and untamed mares' being broken to carriage driving in a crowded and, therefore, highly unsuitable place (Lincoln's Inn Fields). There was judgment for the injured Claimant. The Court accepted the Claimant's plea that, 'It was the defendant's fault to bring a wild horse into such a place where mischief might probably be done by reason of the concourse of people.' *Mitchell v Allestry* (1676) can be found in Baker, JH and Milson, SFC *Sources of English Legal History Private Law to 1750* (Butterworth, 1986), p 572.

[16] (1883) 11 QBD 503 (CA).

[17] Lord Bramwell in *Smith v Charles Baker & Sons* [1891] AC 325 (HL(E)).

Defendant dock proprietor. The Claimant's claim was dismissed at first instance and he appealed. The leading judgment was delivered by the Master of the Rolls: Sir William Brett. He had no doubts about the basis of the Claimant's action: 'The action is in form and substance an action for negligence.'[18] The Master of the Rolls also identified the ingredients of the tort in a recognisably modern form stating that the focus had to lie on whether a duty of care existed: a mere 'want of attention amounting to a want of ordinary care is not a good cause of action'[19] It seems obvious to us that the dock proprietor should owe a duty of care to the injured employee, but it was far from obvious at the end of the nineteenth century. Brett MR referred to some of the established categories of cases where it had been accepted that, in the absence of a contractual relationship between the parties or any fraud, a duty of care did exist, but the difficulty he faced was that the circumstances of Mr Heaven's case did not fall into any established category. The Master of the Rolls solved this conundrum by returning to first principles: 'every one ought', he said, 'by the universally recognised rules of right and wrong, to think so much with regard to the safety of others who may be jeopardised by his conduct' and, if reasonable care was not exercised and injury resulted then, 'the law, which takes cognisance of and enforces the rules of right and wrong, will force him to give an indemnity for the injury.'[20] It was, therefore, appeal to a universal principle, a natural law of right and wrong, that justified the rule which the MR applied to the case. *Heaven v Pender* may be regarded as another, secular, ancestor of Lord Atkin's neighbour principle. Brett MR went on to formulate the following 'larger proposition':

> '... whenever one person is by circumstances placed in such a position with regard to another that every one of ordinary sense who did think would at once recognise that if he did not use ordinary care and skill in his own

[18] (1883) 11 QBD 503, 506.
[19] *Ibid*, at p 507.
[20] *Ibid*, at p 508.

conduct with regard to those circumstances he would cause danger of injury to the person or property of another, a duty arises to use ordinary care and skill to avoid such danger.'[21]

Sir William Brett was apparently so convinced of the generality of this principle that he made clear that it included, 'all the recognised cases of liability.' In other words, the piecemeal development of the tort of negligence – identifying factual categories of case in which a duty of care was owed – was to be no more. Instead, the Brett MR formula could be deployed. Thus, a duty of care would be owed and an action in negligence might be available where a person supplied goods or machinery to another knowing that, unless reasonable care and skill were exercised in the supply of the goods or machinery, a danger of injury might result. Clearly, in *Heaven v Pender* the Claimant's case satisfied the MR's formula. A duty of care had been owed by the Defendant to the Claimant and liability was established.

The ambition of the leading judgment in *Heaven v Pender* could, if allowed to develop and to be applied, have led to a very significant extension of the law of negligence at a time when the fairly rudimentary industrial machinery of the nineteenth century was killing and maiming people in increasingly industrial quantities. The roots set down by *Heaven v Pender* proved, however, to be shallow. People – by which I mean other lawyers – started to be rude about Sir William Brett's formula very quickly. The process of retreat began in the same case. Lords Justices Cotton and Bowen agreed with the Master of the Rolls that the Claimant should win his appeal. However, they based their decision on much narrower grounds. These Judges believed that the Claimant was entitled to succeed in his action because he was present at the dock for the purposes of his work and, being 'engaged in work in the performance of which the defendant was interested', he fell within one of the existing categories of (occupiers' liability) case

[21] *Ibid*, at p 509.

in which a duty of care had already been held to exist. Lord Justice Cotton went out of his way to make it clear that he did not espouse the same principle identified by his senior colleague, 'I am unwilling to concur with the Master of the Rolls in laying down unnecessarily the larger principle which he entertains, inasmuch as there are many cases in which the principle was impliedly negatived.'[22] By the time that *Donoghue v Stevenson* was decided Brett MR's apparently universal formula was so out of favour that, in the course of his own powerfully dissenting speech, Lord Buckmaster offered the prayer that it be, 'buried so securely that … [its] perturbed spirit shall no longer vex the law.'[23] Even Lord Atkin had doubts about the potential expansiveness of the Master of the Rolls' formula; he felt it necessary, in a product liability context like *Donoghue v Stevenson*, to qualify the formula so that it applied only where goods were to be used immediately and where the ultimate consumer would have no possibility of examining them prior to consumption (an approach which he felt was consistent with what Sir William Brett intended).[24] Sir Frederick Pollock was rude about Brett MR's formula in one of the earliest academic writings about *Donoghue v Stevenson*: 'The precision of a neat draftsman', wrote Pollock, 'has never been counted among … [Brett MR's] accomplishments.'[25]

As I have indicated, the other two sources for Lord Atkin's neighbour principle were the judgment of Benjamin Cardozo in the New York Court of Appeals in *MacPherson v Buick* and Lord Atkin's own reading of the Gospels. Whatever the Judges in England thought about Brett MR's decision in *Heaven v Pender*, Justice Cardozo, sitting in New York in 1916, liked it. The *MacPherson* case involved a defective car with wooden wheels. One of the wheels fell to bits, the car collapsed and the Claimant driver was thrown out of the car and suffered injury. It may not be wholly irrelevant to the outcome of the case that, at the time

[22] *Ibid*, at p 516.
[23] [1932] AC 562, 576.
[24] *Ibid*, at pp 581 – 582.
[25] Pollock, F 'The Snail in the Bottle and Thereafter' (1933) 49 LQR 22, 25.

that this happened, the Claimant was driving a sick neighbour to hospital. The Claimant had purchased his car from a retailer who had, in turn, sourced the car from a manufacturer. The Claimant sued the manufacturer with whom he had no contract. Justice Cardozo recognised Brett MR's formula as the concise expression of the 'tests and standards' of US law (at least in New York State) . He therefore resuscitated the *Heaven v Pender* formula as a statement of general principle capable of practical application (an approach which stood in very marked contrast to the manner in which this judgment was treated on the British side of the Atlantic).

Justice Cardozo stated that the application of this principle would be justified where: (1) the nature of an article or object would, if negligently made, be reasonably certain to endanger life or limb; (2) such danger was accompanied by knowledge that the article would be used by persons other than the immediate purchaser; (3) the manufacturer of the finished article or object, placed on the market, must fail in his duty of inspection; and, (4) the ultimate user of the article must have no opportunity of examination or inspection of the finished article before using it (and the manufacturer should know that the article will be used 'without new tests' by the ultimate consumer). If these conditions were satisfied then 'the manufacturer of this thing of danger is under a duty to make it carefully.' It would be a question of fact in each case whether the necessary element of danger was present.

Justice Cardozo managed to persuade most of his judicial colleagues to side with him in the outcome of *MacPherson v Buick* against the Chief Justice of the Court of Appeals who dissented. He had no time for those, like the Chief Justice, who argued that case law concerning the danger, or otherwise, of horse drawn carriages could be applied to the brave new world of the motor car: 'Precedents drawn from the days of travel by stage coach do not fit the conditions of travel to-day.' By 1916, when the *MacPherson* case was decided by the Court of Appeals,

the people of New York had new, and faster, modes of transport and, by implication, they needed new legal principles to apply to the accidents which they caused as well.

Finally, as a source of the neighbour principle, the Parable of the Good Samaritan. In the Gospel of St Luke the Good Samaritan teaching is introduced by a conversation between Jesus and a cunning lawyer. The lawyer seeks to catch Jesus out by asking him the beguilingly simple, but rather abstract question, 'Who is my neighbour?' The lawyer knew that Jesus lacked the formal biblical education that he had enjoyed and his intention was clearly to tempt an answer which was inconsistent with Scripture. In fact, Jesus avoided the trap by means of the Good Samaritan parable with its message of compassion towards strangers and its central teaching that those who were leaders of the community – the Priest and the Levite – showed less kindness than the suspicious foreigner, the Samaritan (a heretic), who came to the aid of the man fallen among thieves and who had spent two pence on his care. The core message of the Good Samaritan story – that kindness should prevail over code (if you like, over precedent) – may provide a convenient metaphor for what Lord Atkin was trying to do in his formulation of the neighbour principle.

Lord Atkin's extra-judicial writing and lecturing proves that he was thinking a good deal about the connection between conventional Christian morality and the law of tort in the years which preceded the Lords decision in *Donoghue v Stevenson*. In 1930 he delivered a lecture at the University of Birmingham in which, while acknowledging that law and morality are not synonymous, he also made clear his view that English law set up a high, but attainable, standard of honesty and fair-dealing to which the commercial community, in particular, were expected to adhere. Lord Atkin deployed the example of the honest contract-maker who 'swears unto his neighbour and disappointeth him not' as a person commended by the law and whose standards were enforced by the law of

contract. By the time that Lord Atkin delivered a further lecture – this time at King's College, London a year later – the honest contract maker had been joined by another exemplar of virtue: the moral actor who seeks to avoid injuring his neighbours by acts of negligence. 'I doubt', Lord Atkin said to his audience of law students, '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.' The neighbour principle was clearly just a refinement of this universal, moral proposition.

The House of Lords famously split 3:2 in Mrs Donoghue's case. The late Professor Heuston, an Irishman, who lectured me when I was of an even more impressionable age referred to a 'celtic majority' in the Lords on the grounds that Lord Atkin was an Australian who considered himself a Welshman and Lords Macmillan and Thankerton were both Scottish. Lord Buckmaster, who had served as Lord Chancellor and was resolutely English, delivered the leading dissenting speech. His contribution has been described as having an 'almost passionate sarcasm' and there is certainly something very close to suppressed outrage in his treatment of the decision in *Heaven v Pender* in particular. Lord Buckmaster called this a 'plank in a shipwreck' seized upon by those – presumably Lord Atkin, among others – who sought to extend the law of negligence in the face of what Lord Buckmaster regarded as overwhelming authority to the contrary.

As I have indicated, Lord Atkin was joined in the majority by Lord Macmillan who delivered a lengthy speech containing, among other things, an aphorism which has become almost as famous as the neighbour principle: 'The categories of negligence are never closed.' We know a good deal about the character and thoughts of Lords Atkin and Macmillan because both wrote autobiographies. Lord Atkin never completed and never published his book, but a draft can be read in the Atkin archive at Gray's Inn. In 1952 Lord Macmillan's autobiography was published – posthumously – 'A Man of Law's Tale'. Inner

Temple library has a copy and it's an interesting read from a man who was not unaware of his own extraordinary talents. Lord Macmillan clearly loved being a member of the House of Lords and modestly observed in his autobiography that 'I had for some years [before appointment] known that this was to be my ultimate destination.' Of Lord Thankerton the man, we know rather less, although one biographer recorded that, '... he had a habit of arguing somewhat aggressively with counsel and this did not decrease with the years. It was also said that his habit of knitting while on the bench irritated some counsel.'[26]

Identifying the ratio of *Donoghue v Stevenson* is not an easy task – even with the benefit of the succinct headnote which appears in the Appeal Cases law report. It has been suggested that a restrictive reading might confine the significance of the decision to the proposition that there is a duty not to sell opaque bottles of ginger beer containing dead snails to Scottish women.[27] Unsurprisingly, commentators have focussed attention on the neighbour principle, but it is questionable whether this forms part of the ratio at all. Lord Atkin could not decide the case by himself and the ratio has, of course, to be found in a reading of all three majority judgments. It is striking that neither Lord Macmillan nor Lord Thankerton make any reference to the neighbour principle or to anything which looks much like it. Lord Thankerton did state that he so entirely agreed with the speech of Lord Atkin that he could not usefully add anything to it, but he was careful to make it clear that this was because of Lord Atkin's treatment of the English case law (rather than because he had been won over to the neighbour principle).[28] Indeed, Lord Thankerton's reasoning was couched in much more limited terms. Lord Macmillan perhaps came a little closer to the neighbour principle in the closing passages of his speech where this appears, 'In the present case the respondent, when he manufactured his ginger-beer, had directly in

[26] Simpson, AWB (ed) *Biographical Dictionary of the Common Law* (Butterworths, 1984), p 525.
[27] Commentary by Professor Stone in *Province and Function of Law*, reported by RFV Heuston in '*Donoghue v Stevenson* in Retrospect' (1957) 20 MLR 1, 6.
[28] [1932] AC 562, 604.

contemplation that it would be consumed by members of the public. Can it be said that he could not be expected as a reasonable man to foresee that if he conducted his process of manufacture carelessly he might injure those whom he expected and desired to consume his ginger-beer?'[29] However, this is not the neighbour principle in the unexpurgated form apparently advocated by Lord Atkin and taken up in later cases. The principle that a duty of care will exist where a person reasonably foresees that his acts or omissions will be likely to result in damage to another is a more 'restricted' answer to 'the lawyer's question' than can be found in the Lucan Gospel, but it was not sufficiently restricted for even the majority-supporting judges in *Donoghue v Stevenson*. Professor Heuston, writing in 1957, described the ratio in *Donoghue v Stevenson* in the following, rather conservative, terms. First, negligence is a separate and distinct tort. Second, a contractual relationship between the parties to the action is not a prerequisite for liability in tort. Third, and finally, manufacturers of products owe a duty of care to the person who ultimately consumes or uses the product.

The neighbour principle might not – strictly speaking – have formed part of the ratio of *Donoghue v Stevenson*, but it can fairly safely be said that it is the reason why we are still talking about the case – why I am delivering this lecture today. Unleashed upon a common law world that was clearly ready for it, the neighbour principle drove the development of the modern law of negligence. Expansions and contractions of the duty of care in negligence and applications of the tort to new factual situations in the decades since 1932 are measured against *Donoghue v Stevenson* and Lord Atkin's neighbour principle in particular. The speeches in the House of Lords were delivered on 26 May 1932 and by March the following year, Mr Justice Evatt of the Australian High Court was writing to Lord Atkin to congratulate him on, as he put it, both reflecting modern industrial conditions and aligning the law of England, Scotland and, therefore, the wider

[29] *Ibid*, at p 620.

empire with that of the USA, as reflected in the *MacPherson* judgment of Justice Cardozo.[30]

Perhaps it was, above all, the language with which the Law Lords expressed themselves that secured lasting fame for *Donoghue v Stevenson*. The issues at stake in the case were of huge importance and the Judges' phrase-making matched this importance. Lord Atkin's speech blends an appeal to common sense and popular conceptions of morality with high principle, legal precedent and New Testament allusion: a heady mixture. Overturning decades – even centuries – of contrary authority was likely to require the winning of hearts and minds and Lord Atkin's successful attempt to capture the imagination by expressing himself in a manner that would seem unusual today – let alone in 1932 – clearly did the trick. Lord Macmillan also rose to the challenge and devised new ways of expressing what might be regarded as a more conventional approach to the expansion of the duty of care. Lord Buckmaster's dissenting speech was also couched in unusually powerful terms. Indeed, the passion of his own views and the intemperate contempt that he expressed for the contrary position did, perhaps, as much to underline the importance of what the House of Lords was deciding as anything else. The radicalism of the neighbour principle was illuminated by the outrage of those, like Lord Buckmaster, whose more orthodox views it challenged. Within a few short years, the language of Lords Atkin, Macmillan and Buckmaster had become common currency throughout the jurisdictions of the British Empire where, in a number of instances, precocious expansions of the duty of care in negligence significantly exceeded post-*Donoghue v Stevenson* developments in the Mother country. As early as 1933 the distinguished legal historian and academic Sir Frederick Pollock was warning, in the Law Quarterly Review about 'the untenable exaggeration of the rule in the Snail's Case' by 'adventurous counsel and over-

[30] Atkin archive. File reference ATK1/JUD/1/1.

ingenious teachers of law.'[31] Pollock's warning about what he preferred to call – as a man who probably read seventeenth century law reports in his spare time – the 'Snail's Case' was prescient. By 1932 the conservative centre of the law of negligence, struggling under the weight of twentieth century industrial conditions, could not hold. As a result of the House of Lords the genie – and the snail – were out of the bottle.

It is tempting to speculate why Mrs Donoghue's case was taken to the House of Lords given the unpromising outcome in the Court of Session and the weight of precedent, including the mouse cases, which Lord Buckmaster later deployed. The son of her solicitor believes that his father would have met Mrs Donoghue before taking on her case and would have persuaded himself of the veracity of her factual account before deciding that an injustice had been done to her and that this required a remedy. It appears to have been felt that Mrs Donoghue would stand a better chance in London than she had in Edinburgh and her solicitor's son has said in correspondence that, 'My father did not have such a high opinion of the Scottish judges of the time, even in the Appeal Court here. He felt that the judges in the House of Lords, being English and Scottish and using 'equity' as part of their base ... would be more equitable in their decision.'[32] In fact, as we have seen, a Welsh Australian and two Scots did much more to assist Mrs Donoghue than the Englishmen who also heard the appeal. Equity had little to do with it. However revolutionary it might have appeared to commentators and certainly to Lord Buckmaster, Lord Atkin's neighbour principle was almost self-consciously placed by the Judge in the line of existing authority. As we have seen, after asking himself, 'Who, then, in law is my neighbour?', Lord Atkin immediately says, 'The answer *seems to be* ... [emphasis added]': in doing so, he surely

[31] Pollock, F 'The Snail in the Bottle and Thereafter' (1933) 49 LQR 22, 26.
[32] See, Taylor, M 'The Good Neighbour on Trial: a Message from Scotland' (1983) 17 UBC Law Review 59, 64.

acknowledges the judicial and other sources of authority for the answer that the neighbour principle provides.

As a result of the decision of the House of Lords the judgment of Lord Moncrieff, sitting at first instance in the Court of Session, was restored. Mrs Donoghue had established her case in law. The *Paisley and Renfrewshire Gazette*, describing Mrs Donoghue as Mrs Macalister (her maiden name), succinctly reported the outcome of proceedings in the House of Lords as 'Appeal allowed: Snail in Ginger Beer Case'. In order to succeed in her action Mrs Donoghue would now need to prove her factual case: the presence of the snail in the bottle; the negligence of Mr Stevenson; the illness that she had suffered by consuming the snail-flavoured ginger beer. Mr Stevenson's involvement in the action can be traced to the actions of the somewhat mysterious friend with whom Mrs Donoghue was in the cafe. We know from the pleadings that, after Mrs Donoghue saw the decomposed snail and apparently suffered the violent reaction that the pleading describes, her friend identified the name and address of David Stevenson from the label pasted on the side of the ginger beer bottle (the unidentified friend may justifiably be regarded as *the* key player in the litigation). On all the matters raised by Mrs Donoghue and her legal team Mr Stevenson, for his part, had joined issue in his pleading before the legal point had been hived off for preliminary determination. He vigorously denied that any bottle manufactured by his factory contained a snail. It was denied that Mr Stevenson's business had ever issued a bottle of ginger beer of the description given by Mrs Donoghue. A trial in the Court of Session would determine whose version of events was correct. This was scheduled to take place in January 1933.[33]

Nearly a decade later, in wartime, Lord Justice MacKinnon was invited to give an after dinner speech to the law students at the University of Birmingham (he

[33] Interlocutor of 4 November 1932, as reported in McBryde, WM '*Donoghue v Stevenson*: the Story of the "Snail in the Bottle" Case' in Gamble, AJ (ed) *Obligations in Context* (W Green, 1990), p 26, n 23.

was the President of their Holdsworth Club). The speech was originally scheduled for May 1942, but was postponed for reasons related to the war effort. A copy of the speech appears in Lord Atkin's papers at Gray's Inn.[34] The speech was, perhaps, prepared for a well oiled audience (in need of some cheering up), 'Not for me to expound the implications of *Donoghue v Stevenson*. To be quite candid, I detest that snail. I think that my friend, Lord President Normand, explained to you that the problem in the case arose on a plea of relevancy – the Scots equivalent of a demurrer. I think that he did not reveal to you that when the law had been settled by the House of Lords, the case went back to Edinburgh to be tried on the facts. And at that trial it was found that there never was a snail in the bottle at all. That intruding gastropod was … a legal fiction … .'

Lord President Normand was, of course, the former Solicitor-General for Scotland who had appeared as leading counsel for Mr Stevenson before the House of Lords. Lord Justice MacKinnon's revelation probably went down well with his audience of law students. However, it was also noticed by Lord Atkin who was obviously diverting himself with some recreational reading during the long vacation of 1942 and so had a copy of the speech. He sent the speech to Lord Macmillan who, following the thread back to the man who was there at the time, wrote to Normand (enclosing a copy of MacKinnon's speech). He received the following reply dated 19 September 1942:

> 'My dear Macmillan, I have not yet seen MacKinnon's address to the Holdsworth Club. His account, as you report it, of *Donoghue v Stevenson* is not accurate. The case never went to trial. I speak from recollection, but I think it can be trusted, and what I remember is that the defender died soon after the HL decided the point of relevancy. The pursuer did not move to

[34] File reference ATK1/JUD/1/1.

> have the defender's executors sisted as a party and there were no further proceedings. So much for the sake of history.'[35]

Normand's recollection of the chronology was correct. On 12 November 1932, by which time the case was back in the Court of Session awaiting trial (proof), David Stevenson died. In a 1990 article Professor McBryde states that, 'A year elapsed and David Stevenson's executors were sisted as parties to the case which then settled.'[36] Lord Macmillan sent Normand's letter on to Lord Atkin and added the following note in his cover letter of 21 September 1942:

> 'My dear Atkin, I, too, was struck by that statement in MacKinnon's Holdsworth Club address. I was sure it was wrong. Before answering your letter, however, I wrote to Normand in order to verify my impression, and this morning I have a letter from him of which I enclose a copy. You may take it as quite certain that the case never went to trial. Whether there was or was not a snail in the bottle must remain one of history's unsolved problems.'[37]

An article published in October 1955 in the Law Quarterly Review suggests that a myth had grown up that there was no snail in the bottle.[38] Indeed, in a 1954 decision of the Court of Appeal (in the form of a Practice Note) Lord Justice Jenkins, ignorant of the private correspondence referred to above, stated confidently, '... the House of Lords heard the preliminary issue in *Donoghue v Stevenson* ... and when the trial was heard there was no snail in the bottle at all.'[39] Mr Ashton-Cross, the author of the Law Quarterly Review article, was keen to set the record straight and corresponded with the solicitors for Mr Stevenson who

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[35] *Ibid*.
[36] McBryde, WM '*Donoghue v Stevenson*: the Story of the "Snail in the Bottle" Case' in Gamble, AJ (ed) *Obligations in Context* (W Green, 1990), p 26.
[37] Atkin archive. File reference ATK1/JUD/1/1.
[38] Ashton-Cross, D '*Donoghue v Stevenson* [1932] AC 562' (1955) 71 LQR 472.
[39] *Adler v Dickson & anor* [1954] 1 WLR 1482, 1483 (CA).

informed him of the death of the Defendant and the subsequent settlement by his executors.

The answer, therefore, to the question – what really happened in the café – is that we will never know. There was no trial. No witnesses gave evidence. No decision on the alleged facts was ever reached. A factual determination and, perhaps, a snail are missing.

It does, at least, seem clear that there was a settlement. Professor McBryde records that the settlement sum was £100, although he acknowledges that it is difficult to be accurate about this.[40] McBryde's source for the settlement sum was Professor Heuston and he, in turn, heard about it from Lord Macmillan[41] who, one presumes, would have been told by Lord Normand. Lord Rodger was told by Mrs Donoghue's grandson that it was believed that the settlement sum was £500 (the sum claimed in the proceedings),[42] although this may be an exaggeration. In fact, a more accurate account of the settlement might have been provided by the son of Mrs Donoghue's solicitor who, for the purposes of an article published by the Canadian Judge, Mr Justice Taylor, in 1983, stated that he believed the sum paid by the executors of the estate to have been £200.[43] While, by contrast to her lawyers, Mrs Donoghue never had her day in court, she achieved what would at the time have been a significant sum (particularly to someone suing, as she did, *in pauperis*).

Wellmeadow Street in Paisley is still there. Prior to 1990 the site of the cafe was waste ground:[44] a metaphor, perhaps, for the factual void which lies at the

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[40] McBryde, WM '*Donoghue v Stevenson*: the Story of the "Snail in the Bottle" Case' in Gamble, AJ (ed) *Obligations in Context* (W Green, 1990), p 26, n 26 citing Heuston, RFV '*Donoghue v Stevenson* in Retrospect' (1957) 20 MLR 1, 2.
[41] Heuston, RFV '*Donoghue v Stevenson* in Retrospect' (1957) 20 MLR 1, 2, n 5.
[42] Rodger, A 'Mrs Donoghue and Alfenus Varus' (1988) 41 CLP 1, 9, n 98 referring to a letter of 24 July 1973 which he had received from Thomas Donoghue.
[43] Taylor, M 'The Good Neighbour on Trial: a Message from Scotland' (1983) 17 UBC Law Review 59, 65.
[44] See report in *The Paisley Express* for 31 August 1988, 'And all because of a drink!'

heart of the case. Between 28 and 30 September 1990 a conference on the law of negligence was organised in Paisley by the Canadian Bar Association, the Faculty of Advocates, the Law Society of Scotland and the Old Paisley Society. The conference was entitled, 'The Pilgrimage to Paisley: a Salute to *Donoghue v Stevenson*' and the conference programme records that, between 4.05 pm and 4.30 pm, the delegates paraded, to the accompaniment of pipers, to Wellmeadow Street. There are photographs in the Paisley library archive of them doing so (well wrapped up for Paisley's late September weather). At the site of the Café a memorial park and garden were formally dedicated. The afternoon's events concluded with a tea of ice cream and ginger beer.

In August 2008, some 80 years (nearly to the day) after Mrs Donoghue's journey, I made my own pilgrimage to Paisley, taking the train there from Glasgow on a damp afternoon. The memorial park is still at the corner of Lady Lane and Wellmeadow Street and is overlooked, from the other side of the road, by the Thomas Coats Memorial Church. The memorial stands alongside a busy road – Wellmeadow Street – between two derelict buildings: an abandoned bingo hall and what was once a chapel. The somewhat melancholy scene and weather were complemented by a funeral which was taking place at the adjacent co-operative society funeral service. In the small park itself, there is a wooden bench, donated by the Canadian Bar and constructed of Canadian Cedar wood, with decorative, snail-shaped roundels. A rectangular marble stone is finished with a metal plate on each side recording the allegations made in the case and the decision in the House of Lords. Lord Atkin's neighbour principle is, of course, directly referenced. It may seem odd that, in 1990, the location was marked of an otherwise undistinguished and long demolished cafe where something of factual significance may or may not have happened. But the point is, however, that something significant did emerge from Wellmeadow Street and Mrs Donoghue had to travel there from Glasgow in order for this to happen.

The issues raised by *Donoghue v Stevenson* aroused strong passions at the time that it was decided. It is only necessary to read the speech of Lord Buckmaster to realise this. As we have seen, the drive to limit the potential universality of Lord Atkin's neighbour principle began almost immediately. Even those who expressed a grudging admiration for what the majority had decided in *Donoghue v Stevenson* were keen to make it clear that there had to be limits: 'The decision in the Donoghue case was one of good sense and social necessity, but social necessity and good sense require some limits.'[45] More recently, discussions about the proper reach of the law of negligence have resulted in Parliamentary debate and the passing of legislation seeking to influence the standard of care applied by the courts in certain areas of social activity.[46] However, the neighbour principle, whether or not it forms part of the ratio of the majority decision in *Donoghue v Stevenson*, has proved stubbornly resistant to constraint and restriction. In the decades which have now passed since 1932 it has inspired many efforts to extend the reach of the law of negligence to areas previously untouched by it. Not all of the advances made have proved to be permanent, but *Donoghue v Stevenson* continues to be taught to law students and continues to be cited in important cases. It is simply, always there, framing the terms of the debate.

As I have indicated, *Donoghue v Stevenson* in the House of Lords is a case of metaphors and aphorisms. While Lord Macmillan and Lord Buckmaster's speeches have attracted interest and scholarship, it is Lord Atkin's speech that excites most lawyers. The singular ambition of his opinion, the energy with which it was expressed and the eloquent use of metaphor and Biblical allusion all helped to ensure that it was Lord Atkin's neighbour principle that emerged as the greatest gift given by English/Scots law to the wider common law world. The neighbour

[45] DeRoche, WEP 'Torts – Negligence – Duty of Care – Liability of Contractor to Third Person' (1935) 13 Can B Rev 112, 114.
[46] Compensation Act 2006 which received the Royal Assent on 25 July 2006. For an article by one of those who advised on the draft legislation, see: Parker, A 'Changing the Claims Culture' (2006) 156 NLJ 702.

principle was the thread which enabled the tort of negligence to escape the labyrinthine complexity of the law prior to 1932 and also provided patterns for the development of negligence over the decades that followed. More than that, however, Lord Atkin's neighbour principle – a careful recital of the role and limits of morality (even of kindness) in our law of obligations – reminds us why the law of negligence is important and why it is still needed today.