

## FUNDAMENTAL ERRORS IN DONOGHUE V STEVENSON?

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I was asked to speak this evening (1) on a topic with which all lawyers will be familiar as well as many non-lawyers, (2) to offer a different perspective, (3) to keep the discussion reasonably light, and (4) to speak for about 45 minutes. I am delighted to speak and I am confident that I will achieve one of the four requests. I will let you judge which one I succeed upon, although I would point out that the time is now 7pm and I expect to invite questions at 7:44.

I want to speak tonight on a decision that is commonly regarded as one of the greatest works of the person who is Australia's most famous legal export to England: Lord Atkin. The decision is *Donoghue v Stevenson*.<sup>1</sup> Lord Hope of Craighead once said of *Donoghue* that 'one might even say that the modern law of negligence was created by it'.<sup>2</sup> Lord Rodger of Earlsferry described it as 'probably the most famous case in the whole Commonwealth world of the Common Law'.<sup>3</sup>

On 26 May 2012 it was the 80th birthday of *Donoghue v Stevenson*. The writers of many hundreds of journal articles, and books,<sup>4</sup> joined in a celebration of the decision. It has not always been so.<sup>5</sup> I hope that I will be forgiven for asking, at the introduction of this conference, whether this decision is really worth celebrating. I emphasise at the outset, however, that I do not suggest that there is, or should be, any doubt about the *result* of the case. In my view, it was, and is, appropriate that the law recognises liability where one person carelessly causes reasonably foreseeable loss to another caused by negligent infringement of another's bodily integrity. But, I will ask whether Lord Atkin made four fundamental errors in reaching this conclusion. These were errors in his reasoning, errors in his theology, errors in his understanding of the manner that the common law should be developed, and errors in his

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<sup>1</sup> *Donoghue v Stevenson* [1932] AC 562. For further background, see A Rodger (Lord Rodger of Earlsferry), 'Mrs Donoghue and Alfenus Varus' (1988) 41 Current Legal Problems 1, and 'Lord Macmillan's Speech in *Donoghue v Stevenson*' (1992) 108 LQR 236.

<sup>2</sup> D Hope 'James McGhee - A Second Mrs Donoghue' (2003) 62 CLJ 587, 587.

<sup>3</sup> A Rodger (Lord Rodger of Earlsferry), 'Mrs Donoghue and Alfenus Varus' (1988) 41 Current Legal Problems 1, 2.

<sup>4</sup> Most recently, M Chapman, *The Snail and the Ginger Beer* (2010).

<sup>5</sup> J C Smith and P Burns 'Donoghue v Stevenson - The Not so Golden Anniversary' (1983) 46 MLR 147.

conception of the structure of the law of torts. And all of this in a case where the appeal was from a jurisdiction, Scotland, with a different system of law, and where the facts probably never happened.

### ***Donoghue v Stevenson in summary***

I begin with the well known allegations of fact of the case. It was a warm evening by Scottish standards on Sunday 26 August 1928. At about 8.50pm a lady named May Donoghue went into a café with her friend. They chose a small table by the window.

Mrs Donoghue's friend ordered a drink, popular in Scotland, called a pear and ice. Then, her friend was alleged to have committed an act of generosity that has haunted our law of tort ever since. She purchased for Mrs Donoghue an ice cream and a ginger beer. Had Mrs Donoghue purchased the ginger beer herself she would have had a perfectly good action for breach of contract against the retailer.

The ginger beer came in an opaque glass with the name of the manufacturer, David Stevenson, on the side. Her friend poured part of her drink and Mrs Donoghue drank it. As her friend was proceeding to pour the remainder of the contents of the bottle into the tumbler, a snail, which was in a state of decomposition, floated out of the bottle.

Mrs Donoghue subsequently contracted what her lawyers described as “severe gastro-enteritis”. Mrs Donoghue sued the manufacturer, Stevenson and Co. The manufacturer brought a plea of relevancy (similar to a demurrer) all the way up through the Scottish courts to the House of Lords. Mrs Donoghue lost in all the courts below the House of Lords.

On 26 May 1932, the judges in the House of Lords delivered their decisions. By a majority of 3:2 they allowed Mrs Donoghue's appeal. Lord Atkin, Lord MacMillan and Lord Thankerton delivered speeches in the majority. Lord Buckmaster (with whom Lord Tomlin agreed) dissented. It is Lord Atkin's speech in the majority which has had a staggering historical influence. Lord Atkin had strong supporters. Lord Wright, for instance, wrote to Lord Atkin and said<sup>6</sup>

I have been reading with admiration your magnificent and convincing judgment in the Snail case- also Macmillan's which is

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<sup>6</sup> Letter from Lord Wright to Lord Atkin, 12 May 1932 quoted in G Lewis *Lord Atkin* (1983) 51.

very good. I am glad that this fundamental rule of law will now be finally established. I find Buckmaster on Snails very disappointing.

The ratio decidendi of the decision was expressed by the Privy Council a little more than 3 years' later. It was derived from Lord Atkin's decision, with which the Privy Council considered Lords Thankerton and Macmillan had agreed on this point:<sup>7</sup>

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

But Lord Atkin's most famous words, at the heart of his decision, were far more general and went further than this narrow ratio. Those words, which were the foundation of what Tony Weir later described as the 'staggering march of negligence,'<sup>8</sup> were as follows:

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.

That is the basic story of *Donoghue v Stevenson*.

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<sup>7</sup> *Grant v Australian Knitting Mills Ltd* [1935] UKPCHCA 1; (1935) 54 CLR 49, 63.

<sup>8</sup> T Weir 'The Staggering March of Negligence' in P Cane and J Stapleton (eds) *The Law of Obligations: Essays in Celebration of John Fleming* (Oxford, 1998) 97.

## Was Lord Atkin's premise theologically accurate?

Before I turn to the enormous influence of Lord Atkin's remarks that I have quoted, let me begin with Lord Atkin's questionable understanding of the theology upon which they were based. As Mrs Donoghue's case was progressing through the Scottish courts, in October 1931, Lord Atkin gave a paper at Kings College London. He was speaking at the Society for the Public Teachers of Law. He spoke of the relationship between law and morality. He said that law and morality do not cover identical fields. But then he spoke of the moral principle that a person<sup>9</sup>

is not to injure his neighbour by acts of negligence; and that certainly 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.

Lord Atkin's biographer, Geoffrey Lewis, says that Lord Atkin also tested these ideas around the luncheon table after Church.<sup>10</sup> The link with Church is obvious. Lord Atkin's passage concerning neighbourhood borrowed from the Book of Luke in the New Testament to illustrate the scope of legal duty.<sup>11</sup>

The passage from the Book of Luke from which Lord Atkin borrowed is a parable of the good Samaritan who stopped to assist a wounded man after a priest and a Levite had walked past but crossed to the other side. There is a significant consensus about what Lord Atkin meant with his allusion to the parable of the good Samaritan. The consensus is that Lord Atkin meant to explain that despite the immorality of the priest and the Levite those men would not be *legally* liable. Each of the priest, the Levite, and the good Samaritan should have loved (and therefore helped) the wounded man, who was their neighbour. But, Lord Atkin was saying that *in law* this was not required of any of them. Lords Reid, Diplock and Hoffmann in the House of Lords<sup>12</sup> and Justice Windeyer in the High Court of Australia<sup>13</sup> have all made the point that Lord Atkin's allusion to

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<sup>9</sup> J Atkin 'Law as an Educational Subject' [1932] *Journal of the Society of Public Teachers of Law* 27, 30.

<sup>10</sup> G Lewis, *Lord Atkin* (1983) 57.

<sup>11</sup> Luke Chapter 10 verse 25.

<sup>12</sup> *Dorset Yacht Co Ltd v Home Office* [1970] AC 1004, 1027 (Lord Reid) 1060 (Lord Diplock); *Stovin v Wise* [1996] AC 923, 943.

<sup>13</sup> *Hargrave v Goldman* (1963) 110 CLR 40, 66.

the book of Luke, and the parable of the Good Samaritan, was intended to contrast general *legal* liability for fault with morality.

This common interpretation which casts the priest and Levite as morally blameworthy was described by the late Professor Geza Vermes, a leading biblical scholar at the University of Oxford as one which is as 'superficial as it is misleading'.<sup>14</sup> An alternative meaning is that the parable is not concerned with morality but with the notion of community. To appreciate this point several things about the parable of the Good Samaritan need to be appreciated.

First, Luke introduces the parable by discussing an exchange between Jesus and a local expert in the law. The legal expert challenged Jesus to explain matters such as what is written in the law about how a person shall inherit eternal life. Jesus answers the question correctly, referring to the injunction in Leviticus to love your neighbour as yourself. The lawyer then attempts to justify his question by asking what is meant by 'neighbourhood'. Jesus' answer, and the parable, is concerned to explain the concept of neighbourhood.

Secondly, the Samaritans were an extremely religious group who were not part of the general Jewish community. In contrast with the priest and the Levite, who would have been regarded as the leaders of their communities, the Samaritan was a foreigner. As Joseph Ratzinger said in his first book after his elevation, 'if the question had been "Is the Samaritan my neighbour, too?" the answer would have been a pretty clear-cut no'.<sup>15</sup>

Thirdly, the story begins with an explanation that the man who was wounded had been going down from Jerusalem to Jericho. This again emphasises that he was not a member of the local community. The point of Jesus' parable was to show which of the three men was the neighbour of the man who was an outsider to the community. The answer was the Samaritan. Importantly, the story was not used to suggest that *all three* men were neighbours of the wounded man. Jesus' point was that none was in a relationship of neighbourhood. It was only the Samaritan who *became* a neighbour by creating the relationship of neighbourhood by his acts of kindness (treating him, taking him to the Inn, paying the Innkeeper).

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<sup>14</sup> G Vermes, *The Authentic Gospels of Jesus* (2004) 153.

<sup>15</sup> J Ratzinger, *Jesus of Nazareth* (2008) 195.

If this is correct, then Lord Atkin's use of the parable as a contrast with the concept of *legal* neighbourhood was inapt. The point of the parable was not, as Lord Atkin supposed, to suggest that each of the three men had a moral duty to assist the wounded man. Rather, it was to illustrate that neighbourhood was not limited to community but that it extended also to those with whom we interact and about whom our actions affect. There is an important difference. If the parable is one about the meaning of neighbourhood, and neither the Priest nor the Levite is a neighbour of the wounded man, then the point of the parable is not that we should love everyone we see but that we should love those with whom we interact. It was the Samaritan's actions of interacting with the wounded man that created his moral duty to love and care for the wounded man.

Not only was Lord Atkin's understanding of the parable arguably flawed but even as an illustration of the nature of neighbourhood the parable was a poor example in 1932. Amartya Sen made this critique of the parable in *The Idea of Justice*.<sup>16</sup> He observed that the concept of community and neighbourhood is no longer restricted to the immediacy of those with whom we live or those who we assist when in need in front of us. We are all linked inter se by trade, commerce, music, literature, politics, news and so on. Our relationships of neighbourhood span the world and our actions can affect those all over the world. They are not limited to those with whom we interact physically.

### **Was Lord Atkin's premise legally accurate?**

Although the use of the parable of the Good Samaritan may have been erroneous, I am content to proceed on Lord Atkin's assumption that it is morally blameworthy not to assist someone who can easily be assisted, although even this point has been disputed. As Professor Sen relays the story, John Sparrow, the former Warden of All Souls, Oxford, used to delight in asking audiences whether the priest and Levite had acted wrongly. Sparrow would reply, 'Of course they did', but then explain to his shocked audience that their wrong was crossing the road to get away from the wounded man. They should not have felt obliged to walk to the other side of the road. They should have walked straight past.<sup>17</sup>

Unlike Sparrow, my previous point was not to question whether the priest and the Levite acted immorally by failing to assist. My point was that the parable was misunderstood. More fundamentally, and assuming Lord

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<sup>16</sup> A Sen, *The Idea of Justice* (2009) 171 - 172.

<sup>17</sup> A Sen, *The Idea of Justice* (2009) 172.

Atkin's view about the purpose of the parable as an illustration of immorality, I turn now to the question whether Lord Atkin's premise was legally accurate. Was Lord Atkin correct to say that '[t]he rule that you are to love your neighbour becomes in law, you must not *injure* your neighbour'? In contrasting his assertion of the moral blameworthiness of the priest and the Levite with the lack of legal liability, Lord Atkin spoke in the active tense of 'injuring'. He did not speak of *causing to be injured*. In other words, he was saying that the law does not impose liability for omissions however morally blameworthy they might be.

My doubt concerns Lord Atkin's assertion that the law of civil wrongdoing is only concerned with a person's positive acts, not with his or her omissions. It is true that, *generally*, there is no liability for an omission. The most extreme hypothetical is the adult who stands by while a baby drowns in a pool of shallow water.<sup>18</sup> But some pure omissions have always been actionable as civil wrongs because the common law sometimes does recognise a duty of positive action. One obvious example is a duty to act that is created by the law of contract. Another is a duty to act undertaken by a trustee to a beneficiary who might be strangers or might not even be born. A further example is that it was both a civil wrong and a criminal offence for a person who professes a common calling to refuse to provide their service to a stranger.<sup>19</sup> The best known example was the innkeeper who is asked by a stranger with funds to provide available accommodation. But the innkeeper is not an isolated example. As A W B Simpson explained, the adjective 'common' was applied to hangmen, prostitutes, informers, sergeants, labourers, attorneys, innkeepers, carriers, and many others. It meant no more than available to or for the public generally.<sup>20</sup>

The above examples all concern positive duties to act that are based upon undertakings by the person who owes the duty. But, in Australia, liability for omissions goes beyond those circumstances involving duties that have been positively undertaken. In *Brodie v Singleton Shire Council*,<sup>21</sup> the question concerned the liability of a local council for failing to maintain a bridge which collapsed when Mr Brodie drove his truck over it. In the majority, Gaudron, McHugh and Gummow JJ in a joint judgment, and

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<sup>18</sup> *Stovin v Wise* [1996] AC 923, 930–931 (Lord Nicholls).

<sup>19</sup> See discussion in *Stapley v Towing Masters Pty Ltd (trading as Dynamic Towing)* [2009] NSWCA 382 [92]; *Pozzi v Shipton* (1838) 1 Per & Dav 4, 12 per Patteson J (arguendo, although the passage does not appear in the report at [1838] Eng R 205; 8 Ad & E 1106; 112 ER 1106); *Belfast Ropework Co v Bushell* at 212 per Bailhache J.

<sup>20</sup> A W B Simpson, *A History of the Common Law of Contract: The Rise of the Action of Assumpsit* (1987) 230.

<sup>21</sup> *Brodie v Singleton Shire Council* [2001] HCA 29; 206 CLR 512.

Kirby J in a separate judgment, held the local council liable even in the absence of an express undertaking. For the majority, the key was that the local council had physical control over the object or structure which is the source of the risk of harm. One example relied upon by their Honours in their recognition of the positive duty of the local council is the obligation on a landowner to remove a hazard from his land.<sup>22</sup> Anticipating *Brodie*, and its predecessor on this point, *Pyranees Shire Council v Day*,<sup>23</sup> the New South Wales Court of Appeal in *Lowns v Woods*<sup>24</sup> also imposed liability for the omission of a doctor to leave his surgery to assist a patient in crisis nearby.<sup>25</sup>

It is not necessary here to venture a view about the boundaries of liability for omissions. There are important reasons of principle why those boundaries should be tightly drawn in a system of law that focuses upon the rights we owe to others. As Professors JC Smith and Burns explained in their attack on *Donoghue v Stevenson* in 1983, 'maintaining a distinction between misfeasance and nonfeasance assumes a right based theory of tort liability'.<sup>26</sup>

It suffices to say that Lord Atkin's assumption that the law is only concerned with a person's positive acts is, and was, simply wrong. It appears that Lord Atkin himself realised this 9 years later in *East Suffolk Rivers Catchment Board v Kent*.<sup>27</sup> In that case, the Board had exercised their statutory power to repair a sea wall so inefficiently that flooding had continued for 178 days, causing damage to land, including that which was occupied by Mr Kent. One question was whether the Board could be liable for failing to repair, since if there were no liability for a complete failure to repair, then there could be no liability for an inefficient repair. A majority of the House of Lords held that there was no liability for an omission to repair. Lord Atkin dissented. It does not appear that any counsel cited the decision in *Donoghue v Stevenson*. But the decision, and the potential inconsistency with Lord Atkin's now famous dictum concerning liability for omissions, must have been in Lord Atkin's mind. Lord Atkin explained that the closeness of the relation between the Board and the plaintiffs included the Board's knowledge of the damage that would result to the plaintiffs the longer that it delayed and he emphasised that the Board had started working on the plaintiffs' land which work the

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<sup>22</sup> See especially [2001] HCA 29; 206 CLR 512 at [85].

<sup>23</sup> *Pyranees Shire Council v Day* [1998] HCA 3; (1998) 192 CLR 330.

<sup>24</sup> *Lowns v Woods* (1995) 36 NSWLR 344.

<sup>25</sup> Relying in part on s 27(1)(h) of the *Medical Practitioners Act 1938* (NSW).

<sup>26</sup> J C Smith and P Burns 'Donoghue v Stevenson - The Not so Golden Anniversary' (1983) 46 MLR 147, 160.

<sup>27</sup> *East Suffolk Rivers Catchment Board v Kent* [1941] AC 74.

plaintiffs could have done themselves.<sup>28</sup> Lord Atkin concluded that part of his discussion by saying that he thought that the principles accepted by the majority in *Donoghue v Stevenson* gave guidance on this aspect of the case.<sup>29</sup>

## **Did Lord Atkin err in the structure he created for the English law of torts?**

The section which follows derives from work by John Davies and myself in the second edition of *English Private Law*<sup>30</sup> which, in turn, built upon questions asked in the first edition in 2000. Shortly prior to that, these deep questions concerning the structure of the modern law of torts were raised by Peter Birks in 1996,<sup>31</sup> with different (and fundamentally opposed) answers subsequently being given by two of his former students.<sup>32</sup>

Before 1932, the law of torts had developed without any structure.<sup>33</sup> The writ of trespass and the actions on the case were forms of action which created a list of wrongs by serving as set propositions within which plaintiffs had to bring their facts. Although these forms of action were replaced by causes of action in the mid-19<sup>th</sup> century,<sup>34</sup> the liberalising effect of this major procedural change was slow to take effect. The names of the old forms of action continued to be used by courts to describe the causes of action.

By the time of *Donoghue v Stevenson* a debate was taking place about the structure of the law of torts. One simple solution to the facts which arose in that case had been proposed by some of the 19<sup>th</sup> century's greatest common lawyers. Brilliant minds such as William Blackstone,<sup>35</sup> Thomas Cooley,<sup>36</sup> Frederick Pollock,<sup>37</sup> and Percy Winfield<sup>38</sup> had all argued for a

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<sup>28</sup> *East Suffolk Rivers Catchment Board v Kent* [1941] AC 74, 91.

<sup>29</sup> *East Suffolk Rivers Catchment Board v Kent* [1941] AC 74, 92.

<sup>30</sup> J Edelman and J Davies 'Torts' in A Burrows (ed) *English Private Law* (2nd edn, 2010) esp 1186 - 1192.

<sup>31</sup> P Birks, 'Equity in the Modern Law: An Exercise in Taxonomy' (1996) 26 UWALR 1, 5 - 6.

<sup>32</sup> R Stevens, *Torts and Rights* (2007); E Descheemaeker, *The Division of Wrongs: A Historical Comparative Study* (2009).

<sup>33</sup> JH Baker, *An Introduction to English Legal History* (4th edn, 2002) 401-465; D Ibbetson, *A Historical Introduction to the Law of Obligations* (1999) 39-70, 97-125, 153-87.

<sup>34</sup> The abolition of the forms of action occurred in three stages: JH Baker, *An Introduction to English Legal History* (4th edn, 2002) 53-70, esp 67-69. The second stage of that process, the Common Law Procedure Act 1852, was most crucial.

<sup>35</sup> W Blackstone, *Commentaries on the Laws of England* (1765), Book III.

<sup>36</sup> T Cooley, *A Treatise on the Law of Torts or the Wrongs which arise Independent of Contract* (1880).

<sup>37</sup> F Pollock, *The Law of Torts* (1887). An early review of Pollock complained that the 'scientific' approach to the law of torts ought to be a generalised principle based upon liability for the consequences of acts which a reasonable man ought to have foreseen: 'As a Digest of rights it is a

law of torts which focuses upon the protection of particular rights. That conception of the law of torts could easily have answered the problem in *Donoghue v Stevenson*.

The way the decision could have been given is as follows below. There are powerful modern advocates for this structure, either generally<sup>39</sup> or in relation to areas such as torts involving interferences with chattels.<sup>40</sup>

Lord Atkin could have explained that in many cases a defendant will be liable if he or she intentionally interferes with a right of the claimant, intending to commit the act. In other words, a plaintiff would need to show (1) an existing right; and (2) an intentional interference with that right. Thus,

- (a) if a defendant strikes a plaintiff, intending to make contact with the plaintiff he will be liable for battery. The plaintiff's rights to bodily integrity have been intentionally violated.
- (b) If a defendant interferes with a plaintiff's goods, intending to act in relation to the goods, he commits the tort of conversion. The plaintiff's rights to his goods have been intentionally violated.
- (c) If the defendant locks the plaintiff in a room, intending to lock the door, he commits an act of false imprisonment. The plaintiff's rights to liberty have been intentionally violated.

And so on. The focus of all these torts is an intention of the defendant and a violation of a particular right of the plaintiff.

Lord Atkin could then have said that a defendant can also be liable for the violation of a right of the plaintiff if the defendant acts *negligently*. Thus:

- (d) if a defendant strikes a plaintiff, not intending to make contact with the plaintiff but acting carelessly he will be liable for battery. The plaintiff's rights to bodily integrity have been carelessly violated.

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useful reference but we hold that this is an unscientific way of treating the law of torts': Anon (1886-1887) 12 Law Mag & L Rev 5th Ser 270, 275, 277.

<sup>38</sup> P Winfield, *The Province of the Law of Tort* (1931), 32-39.

<sup>39</sup> R Stevens, *Torts and Rights* (2007).

<sup>40</sup> S Douglas, *Liability for Wrongful Interferences with Chattels* (2011).

- (e) If a defendant interferes with a plaintiff's goods, not intending to act in relation to the goods but doing so carelessly then he commits the tort of conversion. The plaintiff's rights to his goods have been carelessly violated.
- (f) If the defendant locks the plaintiff in a room, not intending to lock the door, but acting carelessly he commits an act of false imprisonment. The plaintiff's rights to liberty have been carelessly violated.

And so on.

The answer to *Donoghue v Stevenson* would have been easy: a defendant who negligently interferes with the plaintiff's right to bodily integrity where there is a foreseeable risk of injury will be liable for battery.

This path was not taken by Lord Atkin. Lord Atkin did not focus at all upon the rights of the plaintiff. Instead he focused only on the fault of the defendant. The Atkinian conception of the law of torts as focused upon fault was, I should admit, supported by the vision of great jurists such as Oliver Wendell Holmes,<sup>41</sup> Arthur Goodhart,<sup>42</sup> and John Salmond.<sup>43</sup> It was also the conception of the law of torts in Article 1382 of the French *Code Civil*. There are powerful modern advocates for this view.<sup>44</sup> It was a view that very nearly prevailed. Its apogee was the decision of Lord Wilberforce in the House of Lords in *Anns v Merton London Borough Council*.<sup>45</sup> Lord Keith later described this decision as 'judicial legislation'.<sup>46</sup> In it Lord Wilberforce relied on *Donoghue v Stevenson*, to create a prima facie liability for negligence. Lord Wilberforce said:<sup>47</sup>

... 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

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<sup>41</sup> Anon, 'The Theory of Torts' (1872) 7 Am L Rev 652. Although the article is not signed, as Vandeveldel has observed much of the language in the article appears in O W Holmes *The Common Law* (1889): K Vandeveldel 'A History of the Prima Facie Tort: The Origins of a General Theory of Intentional Tort' (1990) 19 Hofstra L Rev 447. Holmes' biographer also attributes the article to Holmes: M Howe *Justice Oliver Wendell Holmes The Proving Years 1870-1882* (1963), 184.

<sup>42</sup> J Salmond, *Torts* (2<sup>nd</sup> edn 1910), 8-9.

<sup>43</sup> A Goodhart, 'The Foundations of Tortious Liability' (1938) 2 MLR 1.

<sup>44</sup> Particularly E Descheemaeker, *The Division of Wrongs: A Historical Comparative Study* (2009).

<sup>45</sup> *Anns v Merton London Borough Council* [1978] AC 728.

<sup>46</sup> *Murphy v Brentwood District Council* [1991] 1 AC 398, 471.

<sup>47</sup> *Anns v Merton London Borough Council* [1978] AC 728, 751-752.

between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of 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 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...."

This broad approach did not prevail either. Our law of torts became bifurcated. Some torts focus upon particular rights of a plaintiff which have been infringed. Other torts, most particularly negligence, focus upon the fault of the defendant. In the latter group there are then many difficult value judgments required to determine the boundaries of such liability for fault, particularly in cases where economic loss is caused to a plaintiff but no particular right is infringed.

In seeking to impose on the law of torts a general model of fault, as we see in French law, Lord Atkin undeniably failed. We still have many, many torts in our law which are based on strict liability protection of rights. Trespass to land, trespass to chattels, conversion, detinue, false imprisonment, libel, slander, and so on. These torts protect the particular rights we have. They are not based around an Atkinian notion of fault.

As many writers have observed, this bifurcated nature of the law of torts has created difficulty in the cross-cutting or overlap with torts which allow liability based on infringements of particular rights which we have. Consider the English case of *Spring v Guardian Assurance plc*.<sup>48</sup> In that case, a reference was negligently written by an employer which caused loss to the employee by damaging his future employment possibilities. A claim for defamation would have been met by a defence of qualified privilege which meant that the employer could not be liable in the absence of proof of malice.<sup>49</sup> The employee realised that he could not claim for infringement to his rights to reputation. So the employee sued for negligence. He succeeded, in the teeth of arguments that the generalised claim for negligence would undermine the defence of qualified privilege. In direct opposition to this, Lord Phillips, subsequently remarked in the Court of Appeal in *D v East Berkshire NHS*

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<sup>48</sup> *Spring v Guardian Assurance plc* [1995] 2 AC 296.

<sup>49</sup> *Spring v Guardian Assurance plc* [1995] 2 AC 296, 346.

*Trust*<sup>50</sup> that a plaintiff cannot sidestep the defence of qualified privilege by advancing a claim for defamation in the guise of negligence.<sup>51</sup>

The same concerns were raised in *Sullivan v Moody*,<sup>52</sup> where the High Court of Australia considered whether doctors and social workers were liable to parents for negligently investigating and reporting on allegations of sexual abuse to children. One reason given by the joint judgment of the court for rejecting the claims of the parents was that '[t]o apply the law of negligence in the present case would ... allow recovery of damages for publishing statements to the discredit of a person where the law of defamation would not.'<sup>53</sup> The decision in *Spring* was footnoted by the High Court, as a contrasting decision, preceded by the abbreviation for the Latin *confer*. Whether or not cases like *Spring* and *Sullivan* can be reconciled (such as on the basis that there was a voluntary undertaking in *Spring*) the potential for cross-cutting influence arising from our bifurcated law of torts is ever present. There remains a need to be vigilant to preserve what the High Court described as 'coherence of the law'.<sup>54</sup>

### **Was Lord Atkin's approach alien to the traditional common law method?**

There is an even more fundamental point apart from the possible errors in the theology on which the decision was based, errors in the conception of the law of tort, and the error in Lord Atkin's attempt at a wholesale structuring of the law of torts. The point is the nature of the common law method. Such is the incremental nature of common law development that the decision in *Donoghue v Stevenson* was not initially seen as affecting the massive development of the common law that it did. The first consideration of the decision by an ultimate appellate court came in the decision of the Privy Council in *Grant v Australian Knitting Mills Ltd*.<sup>55</sup>

Mr Grant sued the retailer and the manufacturer of underpants which he had purchased. The underpants gave him dermatitis. He had used them in the ordinary manner, wearing them for the usual period - slightly more than a week - before washing them. A majority of the High Court of

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<sup>50</sup> *D v East Berkshire NHS Trust* [2003] EWCA Civ 1151, [2004] QB 558, 594 [102]. The House of Lords made no comment on this when it considered the appeal: *JD v East Berkshire Community Health NHS Trust* [2005] UKHL 23; [2005] 2 AC 373.

<sup>51</sup> The answer, however, may be, as Stevens postulates, that the right infringed in *Spring* is not the plaintiff's right to reputation but a right, akin to contract, based upon an assumption of responsibility: R Stevens *Torts and Rights* (2007).

<sup>52</sup> *Sullivan v Moody* [2001] HCA 59; (2001) 207 CLR 562.

<sup>53</sup> *Sullivan v Moody* [2001] HCA 59; (2001) 207 CLR 562, 581 [54].

<sup>54</sup> *Sullivan v Moody* [2001] HCA 59; (2001) 207 CLR 562, 581 [55].

<sup>55</sup> *Grant v Australian Knitting Mills Ltd* [1935] UKPCHCA 1; (1935) 54 CLR 49.

Australia held that the retailer and manufacturer were not liable. Dixon J (with whom McTiernan J agreed) explained two different views about the scope of the decision in *Donoghue v Stevenson*.

One view was that a manufacturer's duty of care arose only in relation to a product which is not inherently dangerous or known to be dangerous, only if a 'special relation' between the parties is established. That special relation would exist only if the consumer had no reasonable opportunity to examine it, and there was no likelihood of interference by intermediaries. Dixon J declined to decide this issue. He decided the case on the narrow proposition that Mr Grant had not proved that the underpants caused his dermatitis.

There was a dissent by Evatt J. His Honour cited the famous passage from Lord Atkin and expressed the duty of care in broad terms, including endorsing the view of Sir Frederick Pollock.<sup>56</sup> The Privy Council upheld the view of Evatt J. But Lord Wright, delivering the decision of the Privy Council expressed the duty of care in narrow terms: (1) it concerned a manufacturer of goods, (2) the manufacturer must intend the goods to reach the consumer in the form they were manufactured with no reasonable possibility of intermediate examination, and (3) the manufacturer must know 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.

Lord Wright also emphasised that<sup>57</sup>

The principle of *Donoghue's Case* can only be applied where the defect is hidden and unknown to the consumer, otherwise the directness of cause and effect is absent: the man who consumes or uses a thing which he knows to be noxious cannot complain in respect of whatever mischief follows because it follows from his own conscious volition in choosing to incur the risk or certainty of mischance.

The contrast in technique between Lord Wright delivering the opinion of the Privy Council, and Lord Atkin, is stark. As Lord Wright explained three years later, his view of a judge's role was that the judge would go 'from case to case, like the ancient Mediterranean mariners, hugging the coast from point to point, and avoiding the dangers of the open sea of

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<sup>56</sup> *Australian Knitting Mills Ltd v Grant* [1933] HCA 35; (1933) 50 CLR 387, 440 – 441 citing (1933) 49 *Law Quarterly Review* 23.

<sup>57</sup> *Grant v Australian Knitting Mills Ltd* [1935] UKPCHCA 1; (1935) 54 CLR 49, 65.

system or science'.<sup>58</sup> This careful approach contrasts with the sweeping dicta of Lord Atkin.

It is also helpful to contrast the approach of Lord Buckmaster with that of Lord Atkin as a study of judicial method. In *Donoghue v Stevenson*, the two Chancery lawyers in the House of Lords had dissented. Lord Buckmaster was the leader of those dissentients. Lord Denning famously caricatured Lord Buckmaster as a 'timorous soul' in contrast to Lord Atkin's 'bold spirit'.<sup>59</sup> And Frederick Pollock suggested that Lord Buckmaster had forgotten that he was judging in a court of last resort.<sup>60</sup>

But Lord Buckmaster was not this timorous, reluctant, hesitant judge that he is painted to be. Lord Macmillan, whom Buckmaster led on occasion at the bar, described Buckmaster as a man who 'possessed the most relevant and cogent powers of exposition and argument that I have ever known'.<sup>61</sup> He had been Solicitor-General, and Lord Chancellor. Lord Dunedin explained that although he did not have any sympathy with Buckmaster's 'sentimental' politics, he considered that as a lawyer Buckmaster was 'one of the most learned, one of the most acute, and the fairest judge I ever sat with'.<sup>62</sup> Lord Buckmaster was also the most experienced of the judges who sat on the case. Each of the others had sat on the bench for fewer than 5 years. Lord Atkin had leapfrogged his former pupilmaster (who had become Scrutton LJ) to become a peer in 1928, effectively ending Scutton's prospects of future advancement.<sup>63</sup>

Perhaps the reason why Lord Atkin's reasoning in *Donoghue v Stevenson* emerged unscathed from Lord Buckmaster's dissent was the use of sarcasm by Lord Buckmaster to very poor effect. Lord Buckmaster (with whom Lord Tomlin said he agreed with every word) said that if Mrs Donoghue were allowed to succeed, then a builder would also be liable if the builder negligently built a house that collapsed and injured or killed the occupants. Lord Buckmaster asked 'How could a builder possibly be liable in such circumstances?':<sup>64</sup>

If such a duty exists, it seems to me it must cover the construction of every article, and I cannot see any reason why it should not

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<sup>58</sup> Lord Wright, 'The Study of Law' (1938) 54 *Law Quarterly Review* 185, 186.

<sup>59</sup> *Candler v Crane, Christmas & Co* [1951] 2 KB 164, 178.

<sup>60</sup> F Pollock, 'The Snail in the Bottle and Thereafter' (1933) 49 *LQR* 22, 22.

<sup>61</sup> Lord Macmillan, *A Man of Law's Tale* (1951) 119.

<sup>62</sup> See W Goodhart, 'Buckmaster, Stanley Owen, first Viscount Buckmaster (1861-1934)' *Oxford Dictionary of National Biography* (2004 online edition).

<sup>63</sup> See the excellent discussion in D Foxton, *The Life of Thomas E Scrutton* (2013) esp 297 – 299.

<sup>64</sup> *Donoghue v Stevenson* [1932] AC 562, 577 – 578.

apply to the construction of a house. If one step, why not fifty? Yet if a house be, as it sometimes is, negligently built, and in consequence of that negligence the ceiling falls and injures the occupier or any one else, no action against the builder exists according to the English law, although I believe such a right did exist according to the laws of Babylon.

### **Did the facts really occur?**

Mrs Donoghue's case was brought as a plea of relevancy, the Scots equivalent of a demurrer. After the decision of the House of Lords, the case was set down for a Proof (of the facts). The Proof was to be held on 10 January 1933. But Mr Stevenson died before the Proof. A motion was brought to discharge the Proof by reason of Mr Stevenson's death. The Proof was discharged. The matter did not come back before the Court of Session until 6 December 1934. On that date it was only to approve a settlement.<sup>65</sup> His estate had allegedly settled the claim for £100 (adjusted for inflation, in today's terms around £6,000).

In 1942 Lord Justice Mackinnon told the Holdsworth Club that he had heard from senior counsel for Stevenson that there was no snail at all and that the case had been litigated as a test case. There is a very real likelihood that this was the case. Mrs Donoghue was a pauper. Her Glasgow solicitor, Walter Leechman, acted pro bono. Mr Leechman had acted pro bono previously against a soft drink manufacturer. In that earlier case, Mr Leechman alleged that his clients, two children, had found the body of a decomposed mouse in their ginger beer.<sup>66</sup> The two children suffered injury which Lord Hunter described as '*so slight that the Pursuer might well have been advised to leave the litigation alone*'.<sup>67</sup> Just how the mouse managed to squeeze through the narrow entrance of the ginger beer bottle was never explained. Nor was it explained how the mouse had the speed to dive into the bottle of ginger beer, through the narrow entrance, between the time the liquid was inserted and the time when the top was fastened on the bottle. In the Inner Court of Session, Lord Anderson described the odds of the mouse getting into the ginger beer as 'many millions to one'.

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<sup>65</sup> See D Ashton-Cross, 'Donoghue v Stevenson' (1955) 71 LQR 472, 472.

<sup>66</sup> *Mullen v A G Barr & Co Ltd; M'Gowan v A G Barr & Co Ltd* [1929] ScotCS CSIH 3; [1929] SC 461.

<sup>67</sup> *Mullen v A G Barr & Co Ltd ; M'Gowan v A G Barr & Co Ltd* 1929] ScotCS CSIH 3; [1929] SC 461.

Despite these odds of many millions to one, there was another woman, also in Glasgow, called Mrs M'Gowan who allegedly also found a mouse in her ginger beer. By another coincidence she also engaged Mr Leechman to act for her.

These coincidences may have been a matter of concern to their Lordships. Although they held that no duty of care was owed and that was enough to dispose of the case, Lord Hunter nevertheless remarked that he '*saw no reason to think that the two cases had their origin in a conspiracy to extract money from the defenders*'.

Shortly after these cases were decided against his clients, Mr Leechman then brought Mrs Donoghue's case. Instead of a sizeable mouse, Mr Leechman now pleaded that it was the body of a slippery snail which had been found by Mrs Donoghue. For her gastro-enteritis, Mrs Donoghue claimed damages of £500. In today's money that is about £25,000.

## **Conclusion**

One of the first lectures I ever received in Law School was from Professor John Phillips who was then Dean of Law and a lecturer in contract at the University of Western Australia. It is a great pleasure to see John here this evening because he was an inspirational teacher, and later colleague. His lecture was about the importance of reading for a degree, the need for an open mind and, consistently with the motto on UWA's coat of arms, the seeking of wisdom. The need to question, to challenge, and to debate, lies at the core of every great University. As alumni and friends of the UWA law school we are all affected by this legacy. Consistently with this mantra, the purpose of my lecture tonight was to question existing understanding of one of our most well known cases.

Two years ago, a conference was held in Paisley to celebrate *Donoghue v Stevenson* as one of the most famous common law decisions in history.<sup>68</sup> A group of the most learned torts scholars from around the world, which included Professor Peter Handford from the University of Western Australia, carefully debated the reception and decision in *Donoghue*. The decision, particularly that of Lord Atkin, generally met with great praise. But when we consider the decision closely we might ask whether Lord Atkin was wrong in law, wrong in theology, wrong in the manner that the common law should be developed, and wrong in his conception of the

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<sup>68</sup> Proceedings published as a special edition of the Juridical Review: *Donoghue v Stevenson: The Paisley Papers* (2013).

structure of the law of torts. And all of this in a case where the appeal was from a different jurisdiction, Scotland, and where the facts probably never happened. But, then again, it is possible that Lord Atkin himself never comprehended that a few sentences of obiter dicta could have had such widespread and sweeping effect.