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The snail that never was? Suspicions surrounding Mrs Donoghue's case

By Noel Dilworth

Ninety years ago today, Lord Atkin delivered his speech[1] in Donoghue v Stevenson [1932] AC 562, heralding a revolution in the law of torts. The much-vaunted neighbour principle - the obligation for a person to take reasonable care to prevent reasonably foreseeable damage to a neighbour who (it can be foreseen) will probably be injured as a result of one's failure to act with reasonable care - has since served as a cornerstone of the law of negligence. Several hundreds of thousands of plaintiffs, pursuers and, latterly, claimants have, over the years, recovered damages, despite the absence of any actionable contract, against manufacturers, occupiers, repairers, medics, surveyors, solicitors and other classes of defendants. Without the neighbour principle, what we now know as health and safety law would disappear.

1. The legal principles are, of course, familiar to many a law student. A duty of care can exist independently of a contract. Although debates simmer about whether the decision departed from traditional common law methodology and whether the internal taxonomy espoused by Lord Atkin was or remains sound, the principle that one person's

[1] Unusually, Lord Buckmaster, who was, of course, in the minority, delivered the leading speech. Another unusual feature of the case was that the majority had a distinctly Celtic character: Lords Thankerton and MacMillan from Scotland and Lord Atkin, an Australian-born Welshman.

unintentional actions, which cause injury or harm to another, can create a basis for claiming compensation is now axiomatic.

2. Familiar too are the *pleaded* facts: Mrs May Donoghue, on an outing from Glasgow to visit a friend in Paisley on Sunday 26 August 1928, is taken in the evening to the Wellmeadow café, run by Mr Francis Minchella and is treated by her friend to a Scotsman Ice Cream Float, which comprises ginger beer and ice cream. The ginger beer is presented in an opaque bottle whose label advertises the name and address of the Defendant, David Stevenson. Its contents are poured, in part, into a glass, whereupon Mrs Donoghue sips from it. Initially unbeknownst to her at the time of quenching her thirst is the presence of a decomposing snail in the bottle, whose subsequent discovery precipitates shock and presages a bout of gastro-enteritis.

3. The more observant students will also recall that the manufacturer had entered a plea of relevancy (the Scottish equivalent of demurrer), which escalated the case before trial through the appellate Courts. So, by the time of Lord Atkin's speech, there was no factual finding on the pleadings, but the pleaded facts were assumed to be true for the purpose of the appeal.

4. What happened after the feted decision however is not often traversed in legal textbooks. One of the poignant footnotes to this case is that the Defendant, David Stevenson, died within six months of the decision - on 12 November 1932. Mrs Donoghue's claim had been set down for Proof (of the facts) on 10 January 1933, but the Proof was adjourned following Mr Stevenson's death and the matter only returned to the Court of Session for approval of a settlement between Mrs Donoghue and the executors of his estate on 6 December 1934.

5. Thus, there was never a trial. No factual witnesses (let alone expert gastro-enterologists or soft drinks quality control experts) gave evidence. There was no positive finding that Mrs Donoghue suffered a bout of gastro-enteritis, nor that Mr Stevenson had been negligent, nor, indeed, that a decomposing snail had found its way into a bottle of ginger

beer at Mr Stevenson's premises. Nor have Mrs Donoghue or Mr Minchella or Mr Stevenson committed their recollections to paper (witness statements being barely a nascent glint in the eye of English law).

6. There are, however, a number of curiosities, which have caused some distinguished jurists to question the truth of Mrs Donoghue's pleaded facts.[2] Indeed, amongst Lord Atkin's private papers held by Gray's Inn appears a letter from Mr Stevenson's Leading Counsel to Lord Macmillan in which he claimed that the House of Lords' decision had not come as a surprise to him, but that "*we had a very strong case on the facts. If the case had gone to proof, I think it would have been fought and possibly won on the issue whether there was a snail in the bottle…*"[3]

7. The first striking aspect of the history of the case is the eventual settlement figure. Reports vary as to whether the settlement sum was £100[4] or, as claimed by Mrs Donoghue's solicitor's son[5], £200, but it was considerably less than the £500 which had been claimed on her behalf (a fact recorded in the first line of the law report). The disparity between the amount claimed and the settlement amount might be explained away as typical of the pattern of personal injury cases. It is, however, also consistent with a Pursuer who has lost her nerve that the Court will believe her account.

8. Second, dead snails generally start to decay quickly and, within about 24 hours of death, ordinarily produce ammonia and, with it, an intensely pungent smell. The opaque bottle could very well have prevented Mrs Donoghue and her friend (and indeed, Mr Minchella) from *seeing* the decomposing snail (if ever there was one), but, once the

[2] See *Fundamental Errors in Donoghue v Stevenson?*, Edelman J., Australian Bar Review, Vol. 39, 2014, p160-173
[3] See Lord Atkin's private papers held by Gray's Inn (Ref AK1/JUD/1/1). See also Lewis, G. Lord Atkin (Hart Publishing, 1999)
[4] McBryde, WM, "*Donoghue v Stevenson: the Story of the "Snail in the Bottle" Case*" in Gamble, A.J. (ed.) *Obligations in Context* (W. Green, 1990), p. 26 n.26 and Heuston, R.F.V. "*Donoghue v Stevenson in Retrospect*" (1957) 20 MLR 1, 2
[5] See also Mr Justice Taylor's article, "*The Good Neighbour on Trial: a message from Scotland*" (1983) 17 UBC Law Review 59, 65

metal bottle-cap was removed, it is surprising that no-one appears to have smelt anything. Nevertheless, it is at least possible that the smell had in some way been masked or diluted. Perhaps the ginger beer itself was so strong that it could negate the smell. Or perhaps Mrs Donoghue was suffering a loss of taste and smell from a then unknown and undiagnosed virus…

9. Perhaps the most intriguing aspect of the case concerns Mrs Donoghue's solicitor, Walter Leechman. Born in around 1870, the young Leechman matriculated aged 15 at the University of Glasgow to study for an Arts degree in 1885, later enrolling in a course of English literature and logic. Mr Leechman could not therefore be said to have been unequipped with the tools of creativity and reasoning required to innovate a brand new cause of action.

10. Drawing towards the end of his career and no doubt conscious of his legacy, Mr Leechman offered his services for nothing to Mrs Donoghue. He also had pertinent recent experience. In a case reported in 1929, Mr Leechman had acted (again, pro bono) against a soft drink manufacturer (the producers of Irn Bru, no less), alleging that his clients, two children, had found the body of a decomposed mouse in their ginger beer: *Mullen v A. G. Barr & Co Ltd* [1929] Scots CS CSIH 3. 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.*" No explanation was given for how the mouse squeezed into the bottle and how it did so in the time between the insertion of the liquid and the fastening of the bottle top, which led Lord Anderson in the Inner Court of Session to describe the odds of it having done so as "*many millions to one.*" In a history of curious coincidences, Mr Leechman also acted for another customer, Mrs McGowan, whose ginger beer (produced by the same defendant) was also contaminated by a mouse and whose writ was brought at around the same time as the Mullen children.

11. Both of those cases, which were conjoined on appeal, ultimately failed. The relevant decision of the Court of Session was published on 20 March 1929. Mrs Donoghue's claim was brought less than three weeks later – on 9 April 1929 (the date for Easter

that year falling on 31 March). A cynic might suggest that the replacement of the mouse with a snail removed the implausibility of the size of the relevant animal relative to the size of the bottle opening. However, the involvement of a snail compounds the implausibility of the relevant animal's speed of entry into the bottle. More significantly, however, for the purposes of the development of the law of tort, the pleadings in Mrs Donoghue's case sharpened the focus on the existence of the tort of negligence and succinctly particularised instances of the negligence it claimed.

12. Perhaps, the fates did conspire to place all those animals in the proximity of ginger beer bottling facilities in the Glasgow area in the late 1920s. Perhaps the enticing taste of ginger beer is irresistible to mice and snails alike. Whatever the truth – which will remain, like the Wagatha Christie mobile phone currently resting in Davy Jones' locker, beyond the clutches of justice – Mrs Donoghue's determination to take the point of principle to the House of Lords and, possibly equally importantly, Walter Leechman's persistence - and his rather elegant pleading of his client's case – are to be celebrated for the, on balance, benign influence they have had on our law of torts.

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