Donoghue v Stevenson

90th Anniversary Conference[1]

When *Donoghue v Stevenson* came before the Appellate Committee of the House of Lords, Lord Atkin suggested that it raised the most important question they had ever been asked to consider.[2] Now on its ninetieth anniversary, we can say with confidence that *Donoghue* was, at the very least, one of the most important cases of the twentieth century, for it laid the foundation of the modern law of tort. Over the course of today's conference, others will speak about the impact of *Donoghue* on the substantive law, both here and abroad. I have been asked to consider the case, instead, from the perspective of the UK Supreme Court, as the successor to the Appellate Committee, and the sister court on which I also sit, the Judicial Committee of the Privy Council. It seems to me that there are a number of lessons that this case can teach us about how our highest courts functioned in the last century and how they continue to function today. In the limited time available to me, I will pick out only three.

The first concerns the influence of Scots law. As is well-known, *Donoghue v Stevenson* began life in Scotland. Mrs Donoghue drank the famous bottle of ginger beer at a café in Paisley and commenced her action against its manufacturer in Edinburgh. She was successful before the Outer House at first instance, but the manufacturer succeeded before the Inner House on appeal. Mrs Donoghue appealed to the House of Lords in London, which was at that time, as the Supreme Court is now, the only court

[1] This short lecture was delivered as part of the Donoghue v Stevenson 90th Anniversary Conference, The Immortal Snail, organised by the Law Society of Scotland and involving speakers from around the common law world, held on 26 May 2022. I am indebted to Isabella Buono for her assistance in the preparation of the lecture.
[2] *Donoghue v Stevenson* [1932] A.C. 562 at 579.

exercising jurisdiction across the whole of the UK. As the highest court for all three jurisdictions, one of its functions is to ensure that a consistent approach is followed in those areas of the law that are shared across the UK.[3] The question of whether there should be consistency across the Anglo-Scottish border came to the fore in *Donoghue*. We know from his diaries that, from the outset, Lord Atkin saw *Donoghue* as a case concerned with what he called "British law".[4] He prepared for the hearing by "organis[ing] the [authorities]… without regard to country of origin and go[ing] through them in [chronological] order".[5] In his judgment, he reviewed the Scottish and English authorities alongside each other, before concluding that a duty of care was imposed "by Scots and English law alike"[6]. The two Scottish Law Lords who heard the appeal, Lords Thankerton and Macmillan, were initially inclined to reach a decision "based only on Scots law", but it appears that Lord Atkin persuaded them to take a broader approach.[7] By forming this "Celtic majority"[8], Lords Atkin, Thankerton and Macmillan were able to "override the scruples of [their] English colleagues [Lords Buckmaster and Tomlin] who could not emancipate themselves from the pressure of a supposed current of

[3] See Lord Reed, 'The Supreme Court Ten Years On' (Bentham Association Lecture, 6 March 2019).
[4] J. C. Kleefeld, 'The *Donoghue* diaries: Lord Atkin's research notes in *Donoghue v Stevenson*' (2013) Juridical Review 375, p. 425. As early as June 1931, Lord Atkin predicted that *Donoghue* would provide "the venue to develop a more general duty principle in the law of negligence". For that reason, he considered speaking to the Lord Chancellor "about sitting on the panel": Entry for 9 June 1931, p. 377.
[5] Entry for 29 July 1931: 'The *Donoghue* diaries', op. cit., p. 380.
[6] *Donoghue v Stevenson* [1932] A.C. 562 at 599.
[7] Entry for 23 March 1932: 'The *Donoghue* diaries', op. cit., p. 443. In its March 1932 iteration, Lord Macmillan's judgment purported to decide the case purely on the basis of Scots law. The final version of his judgment proceeded on the basis that there was "no specialty of Scots law involved, and that the case [could] safely be decided on principles common to both systems": [1932] A.C. 562 at 621. Lord Rodger speculated that it was Lord Atkin who persuaded Lord Macmillan to make this change: 'Lord Macmillan's speech in *Donoghue v Stevenson*' (1992) 108 Law Quarterly Review 236.
[8] See P. A. Landon, 'Notes' (1941) 57 Law Quarterly Review 179, 181 and R. F. V. Heuston, '*Donoghue v Stevenson* in Retrospect' (1957) 20(1) Modern Law Review 1, 3. As to the composition of the "Celtic majority", see M. Chapman, *The Snail and the Ginger Beer: The Singular Case of Donoghue v Stevenson* (Wildy, Simmonds & Hill Publishing, 2010), p. xi: "There were two Scottish Law Lords in *Donoghue v Stevenson*: Lord Thankerton and Lord Macmillan. Lord Atkin (of Aberdovey) was born in Brisbane, Australia, but raised in Merionethshire, Wales. Much of his ancestry was Irish, but he always considered himself a Welshman."

authority in English Courts" (as Sir Frederick Pollock observed in 1933).[9] *Donoghue v Stevenson* accordingly stands as the most famous example of the Appellate Committee's ability to "Scottif[y] English law"[10]. This was not a new phenomenon, nor one that ended in 1932. In the years that followed, much of the English law of negligence was developed in Scottish appeals to the House of Lords, and that has continued since the establishment of the Supreme Court.[11]

We also know from his diaries that Lord Atkin, while preparing for the hearing in *Donoghue*, cast his eye across the Atlantic. Although no reference was made to it by counsel, Lord Atkin found his way[12] to the American case of *MacPherson v. Buick Motor Co*.[13] Lord Atkin considered Cardozo J's judgment in that case to "shin[e] much-needed light on the whole area",[14] and he expressed an eagerness to "figure out a way to use [it] in a way that [wouldn't] offend English sensibilities."[15] In the end, *MacPherson* was worked into the majority[16] judgments of Lords Atkin[17] and

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[9] F. Pollock, 'The Snail in the Bottle, and Thereafter' (1933) 49(1) LQR 22. Lord Denning characterised the division in similar terms in *Candler v Crane Christmas & Co* [1951] 2 K.B. 164 at 178: "On the one side there were the timorous souls who were fearful of allowing a new cause of action. On the other side there were the bold spirits who were ready to allow it if justice so required."

[10] See Lady Hale, 'The Contribution of Scottish Cases to Developing United Kingdom' (Society of Scotland Annual Conference, 26 October 2018).

[11] See, in particular, *Glasgow Corporation v Muir* [1943] A.C. 448; *Hughes v Lord Advocate* [1963] A.C. 837; *McGhee v National Coal Board* [1973] 1 W.L.R. 1; *Junior Books Ltd v Veitchi Co Ltd* [1983] 1 A.C. 520; and *MacFarlane v Tayside Health Board* [2000] 2 A.C. 59.

[12] Lord Rodger, op. cit., pp. 244-245, speculated that Lord Atkin learned of *MacPherson* from an article in the Law Quarterly Review. In his diary entry for 9 November 1931, Lord Atkin states that he was "alerted" to an article in that journal by Lord Macmillan: 'The *Donoghue* diaries', op. cit., p. 427.

[13] (1916) 217 N.Y. 382.

[14] Entry for 9 November 1931: 'The *Donoghue* diaries', op. cit., p. 426.

[15] Entry for 16 January 1932: 'The *Donoghue* diaries', op. cit., p. 438.

[16] Lord Buckmaster also referred to *MacPherson*, only to dismiss it, at [1932] A.C. 562, 677.

[17] In *Donoghue v Stevenson* [1932] A.C. 562 at 597, before referring to *MacPherson*, Lord Atkin said: "It is always a satisfaction to an English lawyer to be able to test his application of fundamental principles of the common law by the development of the same doctrines by the lawyers of the Courts of the United States. The mouse had emerged from the ginger-beer bottle in the United States before it appeared in Scotland, but there it brought a liability upon the manufacturer." In fact, before *Donoghue*, at least eight "mouse-in-a-bottle" claims had been brought against the Coca Cola Company alone: see J. Miller, 'The mouse in the bottle: an historical survey of some legal responses' (1998) 20(4) Advocates' Quarterly 483.

Macmillan,[18] alongside an earlier decision of the New York Court of Appeals.[19] This provides a second lesson: that much is to be gained[20] from looking at the case law of other common law courts. Since *Donoghue*, in many cases – including a more recent Scottish appeal concerning negligence, *Montgomery v Lanarkshire Health Board*[21] – the Supreme Court has looked to the doctrine of other common law jurisdictions as a possible guide to the development of our own.[22]

This brings me to the third lesson: that judgments of the highest court in this country not only are influenced by, but also have an influence on, the case law of other common law courts. This was especially true at one time of the Privy Council. Three years after *Donoghue*, five Law Lords sat as members of the Privy Council in the case of *Grant v Australian Knitting Mills*.[23] This Australian case concerned not a bottle of ginger beer, but a pair of long johns. Dr Grant purchased two pairs from a shop in Adelaide and, after wearing them, developed severe dermatitis. It was found to have been caused by a chemical irritant present in at least one of the pairs. The Privy Council decided that Dr Grant's claim against the manufacturers "c[a]me within the principle of *Donoghue's* case".[24] Contrary to arguments made on behalf of the manufacturers, *Donoghue* could not be distinguished on the basis that it concerned only "food or drink

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[18] Lord Macmillan referred to *MacPherson* at [1932] A.C. 562, 617. In an earlier draft of his speech, Lord Macmillan also referred to *Boyd v The Coca Cola Bottling Works* 177 S.W. 80 (1915), "a more obscure case from Tennessee about a bottle of Coca Cola which contained a cigar stump", but this did not make it into the final draft: see Lord Rodger, op. cit., p. 244.

[19] *Thomas v Winchester* 6 N.Y. 397 (1852). Unlike *MacPherson*, *Thomas* was referred to in argument before the court: see: 'The *Donoghue* diaries', op. cit., p. 397 and *Donoghue v Stevenson* [1932] A.C. 562 at 577 (Lord Buckmaster).

[20] Lord Atkin went so far as to say that Cardozo J "rescued [him] from [a] Slough of Despond": 'The *Donoghue* diaries', op. cit., p. 425.

[21] [2015] UKSC 11.

[22] See Lord Reed, 'Comparative Law in the Supreme Court of the United Kingdom' (Centre for Private Law, University of Edinburgh, 13 October 2017).

[23] [1936] A.C. 85.

[24] [1936] A.C. 85 at 108 (Lord Wright).

to be consumed internally" (and not "pants… to be worn externally"), or that it concerned only products contained in "stoppered and sealed bottles" (and not those contained in "paper packets").[25] The Privy Council clarified, amid some confusion,[26] that negligence was "a specific tort in itself, not simply… an element in some more complex relationship or in some specialised brand of duty."[27] It would be thirty years before *Donoghue* would be accepted as authority for a wider proposition in *Hedley Byrne*,[28] but the Privy Council's decision in *Grant* was an important step along the way, and one with implications far beyond Paisley. [29]

Ninety years on, *Donoghue v Stevenson* stands as both a product and source of cross-border development of the common law. As Matthew Chapman put it in his book *The Snail and the Ginger Beer: the Singular Case of Donoghue v Stevenson*: "These days the vocabulary of the neighbour principle and its successors – the duty of care and its constituents, foreseeability, proximity and so forth – forms part of the common language of the law used in courts from Aberdeen to Cape Town and from London to Vancouver. The fact that tort lawyers around the world can speak to each other in a

[25] [1936] A.C. 85 at 106 (Lord Wright). It was not only the Australian Knitting Mills which took a narrow approach to the ratio in *Donoghue*. It was suggested in *Salmond on the Law of Torts* (8th ed, 1934) that it be confined only to food and drinks manufacturers. According to A. M. Linden, op. cit., at 81-82: "the prize for the narrowest view of *Donoghue v Stevenson*... goes to the Solicitors Journal [(1932)] which, in apparent seriousness, suggested that "[t]here might be a distinction between draft and bottled beer, the former falling without and the latter within the present case"."

[26] See Heuston, op. cit., pp. 9 and 13.

[27] [1936] A.C. 85 at 103 (Lord Wright).

[28] As Lord Atkin's biographer suggests: "[t]he revolution brought about by *Donoghue v Stevenson* was… quiet…; and its true nature was perhaps not fully understood even by the profession until Lord Devlin's speech in 1963 in the *Hedley Byrne* case": G. Lewis, *Lord Atkin* (Butterworths, 1983), p. 67.

[29] The Privy Council has, in the years since, continued to broaden *Donoghue*'s reach, citing it in judgments on appeals from Hong Kong (*Yuen Kun Yeu v Attorney-General of Hong Kong* [1988] A.C. 175), Australia (*Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co. Ltd (The Wagon Mound)* [1961] A.C. 388; *Commissioner for Railways v Quinlan* [1964] A.C. 1054; *Commissioner for Railways v McDermott* [1967] 1 A.C. 169; *Distillers Co. (Biochemicals) Ltd v Thompson* [1971] A.C. 458; and *Southern Portland Cement Ltd v Cooper* [1974] A.C. 623) and elsewhere (eg *Attorney General of the British Virgin Islands v Hartwell* [2004] 1 W.L.R. 1273).

language all can understand owes much to *Donoghue v Stevenson*."[30] I am delighted that this shared language has brought us together today.

[30] M. Chapman, op. cit., p. 144.