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Attentive readers of these pages will recall that in 1990, a dinner at Macquarie University celebrated the 70th anniversary of the *Engineers' Case*.<sup>1</sup> The dinner attracted contributions by Sir Garfield Barwick and Gaudron J.<sup>2</sup> It inaugurated a series of celebratory dinners which now appear to be an established feature of the annual calendar of the Macquarie Law School. In 1991, the dinner marked the 40th anniversary of the decision of the High Court in the *Communist Party Case*.<sup>3</sup> That decision declared unconstitutional legislation designed to outlaw the Communist Party. It occasioned a constitutional referendum, which was defeated.<sup>4</sup>

In 1992 the Anniversary Dinner in this series celebrated the 60th year of the decision of the House of Lords in *Donoghue v Stevenson*.<sup>5</sup> The decision was handed down on 26 May 1932. On 20 May 1992 a packed dinner at Macquarie University heard a number of speeches before the toast to the anniversary was drunk. Amongst distinguished participants in the dinner was McHugh J of the High Court. His contributions to the analysis of the requirements of *Donoghue v Stevenson* are found in numerous decisions<sup>6</sup> and in extra-judicial writing.<sup>7</sup>

As the *London Times* announced on the day following the decision, the case concerned the liability of a manufacturer of ginger beer when a dead snail was poured from a bottle of its product to the astonishment of Mrs Donoghue who had merely asked for an icecream float. Mrs Donoghue alleged that she became seriously ill

as a result. She had no claim in contract as the beverage had been purchased by an unidentified friend who accompanied her to the Wellmeadow Cafe in Paisley, near Glasgow in Scotland. The events of her celebrated encounter with the snail in August 1928 continue to be felt throughout the common law world. This point was made by all of the speakers who supported the Toast.

The first speech was given by Justice Michael Kirby, President of the New South Wales Court of Appeal and Chancellor of Macquarie University. He drew attention to an earlier attempt by Lord Esher (then Sir William Brett) in *Heaven v Pender*<sup>8</sup> to synthesise the multitude of categories in which the common law to that time had found a duty of care to exist, giving rise to an action of negligence. Justice Kirby hinted that it was often the case that appellate judges tendered concepts which took fifty years to gain acceptance in the highest court. Lord Esher's effort foreshadowed the approach which Lord Atkin espoused in *Donoghue v Stevenson*.

The lawyers who had pursued Mrs Donoghue's claim showed uncommon persistence. Shortly before that decision, they had been involved in an unsuccessful case concerned with the consequences of finding a mouse in a ginger beer bottle.<sup>9</sup> Never daunted, they petitioned the House of Lords to allow Mrs Donoghue to proceed as a pauper and this claim was granted.

Reference was made to the account given by Lord Atkin's biographer<sup>10</sup> of the way in which Lord Atkin consulted his family after Church mattins and secured reinforcement of his "neighbour" principle. In fact, Lord Atkin foreshadowed his broad approach in an address he gave to London University six months before the judgment.<sup>11</sup> He then said that he doubted 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".

It was suggested that the significance of the case was that it amounted to a useful illustration of the way the common law moves from a wilderness of single instances to a general principle; and the way in which lawyers of courage and imagination had an important rôle to play in the development of the common law. The high importance of the decision for legal practice and the continuing elaboration and exploration of the limits of the decision were mentioned as was criticism of the suggested retreat from its broad rule to be found in recent English decisions.<sup>12</sup>

The second speech of that occasion was given by Justice Brian Cohen of the Equity Division of the Supreme Court of New South Wales. Justice Cohen pointed to earlier decisions in the United States which had foreshadowed the development reached in English and Scottish law in *Donoghue v Stevenson*. He recounted the historical details of the case, many of them now lovingly recorded in papers presented to the proceedings of the Paisley Conference on the Law of Negligence organised by Canadian lawyers in 1989.<sup>13</sup> Justice Brennan, of the High Court of Australia, had presented the paper which is reproduced in that collection on "Liability-in negligence on public authorities".<sup>14</sup> In that paper, which surveys Australian, English, Canadian and other decisions, Justice Brennan drew attention to the milestones on the road of the law of negligence following *Donoghue v Stevenson*. Most especially he examined the decisions of the House of Lords in *Anns v Merton London Borough Council*<sup>15</sup> and *Murphy v Brentwood District Council*.<sup>16</sup> Justice Brennan concluded his analysis with the graceful tribute:

"All of us are indebted to the thirst of Mrs Donoghue and her companion, which gave Lord Atkin the opportunity to release from its bottle the genie of his creation."<sup>17</sup>

In his speech, Justice Cohen picked up the theme of the way in which lawyers had prosecuted Mrs Donoghue's claim on a *pro bono* basis. He pointed out that, in fact, such a tradition could be traced amongst the Scottish advocates back to 1424. Justice Cohen said that it was essential that important cases containing difficult questions should reach the higher courts with the assistance of skilled lawyers who, if necessary, were prepared to act without fee in cases deemed worthwhile. He also suggested that the decision had helped to shape modern attitudes to consumerism. Sixty years later it was by no means astonishing that the manufacturer should be liable for carelessness. The possible extension of this notion by statute to the absolute liability of manufacturers was raised by Justice Cohen. Closing his remarks, he revealed the little known fact that Mrs Donoghue's case was later settled upon the payment to her of £200 together with her costs. Justice Cohen said that the myth that, at trial, it was found that there was no snail in David Stevenson's bottle after all was lore, not law. The case never came to trial because of the settlement.

The third address was a whimsical one offered by Mr Chris Roper, Director of the Centre for Legal Education recently established by the Law Foundation of New South Wales. Mr Roper took it upon himself to look at the case from the snail's perspective. He suggested that it showed a typically Anglo-Celtic prejudice against snails. Had the case been litigated in France, it would not have been regarded as offensive to find a snail in a ginger beer bottle. To the contrary, it might have been regarded as an additional delight - a bonus. Lawyers of succeeding generations had assumed that Mrs Donoghue had a right to be nauseated. In fact, this merely displayed the prejudices against snails to which Lord Atkin had given his endorsement.

But Mr Roper conceded that Mr Stevenson was truly a "neighbourly man". In fact, he had supplied Mrs Donoghue not just with ginger beer but with one of his factory's rare snails.

As has been the custom at these dinners, and after some concluding remarks by the head of the Law School (Mr Gill Boehringer) the festivities concluded in song. Professor Tony Blackshield presented "Who Then in Law is my Neighbour?". As the souvenir programme revealed, the music was by Franz Schubert being a passage from his Great Symphony. The "lyrics" were by James Richard Atkin. The famous passage in Lord Atkin's judgment brought the evening - with its mixture of legal history, legal principle and good fellowship - to a close:

*"Who, then, in law, is my neighbour? The answer seems to be - persons who are so closely and directly affected by my acts 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."*<sup>18</sup>

Because of the continuing development of negligence law, and the suggestion in some quarters of a retreat from Lord Atkin's broad view, it was timely for lawyers and law students in Australia today to consider this famous decision. Needless to say, the dinner opened with an offering of marinated snails. A small quantity of ginger beer in translucent glass was available to wash down the toast to the decision which was heartily drunk by all.<sup>19</sup>

#### FOOTNOTES

1. *The Amalgamated Society of Engineers v Adelaide Steamship Company Limited & Ors* (1920) 28 CLR 129.
2. See note (1990) 64 ALJ 755.

3. *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1.
4. Cf M D Kirby, "H V Evatt, The Anti-Communist Referendum and Liberty in Australia" (1991) 7 *Aust Bar Rev* 93.
5. [1932] AC 562 (HL). *Sub nom M'Alister (O'Donoghue (pauper) v Stevenson*.
6. See eg *Hawkins v Clayton & Ors Trading as Clayton Utz & Co* (1986) 5 NSWLR 109, 137f (NSWCA); *Parramatta City Council v Lutz* (1988) 12 NSWLR 293, 324.
7. See M H McHugh, "Neighbourhood, Proximity and Reliance" in P D Finn (ed) *Essays on Torts*, Law Book Co, Sydney, 1989, 5. See also note (1992) 66 ALJ 386, 388.
8. (1883) 11 QBD 503 (CA).
9. *Mullen v A G Barr & Co* [1929] Sess. Cas. 461; [1929] SLT 341 (CS).
10. G Lewis, *Lord Atkin*, Butterworths, London, 1983, 51ff.
11. *Id*, 58. See also Lord Atkin "Law as an Educational Subject" (1932) *JSPTL* 27.
12. See eg M Arnheim, "The Snail's Revenge" (1989) 133 *Sol Jo* 307 criticising *Smith v Littlewoods Organisation Limited* [1987] AC 241; [1987] 1 All ER 710 (HL).
13. P T Burns (ed) *Donoghue v Stevenson and the Modern Law of Negligence*, CLE, Vancouver, BC, 1991.
14. *Ibid*, 79.
15. [1978] AC 728; [1977] 2 All ER 429 (HL).
16. [1990] 3 WLR 414 (1990) 2 All ER 908 (HL).
17. *Loc cit*, 115.
18. [1932] AC at p 580. For earlier and other anniversary reviews see J C Smith and P Burns "*Donoghue v Stevenson - The Not So Golden Anniversary*" (1983) 46 *MLR* 147; A Rodger,

"Mrs Donoghue and Alfenus Varus" in R Rideout and Ors (ed) *Current Legal Problems 1988*, Stevens & Sons, London, 1988, vol 41, p 1; J Toher "Still Silvery on its Diamond Jubilee? - On the Trail of The Elusive Snail" (1992) 66 *L Inst J (Vic)* 379.