

HANDOUT 11: The Paisley Snail - Donoghue vs. Stevenson

Outline

“The Paisley Snail” videotape relates the history and the impact of *Donoghue vs. Stevenson*, perhaps the most memorable and important case in the history of the Commonwealth common law. Through narration, re-enactment, interviews and still photography, the video takes the audience on a trip to Paisley, as we can imagine May Donoghue doing some 67 years ago, and from there to the Scottish Court of Session, the Second Division and ultimately to the House of Lords. Many themes are woven into the fabric of the video as it follows May Donoghue on her journey and beyond. Some of these themes are:

- Effect that “judge-made” or common law has on our daily lives
- Difference between breach of a duty owed under a contract and the general duty of care owed to one’s “neighbour”
- Concept of product liability

A Trip to Paisley: The Facts

On August 26, 1928, Mrs. May Donoghue, a shop assistant of very meager means and a single parent, travelled from her brother’s flat in Glasgow, Scotland to the small town of Paisley, nearby, to enjoy a refreshment with a friend. Mrs. Donoghue and her friend met at an establishment bearing the sign “Real Italian Ice Cream Saloon”, the so-called “Wellmeadow Café”), owned and operated by one Francis Minghella, and located at 1 Wellmeadow Street, Paisley. It is said that at approximately 8:50 p.m., Mrs. Donoghue’s friend ordered and paid for their refreshments; ice cream and ginger beer – a Scottish float – for Mrs. Donoghue, and a “pear and ice” for herself. Apparently the “float” was served unassembled; that is, the ice cream was served in a glass and the ginger beer came in its bottle.

The bottle in which the ginger beer was contained was of brown opaque glass so that the contents of the bottle could not be seen until it was poured out. The bottle bore the legend, “D. Stevenson, Glen Lane, Paisley”.

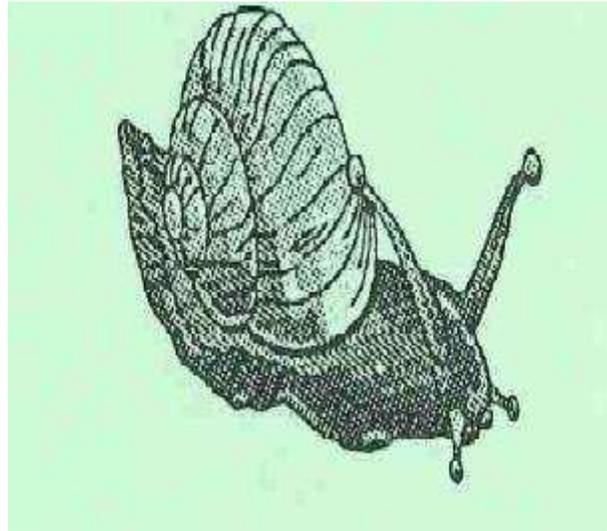
As the friend added more ginger beer to Mrs. Donoghue’s float, after she had already consumed part of the ice cream and ginger beer, Mrs. Donoghue observed what appeared to her to be the partially decomposed remains of a snail flow into her glass.

Mrs. Donoghue claimed that she was made ill both by what she had seen and by what she feared she had eaten: namely, the rotting carcass of a presumed gastropod. Mrs.

Donoghue stated that the resulting illness forced her to see her doctor for treatment three days later and that she again was treated about mid-September at the Royal Glasgow Infirmary.

On the Horns of a Snail: The Legal Issue

Mrs. Donoghue had a difficult legal problem. She could not successfully sue the café owner, Mr. Minghella (although she in fact tried to), either in contract or in tort. In the first instance, she had no contract with Minghella, under which he could be said to have guaranteed the ginger beer fit for consumption, Mrs. Donoghue's mysterious friend having ordered and paid for the refreshments. Minghella poured the first ginger beer.



But this is NOT relevant to the outcome in any way. In the second instance, she could not claim negligence on the part of Minghella because clearly he had neither done nor failed to do anything that could be construed as negligent. The bottle of ginger beer came to him sealed with the clear intention that it remain that way until sold to the consumer. Moreover, the darkness of the bottle prevented Mr. Minghella from inspecting the contents for contaminants prior to delivery to the customer.

Mrs. Donoghue's only possible recourse was to tackle the one player remaining on the field, David Stevenson, manufacturer of the ginger beer. Success for Mrs. Donoghue hung upon the single question:

...whether the manufacturer of an article of drink sold by him to a distributor, in circumstances which prevent the distributor or the ultimate purchaser or consumer from discovering by inspection any defect, is under any legal duty to the ultimate purchaser or consumer to take reasonable care that the article is free from defect likely to cause injury to health...

Unfortunately for Mrs. Donoghue, in 1928 neither the Scottish civil law nor the English common law as they were applied to the tort of negligence had yet progressed to the point of establishing and stating as a matter of general principle, that geographically, a duty of care would be owed by one person remote from another not to cause harm to that other person. Judges relied on precedent, and the absence of a general statement

of the law meant that it was difficult to determine if a duty of care existed in a particular case unless a similar fact situation had been ruled upon by the courts previously.

Thus, recovery against a negligent manufacturer who did not directly and in person caused physical harm or property damage was difficult. Given the rapidly changing face of commerce at the time – the shift from small local industries with small local markets to large manufacturers shipping securely packaged foods, beverages, medicines and other household goods across country – it became increasingly important to resolve the issue of legal responsibility for the safety of such items and for any harm they might cause to consumers. Lord Atkin said, at the beginning of the judgment which ultimately decided her case: “I do not think a more important problem has occupied your lordships in your Judicial capacity...”

Progress at a Snail’s Pace: The Court Process

Mrs. Donoghue sued Mr. Stevenson in April 1929, seven months after the events at the Wellmeadow Café; however a series of Interlocutors (today we would call them interlocutory motions) delayed proceeding for more than a year. In May 1930, David Stevenson’s counsel brought a motion in the Scottish Court of Session before Lord Moncrieff, the Lord Ordinary, to strike out her claim on the grounds that he owned no duty of care to the plaintiff, Donoghue.

It is important to remember that the debate and the subsequent decision of Lord Moncrieff in favour of Mrs. Donoghue were on the point of law: “Was there a duty of care owed, Stevenson to Donoghue?” This narrow question was set within the framework of the larger objection that the claim contained in Mrs. Donoghue writ disclosed no cause of action. Lord Mancrieff dismissed Mr. Stevenson’s motion. Had Mr. Stevenson chosen not to appeal Lord Moncrieff’s ruling, but instead to take his chances on a trial of the issues of fact, *Donoghue vs. Stevenson* might have remained an obscure Scottish case, perhaps useful only to illustrate that it is difficult for a plaintiff to prove she found a snail in her ginger beer if she cannot produce the sail at trial!

At this stage, it appears that Mr. Stevenson went against the advice of his lawyers and instructed them to appeal the decision of The Lord Ordinary, rather than proceed to a trial on the issues of facts. So it was then in late 1930 the decision of Lord Moncrieff came before the Scottish Second Division. As it happened, the Second Division panel consisted of the same four judges who had heard two similar cases the previous year. Each of those cases involved an alleged mouse in ginger beer and in both, the court found that the mouse actually was in the beverage. The court held that there was no negligence in the brewing and bottling methods employed by the defendant manufacturer in those cases but the court indicated that it would have ruled in favour of the manufacturer even if the negligence had been found, on the basis that a

manufacturer owned no duty of care to an unknown non-contractual consumer of its products.

Predictably, the Second Division ruled in favour of Mr. Stevens, in a case really only distinguishable from the mouse cases by virtue of the species of the contaminant. Having lost in the Scottish Second Division, Mrs. Donoghue's final avenue of appeal was in the House of Lords. Remember that Mrs. Donoghue was a poor shop assistant, that there was no legal aid in the early 1930's, and that it was a very expensive proposition to bring a matter before the Law Lords for considering.

Mrs. Donoghue was very fortunate to find a lawyer willing to argue a case where the prospects of reward to them were negligible. In addition, at the time a person wishing to launch an appeal before the House had to lodge security for costs to indemnify that respondent in the event that the appellant lost. This Mrs. Donoghue could not afford to do. Fortunately, a process was available whereby an individual could apply to the

House of Lords for permission to appeal in forma pauperis; that is, as an impoverished person. This Mrs. Donoghue did. Her application was granted; she was not required to post security for costs and her case went before the Judicial Committee of the House of Lords for consideration on December 10, 1931.

Almost four years had elapsed since Mrs. Donoghue's visit to the Wellmeadow Café when Lord Atkin rose in the House of Lords on May 26, 1932, to deliver his landmark speech. No court was ever to pass judgment on the facts of the case. The truth regarding the misadventures alleged by Mrs. Donoghue was never ruled on because David Stevenson died on November, 1932 and, after the executors of his estate were added as parties to the action, they settled the matter out of court.

Thus we do not know if there was a snail and if so, whether it was the cause of Mrs. Donoghue's illness. We do not even know if Mrs. Donoghue was really ill. We do not know whether the ginger beer in the bottle was actually brewed by David Stevenson or by someone else who had pirated a "Stevenson" bottle for his own product, a practice that was apparently common at the time. Finally, even if David Stevenson did brew that offending ginger beer, we do not know if the methods he used in so doing would have been found by the courts to have been negligent.

There is so much we do not know about the case of the snail, the ginger beer and the poor lady from Glasgow with a stomach ache! Yet the shock waves from the decision of the House of Lords in *Donoghue vs. Stevenson* were felt around the common law world and reverberate still today, more than sixty-five years after Mrs. Donoghue met her friend for refreshments at a small café in Paisley, Scotland.