

THE RETURN OF THE “PILGRIMS”: A SECOND PAISLEY CONFERENCE ON THE LAW OF NEGLIGENCE

By the Honourable Martin R. Taylor, Q.C.

Twenty-two years after the B.C.-organized “Pilgrimage to Paisley” following the 1990 Canadian Bar Association Convention in London, judges, lawyers and scholars gathered again in Paisley, Scotland, on May 24–26, 2012, to ponder anew the state of Commonwealth negligence law and march again to the site of the teashop where May Donoghue made legal history.

The 1990 pilgrimage came at a time of uncertainty for the Canadian law of negligence. Only weeks earlier the House of Lords had resiled, in *Murphy v. Brentwood London Borough Council*,¹ from the principle it laid down in *Anns v. Merton London Borough Council*² of a wide-ranging general “*prima facie* duty of care” as an extension of Lord Atkin’s “neighbour principle” in *Donoghue v. Stevenson*.³ This year’s event, marking the 80th anniversary of Lord Atkin’s speech, addressed the role of the neighbour principle now that the *Anns* doctrine, although still so-named, has been limited by the Supreme Court of Canada in *Cooper v. Hobart*⁴ to permitting recovery in established and newly identified categories of negligence.

Has the neighbour principle of *Donoghue v. Stevenson* run its course? Or has it in fact been restored to the role which Lord Atkin intended, to cases of personal injury and physical property damage, with incremental extension to specific new categories of negligence as Lord Macmillan predicted in his concurring speech? Is it rather the general extension of the *prima facie* duty originally contemplated by *Anns*, particularly into the field of pure economic loss and resulting head-on conflict with the free-enterprise system, that has come to an end?

This proved but one of a galaxy of negligence topics addressed at the 2012 “Paisley Snail Conference”,⁵ organized by the recently created University of the West of Scotland, whose Paisley campus, complete with law school, now stands across the road from the site of the Wellmeadow Café, where May Donoghue thought she saw the decomposed remains of a snail emerge from her partly consumed bottle of ginger beer. It was sponsored also by the Faculty of Advocates, Law Society of Scotland and Renfrewshire Law Centre.

Canadian lecturers included Professor Lewis Klar of the University of Alberta, who saw little place for the neighbour principle in the post-*Cooper* world; Professor Alan Hutchinson of Osgoode Hall, who pondered uncertainties of its past and future; Professor Erika Chamberlain of Western University in London, Ontario, who discussed the role of the dissenting Lord Buckmaster, "Reluctant Villain in *Donoghue v. Stevenson*"; and Barbara Legate, a London, Ontario, personal injury practitioner, who spoke of the continuing importance of the role of *Donoghue v. Stevenson* in Canada with reference to duties owed by a physician to mother and fetus. Ms. Legate discussed recent authority of the Ontario Court of Appeal that the effect of *Cooper v. Hobart* is to continue the neighbour principle in established fields and orderly development of new categories.

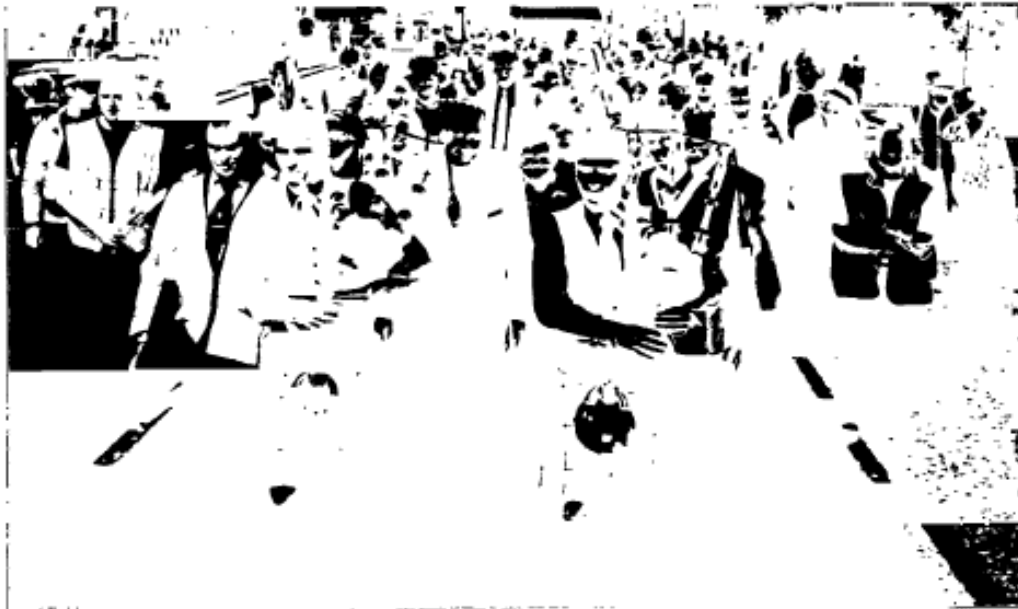
Professor John Kleefeld of the University of Saskatchewan, who practised in Vancouver with Lawson Lundell, scored a singular success with "The Donoghue Diaries", a running account of Lord Atkin's thoughts over the 13-month period between learning of May Donoghue's appeal and the delivery of his immortal speech in the House of Lords. Extensively footnoted with references to the people, facts and cases mentioned by the diarist as he formulates what would emerge as the neighbour principle, the diaries record Lord Atkin's efforts to ensure that his concept would secure majority support in the House. Only after selected portions of his 61-page, single-spaced chronicle and accompanying commentary had been read did Professor Kleefeld disclose, to much surprise, that Lord Atkin's diaries have in fact yet to be located.

Other papers on a wide range of negligence topics were presented by speakers from as far afield as New Zealand, Austria, Western Australia, the Philippines, New South Wales, Macau and Canberra, as well as Scotland and England.

The march behind pipers to Wellmeadow Street ended at a splendidly refurbished stone-paved memorial park now centred on an immense polished-marble tablet. This describes on one side the significance of the event said to have occurred there, the other side bearing the passage containing the famous words from Lord Atkin's speech, delivered 80 years earlier to the day. A worthy shrine, ten minutes from Glasgow International Airport, at which every visiting lawyer may now wish to pay homage, at least once in a legal lifetime.

At the closing dinner the writer, a member of the large B.C. contingent led by Chief Justice Finch, explained as follows the genesis of the original pilgrimage.

It all started more than 50 years ago, when we were doing first-year torts at the University of British Columbia. From the law school we could gaze up



CONFERENCE DELEGATES MARCH BEHIND PIPERS THROUGH DOWNTOWN PAISLEY FROM THE TOWN HALL, WHERE THE CONFERENCE SESSIONS WERE HELD, TO SITE OF THE CAFE WHERE MAY DONOGHUE CLAIMED SHE WAS SERVED WITH SNAIL-TAINTED GINGER BEER (PHOTO BY DAVID HAY)

Howe Sound, a stunning prospect described by a distinguished Scottish legal visitor as “Scotland writ large”; in this dream-inducing setting we learned of May Donoghue’s misadventure in Wellmeadow Street. Many years later, casting our minds back while seeking a theme for the 20th anniversary of the Class of ’62, we were struck by its happy coincidence, that very week, with the 50th anniversary of the decision of the House of Lords in the Paisley Snail Case.

We went to the 1932 *Appeal Cases* and at the end of the report found the name of May Donoghue’s solicitors: “W.G. Leechman & Co., Glasgow”. In the current *Scottish Law List* we located a Glasgow listing for “W.G. Leechman & Co.: John F. Leechman”—a one-person law firm, the incumbent almost certainly the son of that most dedicated and determined of solicitors who took May Donoghue’s complaint to the House of Lords.

For our celebration, we looked to Mr. Justice Allen Linden, Professor Joe Smith and Dean Peter Burns for the law, and to John Leechman in Glasgow for the facts. The Chief Justice has spoken of the ensuing debate⁶—and how the paper presented by Professor Smith and Dean Burns also went all the way to the House of Lords.⁷

We sent John Leechman a list of officious interrogatories. Had he met May Donoghue? Where was the bottle? What did his father say about the case? What was in the file? John, delightful man that he proved to be,

answered as best he could. He was a law student at the time, so he had not met the client. His father was convinced that the English judges would give her a “more equitable” decision than had the Scottish appeal judges. He sent all there was in the file: the printed “Case” on appeal and the typewritten transcript of the speeches of the Law Lords as it arrived—no doubt on the overnight Flying Scotsman, perhaps the Royal Scot?

From the “Case” we found the submission of the then Mr. Normand, counsel for the defender, with its elegant disparagement of the judgment of the Lord Ordinary, Lord Moncrieff⁸—unsung hero of the case who decided for May Donoghue at first instance. The Lord Ordinary had delivered “an elaborate opinion which seems to show—if this may be said without disrespect [*how could it be*]—a disinclination on his Lordship’s part to acquiesce in the law as it had been declared, rather than any real misapprehension regarding it”.

Soon thereafter we learned that in a discussion with students at London University, of which our informant was one, Lord Normand, then a Law Lord, dismissed May Donoghue’s story of misadventure in Wellmeadow Street as a “hoax”⁹—a rumour which had already led one English judge, and would soon lead another, into what we call “palpable and over-riding error”.¹⁰

This unsatisfactory state of affairs led us to persuade John Leechman to come and dine with us in Vancouver. John told us that his father was a meticulous solicitor who would have carefully questioned his client and her companion and satisfied himself they were telling the truth and would do so under the Scottish oath—hand-uplifted, “as I shall answer at the Great Day of Judgment”. He told us that his father settled the case for £200.

John Leechman did much more for us. He put us in touch with the Old Paisley Society, then and now under the leadership of Ellen Farmer, MBE. They found for us the site of the Wellmeadow Café and confirmed its occupation at the critical time by a Francis Minghella.¹¹ This was the first the society had heard of the Great Paisley Snail Case.

With the Canadian Bar Association scheduled to hold its Annual Convention in London in September 1990, the idea of an “add-on” “Pilgrimage to Paisley” caught fire.

The association’s past-president Bryan Williams—also with us—agreed to take the chair. Jack Huberman, head of our Continuing Legal Education Society, played a truly indispensable part as conference co-ordinator; Ellen Farmer formed a Paisley Conference Committee of Old Paisley Society volunteers, who made it happen. We had a “steering committee” in Vancouver, but our wheel wasn’t really connected to anything. Direction and motive power were all in Paisley. David Hope,¹² as he was, threw in the weight of the Faculty of Advocates, and Michael Clancy laboured tirelessly on behalf of the Law Society of Scotland.



MEMBERS OF THE B.C. CONTINGENT GATHER BEHIND THE POLISHED MARBLE MONUMENT PROVIDING THE CENTREPIECE OF THE REFURBISHED MEMORIAL PARK, ORIGINALLY DEDICATED BY LORD MACKAY OF CLASHFERN, LORD CHANCELLOR, DURING THE B.C.-ORGANIZED 1990 "PILGRIMAGE TO PAISLEY"

Though far removed from the scene, we in Vancouver were not without guidance on matters of Scottish punctilio. We asked David Lunny, distinguished Vancouver counsel who claims an ancestral home in Glen Lane, whether it was true that no one in Paisley is permitted to pipe in the haggis at dinner except on Burns night. "Nonsense," said David, who is also with us. "If you pay for it, you can do what you want with it."

Much of the learning of the Paisley Pilgrimage is recorded in *The Paisley Papers*.¹³ Some has found its way into the jurisprudence, as assuredly will in due course be the case with the learning that was shared in 2012.

Also to be found in *The Paisley Papers* is a reminiscence by John Leechman of his father,¹⁴ that heroic figure of the modern law of negligence, Glasgow alderman and founder of a notable Scottish legal family—his daughter to become a legal scholar; his elder son Lord Leechman, a member of the Court of Session; and John, successor to the one-man practice, to whom with the Old Paisley Society we all owe so much.

The Paisley Papers also contains the sermon given by the Rev. Kerr Spiers¹⁵ at the ecumenical service held for us at the Thomas Coats Memorial Church, opposite the Wellmeadow Café. The minister told us how wide is the gulf—recognized by Lord Atkin himself—which separates the law's requirement to take reasonable care to not cause others foreseeable harm from the Biblical precept that requires positive action to do good. The "good neighbour" of the Gospel took much more than timely evasive action, the minister reminded

us—the Samaritan stopped, picked up the stranger, gave him shelter, saw him restored to health.

Shortly thereafter, when Yorkminster Baptist Church in Toronto, Canada's largest Baptist congregation, was seeking an outstanding preacher for its new minister, the Rev. Kerr Spiers was mentioned by one of those who had heard this moving sermon. And so he moved to our country—which did nothing to make us popular with his Paisley congregation.

Our Paisley adventure would have ended with the book but for the inspired notion of our classmate Bruce Fraser that there had also to be a film. Bruce persuaded his colleague David Hay to produce the now celebrated docudrama *The Paisley Snail*, including an interview with Lord Denning. With the movie, and David's accompanying website,¹⁶ *Donoghue v. Stevenson* "went viral"—ultimately prompting May Donoghue's granddaughter to send David, also with us, the first picture of the famous Persuer ever publicly seen.¹⁷

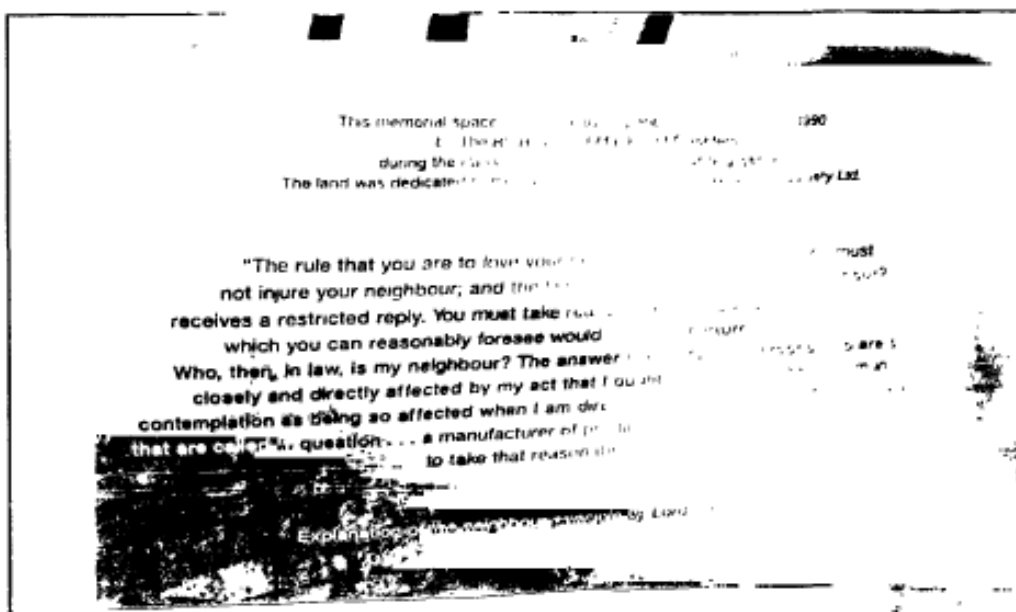
Over the years the image of May Donoghue went through several distinct phases. At first she seems to have been regarded as a fictional person—a product of Scottish legal mythology. There followed a time when her existence was recognized, but almost everything to do with her emanated from the collective imagination of the legal community. Only with the research conducted by the late Alan Rodger, Q.C., later Lord of Appeal in Ordinary—a speaker at our 1990 Conference—Professor McBryde's 1990 paper¹⁸ and publication two years ago of Matthew Chapman's *The Snail and the Ginger Beer*¹⁹ has the true story of May Donoghue, and her sadly straightened circumstances, become widely known.

It was during an early phase that our colleague Dr. Hamish Gow—a true Scot who served with the 51st Highland Division and defended the perimeter at Dunkirk, leading to five years in enemy captivity—produced an arresting, wholly fictional, account of May Donoghue's reaction to events at the Wellmeadow Café on August 26, 1928:

Bella, Bella [*this is the hitherto innominate companion*] gie's yer haun.
Am muckle scairt yon beastie's pushioned me.
Am sair forfochten, am deein, am deein.²⁰

A glance at the picture of the real person, and her life story as we now know it, tells us that May Donoghue was made of much sterner stuff. Outrage, but never despair, would surely have been the reaction of one who had endured the difficult life we now know.

Soon after publication of Hamish Gow's imaginative account, someone sent us a paper by Professor Clive Schmitoff²¹ in which that learned author records: "The friend, when *he* saw the disaster, discreetly disappeared." Contrary to Lord Macmillan's judgment, the professor designates the mysterious



THE POLISHED GRANITE MEMORIAL BEARING THE IMMORTAL WORDS OF LORD ATKIN WHICH ESTABLISHED THE "NEIGHBOUR PRINCIPLE" AS THE BASIS OF THE MODERN LAW OF NEGLIGENCE AND RECORDING THE ORIGINAL DEDICATION OF THE PARK DURING THE B.C.-ORGANIZED "PILRIMAGE TO PAISLEY" (PHOTO BY DAVID HAY)

companion as a male, and then attributes to this unknown soldier on our legal roll of honour the most unchivalrous act in Scottish history.

Mr. Justice Gow, as he became, rejected this version out of hand. It would be unthinkable for a married woman, even though then separated from her husband, to be publicly entertained in Paisley by another male. In Scotland, he said, those were "not *permissive* times".²²

Inspired by Judge Gow's account, Mrs. Patricia Moulton, a member of our court support staff, composed lines entitled *Requiem for a Snail*, in which not only the companion but even the intruding gastropod is named. They read, in part:

A lady named May Donoghue
 Had gone with friend to taste the brew
 To the cafe owned by F. Minghella
 A favored spot of May and Bella
 Her friend poured May's beer with glee
 And then poor Sammy did she see
 May screamed "Oh Bella ah think am dein
 It's a wee dead beastie that am sein".

There followed a cascade reports of *Donoghue v. Stevenson* "look-alike" cases—mostly unsuitable for dinner conversation, generally involving animate remains identified in a wide range of consumables, most revoltingly of all, chewing tobacco.

These included a report from California that a lady in San Diego had sued a restaurant in that city alleging that one of the escargots she ordered for dinner started moving on her plate, and attempted to make a getaway at the table. She claimed to have become so “distressed and disgusted” that while rushing for the exit she fell down a flight of stairs and broke an ankle. What an opportunity for David Hay and his colleague, a sequel indeed to both *The Paisley Snail* and *Sleepless in Seattle*—“*Muckle Scairt in San Diego*”!

The Paisley Pilgrimage ended with us joining in a huge circle, the Provost leading *Auld Lang Syne*, for once done properly. It was much akin to *Will Ye No Come Back Again* but with a big difference—because return we have.

On behalf of the Paisley Irregulars,²³ the oldest institution in the world devoted to the memory of the Great Paisley Snail case—its convenor, Richard Olson, also with us—I would like to leave for the UWS law library in Paisley the very last copy of *The Paisley Papers*, hoping that it will find a place beside the record of this week’s learned proceedings.

I would like to add a word about *Donoghue v. Stevenson* in the 21st century. It remains, of course, our leading authority in personal injury and physical property damage cases, to which alone Lord Atkin intended that it apply, and we have heard from a few of the many who teach it every year in law schools around the Commonwealth. It would be an insult today to suggest that any judge would need to have it cited. Instead we argue today about the new categories of negligence since found, as Lord Macmillan predicted,²⁴ lying in timeless slumber in the vaulted chambers of the legal mind to which Lord Atkin’s words provided the key.

The last two days of learned dissertation and debate were admirably divided between examination of the history of this endlessly fascinating case and consideration of the new avenues to recovery developed as a direct result of its unprecedented impact on our law.

Thank you to everyone involved in organizing this wonderful event. Thank you for bringing us again to the place that gave birth to a new and enduring conception of duty between members of a civilized society, and new meaning also to the tribute paid to our law by Oliver Wendell Holmes—that it has “this final title to respect that it exists, that it is not a Hegelian dream but part of the lives of men”. To which May Donoghue’s victory also added three important missing words: “and of women”.

Thank you so much.

ENDNOTES

1. [1991] 1 AC 398.
2. [1978] AC 728.
3. [1932] AC 562.
4. [2001] 3 SCR 537.
5. Publication of papers presented at the conference will be announced shortly.
6. (1983) 17 UBC L Rev 58–110.
7. The Smith-Burns paper given at the 1982 UBC Class of '62 debate, later published in the *Modern Law Review*, cited in the decision of the House of Lords in *Curran v Northern Ireland Co-*

- ownership Housing Association*, [1987] AC 718 at 724.
8. (1930), SN 117.
 9. See letter of David Roberts, Q.C., to himself as editor of the *Advocate*, (1986) 44 *Advocate* 585 at 588.
 10. In a presidential address at the University of Birmingham in 1942, Lord Justice MacKinnon had said that when the law had been settled the case went to trial and "it was found that there never was a snail in the bottle at all". In *Adler v Dickson*, [1954] 1 WLR 1482 at 1483, Lord Justice Jenkins was later to repeat this error in the Court of Appeal.
 11. "One Minchella" is named in the *Appeal Reports* as owner of the café, identified in the summons as the Wellmeadow Café at Wellmeadow Place and stated to be occupied by "Francis Minchella". The café site was found by the Old Paisley Society to have been occupied at the relevant time, in August 1928, by an "F. Minghella". At the 1990 conference, young Allan Minghella, great-grandson of the proprietor, served ginger beer to Lord Mackay, the Lord Chancellor, Madam Justice Wilson of the Supreme Court of Canada, Lord Hope, Lord President of the Court of Session, and Mr. Justice Brennan, later Chief Justice of Australia, following dedication of the memorial park at the café site.
 12. Then dean of the Faculty of Advocates, later to become Lord President of the Court of Session, Lord of Appeal in Ordinary, and Justice of the Supreme Court of the United Kingdom.
 13. "*Donoghue v. Stevenson* and the Modern Law of Negligence": *The Paisley Papers*, 1991, Legal Education Society of B.C.
 14. *Ibid* at 273.
 15. *Ibid* at 279.
 16. *The Paisley Snail* website is <www.the.paisleysnail.com>; the movie itself (in less than ideal resolution) can be sampled online at <www.justiceeducation.ca/resources/Paisley-Snail>.
 17. (2007) 65 *Advocate* 635 at 636.
 18. *The Paisley Papers*, *supra* note 13 at 25.
 19. Matthew Chapman, *The Snail and the Ginger Beer: The Singular Case of Donoghue v. Stevenson* (London: Wildy, Simmonds & Hill, 2010).
 20. (1986) 44 *Advocate* 329 at 336.
 21. "The Exporter's Product Liability", *Export* (April 1986) 13.
 22. "Mrs. Donoghue's Journey", *The Paisley Papers*, *supra* note 13, 1 at 2.
 23. The Paisley Irregulars hold an annual dinner in Vancouver each May to celebrate the anniversary of the decision in *Donoghue v. Stevenson*. Most served the B.C. Supreme Court or Court of Appeal during the period 1978-1995 and assisted the writer in researching aspects of the case. Others were invited to become members *honoris causa* in recognition of their contributions to understanding of the history of the case and its unprecedented contribution to development of our law.
 24. [1932] AC 562 at 619.

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