

Postscript to U.B.C. Class of '62
'Donoghue v. Stevenson Festival':

A Pilgrimage to Paisley

by

The Honourable Mr. Justice Martin R. Taylor*

"Come then, good neighbour, let us be going".
—John Bunyan, *The Pilgrim's Progress*.

This is the story of a pilgrimage to Paisley, the legendary Scottish manufacturing town which has such a special place in the hearts of those around the world who study, teach, practise and decide the common law.



Taken between 1926 and 1931, probably the only picture extant of the Wellmeadow Cafe. The cafe is in the lower building on the right. It was demolished 35 year ago. A 'Francis Minchella, confectioner', is listed in directories of the time as occupant of these premises. The picture was taken sometime between 1926 and 1931 (remember the critical date, August 26, 1928). See the figure on the right! Could this be Mrs. Donoghue, heading for her appointment with destiny?

It is in the nature also of unfinished business from an historic occasion mounted three years ago by the University of British Columbia Law Class of 1962 on the 20th anniversary of its graduation — the now famous 'First-Ever, World-Class **Donoghue v. Stevenson** Festival'. In that great clash of intellects our class sought to pay tribute to the concurrent Golden Jubilee of the most important case in the history of the

* This article is based on what the author describes as "purely ruminatory, anecdotal and informal remarks made at the U.B.C. Law School 40th Anniversary Dinner and elsewhere in the capacity of a pilgrim on behalf of the Class of 1962 and intended for the most part to be taken *cum grano salis*".



Genuine Stevenson Bottle. "The said bottle was made of dark opaque glass, and the pursuer and her friend had no reason to suspect that the said bottle contained anything else than the aerated water" — Condescence of the Pursuer, Donoghue v. Stevenson. [Bottle now in possession of U.B.C. Faculty of Law] See the imprimatur: "D. Stevenson, Glen Lane, Paisley". Its content is incapable of intermediate examination!

common law. Mr. Justice Linden, champion of the sufferer, advocated ever-widening application of the doctrine of the Good Neighbour: "A beacon of hope", he called it, "a fountain of sparkling wisdom, the seed of an oaktree, a skyrocket bursting in the midnight sky". In the other corner, Professor Joe Smith, wearing both the Dean's colours and his own, strove for restraint. "Our rights of freedom of action are in danger of being eroded", he said, "by judges who see themselves as guardians of public morality and view the restructuring of society to force us all to become Good Samaritans as a proper judicial function."

Missing from the ringside, of course, were those who fought the original battle half a century before. We did not forget them. We resolved one day to journey to Scotland to find out what sort of people they really were who launched this immortal lawsuit, to discover something of the circumstances in which the case began, how it got before the House of Lords, and what happened afterwards. We hoped also to find inspiration at the birthplace of the Good Neighbour which would guide us into the second half-century of the modern law of negligence.

We resolved on a pilgrimage to Paisley.

From the pleadings — or 'condescendences' — in the case we knew this much. Mrs. May Donoghue was a Glasgow shop assistant who went with a friend to the Wellmeadow Cafe operated by Francis Minchella at 1 Wellmeadow Street in Paisley, Scotland, on the evening of August 26, 1928. She claimed that her unidentified friend ordered for her ice cream and ginger beer, that Mr. Minchella poured some of the ginger beer into a glass and she drank it, that the unidentified friend poured a second time from the bottle and that she then saw the decomposed remains of a snail float into her glass. Mrs. Donoghue pleaded that she contracted gastro-enteritis as a result of what she had consumed, and that she had to seek medical treatment three days later from her doctor and three weeks later, on September 16, 1928 at the Glasgow Royal Infirmary. Her unidentified friend, who alone enjoyed a contractual relation-

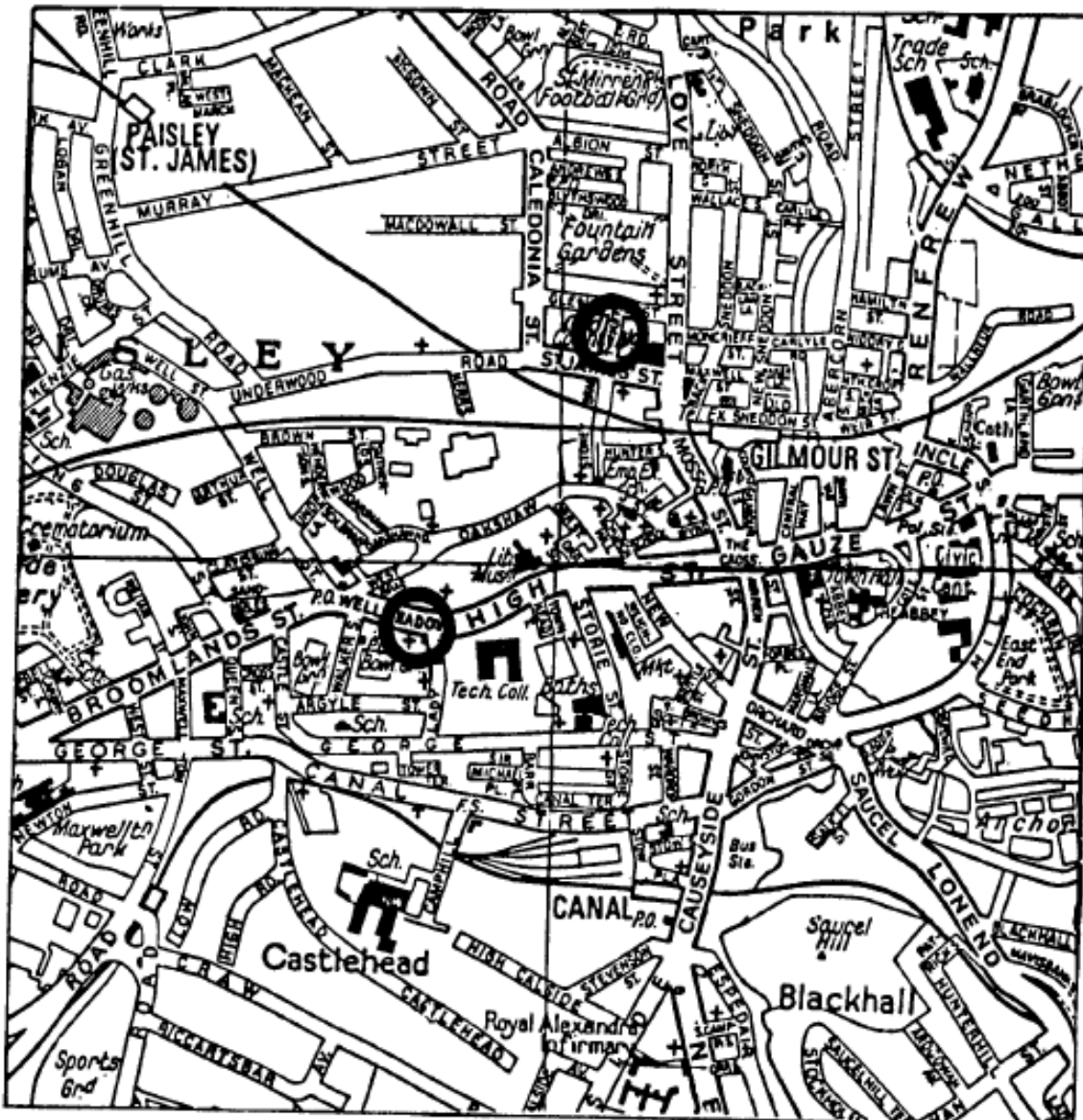
ship with the management of the Wellmeadow Cafe, is said to have consumed "a pear and ice", and seems to have escaped unscathed.

The condescendences told us that the name of the 'defender', David Stevenson, appeared on Mrs. Donoghue's bottle as manufacturer of the ginger beer, along with his address, Glen Lane, Paisley, and that the bottle was opaque, so that neither Mr. Minchella nor Mrs. Donoghue nor her unidentified companion could examine its



DONOGHUE v. STEVENSON

THE PAISLEY 'SNAIL CASE' WHICH CHANGED THE LAW AROUND THE WORLD



The Official Donoghue v. Stevenson Walking Tour street plan of downtown Paisley. See the location of David Stevenson's plant in Glen Lane and that of the Wellmeadow Cafe. They lie only 650 yards apart, well within bagpipe range!





The site of the Wellmeadow Cafe today. Note Miss Janet Brown, Secretary of Old Paisley Society, a Fellow of the Society of Antiquarians of Scotland, whose presence attests to its authenticity.

contents. David Stevenson denied there was a snail in any bottle of ginger beer that ever went out of his plant.

We knew something also of a fifth figure in the story, Mr. Walter Leechman, a remarkable Glasgow solicitor and city councillor. Mrs Donoghue went to see Mr. Leechman and he issued a writ against David Stevenson claiming £500 damages. He also retained Mr. W. R. Milligan, an Edinburgh advocate, to plead the case. Mr. Milligan was then 27, an olympic runner who had raced Lord Birkenhead around the Cambridge quadrangle immortalized in *Chariots of Fire*. Mr. Milligan was to represent Mrs. Donoghue in the proceedings at first instance before the Lord Ordinary, Lord Moncrieff, as well as on appeal to the Second Division of the Court of Session and before the House of Lords in *in forma pauperis*. He was destined, in the fullness of time, to be himself a judge of the Court of Session.

We had discovered that even before Mrs. Donoghue's case started the Court of Session decided the law against her.

This happened in the consolidated cases of **Mullen v. Barr & Co.** and **McGowan v. Barr & Co.** [1929] S.C. 461, actions against the same Glasgow ginger beer manufacturer in respect of two different mice alleged to have been found in separate bottles of ginger beer. These actions were dismissed on appeal just three weeks before Mrs. Donoghue's writ was issued.

It was in reliance on the 'mouse' cases that Mr. Stevenson's counsel, as might be expected, applied in due course before the Lord Ordinary to strike out Mrs. Donoghue's claim. Lord Moncrieff managed to distinguish those cases, only to be reversed on appeal. The appeal judges in the Court of Session found the only difference between the facts of the case was that between two rodents and a gastro-

pod and that this, according to the law of Scotland, was no difference at all. So it was that Mrs. Donoghue went to the House of Lords.

In his written argument before the Lords, David Stevenson's counsel, Mr. W. G. Normand — he was then Solicitor General for Scotland — charged the Lord Ordinary with having delivered "an elaborate opinion which seems to show — if this may be said without disrespect — a disinclination on his Lordship's part to acquiesce in the law as it had been declared, rather than any real misapprehension regarding it." It would be "inexpedient and inequitable", Mr. Normand contended, to impose the duty on a person in David Stevenson's position, "a duty which, if it were to be affirmed, would be affirmed now for the first time.

Some research into the Session Cases disclose that Mr. Leechman must have known from the day the writ was issued that Mrs. Donoghue would have to go to London if she were to get her day in court.

This is apparent from the fact that Mr. Leechman's firm is named as solicitors for the pursuers in the **Mullen** and **McGowan** actions. It seems unlikely that he could have taken those cases to the House of Lords, because in addition to holding that no duty of care was owed by the manufacturer of such a product to the ultimate consumer the Court of Session also found there was no proof the particular mice there in question entered their bottles as a result of negligence on the part of the manufacturer. So Mr. Leechman was relying on the Law Lords and law of England when he issued Mrs. Donoghue's writ. We learned that he had much confidence in the House of Lords, believing it would introduce general conceptions of 'equity' into the common law of both parts of the kingdom.

What, then, was the law in England? It was laid down 35 years earlier in **Le Lievre v. Gould** [1893] 1 Q.B. 491. The Master of the Rolls, Lord Esher, said: "If one man is



The site of David Stevenson's plant today: only his house remains. It was here that the world-famous gastropod is said to have lived, and died

near to another, or is near to the property of another, a duty lies upon him not to do that which may cause a personal injury to that other, or may injure his property." How could this duty be extended to benefit a person who consumed a manufactured refreshment which contained a decomposed snail? Lord Atkin, as we all know, had the answer — it lay in the parable of the Good Samaritan. Neighbourhood could be a mental as well as a physical phenomenon. It was enough that Mrs. Donoghue should have been in Mr. Stevenson's mind. They were neighbours **in spirit**. "Who then is my neighbour?" Lord Atkin asked. "Persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation."

Lord Atkin was careful, of course, to limit the scope of the 'neighbour principle'. "Acts or omissions which any moral code would censure cannot in a practical world be treated so as to give a right to every person injured by them to demand relief", he said. But it is thought possible today that the rule laid down by Lord Atkin in **Donoghue v. Stevenson** in relation to physical injury and property damage is applicable also in cases in which there is no risk of either — cases involving injury only to the plaintiff's pocket or estate. There are those who argue that the principle in **Donoghue v. Stevenson**, as restated in our time, means you must generally take reasonable care also to avoid acts or omissions which you can reasonably foresee would be likely to injure the **economic interests** of your neighbour.

"What of free enterprise?" others ask. What of automation, collective bargaining, price competition, security realization, allocation of capital and resources, corporate take-overs, the vanishing corner store, the struggle for promotion, property and profit? What of the principles of "social Darwinism?" What, they ask, of Adam Smith's contention that "Society will be best served when everyone cares for his own interest first?" The only way to make money, one member of the House of Lords is reputed to have said, is by taking it from other people!

Will the Good Neighbour offer a shield for the 'haves'? A sword for the 'have-nots'? First aid for economic casualties? The great debate staged at our historic festival in 1982 rages on.

Some say this good person has no place at all on the economic battlefield. They say liability for true pure economic loss will be found only in a limited class of cases, generally based on a new concept of assumpsit-like quasi-contractual duty, an obligation arising out of reliance by one party on an 'undertaking' to use care expressly or impliedly given by another.

Lord Denning said: "Enough has been done for the sufferer".

Perhaps at the birthplace of the Good Neighbour we might find inspiration to guide us in this jurisprudential no-man's land.

Perhaps, too, we might find out what really happened in Wellmeadow Street that August evening, 57 years before. For the facts of **Donoghue v. Stevenson** are almost as controversial as its doctrine.

Within the first quarter century after the decision two English judges of appeal publicly and flatly proclaimed there never was a snail in Mrs. Donoghue's ginger beer. In a speech in 1942, Lord Justice MacKinnon said: "When the law had been settled by the House of Lords, the case went back to Edinburgh to be tried on the facts. And at that trial it was found that there never was a snail in the bottle at all. That intruding gastropod was as much a legal fiction as the Casual Ejector". Twelve years later, in **Adler v. Dickson** [1954] 1 W.L.R. 1482, Lord Justice Jenkins said (at p. 1483): "The House of Lords heard the preliminary issue in **Donoghue v. Stevenson** and when the trial was finally held there was no snail in the bottle at all."

As a consequence, no doubt, of these high judicial pronouncements people have questioned whether there was a Wellmeadow Cafe, a Mrs. Donoghue, or a Mr. Stevenson — there have been misgivings about the *bona fides* of the case.



The official Old Paisley Society 'Sma' Shot Cottage ice cream and ginger beer quaffing cup!

Those doubts must now be forever laid to rest.

Mr. John Leechman, son of Walter Leechman and at the time principal of W. G. Leechman & Company, of Glasgow, Mrs. Donoghue's solicitors, provided us with much valuable material for our Festival in 1982. He also came to Vancouver to be the guest of our Class, in September, 1983, and at a dinner in his honour Mr. Leechman then asserted before us all that no such finding as the Lord Justices described was ever made. The trial which they reported never took place. Professor Heuston and Vice-Chancellor Megarry have confirmed it. The reason there was no trial, as Mr. Leechman told us, is that David Stevenson's executors paid £200 (not £100 as elsewhere stated) to end the matter.

So it seems that the English judges of appeal must have committed of what is called in their business 'palpable and over-riding error'!

At that memorable dinner with Mr. Leechman we learned something of his father's practice and public life, and about the forms and customs of the Scottish legal system in his father's day. Mr. Leechman also told us about the differences between Edinburgh and Glasgow, and other fascinating things.

The Pilgrimage

Mr. Leechman did much more. On his return he put us in touch with some wonderful people in Scotland.

They constitute the Old Paisley Society, an organization devoted to the history of that special town, the spiritual home of the law of negligence — famed also for its textiles and marmalade — and proud of its history, valiantly resisting submersion in the Glasgow conurbation. The Society did not until then know about **Donoghue v. Stevenson**. I am pleased to say they now have in their reading room a book of all the documents in the possession of the Class of '62 relating to the case, including those given to us by Mr. Leechman.

There is little penance to be done on a journey today from Vancouver to Wellmeadow Street. Wardair took us non-stop to Gatwick and British Caledonian from there to Glasgow Airport (Abbotsinch). It is right in Paisley: our glide path was over the site of Francis Minchella's cafe!

The rest of the story is to be found in the souvenirs which, through the kindness of the Old Paisley Society, we acquired there. They have been donated to the U.B.C. Law Society by our Class, for use as teaching aids.

What conclusions can we reach, then, from this nostalgic perambulation through downtown Paisley?

In the first place, we find these two historic sites are only 650 yards apart. Had David Stevenson played his bagpipes on that quiet August evening in the attic of his

Glen Lane residence, Mrs. Donoghue and Mr. Minchella could have danced a strathspey in Wellmeadow Street! That, in Scotland must, of course, be the true test of neighbourhood. So a physical relationship of proximity existed between these parties without the need of judicial invention! Would a duty of care not have arisen, then, under the law laid down by Lord Esher in 1893? Why was Lord Moncrieff not told? Can it be that the most famous decision in the whole history of the common law is, in the end, mere *obiter dicta*?

Our pilgrim tour of Paisley yields much more.

See the size of the site of the Wellmeadow Cafe. If there was a snail in Mrs. Donoghue's ginger beer, how could Francis Minchella not have known it? Would a solicitor of Mr. Leechman's standing have advised the lawsuit, or an advocate such as Mr. Milligan have been willing to take it on, in *forma pauperis*, if Mr. Minchella knew nothing of any snail? Why would Mr. Minchella say there was a snail if it were not so, or that there was no snail if he had seen one? Surely all this tends to support the *bona fides* of the claim!

But what of David Stevenson's operation?

The Stevenson aerated-water business enjoyed an excellent reputation in Paisley. Living as we find he did beside the plant, how can we doubt he was in control of his operation. How, then, could such a thing as Mrs. Donoghue alleged have happened there? Surely the author of Mrs. Donoghue's condescence was wrong in calling it, as he did, a place "where snails and the slimy trails of snails were frequently found". If there was a snail in Mrs. Donoghue's ginger beer, can it perhaps have entered before the bottle was last returned to the plant, and have escaped the cleaning process? Was a highlander on quality control dreaming at the critical moment of a distant glen, or of a lassie he knew there? There are questions of fact — and not the first to be raised in the courts — on which elusive truth, like the mouse loose in the bottling plant, forever evades our grasp. But we must remember — as was judicially found in the 'mouse' cases — that uninvited creatures may enter ginger beer bottles without the manufacturer being at fault.

Of Mrs. Donoghue herself, unfortunately, little has been discovered.

Both of the Glasgow addresses given in her pleadings are now long gone. Our friends in Paisley have been in touch with some of the Donoghues in the Glasgow area, but have found none of her descendants. They remain confident they one day will. In the absence of factual information, we may perhaps for now be forgiven for resorting to some fiction. Here is the conclusion of an anonymous fantasy, received from an unimpeachable source, which is obviously inspired by events of August 26, 1928, at the Wellmeadow Cafe:

'Bella' [this must be Mrs. Donoghue's hitherto unidentified companion] 'had no time to reflect on the hideous apparition she saw floating atop the madly dancing bubbles in the tumbler. She heard the crash of May's chair and turned to find her friend standing. May's face was distraught. One hand to her throat the other to her stomach, she let out a piercing wail, banshee in its mournfulness:

"Bella, Bella —
Gie's yer haun!
Am muckle scairt
Yon beastie's pushuned me;
Am sair forfochten*
Hud me Bella —
Am deein, am deein!"

* 'Forfochten': '1. Exhausted with fighting 2. exhausted with any other kind of effort'. *The Concise Scots Dictionary*.

'And with a further piteous cry' [we are told] 'she falls unconscious to the floor.'

Splendid Caledonian melodrama! But we know that Mrs. Donoghue was made of sterner stuff than this. One day, perhaps, we shall learn what really happened to Mrs.



Book, Snail and Bottles: Miss Janet Brown, Secretary, and Mrs. Ellen Farmer, President, exchange souvenirs with British Columbia pilgrim at Old Paisley Society's recently-restored weaver's loom house.

Donoghue that August evening in Wellmeadow Street, and thereafter. For now pure fantasy must suffice to fill this historical hiatus.

Epilogue

What is it, then, that makes Mrs. Donoghue's case still a subject of fascination, half a century later?

The magnificent language of Lord Atkin, the profound mysteries of the 'neighbour principle', these are things which those who make their living in the courts will live with all their lives. The clash between the Law Lords, as told in Professor Heuston's splendid article on the 25th anniversary of the decision, this is the stuff of legal history. The head-on collision which **Donoghue v. Stevenson** caused between the principles of contract and tort law — fifty years of turbulent jurisprudential upheaval — has brought about the most important developments in the common law in our time. Surely there will never be such a case again.

Is it because of the importance of the legal principles involved, then, or in spite of them, that the people and places of this remarkable story have such a special place in the common-law hall of fame?

Mrs. Donoghue and her unidentified companion, David Stevenson, Francis Minchella, Walter Leechman, W. F. Milligan, W. G. Normand and all the rest — what a wonderful company they are! If we smile when we speak of them now it is because we believe they would smile, too; whatever their tribulations at the time, surely they would smile with us now! We remember them when so many of their legal contemporaries — leaders of the bar, ornaments of the bench — are long forgotten. They are the true immortals of the common law.

Surely it was of people such as these that Mr. Justice Holmes spoke when he said of our system of law: "It has the final title to respect that it exists, that it is not a Hegelian dream, but part of the lives of men". [That great judge would, of course, now add: "and of women"]

As the pilgrim drives wistfully down Wellmeadow Street at the end of the day, italicized case citations roll through his mind like credits to a Masterpiece Theatre mini-series: **Hedley, Byrne, Dorset Yacht, Anns v. Merton London Borough Council, Rivotow v. Washington Iron Works, Junior Books, Weller v. Foot & Mouth Institute, Spartan Steel, Kamloops v. Nielsen, Hoffstrand Farms, Paterson Zochonis v. Merfarken Packaging** — the trilogies form and reform. Here, the pilgrim thinks, at the birthplace of the doctrine of the Good Neighbour, there ought to be a Commonwealth Conference on the Law of Negligence! Here, perhaps, lawyers could decide what the courts really mean when they say that the 'neighbour principle' applies wherever there is 'sufficient proximity'. Surely social Atkinism and economic Darwinism could here make their peace, in terms which the worlds of law and commerce would both understand and accept.

The reverie ends as we lurch helplessly into the torrent of traffic on the elevated motorway. The pilgrimage is over, but so many memories remain!

Wonderful Paisley people; the narrow streets; the small corner site at 1 Wellmeadow Street, the patch of green grass in Glen Lane — glimpses of living legal history that will never fade. We are guided miraculously through blinding mud-mist behind huge articulated lorries, headed south for Cambridge and the Canadian Law Lectures. As the Good Neighbour leaves us we hear again the words of a haunting refrain — something from the flip side of the great Paisley snail case:

"It is of particular importance to guard against the danger of stating propositions of law in wider terms than is necessary" — Lord Atkin in **Donoghue v. Stevenson**.