



The Immortal Snail Itself: Why Does Donoghue v Stevenson Still Resonate? - A View From the Caribbean

The Honourable Mr Justice Adrian
Saunders, President of the Caribbean Court
of Justice

**Donoghue v Stevenson 90th Anniversary Conference: 'The Immortal
Snail'**

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Remarks
by
The Honourable Mr Justice Adrian Saunders*¹, President of the Caribbean Court of Justice
on the occasion of the
***Donoghue v Stevenson* 90th Anniversary Conference: ‘The Immortal Snail’**
on
The Immortal Snail Itself: Why does *Donoghue v Stevenson* still resonate? – A view from the Caribbean
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The tort of negligence is a fundamental feature of the common law; that legal system that invites judges, incrementally, to shape and to expand the law, in partnership with the legislature. And since 1932, I reckon that every student of tort law throughout the Commonwealth, in their first semester, has come across, and been fascinated by the dispute involving the snail in the bottle. The striking nature of the gruesome facts, tersely recounted in the judgments; the magisterial analyses of the prevailing law and the simplicity of Lord Atkin’s inspired deployment of the biblical injunction to ‘love thy neighbour’, so indelibly imprint themselves on one’s senses that it takes some time before it is appreciated that the celebrated judgment does not itself reveal the answers to such questions as whether poor Mrs Donoghue (who is actually described in the heading of the case as a pauper) ultimately succeeded in her action. If she did, how much compensation did she receive? And were the damages obtained close to what she thought was satisfactory? Those were naturally critical questions, at least for the goodly lady; but, as students of the law, we were more enthralled by the ambitious, and for the most part successful, attempt at systematising and clarifying the law of negligence and the prospects the ‘neighbour principle’ opened up for expanding the liabilities of those who caused harm by their carelessness.

Yes, the 90th Anniversary of *Donoghue v Stevenson*² is an occasion worthy of celebration and I wish to thank the Law Society of Scotland for affording me the opportunity, no, the privilege to

*The huge assistance of Denys Barrow, Chumah Amaefule and Jacinth Smith are gratefully appreciated.

² [1932] AC 562.

participate in today's commemoration. It has been a profitable experience. In a friendly chat held a few weeks ago among fellow presenters and our Scottish organisers, I learned for the first time the answers to *all* the aforementioned questions, and more, which their Lordships' judgment did not and could not reveal.

In preparation for today's event, I asked my court's Chief Librarian to run a search of *Donoghue v Stevenson* on a database that features Caribbean cases. Unsurprisingly, it turns out that over the last 10 years, the case was directly applied, or followed, or at least specifically cited, on dozens of occasions by judges of all stripes throughout the Caribbean region. And, in a Belizean case³, a Mr Anthony Barnett suffered an experience that was eerily similar to that which confronted Mrs Donoghue.

Mr Barnett had purchased a bottle of Belikin stout at a restaurant. The bartender opened the bottle in his presence and handed it over. What occurred next is graphically captured in the law report⁴ – the appellant,

[T]ook one sip, then another, and tasted some 'slimy stuff' in it of which he complained to the bartender. They both went outside where the appellant poured out the contents of the bottle and there fell out what he described as 'a slimy thing about an inch and a quarter, shaped and coloured blackish brown like a toad'.

Barnett sued the brewery.

In considering the case, the trial judge actually did a visual inspection of the entire manufacturing process before deciding that the defendant was not negligent. The judge surmised that the bottle must have been previously opened at the restaurant and the cap manually replaced. The judge's decision was reversed. The Court of Appeal criticised the manner in which the visit to the factory was conducted and the evidence obtained there collected and deployed. Applying

³ *Barnett v Belize Brewing Co Ltd* [1983] 35 WIR 136.

⁴ *ibid.*,137.

Donoghue and the Latin maxim *res ipsa loquitur*, the court held that the brewing company had not provided any facts to rebut the presumption that it had been negligent. As to the question of damages, the President of the Court of Appeal, Sir John Summerfield, expressly stated that he was influenced by the fact that, ‘the modern approach to the equality of the sexes notwithstanding ,... a robust male police officer ... [was] likely to be less sensitive’ to such ‘unpleasant’ experiences than Mrs Donoghue was some 50 years earlier.⁵ Mr Barnett’s general damages were assessed at the equivalent of US\$375.

The countries of the Commonwealth Caribbean do have enough in common with each other such that a shared approach to *Donoghue* and, generally, to the development of the tort of negligence should be feasible. The West Indian Reports collate, at least annually, many (though not all) of the salient judgments delivered by the courts of the various territories. Beginning in the 1970s most persons called to the Bar in the region have been trained at one of the region’s three Law Schools, whether in Trinidad and Tobago, Jamaica or The Bahamas, all run by a single entity - the Council of Legal Education. Several Caribbean authored legal texts package and explain Caribbean law, including Professor Kodilyne’s *Commonwealth Caribbean Tort Law*⁶ which I gratefully drew on for today’s exercise. In 2005, my court, the Caribbean Court of Justice or CCJ, was established, in part to replace the Judicial Committee of the Privy Council as a final court of appeal for the independent English-speaking States of the Caribbean.

Notwithstanding these developments, it would be an error to believe that, throughout the Anglophone Caribbean, the law has developed or is developing in a uniform manner. Only four States have to date availed themselves of the opportunity to make the Caribbean Court of Justice their final court of appeal. The majority, including the most populous States of Jamaica and

⁵ *ibid.*

⁶ Gilbert Kodilyne, Natalie Corthésy, *Commonwealth Caribbean Tort Law* (6th edn Routledge, 2022).

Trinidad and Tobago, still use the Judicial Committee of the Privy Council. Hopefully, that will change over time. It really should, because appeals to a final court are pursued invariably in the cases where the law is uncertain; where interpretation admits of two or more rational answers; where the law is possibly out of step with the ongoing march of an advancing society. For a court, sited in London and comprising British judges who do not reside in the Caribbean, to continue to prescribe for the region in policy-laden circumstances is unfortunate. So far as the tort of negligence is concerned, if and when a precedent must be established as to whether a new duty situation must be held to arise, it helps if the precedent setting court comprised judges who are fully alive to the nuances of the prevailing social, economic and cultural context and, importantly, who experience for themselves the real life consequences of the precedent they set.

The CCJ, in one of its early cases of *Attorney General v Joseph*⁷, staked out a position on this issue of precedent. We emphasized that, and I quote:

the main purpose in establishing the CCJ is to promote the development of a Caribbean jurisprudence, a goal which Caribbean courts are best equipped to pursue. In the promotion of such a jurisprudence, we shall naturally consider very carefully and respectfully the opinions of the final courts of other Commonwealth countries and particularly, the judgments of the JCPC which determine the law for those Caribbean states that accept the Judicial Committee as their final appellate court.⁸

Over the course of its 17-year existence, the Caribbean Court of Justice has had occasion to address only a few cases of negligence, none of which required a serious reconsideration of existing authorities. This has meant that, for the most part, Caribbean courts instinctively look to English decisions as a guide; but the manner of application of those decisions has been characterized by unevenness and inconsistency, especially given the refinements made in the United Kingdom to *Donoghue*. As many of us know, in *Anns v Merton London Borough*

⁷ (2006) 69 WIR 104, [2006] CCJ 3 (AJ).

⁸ *ibid* at [18].

Council,⁹ decided in 1977, it might be said that Lord Wilberforce opened further the doors of the tort and left it to the courts to determine how and when to close them. He articulated a two-stage test for establishing a duty of care. Firstly, proximity, or neighbourhood, coupled with reasonable foreseeability on the part of the defendant, and secondly, if the claimant crossed that first relatively straightforward threshold, an assessment as to whether there were considerations the court should weigh to deny the claimant.¹⁰

This approach was later frowned upon. It was said that the first stage was too easily satisfied, and that it allowed for the tort's incursion into traditionally contractual areas. The two stage test gave the courts too much work to do at the second stage. So, in a 1990 decision - *Caparo Industries plc v Dickman*¹¹, considering the dicta of Justice Brennan in the High Court of Australia¹², the House of Lords counseled that 'the law should develop novel categories of negligence incrementally and by analogy with established categories'.¹³ It was decided that, after the reasonable foreseeability and proximity stages have been satisfied, in order to impose a duty of care, the court must find that the situation is one in which it is fair, just and reasonable to do so.¹⁴

Despite *Caparo*, several courts in the Caribbean region are still ostensibly applying *Donoghue* in its unvarnished state, some apply *Anns*, and some apply *Caparo*, thereby perhaps suggesting that, in most instances, the facts of the dispute all lead to the same legal result irrespective of which of these three precedents is applied. In April 1999, a trial judge in Trinidad and Tobago agreed with counsel that *Anns* had been overruled.¹⁵ But in July of that year another Trinidadian

⁹ [1978] AC 728, [1977] All ER 492.

¹⁰ *ibid.*, 751; 498.

¹¹ [1990] 2 AC 605, [1990] 2 WLR 358.

¹² *Sutherland Shire Council v Heyman* (1985) 60 ALR 1.

¹³ *Caparo* (n 11), 618; 365.

¹⁴ *ibid.* Note as well, *Governors Peabody Donation Fund v Sir Lindsay Parkinson Ltd* [1984] AC 210, [1984] 3 All ER 529.

¹⁵ See *Gonzales v Trinidad Cooperative Bank Trust Co Ltd* (Trinidad and Tobago HC, 28 April 1999).

trial judge held¹⁶ that the applicable test for imposing a duty of care was properly laid down in *Anns*. In the latter case that specifically followed *Anns*, a police officer was held liable when, in hot pursuit of an armed man who had shot at the police, the officer's return fire struck a boy scout at a camp site, in circumstances where the police officer was aware that boys were camping in the area where the armed man was confronted.

Overarching policy in tort law is guided by efforts at the redistribution of loss in a fair, just and reasonable manner. In more affluent countries, where damages, if left unchecked, can run to exorbitant amounts, rendering it difficult to obtain adequate insurance to cover new areas of liability, a principal consideration of courts is to restrict the size of awards. It is said¹⁷ that it was this consideration that accounted for the reining in of Lord Wilberforce's two-stage approach in *Anns*.

In less affluent States like those of the Caribbean, the main preoccupation may well be not so much the need to limit the extent of liability but rather, on a case by case basis, to adopt creative ways of managing the redistribution of loss; at identifying circumstances where it is reasonable and just that injured persons should be compensated and careless actors be made to 'cough up'. This might explain why, as Dr Amaefule has suggested that, despite *Anns* and *Caparo*, many Caribbean judges have remained 'faithful adherents to the neighbour principle as a touchstone for understanding the duty of care which a defendant owed a plaintiff to ground a claim in negligence.'¹⁸

In a presentation this brief, and on an occasion like this, it is hardly appropriate to attempt to explore the quicksand of relief for nervous shock and psychiatric illness; but I can share two

¹⁶ *Ramdeen v Attorney General* (Trinidad and Tobago HC, 30 July 1999).

¹⁷ Kodilinye (n 6) 77-78.

¹⁸ Unpublished Paper (2022) made available to the writer.

heartbreaking cases, one from Barbados and the other from The Bahamas, that indicate a measure of consistency with the English authorities in this area.

In the first, *Alleyne v Attorney General*,¹⁹ the claimant's baby girl was delivered on 10 June 1998. Tragically, the infant died four days later at the hospital, without any negligence on the part of anyone. The claimant appeared to be coping satisfactorily with her grief and was making arrangements for a funeral when she was told by the hospital authorities that the dead baby had been negligently incinerated. The claimant developed severe post-traumatic stress disorder and later filed suit. The trial judge combed through the main English authorities and began the dispositive part of her judgment by observing, fittingly, that if sympathy for the plaintiff was the main criteria here, her exercise would be an easy one. Ultimately, relying on *Alcock v Chief Constable of South Yorkshire Police*²⁰ the judge denied liability.

By contrast, In *Wilcombe v Princess Margaret Hospital*,²¹ the plaintiff was discharged from the hospital after delivering her baby girl, but the hospital kept the baby for follow up treatment. For three days the mother went to and fro to breast feed the baby who appeared to be thriving. On the fourth day, when the parents arrived at the hospital for the mother to breast-feed, the baby was not where they expected to see her. A nurse said that a doctor was 'working on her'. The parents became anxious. They waited for two hours. Eventually they were allowed to see little Dominique lying on her back with several tubes attached to her throat and navel. Two doctors were indeed working feverishly on her. One operated a manual pump and the other was 'doing compressions'. But Dominique was not responding. The parents witnessed their baby die and both husband and wife developed serious psychiatric responses. The judge held that the hospital owed them a duty of care to shield them from the experience of witnessing medical

¹⁹ *Alleyne v Attorney General* (Barbados HC, 22 April 2005).

²⁰ [1992] 1 AC 310.

²¹ *Wilcombe v Princess Margaret Hospital* (The Bahamas SC, 28 June 2002).

procedures on their baby that could cause them distress. The reasonable foreseeability and proximity tests were satisfied and, according to the judge, where there is a duty of care to avoid causing personal injury to the plaintiffs, it did not matter that the injury sustained was psychiatric rather than physical.²² Both parents were compensated for psychiatric illness!

So, in summary, what is the view from the Caribbean on the case of the immortal snail? Well, firstly, the snail's legacy is still very much alive. Ninety years later, young Caribbean law students are just as fascinated by Mrs Donoghue's travails as they continue to be with those of a certain Mrs Carlill who took on the bombastic Carbolic Smoke Company. Secondly, that there does exist an untidy and unsettling measure of doctrinal uncertainty and inconsistency surrounding the application of the case. Greater acceptance of the CCJ by regional States might provide a better platform, ultimately, for driving a Caribbean approach to judicial policy on this issue; and finally, the prospects remain wide open for further evolution of the tort taking advantage of the collective wisdom of judges all across the Commonwealth.

I thank you.

²² *ibid* at [26]. See also *Page v Smith* [1996] 1 AC 155.