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Some 'What if?' Thoughts: Notes on Donoghue v. Stevenson

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Forthcoming in *Osgoode Hall Law Journal*, Vol. 51, No. 2 (2014)

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Abstract:

This article looks at the seminal case of *Donoghue v. Stevenson* and poses a series of “what if?” questions as to the importance of *Donoghue*. What if the events that led to that case had not unfolded in the same way or its cast of characters had been different? The author finds that the players in *Donoghue* left a continuing impact on the fine texture and local development of the law. But the impact of particular individuals must be measured and assessed in light of the pervasive social and historical forces in play in 1932 and soon after. To prioritize individual personalities over social forces (and vice-versa) as a general matter of historiographical principle is mistaken; each interacts with and on the other. On another day and in another case, their involvement might well have been decisive. Accordingly, the article tentatively concludes that the precise interaction of the general social forces in play, the particular situational dynamics in law, and the characters involved can unfold very differently from one context to another. *Donoghue* is simply one chapter, albeit a significant one, in the further evolution of the common law.

Keywords:

legal history, *Donoghue v Stevenson*, torts, duty of care, common law, negligence

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**Some 'What if?' Thoughts:
Notes on *Donoghue v. Stevenson***

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This short essay is based on talk that the author gave in May 2012 at a conference celebrating the 80th Anniversary of *Donoghue v. Stevenson*; it was held in Paisley and organized by the University of West Scotland. It will be published in the next issue of the *Osgoode Hall Law Journal* (51:2).

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“All histories are just fables that have been agreed upon.”

-- Voltaire

Donoghue v. Stevenson is so well-known that its facts and judgment need little further rehearsal or rendition. Indeed, the case and its aftermath are some of the most documented in the long common law tradition. Donoghue is treated by many as if it were the greatest of all ‘great cases’.¹ That being said, there still remains a continuing vibrant debate about the precise meaning and ambit of its legacy, especially the putative leading judgment of Lord Atkin and its influence on the development of the common law of tort. Indeed, part of Donoghue’s greatness is considered to be its almost Delphic sweep and interpretive elusiveness; its importance is matched by and reinforced by its indistinctness. However, there is a tendency to approach the case as if its origin and later pre-eminence are somehow preordained -- that it was always destined to be great and that it exerted its huge influence by dint of its irresistible rationale and inevitable effect.

Yet this assessment seems to depend on a very crude depiction of both the evolution of the common law and social history generally. The assumption seems to be that law is a rational exercise that is largely set apart from social history and that both law and social history unfold in a reasonably orderly, if unconnected, manner. This whiggish sense of inevitability to the path of both law and social history is mistaken and misleading. Far from being a prime example of law and history’s methodical and almost inexorable operation and development, Donoghue is better understood as an occasion on which law and history’s organic and catch-as-catch-can quality can be glimpsed. In short, Donoghue is a great case that illustrates the contingent nature of law, greatness, and history. Despite appearances to the contrary, Donoghue (and Lord Atkin’s judgment in particular) is not tantamount to a jurisprudential ‘sermon on the mount’ that wields its influence and authority by that fact alone.

In this essay, I will look at Donoghue and its legacy through the lens of a different and speculative kind of inquiry. I will seek to isolate what was and was not important about Donoghue in exploring the development and dynamics of legal change; the focus will be upon asking *what if* the case had not unfolded in precisely the way that it did and *what if* there had been some slight changes in the surrounding circumstances and the *personae dramatis*. This may seem a rather obscure and elliptical approach to the case and the common law. However, this way of proceeding might hopefully allow a more critical and less trite analysis of how cases achieve greatness and how the developmental process of the common law works. Indeed, answering these *what if* questions will demand that some

¹ Donoghue v. Stevenson, [1932] AC 562. For my own account, see ALLAN C. HUTCHINSON, IS EATING PEOPLE WRONG?: GREAT LEGAL CASES AND HOW THEY SHAPED THE WORLD ch.6 (2011).

very big questions about law, law and society, and their change are confronted, if not resolved.

Re-Imagining History

'Alternate' or 'Counterfactual History' exists somewhere in that shadowy intellectual zone between the more familiar and traditional domains of fact and fiction. In attempting to explore a number of *what if* situations, this intellectual approach takes an authentic or agreed-upon point in history, posits some slightly different factual assumptions, and then spins out an alternate or competing narrative account of how events might have worked out differently (or not). While this can be utilized as an entirely fictional and imaginative endeavour,² it can also be used to serve more strict and rigorous historiographical ends. This is achieved by isolating certain incidents and events or focusing on the role of a particular person in the traditional historical account, imagining that that incident or event had not happened or that person had not existed or acted differently, and then seeking to evaluate whether history might or might not have unfolded differently. In this way, the relative importance of any particular incident, event or person can be better measured or adjudged.³ As such, this disputed mode of historiographical analysis can contribute to more nuanced and informed accounts of history. Imaginative reconstruction can be combined with factual reporting to offer a more revealing and suggestive account of history. In particular, it can be deployed to help isolate what might be central and what might be peripheral to the unfolding and explanation of specific events and incidents that did occur.

For example, a continuing debate in history and related disciplines is over the extent to which certain historical figures were essential to the historical record and dynamic of the Twentieth Century – Would there have been a Holocaust if Hitler had not existed?; Would Apartheid have been swept aside in South Africa without the leadership of Nelson Mandela?; or Would the Independence of India have occurred differently if Mahatma Gandhi had not been around? In sum, *what if* these characters had each fallen victim to some childhood illness or accident that had ended their lives, would history have turned out in a fundamentally different way? Or, to put it another way, what if these figures did exist, but at a different place and phase of history, would their impact have been as significant or even noticed? While these questions obviously do not have definitive answers, a serious consideration of them does oblige a critical re-assessment of certain accepted truths.

More broadly understood, these 'what if?' questions raise the historiographical chestnut of the relation between individual agency and broader social forces in their shaping of history. Any answer to the stated questions will both depend on and illuminate what is thought to be the balance between human personality and social circumstance. By positing an alternative history in which these people did not exist or acted very differently, it becomes possible to provide a more subtle, if indeterminate assessment of the respective

² Two famous examples of alternative history in literature are [VLADIMIR NABOKOV, *ADA OR ARDOR: A FAMILY CHRONICLE* \(1969\)](#) and [PHILIP ROTH, *THE PLOT AGAINST AMERICA* \(2004\)](#).

³ See, for example, [NIALL FERGUSON, *VIRTUAL HISTORY: ALTERNATIVES AND COUNTERFACTUALS* \(1997\)](#) AND [Martin Bunzl, *Counterfactual History: A User's Guide*, 109 *AMER. HIST. REV.* 435 \(June 2004\)](#)

roles that personality and social dynamics played. While it seems reasonable to concede that events may not have happened in exactly the same way without them, it seems a stretch to suggest that the larger historical pattern and outcomes would have been vastly different – Nazi Germany was not only about Hitler; South African Apartheid was wobbling any way; and India, like other colonies, would likely have achieved independence at some similar point in time. Yet, this assessment may itself reveal certain contested assumptions and propositions about historical development and change. Accordingly, it is important to remain open to the broader historiographical debate in offering more focused accounts of particular historical events.

That said, what are the uses and consequences for this way of alternative or counter-factual thinking in regard to Donoghue v. Stevenson? What can such an approach do to provide new or telling insights into the case, the common law, and the law/society relationship? Of course, the nature of this jurisprudential inquiry will be unavoidably conjectural and inconclusive. Nevertheless, by isolating a series of occurrences and the roles of particular people, it might offer some suggestive and hidden insights into how law develops and how law and society interact over time. Accordingly, the ambition of this essay is not to offer definitive or grand answers to some perennial questions of jurisprudence. Instead, the more modest goal is to shed some light on one episode in the contingent and experimental drama of the common law.⁴ It will be for others to determine the cogency and suggestiveness of my provocations for a broader account of the common law's changing doctrines.

Beer and Snails

A first question to ask any theorist of the common law might be -- would the history of tort law have been different (and significantly so) if May Donoghue had not gone to the Wellmeadow Café on that summery August evening? Of course, this would mean that the case of Donoghue v. Stevenson would not have entered the law reports. So, to that extent, at least, the history of tort law would be different. However, it does not follow that the history of tort law would be different in some fundamental or substantive way – whoever drank that fateful bottle of ginger beer might well have initiated similar litigation; or Mrs. Donoghue or another person might have consumed some other noxious substance in similar circumstances on a different date. To address and unpack these particular queries, it is necessary to move quickly to some deep and contestable issues about how law changes and takes shape and how the relationship between legal doctrine and social conditions is understood. While it is hard to conclude that a general tort of negligence would not have seen the doctrinal light of day if Mrs Donoghue had not gone to the Wellmeadow Cafe, it is also unconvincing to imagine that everything would have unfolded in much the same way.⁵

⁴ For more on a broader understanding of common law and society, see ALLAN C. HUTCHINSON, *EVOLUTION AND THE COMMON LAW* (2005).

⁵ Of course, there is an analogue to all this in so-called chaos theory in which the 'butterfly effect' is given pride of place (i.e., in deterministic non-linear contexts, large systems are sensitive to changes in their initial conditions such that a very tiny change in one place can bring about vast changes throughout the systems). See EDWARD

The next thing to do is to distinguish between those events and personalities that might have had some alternative effect on the law's development and those that might not. For instance, while the non-involvement of Lord Atkin or Walter Leachman (Donoghue's lawyer) might well have had a significant impact on what occurred and followed, it is much more difficult to speculate that the non-involvement of Lord Tomlin or W.G. Normand (Stevenson's appellate counsel) would have had a significant effect. However, even this distinction is open to challenge and can be seen to depend upon larger assumptions about the dynamics of historical change – was it important that May Donoghue went to the Wellmeadow Café as opposed to another establishment? That she had a ginger beer as opposed to another beverage? That her friend paid for the drink and not her? All these will take on particular significance and resonance depending on what a commentator's historiographical commitments are about the progress of law, society and history.

So, for the sake of argument, it might be assumed that the involvement of Lord Atkin and Walter Leachman was significant for both the *Donoghue* litigation itself and its subsequent elevation in to a 'great case'. From an alternative history perspective, the key issue would be not only whether it was significant, but also how significant it was – What if Walter Leachman had not championed May Donoghue's plight?; What if there had been a different bench of law lords?; What if Lord Buckmaster's pinched judgment had won out over Lord Atkin's more expansive effort? Or, what if later judges and lawyers had taken more of shine to Lord Macmillan's judgment than Atkin's? As focused as these questions might be, they do offer a keyhole glimpse at the wider world of jurisprudential debate about how the common law changes – what is the nature of the relationship between the common law's development and changing social dynamics?

Almost all legal scholars maintain that the substance and development of law is *relatively autonomous* (i.e., it is neither entirely beholden to nor completely independent of socio-economic forces). However, this acceptance is so trite and capacious as to be almost meaningless. There is a world of difference between a stance that maintains that law is primarily separate from society, but is partly determined by it and one that insists that law is primarily determined by society, but is partly separate from it. So, while it might well be that law has some 'relative autonomy' from its larger social and historical context, the more compelling question is about how relative and how autonomous it is. Accordingly, it is incumbent on legal scholars to give some substance and specificity to the claim about law's relative autonomy. A 'what if?' approach is one way to contribute to that jurisprudential task.

The challenge, of course, is to determine why *Donoghue* did take place and unfold as it did as much as why it might not have done so. There had to be a certain confluence of forces and findings in place for the considerable shift to a tort of negligence to occur at all.⁶ Unless one is a dyed-in-the-wool legalist, it beggars belief to imagine that negligence's

LORENZ, PREDICTABILITY: DOES THE FLAP OF A BUTTERFLY'S WINGS IN BRAZIL SET OFF A TORNADO IN TEXAS? (1972).

⁶ See Robert Rabin, *Historical Development of the Fault Principle: A Reinterpretation*, 15 GA. L. REV. 925 (1980).

introduction and acceptance was simply a matter of internal and intellectual engagement within the legal community; there were definite political leanings and social values in place that made a tort of negligence's creation more likely than not or, at least, that made its creation less than unacceptable to the judicial profession. As Lord Esher had stated almost 40 years before, "any proposition the result of which would be to show that the common law of England is wholly unreasonable and unjust, cannot be part of the common law of England."⁷ Moreover, Donoghue is an extension of a principle articulated by Benjamin Cardozo in the American case of Macpherson in 1916, which the judges referred to in Donoghue.⁸ This might lead to the conclusion that, even if Donoghue had not seen the doctrinal light of day, the courts would have found another occasion on which to develop the intellectual roots of negligence and to tap into the prevailing milieu around what is 'reasonable' and 'just'.

It also bears noting that, contrary to common understanding, Donoghue did not release tort liability for negligence onto an unsuspecting legal world. While contract was the primary mode of civil obligation in the 1930s, there existed a patchwork quilt of statutory and judicial schemes of tort liability that imposed a range of duties to take care on actors. While Donoghue extended negligence liability to some new areas and grounded tort liability where none had existed previously, it also reduced liability in other old areas from its existing strictness to a more negligence-focused liability. As is so often the case with the common law, two steps forward was often accompanied by one-step back; the path of the common law is not the unidirectional or straightforward one that many envision or wish for.

Lordly Matters

Even if Lord Atkin had not sat on the Donoghue bench (or Lord Tomlin had sided with Lord Buckmaster), the tort of negligence might well have emerged, albeit not in the majestic form of the 'neighbour' principle. In his supporting judgment (and what is considered the swing vote), the recently appointed Lord MacMillan had refused to go as far as Lord Atkin in extending liability to all negligent actors; he had confined himself to the manufacturer-consumer relationship in his imposition of negligence liability aside from contract. However, as well as finding against Stevenson on the basis of negligence, he did throw down the doctrinal gauntlet to later generations of judges and jurists by declaring that "the categories of negligence are never closed."⁹ Similarly, Lord Thankerton was more tentative than Atkin, but hinted strongly at the possibility that a duty of care might exist more generally even if it is "impossible ... to catalogue finally, amid the ever varying types of human relationships, those relationships in which a duty to exercise care arises apart from contract."¹⁰ Indeed, MacMillan's and Thankerton's less daring and more step-by-step

⁷ Emmens v. Pottle 16 QBD 354 (1885).

⁸ MacPherson v. Buick Motor Co. 217 NY 382, 111 NE 1050 (1916).

⁹ Supra, note 1 at 619.

¹⁰ Id. at 603.

approach might well have been more in line with the traditional incrementalist spirit of the common law.

Also, it was surely not the rhetorical potency of Atkin's bold judgment alone that carried the day and made *Donoghue* into a great case. For *Donoghue* to rise to its historic status, there had to be a few generations of judges and jurists (and, of course, society at large) who bought into the idea and practice of an expanding principle of negligence liability. Although the reaction to the law lords' decision in *Donoghue* was predictably mixed, there was more support than criticism. Among the legal community, it was celebrated as a necessary step forward in negligence law and as a decision that brought the law more in line with contemporary sensibilities. Lord Atkin was praised by the eminent Sir Frederick Pollock in the *Law Quarterly Review* for "overriding the scruples of English colleagues who could not emancipate themselves from the pressure of a supposed current of authority in the English Courts."¹¹ Insofar as it pierced public consciousness, there was warm approval. Whereas the newspaper *The Scotsman* wrote that the decision "should be welcomed by the public," the *Law Times* said that the decision was "revolutionary" and represented a "radical change" in tort law that was "strictly in accord with the needs of modern economic times."

The staying power of Atkin's neighbour principle can be attributed to an organic combination of its intellectual appeal and its socio-political acceptability. Although the House of Lords has wavered on its commitment to a principled articulation of tort law, it has often sought to satisfy Atkin's aspiration to identify "some general conception of relations giving rise to a duty of care, of which the particular cases found in the books are but instances."¹² Most boldly, in *Anns* in 1973, Lord Wilberforce declared that it was no longer necessary to proceed by way of a case-by-case basis. Instead, courts should ask "whether there is a sufficient relationship of proximity or neighbourhood" between the harmed plaintiff and the negligent defendant. If so, a *prima facie* duty of care is established unless there are "any considerations which ought to negative, or to reduce or limit the scope of the duty."¹³ And, as late as 1990 in *Caparo*, the House of Lords revised Atkin's 'neighbour' principle to encompass public policy concerns such that, even if foreseeability and proximity or neighbourhood are found to be present, a duty of care will only arise when it is "fair, just and reasonable that the law should impose a duty of given scope on one party for the benefit of the other."¹⁴

Furthermore, even it is assumed that Lord Atkin's judgment did not prevail over Lord Buckmaster's narrower and more skeptical judgment, it is by no means certain that a tort of negligence would not have become part of the law. His opinion may have galvanized opposition and given life to a political momentum to establish an even more expansive tort of negligence or even strict liability. Indeed, it has to be remembered that Buckmaster, who was a relative progressive and experienced liberal politician in the 1920s and 1930s, was

¹¹ Pollock, *The Snail in the Bottle and Thereafter*, 49 LQR 22 (1933).

¹² *Supra*, note 1 at 580.

¹³ *Anns v. Merton Borough Council*, [1978] AC 728.

¹⁴ *Caparo Industries plc v. Dickman*, [1990] 2 AC 605.

as concerned with corralling the activist role of courts in a democracy as much as stymieing the creation of the substantive tort of negligence itself. Against the political and social context of the time (in which the welfare state was midwifed), it is hard to resist the conclusion that some form of legislation might well have been introduced to do exactly what Atkin's opinion did for negligence liability in the common law.

Accordingly, asking questions from a counterfactual or alternate history can help to illuminate or, at least, hint at those historical circumstances and personalities that were likely more required than not for a Donoghue-like principle to become part of the common law. There is nothing scientific or determinative about such an approach, but it does enable a more critical perspective to be taken so that there is not a knee-jerk Panglossian response to each and every twist and turn of legal doctrine. The common law is constantly moving, but never arriving anywhere in particular.

Broader Considerations

One way to approach the issue of what is and is not important in determining the role of Donoghue and its component parts in the development of negligence liability is to ask -- after gathering together all the pertinent and contextual features of Donoghue, which ones are essential to the development of a tort of negligence and which are not? On such a basis, while it is clear that some small changes will undercut the importance and even existence of Donoghue as a landmark case, it is less obvious which changes will be sufficient to prevent the establishment of a tort of negligence at all. In other words, while some small changes in character and circumstances might effectively nullify the impact of Donoghue itself and its doctrinal template, it would require much more substantial changes to prevent entirely the introduction of negligence liability into English law over the following decades. So, for instance, although the presence or absence of Lord Atkin in the case might prove to be important in mapping out exactly how the law would have developed without his 'neighbour principle', it is far from conclusive that a similar tort of negligence would not have seen the light of day.

It is a considerable analytical stretch to insist that Atkin's involvement alone was pivotal to the development of negligence liability in English law and that, without him, there would have been no tort of negligence. After all, the tort of negligence did take hold in American law around the same time as Donoghue. At the risk of sounding silly, it is apparent that Lord Atkin played no role in such an occurrence; the case occurred in another jurisdiction and several years before Donoghue. This strongly suggests that it was less the particular characters and circumstances of Donoghue that drove English law's evolution towards negligence and more the social dynamics in play that drove the general orientation towards negligence law. In short, the time was right and, if it had not been Atkin, it might well have been someone else who seized the doctrinal day and laid down a test for duty or proximate cause. Of course, this argument raises the obvious difficulty of explaining why English law did not take a similar and later turn to American legal doctrine in the 1960s. The California case of Greenman in 1963 ushered in the doctrine of strict

liability that soon took hold across the United States and replaced much of the jurisprudence on negligence.¹⁵

Efforts to elucidate that divergence of legal doctrine between England's continuing adherence to negligence liability, especially for products liability, and the United States' move towards strict liability might take a number of routes. Two main ones come to mind - that there were different regimes of legislative protection that were enacted for consumers in the two jurisdictions (i.e., the English political landscape allowed for more consumer-friendly legislative interventions than the American) and that the practical application and judicial exception-making that occurred rendered the apparently different legal doctrines more similar than different (i.e., the American legal doctrine is less strict in operation and the English doctrine is more exacting than might be initially appreciated¹⁶). That said, there might well be a host of other explanations that might pass historiographical muster. Again, it bears emphasizing that there is no theoretical formula or generisable account that will work in all instances to explain historical development or what is needed to reach the tipping-point for significant social or legal change.

Nevertheless, it does seem possible to draw some general observations about the role of *Donoghue* and its surrounding context in the history of negligence liability. The challenge is to do so without making extravagant claims about the overall evolution of legal doctrine across the jurisprudential board. Both society in general and law in particular are far too messy in their patterns and practices to be reducible to neat equations of cause and effect. The historical interaction between one feature of society and another cannot be described or formulated once and for all: "the system as a whole has no single ideological imprint."¹⁷ The fact is that not only does law not conform to any internal or external deep logic, but also the specific relation between external forces and internal rationality resists generalization; no one account of that relation is valid for all time and all places. The development of the common law is neither serendipitous nor scientific. As such, the relation between law's development and changing social relations is more complicated and indeterminate than is usually allowed or conceded; it defies simple or consistent elucidation. Nevertheless, this does not mean that an analytical account of one episode in the common law's development cannot be profitably made.

While the history of English tort law might have unfolded differently if Mrs. Donoghue had not walked into the Wellmeadow Café, if Walter Leachman had not been on a mission to skewer Paisley's ginger beer manufactures, or if Lord Atkin had not been on the bench that day, it would not be so different a history looked at from today's standpoint over 80 years later. The path travelled may have been slight different in timing and terrain, but the overall direction and destination would surely have been much the same. Is it

¹⁵ *Greenman v. Yuba Power Products*, 59 Cal. 2d 57 (1963).

¹⁶ In *Donoghue* itself, Lord Macmillan was minded to emphasise that "I rather regard this type of case as a special instance of negligence where the law exacts a degree of diligence so stringent as to amount practically to a guarantee of safety." *Supra*, note ** at 612.

¹⁷ DUNCAN KENNEDY, *A CRITIQUE OF ADJUDICATION: FIN DE SIECLE* 225 (1997). For a more fully developed account of this insight, see ALLAN C. HUTCHINSON, *IT'S ALL IN THE GAME: A NONFOUNDATIONALIST ACCOUNT OF LAW AND ADJUDICATION* 216-51 (2000).

really feasible to maintain that, without these three personalities, the whole of negligence law would be entirely and meaningfully different?

None of this is to say that the involvement of Donoghue, Leachman and/or Atkin was not important. It was: they had a continuing impact on the fine texture and local development of the law. But the impact of particular individuals must be measured and assessed in light of the pervasive social and historical forces in play in 1932 and soon after. To prioritize individual personalities over social forces (and *vice-versa*) as a general matter of historiographical principle is mistaken; each interacts with and on the other. On another day and in another case, their involvement might well have been decisive. Accordingly, it can be tentatively concluded that the precise interaction of the general social forces in play and the particular situational dynamics in law can unfold very differently from one context to another. Donoghue is simply one chapter, albeit a significant one, in the further evolution of the common law. The doctrinal story and plot of the common law might have experienced a significant twist as a result of Donoghue occurrence or non-occurrence. Whether the law's tale would have turned out entirely differently over time seems possible, but unlikely.

Conclusion

As I was completing this short piece, it was the 50th anniversary of John F. Kennedy's assassination. There was much talk about how things in the United States and the world might have happened differently if he had not died in Dallas in late November, 1963 -- Would Vietnam have happened? Would the Cold War have played out differently? Would the push for Civil Rights have been stronger? And would Kennedy himself have become and remained the iconic figure that he is now perceived to be?¹⁸ These are each fascinating and unanswerable 'what if?' questions. But their posing and the ensuing efforts to answer them do offer an occasion to muse on larger questions of historical judgment and historiographical insight. Kennedy was a 'great man' by most standards. Yet his contemporary status and later influence were, at least in some part, shaped by the extant social and political forces of his presidency and its aftermath. In the same way that Kennedy and his legacy are inseparable from his and our times, so also is Donoghue. To attempt to detach the force of personality from the impact of larger currents is folly; to attempt to develop a grand account of how they work to constitute and re-constitute each other is also foolhardy.

¹⁸ See, for example, ROBERT DALLECK, *AN UNFINISHED LIFE* (2003) and *CAMELOT'S COURT* (2013).