

LORD ATKIN AND THE NEIGHBOUR TEST: ORIGINS OF THE PRINCIPLES OF NEGLIGENCE IN *DONOGHUE v STEVENSON*

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THE NEIGHBOUR PRINCIPLE

In May 1932 the House of Lords delivered its judgment in the case about the presumed snail in the ginger beer bottle with which even non-lawyers are familiar, *Donoghue v Stevenson*. One of the five judges, Lord Atkin, formulated what has become known as the neighbour test in this way:¹

At present I content myself with pointing out that in English law there must be, and is, some general conception of relations giving rise to a duty of care, of which the particular cases found in books are but instances. The liability for negligence, whether you style it such or treat it as in other systems as a species of “culpa”, is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay. But 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. In this way rules of law arise which limit the range of complaints and the extent of their remedy. The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer’s question, Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law, is my neighbour? The answer seems to be—persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.

This remains the classic test for liability in negligence. But what was it that inspired Lord Atkin to pen these powerful words and what were the conscious and unconscious influences on him some seventy years ago?

BIOGRAPHICAL NOTE²

James Richard Atkin was born at Brisbane in 1867, the eldest son of recent immigrants from London. His father was Irish and his mother Welsh. When Atkin was only four or five, his father died suddenly aged 30 and his mother made her home in Merionethshire. Atkin always regarded himself as Welsh, eventually buying a house in Aberdovey where he brought up his own large

* The author would like to thank the Revd. Roger Greeves, former Chaplain of Robinson College, for his help on the biblical aspects of this article.

¹ *Donoghue v Stevenson* [1932] AC 562 at 580, HL.

² Material for this section is taken from the *Dictionary of National Biography 1941–1950* and Geoffrey Lewis, *Lord Atkin* (London, Butterworths, 1983).

family. Commercial cases were his forte, particularly those relating to the Stock Exchange. He took silk in 1906 and was appointed to the High Court bench in 1913 at the age of 45. After six enjoyable years as a King's Bench judge he was promoted to the Court of Appeal where he frequently sat with Lords Justices Bankes and Scrutton to form a 'formidable trio'. In 1928 Atkin was appointed a lord of appeal where he found scope to apply and develop legal principles as he saw them. He died from bronchitis at Aberdovey in 1944 at the age of 77.

THE KING'S COLLEGE ADDRESS

Throughout his life, Lord Atkin had been a fervent advocate of legal education and was chairman of the Council of Legal Education from 1919 to 1934. He wanted to see law taught as a school subject and worked to bridge the gap between professional and academic lawyers and to improve the status of law teachers. In October 1931 he gave a lecture to the Great Hall at King's College in the Strand entitled 'Law as an Educational Subject'.³ This was only some two months before the House of Lords hearing in *Donoghue v Stevenson*. Lord Atkin had become convinced that there was some common thread to the cases in which a duty to take care had been established and was moving towards the statement of a general principle.⁴ By the time of the King's College lecture the neighbour test was uppermost in his mind. Persistently using the word 'neighbour' and the concept of neighbourliness, he said:⁵

It is quite true that law and morality do not cover identical fields. No doubt morality extends beyond the more limited range in which you can lay down the definite prohibitions of law; but, apart from that, the British law has always necessarily ingrained in it moral teaching in this sense: that it lays down standards of honesty and plain dealing between man and man. The idea of law is that the obligations of a man are to keep his word. If he swears to his neighbour, he is not to disappoint him. In other words, he is to keep his contracts. He is not to injure his neighbour by word. That is to say, he is not to libel or slander him. He is not to commit perjury in respect of him, and he is not to defraud him into acting to his detriment by telling him lies. He is not to injure his neighbour by acts of negligence; and that certainly covers a very large field of the law. I doubt whether the whole of the law of tort could not be comprised in the golden maxim to do unto your neighbour as you would that he should do unto you.

THE GOLDEN RULE IN ETHICAL TEACHING

The 'golden maxim' referred to by Lord Atkin (more often called the 'golden rule') has a distinguished history. In the Authorised Version of the New Testament it occurs twice, each time as a central tenet of Christ's teaching. The Sermon on the Mount in Matthew's gospel renders it:⁶ 'Therefore

³ Printed in *Journal of the Society of Public Teachers of Law* (1932) 27.

⁴ See Lewis, *Lord Atkin*, p 56.

⁵ *Journal of the Society of Public Teachers of Law* (1932) 27 at 30.

⁶ Matthew 7: 12.

all things whatsoever ye would that men should do to you, do ye even so to them'. Luke gives it a more natural setting. After exhorting his hearers to love their enemies 'do good to them which hate you' and to turn the other cheek, Christ urges:⁷ 'And as ye would that men should do to you, do ye also to them likewise'.

Note that Lord Atkin made a significant alteration to Christ's words in the Authorised Version. He imports the word 'neighbour' by giving the 'golden maxim' as: 'Do unto your neighbour as you would that he should do unto you'. In fact it is earlier Jewish teaching which imports the notion of neighbourliness. Leviticus directs:⁸ 'Thou shalt not avenge, nor bear any grudge against the children of thy people, but thou shalt love thy neighbour as thyself.'

Before or about the time of Christ, rabbis enunciated the rule in negative form. Challenged to summarise the entire Torah, Hillel the Elder is said to have replied:⁹ 'What is hateful to you, do not do unto your neighbour'.

The negative form is also found much earlier among the Greeks, and the thought is widespread in the ethical and religious principles of many cultures¹⁰.

Small wonder then to find that the neighbour test predates Lord Atkin by many years in the annals of English law. Buller's *Trials at Nisi Prius*, first published in 1760, contains the following passage under 'Of Injuries arising from Negligence or Folly':¹¹

Every man ought to take reasonable care that he does not injure his neighbour; therefore, wherever a man receives any hurt through the default of another, though the same were not wilful, yet if it be occasioned by negligence or folly, the law gives him an action to recover damages for the injury so sustained.

THE PARABLE OF THE GOOD SAMARITAN

The lawyer's question referred to by Lord Atkin was clearly the one put to Christ before he told the parable of the Good Samaritan. Lord Atkin's grandson Toby Low (later Lord Aldington) told how in the summer holidays of 1931, not long before the hearing in *Donoghue v Stevenson*, he was staying at his grandparents' home with other members of the family¹².

⁷ Luke 6: 31.

⁸ Leviticus 19: 18.

⁹ *Encyclopaedia Judaica* (Jerusalem, Macmillan, 1971), vol 8, col 484.

¹⁰ See eg *Encyclopedia of Philosophy* (New York, Macmillan, 1967), vol 3, p365.

¹¹ Sir Francis Buller, *An Introduction to the Law relative to Trials at Nisi Prius* (London, R Pheny and S Sweet) 7th edition (1817), p 24b. For a fascinating commentary, see M J Prichard 'Trespass, Case and the Rule in *Williams v Holland*' [1964] *Cambridge Law Journal* 234.

¹² Cited in Lewis, *Lord Atkin*, p 57.

In those days the family went to Matins at the Aberdovey Church every Sunday morning and there was a large family lunch with Aunts and cousins presided over by my Grandfather, who took much pride in his carving of the joint. He often used the carving time and the carving weapons to conduct a discussion. I remember on several occasions that the post-church discussion about the snail and the ginger beer bottle case—who is my neighbour?—was an easily understandable theme immediately after church.

The lead-in to the parable itself harks back to Leviticus with the lawyer's response to Christ's question. The Authorised Version reads:¹³

And, behold, a certain lawyer stood up, and tempted him, saying, Master, what shall I do to inherit eternal life? He said unto him, What is written in the law? how readest thou? And he answering said, Thou shalt love the Lord thy God with all thy heart, and with all thy soul, and with all thy strength, and with all thy mind; and thy neighbour as thyself. And he said unto him, Thou hast answered right : this do, and thou shalt live. But he, willing to justify himself, said unto Jesus, And who is my neighbour?

Though the link between the neighbour test in *Donoghue v Stevenson* and Christ's telling of the story of the Good Samaritan is both obvious and well known,¹⁴ the point was lost on the editor of the All England Reprints, who refers to 'the lawyers' question' as though it was a query among lawyers generally, rather than a question which one lawyer specifically put to Christ.¹⁵

CONCLUSION

Arguably *Donoghue v Stevenson* is the most famous case in the common law, and Lord Atkin's words are among the best known uttered by any judge. Lord Atkin was well aware of the importance of the case and that it could have a revolutionary effect on civil liability for carelessness.¹⁶ The ringing tone of the judgment attracted the praise of Atkin's friend and judicial colleague Lord Wright even before they were delivered. On 12 May 1932, Wright wrote to Atkin:¹⁷

Dear Atkin

I have been reading with admiration your magnificent and convincing judgment in the snail case—also Macmillan's which is very good. I am glad this fundamental rule of law will now be finally established.

It seems as if (alas!) I were fated to differ from old Scrutton in the first two cases from his Court I have had to deal with!

I hope you will have a pleasant vacation.

¹³ Luke 10 : 25–29.

¹⁴ See Revd Kerr Spiers, 'Who is My Neighbour?' in Peter T. Burns (ed) *Donoghue v Stevenson and the Modern Law of Negligence* (Vancouver, Continuing Legal Education Society of British Columbia, 1991).

¹⁵ See *Donoghue v Stevenson* [1932] All ER Rep 1 at 11.

¹⁶ See Lewis, *Lord Atkin*, p 57.

¹⁷ Cited in Lewis, *Lord Atkin*, p 51.

Yrs.

Wright

I find Buckmaster on snails very disappointing. I have not seen Tomlin's efforts on the same subject.

Lord Atkin was far from being a one-case judge. In the leading case of *Bell v Lever Brothers*¹⁸ he spelled out the law on the effect of mistake on contracts. In *Fender v St John Mildmay*¹⁹ he reviewed the extent to which public policy had a rôle to play in the legal process. In the *Fibrosa* case²⁰ he drew attention to the illogicalities of the common law rules on frustration of contracts, and soon afterwards Parliament altered those rules by the Law Reform (Frustrated Contracts) Act 1943. Towards the end of his career he became for a brief time a public figure on the basis of his brave and controversial stand in *Liversidge v Anderson*.²¹ Yet without all that he would still be acknowledged for his part in the snail in the ginger beer bottle case and in particular for his foundation of the tort of negligence through the neighbour test.

¹⁸ *Bell v Lever Bros Ltd* [1932] AC 161 at 217, HL.

¹⁹ *Fender v St John Mildmay* [1938] AC 1 at 10, HL, a case on breach of promise of marriage.

²⁰ *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32 at 50, HL.

²¹ *Liversidge v Anderson* [1942] AC 206, HL.