Where It All Began By Frana Divich

Over the last 45 years there has been a proliferation of negligence cases brought against councils. Have you ever wondered how it all started?

In this, the 50th anniversary year of the Building Officials Institute of New Zealand, we thought you might be interested to learn about how the modern law of negligence as it applies to councils, came about in this country.

Once upon a time (Sunday 26 August 1928 to be precise) Mrs Donoghue travelled from Glasgow by train to Paisley. Once in Paisley she visited the Wellmeadow Café with a friend. Her friend placed an order, a pear and ice for herself and a Scotsman Ice Cream Float (a mix of ice cream and ginger beer) for Mrs Donoghue. The café owner brought a tumbler of ice cream to the table and poured ginger beer on it from an opaque, brown bottle labelled "D. Stevenson, Glen Lane, Paisley". Mrs Donoghue had some of her ice cream float. Her friend then poured the rest of the ginger beer from the bottle into the tumbler – and horrors – a decomposed snail came out of the bottle. Mrs Donoghue said she felt sick at the sight of the snail. A few days later abdominal pain caused her to see a doctor. On 16 September she was admitted to the Glasgow Royal Infirmary for "emergency treatment". She was subsequently diagnosed with severe gastroenteritis and shock.

The ginger beer had been manufactured by David Stevenson, who ran a business manufacturing both ginger beer and lemonade, less than a mile from the Wellmeadow Café. The manufacturer's contact details were on the label attached to the bottle and Mrs Donoghue's friend dutifully wrote them down.

On 9 April 1929 Mrs Donoghue's solicitor issued a writ against the ginger beer manufacturer, Mr Stevenson, seeking damages of £500 (this would be the equivalent of approximately £27,000/$46,500 NZD today).

Mrs Donoghue's case was that Mr Stevenson owed a duty of care to her to ensure snails did not get into the bottles of ginger beer and that he had breached the duty of care by failing to have a proper system in place to clean the bottles given that the business was supplying drinks intended for human consumption. She alleged that the ineffectiveness of the cleaning process resulted from the bottles being left in places "to which it was obvious that snails had freedom of access…and in which, indeed, snails and snail trails were frequently found". The breach of duty was alleged to have caused Mrs Donoghue's illness.

Back in 1929 injury caused by defective products was normally only claimable in contract between the seller and the consumer. However in this case, Mrs Donoghue had no contractual relationship with the café, as she had not placed the order. Her friend had a contract with the café, but she had not suffered an injury. Neither Mrs Donoghue nor her friend had a contractual relationship with the manufacturer.

The case proceeded and Mrs Donoghue succeeded at first instance. Mr Stevenson appealed and he won by a majority decision. Mrs Donoghue then appealed to the House of Lords.

The appeal was heard by five Lord Justices on 10 and 11 December 1931. After an unusually long delay for those times the House of Lords gave judgment on 26 May 1932 . The court held, by a 3-2 majority, in favour

of Mrs Donoghue and we like to think she lived happily ever after.

Lord Aitken commented that he did "not think a more important problem has occupied your Lordships in your judicial capacity; important both because of its bearing on public health and because of the practical test which it applies to the system under which it arises". He agreed that Scots and English law were identical in requiring a duty of care for negligence to be found and explained his general neighbour principle on when that duty of care arises. He famously said:

> ***"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 and omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, 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 my contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question".***

In 1972 (when BOINZ was 5 years old) the English Court of Appeal applied the "snail in the bottle" reasoning to a situation where a council had issued a building permit and carried out inspections. In 1975 (when BOINZ was 8 years old) the English case was followed in a New Zealand building defects case brought against the then Hamilton City Corporation.

Interestingly our council liability law has developed separately from the English law (that could be the subject of a whole new article) and can still be traced back to that British House of Lords case all about a snail in a ginger beer bottle.

So next time you are out on a building site carrying out an inspection you may wish to spare a thought for poor Mrs Donoghue and remember that a defect in a building today is the equivalent of a decomposed snail, hidden in an opaque bottle, waiting to do harm.

1. **Donoghue v Stevenson [1932] AC 562 (HL)**
2. **Dutton v Bognor Regis Urban District Council [1972] 1 QB 373 (CA)**
3. **Gabolinscy v Hamilton City Corporation [1975] 1 NZLR 150 (SC).**