
Lord Atkin: Principle and progress

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2017 marks the 150th anniversary of the birth in Brisbane of Lord Atkin. His judgments still guide Australian law. From where did he derive the values which shaped his progressive judicial philosophy? What is his legacy?

Any view of Lord Atkin is dominated by his towering judgments in *Donoghue v Stevenson* (1932)¹ and *Liversidge v Anderson* (1941).² Yet to focus upon the two judgments for which he is most famous risks overlooking other contributions he made to the law.

Any account of Lord Atkin's life must begin with the fact that he was born in Brisbane. But as proud as we are of Lord Atkin's Queensland origins, he did not regard himself as an Australian or a Queenslander. He was a different kind of outsider in the colleges of Oxford and in the legal establishment of London – a Welshman.

There is, however, a good reason to treat Lord Atkin as an honorary Australian. It has more to do with his work in the last few years of his life than with the accidental place of his birth. In 1943 and 1944 he represented the Australian Government on the War Crimes Commission, a body which the allies created to investigate war crimes and to advise allied governments about how to try them. Lord Atkin was uncompromising in his views that Nazi war criminals should be brought to *justice*, if necessary before international tribunals. He took an uncompromising stand about the process to punish the barbarians who committed crimes against humanity. This stand was consistent with the "sympathetic and welcoming" attitude he displayed to victims of oppression, including leading German lawyers who sought refuge in England in 1940.³

According to his biographer, Lord Atkin's "humane and compassionate spirit was the most constant feature of his work for more than thirty years on the English Bench".⁴ Lord Denning described Lord Atkin as "a progressive within the law".⁵ These humane and progressive instincts were not developed late in his life. They were inherited from a father who died tragically young after championing progressive causes in Queensland politics. They also were inculcated by powerful women who raised and educated James Richard Atkin.

The first part of this article concerns Lord Atkin's life and legal career. Naturally, I will discuss *Donoghue v Stevenson*. At the risk of being accused of elevating style over substance, I will concentrate on Lord Atkin's judicial method and style in that seminal judgment:

- his use of the parable of the Good Samaritan;
- his rhetorical resort to common sense and the views of ordinary people to justify the result he reached;
- his reliance on a similar development in the law of torts in the United States in the form of Cardozo J's judgment in *MacPherson v Buick Motor Company*;⁶ and
- the simplicity and persuasiveness of his writing style.

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¹ *Donoghue v Stevenson* [1932] AC 562.

² *Liversidge v Anderson* [1942] AC 206.

³ Geoffrey Lewis, *Lord Atkin* (Butterworths, 1983), 48.

⁴ Lewis, n 3, 48.

⁵ Lewis, n 3, 48.

⁶ *MacPherson v Buick Motor Co* 217 NY 382 (1916).



It is not just what he said, it is the way he said it. It is not simply what he ruled, it is the way he wrote it. Lord Wright described Atkin's style as "chaste, composed, easy, accurate ... But he could on occasion illuminate a whole topic by a felicitous phrase".⁷

Later I will turn to *Liversidge v Anderson* and the dissent which was vindicated by history. That dissent has been described as a ringing blow for liberty and equality under the rule of law and for "the integrity of the English language itself".⁸ It was, however, an unfortunate feature of Lord Atkin's uncompromising attitude that such a brilliant judgment took an unnecessary swipe at his colleagues with his humiliating reference to *Alice in Wonderland*.

EARLY LIFE AND HIS FATHER'S LIBERAL LEGACY

James Richard Atkin was born on 28 November 1867 at Ellandale Cottage in Tank Street, North Quay. His father, Robert Travers Atkin, was an Irishman from County Cork. His mother, Mary Elizabeth Ruck, was from Wales. She met Robert Atkin in Dublin when they were "doing the season".⁹ They were married in London on 7 July 1864. Four months later the couple departed for Australia. Professor Carney researched Lord Atkin's Queensland origins, and I commend to you his 2005 paper.¹⁰ He remarks that the Atkins' reasons for travelling to Australia, and Queensland in particular, were "probably curative and financial".¹¹ Members of the Atkin family had died from consumption and the remaining members sought a warmer climate. Some land and property in County Cork had descended to Robert Atkin, but as Lord Atkin later wrote, there was "never much margin between the rents paid by tenants and the headrents".¹² As a result, Robert Atkin sought his fortune in Australia. After a short stay in Brisbane the Atkins settled at Herbert's Creek, about 100 km from Rockhampton. Robert built a house on a selection, but conditions were harsh and the colony was in the grip of a depression. The Atkin family was beset by oppressive heat, the cost of food, mosquitos and a bushranger named McPherson, who was known as "The Wild Scotchman".¹³ In a fragmentary autobiography, Lord Atkin wrote that the pastoral station failed in a year or two and "the only souvenir of that period I possess is a collection of aboriginal weapons, boomerangs, spears and clubs captured by the combined station owners after defeating a raid in force by the natives".¹⁴

In 1865 Robert Atkin seriously injured his chest when he fell from his horse. Mary Atkin's health also was poor. Robert was misled into buying a half-share in a stock and station agents' business, which struggled. The Atkins decided to move to Brisbane and for Robert to become a barrister. He registered as a student of law, but because of his work and political commitments never finished those studies. He worked as a journalist and newspaper editor. Robert Atkin's interest in politics may have been ignited whilst in Central Queensland. In March 1866 Mary wrote to her mother about the sensation Robert created in the speech he gave during an election campaign. His journalistic coverage of Queensland politics led to a short parliamentary career. He was first elected to the Queensland Legislative Assembly on 1 October 1868 as a member for Clermont. He was a leader of the liberal cause, supported land reform and opposed the power of the squatters. In 1870 he was elected unopposed to the seat of East Moreton which was represented by two members. Significantly, his fellow member after 1871 was William Hemmant.

⁷ Wright (Lord), "In Memoriam: Lord Atkin of Aberdovey, 1867-1944" (1944) 60 LQR 332, 333.

⁸ PA Keane, then Chief Justice of the Federal Court, at the unveiling of Lord Atkin's plaque on 28 November 2012.

⁹ Lewis, n 3, 1.

¹⁰ Gerard Carney, "Lord Atkin: His Queensland Origins and Legacy" in M White and A Rahemtula (eds), *Supreme Court History Program Yearbook 2005* (Qld Supreme Court Library, 2005), 33-61, <http://legalheritage.sclqld.org.au/lecture-five-lord-atkin>. Another engaging account of Robert Atkin's life and political career is G Luck, "The Story Behind Lord Atkin of Snail", *Quadrant*, 1 March 2015, <http://quadrant.org.au/magazine/2015/01-02/story-behind-lord-atkin-snail-2>.

¹¹ Carney, n 10, 33, 36.

¹² Quoted in Lewis, n 3, 183.

¹³ Carney, n 10, 39.

¹⁴ Quoted in Lewis, n 3, 183.

Robert Atkin joined ex-Premier Lilley and others in an extra-parliamentary group, the Queensland Defence League, to oppose Premier Palmer's electoral redistribution Bill, which would have reduced the number of seats for Brisbane and its suburbs.¹⁵ They opposed the squattocracy and a group of six members of Parliament from Ipswich and West Moreton who were dubbed "the Ipswich Bunch":

And as the merchants of Ipswich enjoyed the trade patronage of the Downs squatters, their votes, and those of their Parliamentary representatives, followed only too frequently the wishes of the town's best customers.¹⁶

A significant public meeting was held at the Brisbane Town Hall on 23 December 1871 to form a Council of Defence against the squatters and the Ipswich Bunch.¹⁷ In the same year, the Protestant Robert Atkin co-founded the non-sectarian Hibernian Society of Queensland with his friend and Irish patriot Dr Kevin O'Doherty.¹⁸

By this time Robert Atkin's health was in decline. Still, he accepted appointment to a Royal Commission to investigate Queensland's railway system and its recommendations were accepted after his death. He continued to champion progressive causes in speeches and newspaper articles.

Two other sons had been born by this time. Walter Stewart Atkin was born in May 1869 and Robert Laurence Atkin was born in September 1870. The illness of her third-born son prompted Mary Atkin to return to Wales at the end of 1870 with all of her sons. The sons were never to see their father again.

During the final years of his life Robert Atkin enjoyed what Lord Atkin later described as the "unremitting care" of William Hemmant, who was both a member of the Legislative Assembly and a prosperous merchant. About 20 years later in England, William Hemmant became a benefactor of the young barrister, Dick Atkin, and in 1893 became his father-in-law.

Robert Atkin resigned as Member for East Moreton in March 1872 on the basis that Samuel Griffith could be persuaded to stand for the seat. Griffith did so and won an election.¹⁹

Robert Atkin died on 25 May 1872, aged only 30. His wife had returned to Brisbane in April 1872, and her arrival alone is said to have been a severe disappointment to Robert who yearned to see his sons.²⁰ A few weeks after his death, Mary Atkin wrote to her two eldest sons and explained their father's passing to heaven and the love which he sent to them. She assured her sons that she would be back to them soon. She wrote: "Perhaps some day when you are big men, we shall come out to Brisbane, and you shall finish the work that Papa had only time to begin."²¹

Late in his life, Lord Atkin wrote, "My father must have been a man of exceptional gifts". One of the pieces of evidence that he pointed to was the inscription upon a public memorial set up in memory of his father. It was erected by members of the Hibernian Society, and still stands at Sandgate. The broken column on the monument is said to symbolise "the irreparable loss of a man who well represented some of the finest characteristics of the Celtic race – its rich humour and subtle wit, its fervid passion and genial warmth of heart". The inscription on the monument describes how Robert Atkin was distinguished in the press and the Parliament by "large and elevated views, remarkable powers of organization, and unswerving advocacy of the popular cause, his rare abilities were especially devoted to the promotion of a patriotic union among his countrymen, irrespective of class or creed, combined with a loyal allegiance to the land of their adoption".

¹⁵ JM Bennett, *Sir Charles Lilley: Premier and Chief Justice of Queensland* (Federation Press, 2014), 143; Roger B Joyce, *Samuel Walker Griffith* (UQ Press, 1984), 31.

¹⁶ A Douglas Graham, *The Life of Sir Samuel Walker Griffith* (Powells & Pughs, 1939), 23-24 (John Murtagh Macrossan lecture, 1938).

¹⁷ Graham, n 16, 25.

¹⁸ O'Doherty had been transported to Tasmania as a leader of the Irish rebellion of 1848: see Luck, n 10.

¹⁹ Joyce, n 15, 31; Graham, n 16, 26.

²⁰ Carney, n 10, 46.

²¹ Carney, n 10, 47-48.

THE WISHES OF A DYING FATHER

On Dick Atkin's fourth birthday on 28 November 1871, his dying father had written to him about the need to be "truthful and honourable". In April 1872, the month before he died, Robert Atkin wrote another letter which instructed his eldest son to share with his brothers, to be kind and affectionate to them, to always tell the truth and to be obedient. His final wish was that his sons would grow to be "nice unaffected gentlemen", without concern for status, honourable and upright.²²

The "rare abilities" which Robert Atkin displayed, his commitment to the values of liberal democracy and his egalitarianism were passed to his son. Epigeneticists and psychoanalysts may debate whether the transmission of these qualities was some kind of genetic inheritance, or simply the response of a son to the loss of a father whose work was left incomplete. The letters which his father and his mother each wrote to him in 1872 must have had a profound influence on the young boy. His mother's hope that he might return to Brisbane and finish the work of a father who "everyone was so fond of" was not fulfilled. Instead, the values which his father embodied and championed were taken up by Dick Atkin on the other side of the planet.

A DIVERSION

Robert Atkin's retirement from Parliament opened the way for a great lawyer, Samuel Griffith, to enter politics. The name Sir Samuel Griffith has been appropriated, at least in legal circles, by conservatives. This is not the occasion to survey Griffith's remarkable political and legal career. However, we should recall the classical liberal qualities which Griffith championed between 1872 and 1890. Griffith's initial manifesto in 1872 opposed Palmer's policies, which he described as "class" legislation in favour of the squatters. He advocated greater expenditure on public works.²³ In 1888, after reading Karl Marx's *Das Kapital*, Griffith wrote an article on "Wealth and Want" which attacked unrestricted capitalism and the domination of the weak by the strong. He identified one of the principal functions of government as being to "protect the weak against the strong, and to secure to every man real freedom. And it is only the state, that is, the community in the aggregate, that can enforce the rule of freedom".²⁴

Griffith was not a revolutionary communist. Instead, he believed that action by the state was "the only hope of averting a terrible social upheaval and revolution".²⁵ When that upheaval came in the 1890s, he made common cause with conservatives against militant elements of the labour movement. But in July 1890 he introduced Bills into the Queensland Parliament which articulated principles of natural law and equality. The final declaration of principle was that:

It is the duty of the state to make provision by positive law for securing the proper distribution of the products of labour in accordance with the principles hereby declared.²⁶

One is left to imagine what might have been if the popular Robert Atkin had enjoyed the same robust health as "Damn Sam" Griffith (and, dare I say it, Griffith's capacity for hard liquor).²⁷ If Robert Atkin had lived and thrived, and remained a member of the Queensland Parliament, would his political trajectory have been the same as Griffith's? Would his first son have remained in Australia, or returned to it, and followed his father and Griffith into the realms of law and politics? One can only imagine what would have become of Dick Atkin.

MATERNAL INFLUENCE

Rather than following his father into liberal politics in Australia or Griffith to the Queensland Bar, Dick Atkin's life became that of a Welshman. His formative years were in the Welsh countryside, influenced by strong women.

²² Carney, n 10, 46.

²³ Joyce, n 15, 31.

²⁴ Quoted in Joyce, n 15, 150.

²⁵ Joyce, n 15, 150, citing *The Centennial Magazine* (Sydney), 12 July 1889, 841.

²⁶ Joyce, n 15, 151, citing Bernays, *Queensland Politics*, 121-122.

²⁷ CMH Clark, *A History of Australia, Vol V: The People Make Laws 1888-1915* (1st ed, MUP, 1981), 69-70.

In late 1870 Dick Atkin and his brothers arrived at his grandmother's home in Pantlludw, North Wales. It was in a rural and mostly Welsh-speaking area. His grandmother, Mary Anne Ruck (described affectionately as "Nain", pronounced Nine), with whom Dick Atkin and his brothers would live for many years, had a profound influence upon him. In an affectionate appreciation of her life and influence, Atkin described her as "the greatest woman I have ever met".²⁸ Others have written about this remarkable woman.²⁹ Atkin later recalled how his Nain and his mother "had the appearance of sailing into a room".³⁰ His grandmother had "the widest range of interests, literary, social, political, family, gardening. She was well-read and corresponded with literary personages such as George Eliot and Bret Harte".³¹ Atkin also wrote:

Benevolent and wise, she was consulted by young and old; and no one sought sympathy in vain. She was too warm-hearted to be impartial. Her friends were invariably right, intelligent and well-meaning; their opponents were wrong, stupid and malicious. She was quite a good hater – in theory: but an enemy in distress would immediately have received assistance. All the lame dogs of the neighbourhood found their way to Pantlludw.³²

Geoffrey Lewis, Atkin's biographer, observes that this remarkable woman "must have left a deep, beneficent, mark on the consciousness of the small Dick Atkin who lived in her house in the impressionable years between five and twelve".³³ This is borne out by Atkin's description of his grandmother:

Native wit, large sympathy, great experience of life cultivated by association with all classes of people, an active memory stocked with folk tales and countryside traditions made her conversations inimitable. She had strong likes and dislikes. She detested pretence either in rank or religion: and she was not sparing in her denunciation of her pet aversion, the sanctimonious Calvinist. Her sympathies were with people: not so much politically as in their ordinary life. We were never allowed to speak of the "common" people.³⁴

A SELF-DESCRIBED WELSHMAN

The young Atkin enjoyed the love and devotion of a mother who would toil up the hill to give her children lessons in English history. A summer cottage on a hill near a lake became available and Atkin's protective mother worried that her children might fall into the lake. Atkin's grandmother replied, "My dear, if the children are so stupid as to fall into the lake, it is much better that they should be drowned young".³⁵ Fortunately, Atkin and his siblings did not fall into the lake. In his autobiographical piece, Atkin remarked about the condition of life of Welsh children in the countryside:

It results in fixing in every fibre the feelings that culminate in that passionate love of hill and gorge and trees and brooks and bracken that fills the heart of every Welshman, and I have no doubt is one of the elements of nationalism.³⁶

When Atkin was still at school his mother married a retired Lieutenant Colonel, who was 30 years older than her. Colonel Steuart had graduated from Edinburgh University in 1827, served in the East India Company and fought in the Second Afghan War. Despite the gap in their age, the marriage is said to have been an exceptionally happy one, with Atkin respecting and loving his stepfather. With some financial difficulty and sacrifice on their part, Atkin's stepfather and mother provided each of

²⁸ Quoted in Lewis, n 3, 209.

²⁹ See Bernard Darwin, *The World that Fred Made: An Autobiography* (Chatto & Windus, 1955); Berta Ruck, *A Storyteller Tells the Truth: Reminiscences & Notes* (Hutchinson, 1935).

³⁰ Quoted in Lewis, n 3, 186.

³¹ Lewis, n 3, 186-187.

³² Lewis, n 3, 186-187.

³³ Lewis, n 3, 5.

³⁴ Quoted in Lewis, n 3, 208.

³⁵ Lewis, n 3, 186.

³⁶ Quoted in Lewis, n 3, 186.

their children with a good education. In an affectionate letter to his wife, Colonel Steuart remarked how the boys had availed themselves of this help and had “invariably been dutiful and loving”.³⁷

EDUCATION

In 1876, at the age of eight, Dick Atkin went away to a school about 100 km from his home.³⁸ The school was for boys aged between eight and 18, and Atkin was happy there. His headmaster recognised his potential, and Atkin won prizes. After the Friar School at Bangor, he attended the more prestigious Christ College in Brecon, where he excelled academically. Dick Atkin gained a classical demyship at Magdalen College, Oxford, before he was 17.³⁹

In October 1885, still in his 18th year, Atkin went up to Magdalen. However, his time there was not a happy one. He wrote later in his life that he went up “too young, at any rate it was too young for me”, and that he should have profited by having another year at school. He wrote:

Magdalen was then a markedly well-to-do college; most of the men came from the larger public schools; and I, young and sensitive with a small allowance within which I was resolved to keep, took time to find my bearings. Not unnaturally I fraternised with the Brecon and other Welsh boys I found there. There is always a tendency for Welsh people out of Wales to draw together.⁴⁰

One of those boys who became a good friend of Atkin was John Sankey who later became a judge and a Lord Chancellor with whom Atkin sat. After four years at Oxford Atkin graduated with seconds in Classics and Greats. He was mortified by the fact that one more first in any paper would have seen him given a first class honours degree. He later wrote:

To men who know that a man’s career develops in accordance with the education he gives himself after that period, mere school or academic success will seem relatively unimportant. Nevertheless I should have liked to have had those two firsts.⁴¹

Having missed out on firsts so narrowly, Atkin derived great satisfaction when made a Fellow of Magdalen in 1924 and when his name was given to the College’s Law Society in 1936. That Society carries Atkin’s name to this day.

THE BAR

Atkin explained that he went to the Bar because a cousin of his grandfather was a barrister with a substantial practice and had promised to guide his first steps. He had no other connection with the law. After completing his Bar exams, he sought out chambers for his pupillage by visiting courts to see the advocates of greatest ability. He settled upon Thomas Scrutton who had a leading practice at the commercial Bar. Atkin described Scrutton as the “complete master of the facts and the law”. Atkin persuaded Scrutton to allow him to become his pupil. Scrutton’s other pupils included the future Lord Wright and the future Lord Justice MacKinnon. Scrutton’s pupils worked in poorly lit chambers “in which a Spartan rigour reigned”.⁴²

Atkin completed his pupillage in 1891 and took chambers. Lacking connection with solicitors, his early days at the Bar were difficult. Good fortune came in the form of William Hemmant who, after his career in politics in Queensland, had become resident partner of his firm in London. Hemmant gave most of his legal work to a young solicitor named Norman Herbert Smith who had just started on his own account as a solicitor in the City of London. Smith promised to give Atkin his first brief and did so. Atkin recalled that it was one of the most difficult cases he had ever had to advise upon in his whole career. It concerned the powers of the executors of a testator domiciled in France under a will

³⁷ Lewis, n 3, 7.

³⁸ For a detailed account of his time at school, see Atkin’s autobiography: Lewis, n 3, 188-191, App.

³⁹ Other famous holders of the scholarship included Oscar Wilde, the future Lord Denning and TE Lawrence: Ailen C Hutchinson, *Laughing at the Gods: Great Judges and How They Made the Common Law* (CUP, 2012), 116.

⁴⁰ Lewis, n 3, 195.

⁴¹ Lewis, n 3, 196-197.

⁴² Lord Justice MacKinnon, quoted in David Foxton, *The Life of Thomas E Scrutton* (CUP, 2013), 106.

in English form dealing with personal property in Constantinople.⁴³ Smith sought Atkin's advice about how a Scottish firm which had obtained a judgment in Constantinople against an Italian could enforce the judgment against the Italian's property in England. Atkin wrote to his mother in March 1891, "It was a very complicated case and I think I earned my guinea".⁴⁴

Smith continued to brief Atkin during the whole of his career as a barrister, and went on to build one of the most prestigious firms in the City of London. In Atkin's first year at the Bar, Smith was almost the only solicitor who briefed him. But a little later Atkin was introduced to a Mr Grant, the Official Assignee of the Stock Exchange. The Assignee administered broking firms which had failed and Atkin enjoyed a consistent flow of work. His first several years at the Bar resulted in annual income of less than or little more than £100. In 1896 the corner was turned when he earned £345. His practice grew and in 1900 he took over his own set of chambers. According to *The Times*, when he took silk in 1906 he was probably the busiest junior at the Bar. With the appointment to the Bench of Hamilton in 1909 and Scrutton in 1910, Atkin dominated the commercial Bar.

A CLOSE RUN THING

In retrospect, Atkin's success at the Bar and on the Bench seems inevitable. However, he came close to leaving the Bar in his early years. Professor Gutteridge's obituary reported that in Atkin's early years at the Bar "briefs were few and far between and the outlook was black".⁴⁵ He recalled:

an occasion on which [Atkin] and I were passing along a London street when Atkin pointed to a building and said: "I can never see that without thinking how lucky I have been!" That building contained the office of a well-known scholastic agency, and Atkin told me how a few years before he had walked into that office with despair in his heart to make inquiries as to the possibility of obtaining a mastership at a public school.⁴⁶

We would be well-advised to note how close the law came to losing a junior barrister who was to become a great judge. We should think about what we can do to keep bright and industrious barristers where they belong: at the Bar.

MARRIAGE AND FAMILY

James Richard Atkin and Lucy Elizabeth (Lizzie) Hemmant were both born in Brisbane, 12 days apart. It is said that they lived within 100 yards of each other at North Quay. With the friendship that their families enjoyed, the toddlers must have played together.⁴⁷ Twenty years later they were to meet in England at William Hemmant's large country house in Kent. Atkin visited there at weekends while reading for the Bar. Because Atkin was still struggling to establish himself at the Bar, their engagement lasted five years. They married on 16 May 1893.

They had eight children: six girls and two boys. The large family lived in Kensington in a home filled with music and entertainment. The Atkins' fourth daughter had a dramatic talent which led her to the repertory stage at the age of 17. She appeared in West End productions. Atkin's biographer suggests that Nancy's success on the stage appealed to a side of Atkin which can only have been known to his family and closest friends – his "addiction to drama and low humour". He is said to have loved the musicals all his life.⁴⁸ Tragically, the Atkin's eldest son was killed in France in 1917 at the

⁴³ Lewis, n 3, 204.

⁴⁴ Lewis, n 3, 9, 204.

⁴⁵ HC Gutteridge, "In Memoriam: Lord Atkin of Aberdovey" (1944) 60 LQR 334, 335.

⁴⁶ Gutteridge, n 45, 335.

⁴⁷ Carney, n 10, 34.

⁴⁸ Lewis, n 3, 12.

age of 20.⁴⁹ One small antipodean fact warrants inclusion at this point. On 10 July 1919 Sir Samuel Griffith, on a visit to Great Britain, attended the wedding of one of the Atkins' daughters.⁵⁰

Lord Atkin and Lady Atkin enjoyed a long and happy marriage until her death in 1939. Their son, William Atkin, reflected on his mother's life and that "once the difficult days of low finances and early babies had been successfully survived Lizzie Atkin began to show the kind of person she was. She was a brilliant pianist and a magnificent hostess". Before the First World War she bought a car, the same model as a London taxi, and went shopping in it. Her son reported:

In later years she patronised the Army and Navy Stores into which she would enter majestically leading her bulldog and smoking her cigarette knowing confidently that none of the staff would think of reminding her that both dogs and cigarettes were forbidden in the Stores.⁵¹

Lewis likens Lady Atkin to Atkin's mother and grandmother. He describes Lizzie Hemmant as "a girl and woman of strong, vivid character, great warmth and the habit of outspoken opinions".⁵² If this is right, then Atkin had the great advantage of being loved by a mother, a grandmother and a wife who each had these qualities.

PERSONAL LIFE

A picture of Lord Atkin's personal life, and its intersection with his judicial life, emerges from the recollections of his daughter, Mrs Elizabeth Robson. In 1912 the family acquired a home at Aberdovey in Wales, in addition to their home in London. Elizabeth could remember her father "riding his old green bicycle very fast along the roads, dressed in a very old and disreputable suit".⁵³ She recalled that he was very proud that one of the suits he wore regularly was 30 years old. In spite of having a delicate chest which troubled him all of his life, Dick Atkin was athletic. He almost won a blue for tennis at Oxford and he played tennis for most of his life. He also played golf and bridge. His daughter reported that his children thought that he was very "low-brow" in his tastes. He saw the "Lambeth Walk" at least 12 times. Although he had English classics and poetry on the shelves of his library at home, the books that he read were mainly "thrillers". His daughter recalled: "He found that thrillers were the relaxation he needed – they occupied his mind without making him think. It was a very difficult job to keep him supplied, as he read very quickly."⁵⁴

Atkin was a devout Christian and attended church with his family every Sunday. However, as President of the Aberdovey Golf Club, he supported a movement to play golf on Sundays. Lewis observes that Atkin's Christian faith was a "strong constant in his life".⁵⁵ He was heavily involved in the affairs of the Welsh Church, which achieved disestablishment in 1914. He and two other judges, Sankey and Bankes, were responsible for providing legal advice about its new constitution. Atkin was a member of the church's governing body until his death. Consistent with his father's instruction to be an unaffected gentleman, without concern for status, Atkin was kind to a young curate in Aberdovey, who he encouraged and to whom he gave thoughtful instruction. The clergyman later described Atkin as a "low Church-man with a great love of the Prayer Book", and said that he "found him the kindest of people and ... that many of the villagers went to him with their troubles; he always found time, even on vacation, to talk to them".⁵⁶

⁴⁹ For tributes to Atkin's son from friends and colleagues, see "Atkin, Richard Walter", www.winchestercollegeatwar.com/archive/richard-walter-atkin.

⁵⁰ Joyce, n 15, 324.

⁵¹ Lewis, n 3, 11.

⁵² Lewis, n 3, 10.

⁵³ Lewis, n 3, 23.

⁵⁴ Lewis, n 3, 25.

⁵⁵ Lewis, n 3, 20.

⁵⁶ Lewis, n 3, 22.

When he was at Aberdovey he would sit as a magistrate when he could. In 1939 he described himself as “an elderly magistrate and therefore one having the taint of sentimentality about me”.⁵⁷ He was concerned with the treatment of juvenile offenders, and in 1943 wrote to *The Times* about the qualifications of magistrates: “But the question is not so much that of understanding one’s children as of understanding the children who are juvenile offenders and their conditions of life.”⁵⁸

This is not to suggest that Atkin was lenient towards young offenders. On the contrary, his letter stated that the proper place for social workers was not on the Magistrate’s Bench but in helping juvenile criminals to make a fresh start. In 1932 in an official report, he wrote that the right punishment for malicious children who brutally ill-treated other children or animals was “something short and sharp, the punishment which children of that kind would be or ought to be given in their homes”.⁵⁹ He sympathised with the need to protect the “young and old, rich and poor, employers and employed, and which includes small shopkeepers and householders who are entitled to protection from the loss and damage to property caused by thieves and housebreakers even though their age be 14 to 16”.⁶⁰

As appears from many of his judicial decisions, he considered that principled decisions should rest upon the judicial officer having an understanding of the conditions of life of ordinary people. He initiated the appointment as a magistrate of a sheep farmer who had given expert evidence in a sheep stealing case. Atkin thought that the farmer gave clear and fearless evidence. Much like the friendship which developed between the fictional characters Darryl Kerrigan and Lawrie Hammil QC in *The Castle*, a friendship developed between Atkin and the sheep farmer.

The respect with which Atkin was held by the residents of Aberdovey was shown in 1913, shortly after his appointment to the High Court Bench, when firecrackers were exploded in celebration and he was drawn in a cab with men between the shafts. The villagers wrote about his reputation and integrity “combined with a considerate and genial courtesy”.⁶¹

Atkin’s daughter, Elizabeth, recalled that he did not enjoy his work in the Court of Appeal because he was “neither dealing direct with problems of law nor with the individual but with other people’s opinion of the law; and he felt himself merely an intermediary between one Court and the next”.⁶² His usual answer when asked by his family during this nine-year period about whether he had heard any interesting cases was “No, very dull”.⁶³

As a Lord of Appeal in Ordinary, he would speak to his family about the cases that he was deciding and use his powers of persuasion on them. He would come home and say that he thought that he had won his “brothers” over to his side or “so-and-so is still not convinced but I think he may be tomorrow”.⁶⁴ His daughter remembers his asking the family whom they thought was their “neighbour” and he listened to their opinions before eventually writing his judgment in *Donoghue v Stevenson*.

Elizabeth Robson recalled that her father was never strong physically when he was young and that her mother took great care of him. He would be in his chambers early. All of his letters and judgments were written in his own hand because he never had a secretary. Even as a Lord of Appeal, he spent almost every Saturday morning working in his room at the House of Lords and when he went to Wales on vacation he took with him judgments that were still to be written. He would shut himself in his library until he had finished. Holidays were spent in Wales. Lord and Lady Atkin never went abroad.

⁵⁷ Lewis, n 3, 14.

⁵⁸ Lewis, n 3, 15, citing *The Times*, 31 August 1943.

⁵⁹ Lewis, n 3, 44, citing 84 HL Official Report col 726, 9 June 1932.

⁶⁰ Lewis, n 3, 44.

⁶¹ Lewis, n 3, 13.

⁶² Quoted in Lewis, n 3, 24.

⁶³ Lewis, n 3, 24.

⁶⁴ Lewis, n 3, 25.

After Lady Atkin died in 1939, Atkin visited his surviving son in Rio de Janeiro. His return voyage was on a vessel which had to avoid the enemy and Atkin returned to London in the middle of a blackout.⁶⁵

Atkin is said to have been troubled by anxiety about money for almost the whole of his career. Although he established himself as a leading silk and was earning £11,000 a year, this period was short-lived. Upon appointment to the High Court Bench he suffered a sharp reduction in income, and thought about returning to the Bar. In 1924, whilst a member of the Court of Appeal, he even composed a letter to the Lord Chancellor to say that he was seriously considering the step of submitting his resignation and returning to the Bar. He did not send the letter but it reported the difficulty which he had in surviving on a judge's salary. A judge's salary had been fixed at £5,000 in 1832 and remained unchanged. The common law world came close to losing one of its brightest stars, and in 1931 the Lord Chancellor had to oppose a proposed 20% cut in judges' salaries.

EXTRA-JUDICIAL ACTIVITIES

Atkin was heavily involved in the affairs, and was President for seven years, of the Medico-Legal Society. He spoke at Society events about compensation for industrial accidents and disease, and about crime and mental health. His friend, Lord Birkenhead, appointed him in 1922 to chair a committee about the criminal responsibility of the insane.⁶⁶ His report is said to have shown the clarity of Lord Atkin's mind in distinguishing between criminal responsibility and insanity. To Lord Atkin, insanity was hard to define and medical interpretations of it were in a state of flux. Criminal responsibility was something different, which remained constant and needed to be readily understandable by a jury.⁶⁷

Atkin was committed to improving legal education and to the rejuvenation of Gray's Inn. He championed the education of law in universities and the improvement of practical legal education.⁶⁸

POLITICAL ORIENTATION

Atkin played no role in party politics. When he took part in debates in the House of Lords he spoke from the Liberal Benches, but has been described as a "political agnostic". He was admired by those with a more political bent. A future Prime Minister, Asquith, sitting as an arbitrator, had been so impressed by Atkin's appearance before him as junior counsel that he arranged for his son to read in Atkin's chambers. Although Atkin was held in high regard by many politicians, he was never invited to occupy the Woolsack, and this may be due to the absence of any close political affiliation and the fact that he had "no evident appetite for politics".⁶⁹

JUDICIAL CAREER

The six years that Atkin sat as a King's Bench judge are said to have been the most enjoyable of his professional career. A large part of his time was occupied with criminal proceedings on Assize. Experienced Clerks of Assize during the period regarded him as one of the best criminal judges of his generation.⁷⁰ Another judge who accompanied Atkin on Assize as his Marshall in 1914 was impressed by his "gentle and quiet manner and his equanimity". Professor Gutteridge, in his memorial to Lord Atkin, stated:

It is curious and interesting that two of the most successful criminal judges of the twentieth century, Scrutton and Atkin, should have been commercial lawyers without previous experience of crime.⁷¹

⁶⁵ Lewis, n 3, 27.

⁶⁶ Lewis, n 3, 158-162.

⁶⁷ Lewis, n 3, 162.

⁶⁸ Lewis, n 3, 7, 162-165.

⁶⁹ Lewis, n 3, 19.

⁷⁰ Lewis, n 3, 17-18.

⁷¹ Gutteridge, n 45, 337.

The motto “tough on crime; tough on the causes of crime” may have been coined for Lord Atkin.

In 1919, Atkin was appointed to the Court of Appeal, and shortly after declined an invitation to become President of the Probate, Divorce and Admiralty Division. On the Court of Appeal, Atkin typically sat with his former pupil master, Lord Scrutton, and Lord Bankes. Atkin had a life-long admiration of Scrutton as a lawyer, as well as Scrutton’s passion for justice, which he is said to have “disguised beneath his rough manner”.⁷² Despite this admiration, Atkin often disagreed with Scrutton about the disposition of appeals. Lord Denning said that Scrutton and Atkin “fought for the body of Bankes”.⁷³

The extent of their disagreements should not be overstated, as Foxton’s analysis of 280 reported judgments shows.⁷⁴ Scrutton and Atkin had shared interests outside of the law and there were “strong personal ties between their families”.⁷⁵ Both Scrutton and Atkin had lost sons in World War I.

Despite their long professional and personal association and experience as trial judges, Scrutton and Atkin had different attitudes to interfering on appeal with findings of fact. Scrutton attached more significance than Atkin did to a trial judge’s ability to observe the demeanour of witnesses.⁷⁶ Atkin observed that “the lynx-eyed judge who can discern the truth-teller from the liar by looking at him is more often found in fiction or in appellate judgments than on the Bench”.⁷⁷

The Court of Appeal that was constituted by Bankes, Scrutton and Atkin between 1919 and 1927 has been hailed as a court of “unrivalled distinction”, particularly in the field of commercial law.⁷⁸ Usually, each of the judges gave a separate judgment and it has been said that Scrutton’s mind “was stretched to the full by rivalry with Atkin”.⁷⁹

Atkin’s work ethic and ambition must have been formed at an early age. After his death, his daughter wrote that when he was a small boy, Atkin “had decided he was going to be Lord Chief Justice of England and was disappointed that he did not achieve that ambition”.⁸⁰

In 1928, Atkin was appointed to the House of Lords. He continued as Lord of Appeal in Ordinary and also sat on the Privy Council until his death in 1944. The length and quality of his judicial performance have few counterparts.

JUDICIAL TEMPERAMENT AND MANNER

As an advocate, Atkin is said to have been restrained and understated, and an obituary in *The Times* observed that “there was nothing on the surface to show what grip, learning and real force he possessed”.⁸¹ As a judge he was said to have had a good temperament, being courteous and incisive in his questioning. Some descriptions of his judicial temperament appear in obituaries, and account must be taken of that context. Still, many report the kindness and encouragement which he showed to junior counsel. Lord Denning recollected that Atkin was “precise in his speech, a quiet voice, but always much to the point”.⁸² According to a silk who appeared in a number of tax cases in the House of

⁷² Lewis, n 3, 8.

⁷³ Lewis, n 3, 93.

⁷⁴ Foxton, n 42, 221.

⁷⁵ Foxton, n 42, 221.

⁷⁶ Foxton, n 42, 222.

⁷⁷ *Société d’Avances Commerciales v Merchants Marine Insurance Co* (1924) 20 Ll L Rep 140, 152. See also the different judgments of Scrutton and Atkin about demeanour in *Lek v Matthews* (1926) 25 Ll L Rep 525, 535, 543.

⁷⁸ Foxton, n 42, 219.

⁷⁹ “Reviews” (1975) 38 Mod L Rev 707, 708. As matters transpired, the brilliant and accomplished Scrutton LJ was passed over for elevation to the House of Lords in 1928 in favour of Atkin and, through bad luck, bad timing and perceptions about his bad temper, never achieved that elevation: see Foxton, n 42, 293-299.

⁸⁰ Quoted in Lewis, n 3, 24.

⁸¹ Lewis, n 3, 15, citing *The Times*, 26 June 1944.

⁸² Lewis, n 3, 17.

Lords: “He listened to argument with generous indulgence; his interjections were few and in tone almost apologetic; but his observations were as pointed as a needle.”⁸³

Lord Wilberforce, who appeared before Lord Atkin in the Privy Council, was impressed by Atkin’s great intellectual power, which he displayed with “courtesy and elegance, and never divorced from common sense”. If an argument was not well thought out it risked “fairly quick demolition”.⁸⁴

Other reports suggest that if Lord Atkin had made up his mind, it was hard, if not impossible, to persuade him to change it, and that he saw his main task as persuading other members of the court to take his view. This emerges from the intelligence leaked by his daughter about how he would come home and say that he thought that he had won his “brothers” over to his side.⁸⁵ Lord Denning recalled: “If he was on your side, you had no need to worry – he would put the points in your favour. If he was against you, you could never get him round.”⁸⁶

COMMERCIAL LAW

Lord Atkin had a merchant as a father-in-law and developed a huge practice at the commercial Bar. He understood the needs of the commercial community and the importance of certainty in the law. Although he lamented at the “extraordinary inability” of businessmen to express themselves in a way which is incapable of being mistaken,⁸⁷ he saw the role of the law as giving effect to what parties had agreed upon, rather than seeking to improve it. In *Bell v Lever Bros*, he stated:

Nothing is more dangerous than to allow oneself liberty to construct for the parties contracts which they have not in terms made by importing implications which would appear to make the contract more business like or more just.⁸⁸

The importance of certainty was such that a party to a contract was entitled to demand strict, not merely substantial, compliance with contractual terms.⁸⁹ This amounted to a rejection of the position of Scrutton LJ, who detected that “the commercial mind and the legal mind are quite at variance”.⁹⁰

Atkin was dismissive of legal fictions, adopted to meet the requirements of the forms of action. In *United Australia v Barclays Bank*,⁹¹ he rejected a defence that the plaintiffs had “waived the tort”. Lord Denning, who appeared as senior counsel for the plaintiffs who appealed to the House of Lords, later described how apprehensive he felt in opening the appeal with a history of failure in the courts below. However, the case was “argued for him” by Lord Atkin, who encouraged him with some incisive questions. Lord Denning’s impression was that Atkin was showing his hand in order to bring his colleagues around. In the result, the House of Lords unanimously allowed the appeal. Atkin rejected the notion that the plaintiffs had the slightest intention of “waiving, excusing or in any kind of way palliating the tort”. He declared:

These fantastic resemblances of contracts invented in order to meet requirements of the law as to forms of action which have now disappeared should not in these days be allowed to affect actual rights. When these ghosts of the past stand in the path of justice clanking their mediæval chains the proper course for the judge is to pass through them undeterred.⁹²

⁸³ Lewis, n 3, 17. Similar assessments were made in relation to the judicial style of Lord Bingham.

⁸⁴ Lewis, n 3, 17.

⁸⁵ Lewis, n 3, 25.

⁸⁶ Lewis, n 3, 17.

⁸⁷ Atkin, “The Place of Law in University Education” (Public Lecture, London School of Economics, 5 October 1923), quoted in Lewis, n 3, 69.

⁸⁸ *Bell v Lever Bros* [1932] AC 161, 226.

⁸⁹ *Arcos Ltd v EA Ronaasen & Son* [1933] AC 470, 480.

⁹⁰ *Arcos Ltd v Ronaasen & Sons* (1932) 43 Ll L Rep 1, 4. See also *Hillas v Arcos* (1931) 40 Ll L Rep 307, 31; Foxton, n 42, 279-288, about issues of certainty and the right of rejection in sale of goods.

⁹¹ *United Australia v Barclays Bank* [1941] AC 1.

⁹² *United Australia v Barclays Bank* [1941] AC 1, 29.

Throughout his judicial career, and not only in the province of commercial law, Lord Atkin sought to determine legal disputes in a manner which accorded with common sense, and to avoid complex refinements. This was apparent early in his judicial career and is exemplified in *Banque Belge v Hambruck*,⁹³ on the subject of tracing. Lewis sees the case as an illustration of Atkin's "preoccupation with general principles":

This was not merely the extraction of a principle from the earlier cases, a process which is in any event necessary for the decision of most cases, but the perception of a general underlying idea, which may sum up what has gone before but is also capable of illuminating the future.⁹⁴

PUBLIC POLICY AND AWARENESS OF SOCIAL REALITIES

Atkin's empathy for those who unjustly suffered was evident early in his time as a member of the Court of Appeal in a case in which Scrutton won the fight for the "body of Bankes". The plaintiff, Mr Everett, launched a civil claim after a doctor certified him to be insane without adequate justification. As a result, Mr Everett was detained in an asylum. Atkin held, in dissent, that the defendants owed a duty of care to Mr Everett. His passion and empathy, together with a marvellous writing style, are evident in the following passage:

Grievous as is the wrong of unjust imprisonment of an alleged criminal, I apprehend that its colours pale beside the catastrophe of unjust imprisonment on an unfounded finding of insanity. Modern organization has no doubt done much to remove the horrors that were associated with Bedlam in the days when the victims were subject to public exhibition. Probably even now the insane ward or reception ward is not without its revolting incidents. But it is the effect on the mind sane, even if feeble, that knows itself wrongly adjudged unsound that produces the most poignant suffering.⁹⁵

This attempted recognition of a duty of care preceded *Donoghue v Stevenson* by 12 years. His concluding rhetorical flourish was to the effect that the wrong which Everett suffered should find a remedy in English law:

it is just as it is convenient that the law should impose a duty to take reasonable care that such persons, if sane, shall not suffer the unspeakable torment of having their sanity condemned and their liberty restricted; and I am glad to record my own opinion, ineffectual though it may be, that for such an injury the English law provides a remedy.⁹⁶

Atkin's dissenting judgment was not upheld when the case reached the House of Lords, but Lord Haldane described it as "a powerful piece of reasoning" displaying anxiety to "guard against a possible miscarriage of justice".⁹⁷

Concentration on Lord Atkin's desire for a remedy against injustice in such a case should not permit one to ignore the competing point of view and the public policy which supported it. Atkin's position was that the poor and the weak should not "suffer the unspeakable torment of having their sanity condemned and their liberty restricted". The competing view, articulated by Scrutton LJ, was that it was necessary:

not only to protect the individual who will suffer if wrongly imprisoned, but also the community who will suffer if real lunatics are not imprisoned, because the officers appointed to certify are afraid of the cost and annoyance of actions alleging improper certification even if those actions fail.⁹⁸

One hears the echo of this in modern tort debates about the cost and consequences of defensive medicine.

⁹³ *Banque Belge v Hambruck* [1921] 1 KB 321.

⁹⁴ Lewis, n 3, 80.

⁹⁵ *Everett v Griffiths* [1920] 3 KB 163, 211-212.

⁹⁶ *Everett v Griffiths* [1920] 3 KB 163, 223.

⁹⁷ *Everett v Griffiths* [1921] 1 AC 631, 652.

⁹⁸ *Everett v Griffiths* [1920] 3 KB 163, 197.

Scrutton, the hard-boiled jurist, who as a senior barrister worked in austere chambers at a battered table which came out of one of his father's ships,⁹⁹ injected a note of legal realism into the idea of extending a duty of care in such a case. His view was that few individuals who are detained in an asylum would think that they are properly incarcerated and that most of them would "enjoy an action in which the individual has always a better chance of getting the sympathy of the jury than the officers of the State who are performing the unpleasant duty of incarcerating him".¹⁰⁰ Scrutton was not to be matched by Atkin for persuasive prose, or affected by the fact that Mr Everett appeared sane and argued his own case with great ability. He wrote that "Great cleverness frequently goes with great mental instability" and quoted the poet John Dryden's observation that "Great wits are sure to madness near allied, And thin partitions do their bounds divide".¹⁰¹

In parliamentary debates in 1937 over the Marriage Bill, Atkin supported the introduction of cruelty and desertion as grounds for divorce, and described as "terrible" a proposed amendment which was intended to create an absolute bar on any petition for divorce presented within five years of the date of marriage. His understanding of social realities was evident when he spoke in the House of Lords and stated: "I venture to think that the supporters of this clause have not realized what the real facts of divorce cases are." He then gave some painful examples:

Take the working-class husband who commits adultery with a woman or with women. Is he to return to a wife from the arms of his mistress and sleep with her in the wedding bed? Your Lordships will remember that among the working classes there is no question of separate rooms or even of separate beds. That is an insult from which a working-class woman is entitled to be relieved, and that is a normal, ordinary divorce case.

I do not know what the supporters of this clause have in their minds when they talk of matrimonial difficulties in respect to which people ought to stop and think. What ought they to think about when that happens? What room is there for stopping and thinking? That woman is entitled to relief from the terrible position in which she has been placed; and she would have no remedy.¹⁰²

He then addressed "the case on the other side", when a man discovered that his wife had committed adultery. Atkin thought that in such a case "the right thing to do" was to turn the wife out of doors. He stated: "That is what a husband has done from time immemorial, and that, it seems to me, is what he has a right to do."¹⁰³ Atkin's view was uncompromising. A husband in such a situation should not have to stop and think, and to adjust his personality in circumstances in which his wife might be "bearing the child of her paramour, and he is keeping her in his house and, I suppose, sleeping with her in his bed".¹⁰⁴

Atkin rejected the view of the Archbishop of Canterbury that the victims of adultery should be expected to "settle down and adjust their personalities".¹⁰⁵ His sympathies were for the victim of adultery who, under the proposed amendment, would be required to stay in a marriage for five years and not be able to end it on the grounds of adultery.

Lord Atkin even had some understanding for adulterers and in 1924 rejected the view that a wife's adultery should forever bar her from access to or custody of her children. He observed:

if access were never to be allowed to children on the part of either father or mother, if the father or mother was not always and on all occasions perfectly discreet and wise, there are a great many parents who never would have the opportunity of seeing their children again, and to my mind the love and affection of a mother outweigh many foolish or indiscreet acts on the part of the parent in question.¹⁰⁶

⁹⁹ Quoted in Foxton, n 42, 106.

¹⁰⁰ *Everett v Griffiths* [1920] 3 KB 163, 197-198.

¹⁰¹ *Everett v Griffiths* [1920] 3 KB 163, 197-198.

¹⁰² Quoted in Lewis, n 3, 31-32, citing 106 HL Official Report cols 88-89, 7 July 1939.

¹⁰³ Lewis, n 3, 32.

¹⁰⁴ Lewis, n 3, 32.

¹⁰⁵ Quoted in Lewis, n 3, 31, citing 105 HL Official Report cols 747-748, 24 June 1937.

¹⁰⁶ *B v B* [1924] P 174, 191.

In *Fender v St John-Mildmay*,¹⁰⁷ the House of Lords had to decide the issue of whether a promise to marry made by someone who was still in fact married and awaiting a decree absolute was enforceable. Lord Atkin presided and his judgment was supported by the majority. It concluded that such promises should be enforced. Atkin thought it fanciful to suppose that real harm would flow to the institution of marriage by enforcing them. He rejected what he perceived to be “a resurgence of ecclesiastical principles”.¹⁰⁸

In *Coventry Corporation v Surrey County Council*,¹⁰⁹ Atkin had to consider the plight of a boy in miserable circumstances, who had been adopted and then ordered by justices to be removed to the city in which his natural mother was then living. Atkin displayed an appreciation of the importance of not breaking up families “by distributing parents and children to different settlements”, and that the effect of the Court of Appeal decision was to break up an adopted family. The dissenting judgment of the Court of Appeal described the consequence as “inconvenient”. Atkin concluded that the judge might have “permitted himself the stronger term ‘tragic’”.¹¹⁰

Although my present concern is Atkin’s compassion and his understanding of social realities, one cannot divorce his judicial style from the substance of his decisions. His style varied from the rhetorical to the dismissive. He adopted a simple style but was capable of flourishes.

Returning to his understanding of the plight of individuals, and the actual conditions in which they lived and worked, in *Morgan v Liverpool Corporation*,¹¹¹ he displayed an awareness of the housing conditions of the working class.

In important cases involving workplace injuries, he helped erode the pernicious doctrine of common employment and also applied the doctrine of contributory negligence with an understanding of the conditions in which workers toiled in factories and mines.

In *Radcliffe v Ribble Motor Services Ltd*, Lord Atkin described the doctrine of common employment as “too well established to be overthrown by judicial decision”.¹¹² However, the House of Lords narrowed a doctrine which Lord Wright had earlier described as illogical and one not to be extended, and as having “little regard to reality or to modern ideas of economics or industrial conditions”.¹¹³ Eventually, the legislature took the hint and the doctrine of common employment was abolished in 1948.

In *Caswell v Powell Duffryn Associated Collieries Ltd*,¹¹⁴ Lord Atkin combined an understanding of the conditions in which individuals worked and an ability to conceptualise the doctrine of contributory negligence as tied to the concept of causation. At the time, contributory negligence was a complete defence. Mr Caswell, a 22-year-old worker in a coalmine, was killed in circumstances that were not clearly established. Lord Atkin’s speech described the scene of his death in simple and compelling words. The action was lost at trial on the basis of a suggestion that Caswell had failed to replace a protective plate, causing the accident. Lord Atkin and Lord Wright carefully analysed the evidence and concluded that contributory negligence had not been proved. That would have been sufficient to dispose of the defence. Lord Atkin, however, concluded his judgment with the following insightful analysis of the doctrine of contributory negligence. It shows his analytic skills and preparedness to deploy principles applied in other jurisdictions, such as Admiralty, and in other legal systems, which permit apportionment:

¹⁰⁷ *Fender v St John-Mildmay* [1938] AC 1.

¹⁰⁸ *Fender v St John-Mildmay* [1938] AC 1, 18.

¹⁰⁹ *Coventry Corporation v Surrey County Council* [1935] AC 199.

¹¹⁰ *Coventry Corporation v Surrey County Council* [1935] AC 199, 204.

¹¹¹ *Morgan v Liverpool Corporation* [1927] 2 KB 131, 146.

¹¹² *Radcliffe v Ribble Motor Services Ltd* [1939] AC 215, 223.

¹¹³ *Wilson & Clyde Coal Co Ltd v English* [1938] AC 57, 80.

¹¹⁴ *Caswell v Powell Duffryn Associated Collieries Ltd* [1940] AC 152.

I find it impossible to divorce any theory of contributory negligence from the concept of causation ... And whether you ask whose negligence was responsible for the injury, or from whose negligence did the injury result, or adopt any other phrase you please, you must in the ultimate analysis be asking who "caused" the injury; and you must not be deterred because the word "cause" has in philosophy given rise to embarrassments which in this connection should not affect the judge ... It may be said finally that if contributory negligence is not regarded from the point of view of causation it is difficult to see how damage comes to be divided under the Admiralty rule which is adopted in ordinary cases of injury in other systems of jurisprudence, and which persons of authority think should be adopted in ours.¹¹⁵

Finally, Lord Atkin expressly endorsed the view of Lawrence J that "it is not for every risky thing which a workman in a factory may do in his familiarity with the machinery that a plaintiff ought to be held guilty of contributory negligence".¹¹⁶ As with Lord Wright, Lord Atkin considered that decisions in such cases require an understanding of what it is actually like to work in a factory or mine:

I am of opinion that the care to be expected of the plaintiff in the circumstances will vary with the circumstances; and that a different degree of care may well be expected from a workman in a factory or a mine from that which might be taken by an ordinary man not exposed continually to the noise, strain, and manifold risks of factory or mine.¹¹⁷

In his brilliant work *The Accidental Republic: Crippled Working Men, Destitute Widows and the Remaking of American Law*,¹¹⁸ Professor John Fabian Witt addresses the approach of classical tort law to the problems of attributing fault. He analyses the "clash between deeply divergent ways of thinking and talking about causal relationships in an industrial society, ways of thinking and talking that in turn reflected very different underlying views of the organization of American social and economic life".¹¹⁹ In our everyday reasoning, and in supposedly "common sense" attributions of responsibility we "construct stories and theories about cause and effect on the basis of conventions rooted in some set of values and aimed at more or less specific ends".¹²⁰ Classical tort law embodied values of independence and autonomy.¹²¹ There was no compensation in cases of non-negligent harm to faultless victims. Individuals were only liable for damages in tort when they failed to exercise reasonable care. A worker who failed to exercise reasonable care for his or her own safety would be left without a remedy. However, as a matter of actuarial fact, enterprises were sure to create "accidents" when workers inevitably failed to take care. Workers' compensation statutes adopted a new set of values in the attribution of cause in workplace accidents. But many workers' compensation statutes did not adequately compensate victims for actual losses and, as a result, workers and their widows continued to pursue common law remedies. When they did, they were fortunate to have someone like Lord Atkin on the case, with his grasp of principle, compassion for the victim and appreciation of the actual conditions of life which generated workplace injuries and deaths.

The battleground of negligence law was not the only area of tort in which Lord Atkin displayed his capacity for clear thinking and expression. He ventured beyond the mainland of negligence to the law of defamation, which has been likened to the Galapagos Islands in the law of torts.¹²² In *Sim v Stretch*¹²³ he provided a frequently-cited definition of a defamatory statement. Defining defamation had troubled courts and text book writers, but Lord Atkin had no such trouble. Professor Brown, in his

¹¹⁵ *Caswell v Powell Duffryn Associated Collieries Ltd* [1940] AC 152, 165-166.

¹¹⁶ *Caswell v Powell Duffryn Associated Collieries Ltd* [1940] AC 152, 166, quoting *Flower v Ebbw Vale Steel, Iron & Coal Co Ltd* [1934] 2 KB 132, 139-140 (Lawrence J).

¹¹⁷ *Caswell v Powell Duffryn Associated Collieries Ltd* [1940] AC 152, 166.

¹¹⁸ JF Witt, *The Accidental Republic: Crippled Working Men, Destitute Widows and the Remaking of American Law* (Harv UP, 2004).

¹¹⁹ Witt, n 118, 152.

¹²⁰ Witt, n 118, 153.

¹²¹ Witt, n 118, 464-467.

¹²² David Ipp, "Themes in the Law of Torts" (2007) 81 ALJ 609, 615.

¹²³ *Sim v Stretch* (1936) 2 All ER 1237.

work *The Law of Defamation in Canada*,¹²⁴ states that in 1936 the author of *Gatley on Libel and Slander*, Dr J C C Gatley, was found dead in his chambers. Open on his desk was *The Times* law page reporting Lord Atkin's speech in *Sim v Stretch*.

DONOGHUE V STEVENSON

The pleaded facts in *Donoghue v Stevenson* are familiar to many.¹²⁵ Mrs May Donoghue alleged that she suffered shock and severe gastroenteritis from drinking a ginger beer containing the body of a partially decomposed snail. The ginger beer was purchased for Mrs Donoghue by a friend in a café at Paisley. The ginger beer was manufactured by Mr David Stevenson and was packaged in bottles made from dark, opaque glass bearing labels. Mrs Donoghue drank some of the ginger beer from a tumbler before her friend poured out the remainder into a glass, whereupon the snail was discovered. Mrs Donoghue argued that in circumstances in which the ginger beer was manufactured, bottled and sealed by Mr Stevenson before being sold to the public for consumption, he owed a duty of care to her as the consumer.

The case did not go to trial. No factual findings were made. The sole question in the case was a question of law. It was whether the allegations made by Mrs Donoghue in her pleading, if true, disclosed a cause of action. Lord Atkin framed the issue at the start of his speech as follows:

The question is whether the manufacturer of an article of drink sold by him to a distributor, in circumstances which prevent the distributor or the ultimate purchaser or consumer from discovering by inspection any defect, is under any legal duty to the ultimate purchaser or consumer to take reasonable care that the article is free from defect likely to cause injury to health.¹²⁶

Lord Atkin immediately went on to say that he did not think that “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”.¹²⁷ It was agreed that for the purpose of determining the case, the laws of Scotland and of England were the same. The case is correctly regarded as “the most influential common law decision of the twentieth century”.¹²⁸ It cannot take all the credit, or the blame, for an expansion in tort liability in the 20th century. It certainly was a turning point in the imperial march of the law of negligence. Something should be said about the origins of that empire.

¹²⁴ Brown, *The Law of Defamation in Canada* (1st ed, Carswell, 1987) Vol 1, 87.

¹²⁵ The literature about *Donoghue v Stevenson* is huge, eg, Matthew Chapman, *The Snail and the Ginger Beer: The Singular Case of Donoghue v Stevenson* (Wildy, Simmonds & Hill, 2010) (Chapman); an important conference in 1990 that was attended by jurists and scholars entitled, *The Pilgrimage to Paisley: A Salute to Donoghue v Stevenson*, the papers of which were compiled into a book: Peter T Burns and Susan J Lyons (eds), *Donoghue v Stevenson and the Modern Law of Negligence: The Paisley Papers: The Proceedings of the Paisley Conference on the Law of Negligence* (Continuing Legal Education Society of British Columbia, 1991). An engaging and illuminating discussion of the case was the subject of a lecture by Matthew Chapman: “The Snail and the Ginger Beer: The Singular Case of Donoghue v Stevenson” (Speech at the ICLR Annual Lecture, London, 7 July 2010), <http://www.iclr.co.uk/assets/media/iclr-annual-lecture-transcript-2010.pdf> (Chapman Speech). The case was the subject of this Court's 2012 Supreme Court Oration by the former Chief Justice of the High Court of Australia, Hon Murray Gleeson AC: see Gleeson, “2012 Supreme Court Oration: Donoghue v Stevenson” in John McKenna and Helen Jeffcoat (eds), *Queensland Legal Yearbook 2012* (Supreme Court of Queensland Library, 2012), 101-109. Justice Edelman took a deliberately provocative approach in his assessment of Lord Atkin's speech: see Edelman, “Fundamental Errors in Donoghue v Stevenson?” (2014) 39 Aust Bar Rev 160. Professor Erika Chamberlain gives a compelling contrary view about Lord Atkin's use of the parable of the Good Samaritan: Erika Chamberlain, “Lord Atkin's Opinion in Donoghue v Stevenson: Perspectives from Biblical Hermeneutics” (2010) 4(1) *Law and Humanities* 91.

¹²⁶ *Donoghue v Stevenson* [1932] AC 562, 578-579.

¹²⁷ *Donoghue v Stevenson* [1932] AC 562, 579.

¹²⁸ Gleeson, n 125, 101.

Historical background

The common law tort of negligence has been said to have its source in two places: Roman law and the work of natural lawyers. The Romans introduced “a generalised idea of compensation for loss and a dependence of liability on fault”.¹²⁹ The natural lawyers were responsible for the “crystallisation of fault in terms of the failure to take reasonable care and an analysis of liability in terms of the breach of an antecedent duty to act carefully”.¹³⁰ Professor Ibbetson states that in the early 18th century English lawyers dealing with the action on the case had two sources. For relationship cases the principal source was Roman law and for non-relationship cases “Natural Law” thinking played the more significant part.¹³¹ In the 18th century a general principle emerged in the “non-relationship cases”, which was borrowed from Natural Law. Legal historians say that it first appeared in Lord Bathurst’s *An Introduction to the Law of Trials at Nisi Prius* in 1767:

Every man ought to take reasonable care that he does not injure his neighbour; therefore where-ever 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.¹³²

It is sufficient for present purposes to pick up the story at the beginning of the 19th century when the law of torts was “still recognizably medieval”.¹³³ The law was divided between the action of trespass and the action on the case. The latter was subdivided into a number of forms with a residuary group which “coalesced as the tort of negligence”.¹³⁴

It has been said that “the defining feature of the English (and American) tort of negligence, as compared to its continental equivalents, was the separation between the duty of care and the breach of duty”.¹³⁵ The law, and legal scholars, recognised an important division between contract and tort. Both contractual and tortious obligations arose out of breaches of duty and the law adopted a distinction between a duty in contract which was the product of the agreement of the parties, and a duty in tort which existed by operation of law.

The separate functions of judge and jury assigned to the judge the question of whether a duty of care existed. If an issue could be framed in terms of whether a duty of care existed then the issue was one for the judge, not the jury, to determine. This had the “tendency to load contentious questions about the scope of liability into the duty of care, where they could be decided by judges”.¹³⁶ If a duty of care existed, then it fell to the jury to decide whether the defendant breached that duty. Because the existence and delineation of a duty of care fell under the control of judges, rather than juries, judges exerted control over the expansion of the tort of negligence; “for 19th century judges, supported by an individualist ideology which could be called on to justify a narrow approach to legal responsibility, the duty could hold negligence in check”.¹³⁷

As the existence and delineation of duties of care were questions of law, rather than of fact, they were subject to the doctrine of precedent. The result was an increasing complexity during the 19th century in the tort of negligence.¹³⁸ Whereas in continental Europe general principles governed

¹²⁹ David Ibbetson, “How the Romans Did For Us: Ancient Roots of the Tort of Negligence” (2003) 26(2) UNSWLJ 475, 476.

¹³⁰ Ibbetson, n 129, 476.

¹³¹ Ibbetson, n 129, 507.

¹³² Lord Bathurst, *An Introduction to the Law of Trials at Nisi Prius* (Woodfall & W Strahan, 1767), 24 (repub 1772 with additions by Francis Buller).

¹³³ DJ Ibbetson, *A Historical Introduction to the Law of Obligations* (OUP, 2001), 169.

¹³⁴ Ibbetson, n 133, 169.

¹³⁵ Ibbetson, n 133, 171.

¹³⁶ Ibbetson, n 129, 512.

¹³⁷ Ibbetson, n 129, 514.

¹³⁸ Ibbetson, n 133, 173.

liability for wrongs, English law was fragmented.¹³⁹ There were a multiplicity of duties of care and “a practical understanding of negligence liability required an analysis of the whole range of individual duty situations”.¹⁴⁰

At about the same time as Lord Atkin was going up to Oxford, Thomas Beven published the first edition of *Principles of the Law of Negligence*. This 1889 work consisted of 700 pages.¹⁴¹ In 1889 another author had stated: “The Law in regard to Negligence is the most uncultivated part of the ‘wilderness of single instances’ of which our law consists.”¹⁴² The fourth edition of *Beven on Negligence*, which appeared in 1928 and was current at the time of Lord Atkin’s speech in *Donoghue v Stevenson*, was 1,570 pages with a table of cases consisting of 175 pages.¹⁴³

The judicial control exercised over recognition of duties of care outside of the law of contract could be seen in the area of the law which would now be described as “product liability”. *Winterbottom v Wright*¹⁴⁴ was a case in which the plaintiff was injured when the wheel of a mail-coach flew off. The defendant coachmaker had supplied it to the Postmaster-General. The court refused to allow an action against the careless coachmaker. No authority could be found to support a duty of care in tort, and the court was reluctant to impose what it seemed to perceive as an unreasonable burden on manufacturers.¹⁴⁵ There were some exceptional cases in which a negligent manufacturer was held liable.¹⁴⁶ However, 19th-century law did not evidently recognise a duty of care in the circumstances in which Mrs Donoghue found herself.

The appeal

Based on precedent, Mrs Donoghue’s case could hardly be said to have had good prospects at its commencement. Because she had no contractual relationship with the manufacturer, she was required to establish that she was owed a duty of care recognised by the law of negligence. In 1929, just before the events in *Donoghue v Stevenson*, the Court of Session had rejected a similar claim in *Mullen v AG Barr & Co Ltd*.¹⁴⁷ That was another Scottish case involving a bottle of ginger beer, alleged in that instance to have been contaminated by a mouse. A majority of the Court of Session held that even if the manufacturer had been careless, no duty of care was owed by it to an ultimate consumer. Only in exceptional cases did a manufacturer owe a duty of care to a consumer. A duty would exist if the manufacturer knew that the product was dangerous as a result of some defect and concealed that fact from the purchaser (a case akin to fraud). A duty of care would also exist where the manufacturer was the producer of goods which were dangerous per se (for example, explosives) and failed to warn the purchaser of that fact.

Mrs Donoghue’s case failed in the Court of Session, after succeeding at first instance before the Lord Ordinary. Her claim having been dismissed by the same Court of Session which had dismissed the claim in *Mullen*, she filed a petition on 25 February 1931 and was granted pauper status by the House of Lords on 17 March 1931.¹⁴⁸ She was permitted to pursue her appeal after she stated: “I am very poor, and am not worth in all the world the sum of Five Pounds, my wearing apparel and the subject matter of the said Appeal only excepted.”

¹³⁹ Ibbetson, n 133, 178.

¹⁴⁰ Ibbetson, n 133, 178.

¹⁴¹ Ibbetson, n 133, 179.

¹⁴² MM Bigelow, *Elements of the Law of Torts* (CUP, 1889), 283.

¹⁴³ John Bell and David Ibbetson (eds), *European Legal Development: The Case of Tort* (CUP, 2012) Vol 9, 157, referencing T Beven, *Negligence in Law* (Sweet & Maxwell, 1928).

¹⁴⁴ *Winterbottom v Wright* (1842) 10 M & W 109.

¹⁴⁵ Ibbetson, n 133, 174.

¹⁴⁶ See *George v Skivington* [1870] LR 5 Ex 1.

¹⁴⁷ *Mullen v AG Barr & Co Ltd* [1929] SC 461.

¹⁴⁸ Chapman, n 125, 29, 34; Luck, n 10.

The appeal was heard on 10 and 11 December 1931. Counsel for Mrs Donoghue sought to bring the case within the category of dangerous goods. A duty of care was sought to be imposed on Mr Stevenson because he “manufactured, bottled, labelled and sealed, and invited her to buy” ginger beer.¹⁴⁹ Counsel relied on the fact that Mr Stevenson had so arranged his business that products were available to the public in a condition which made it impossible for the retailer or ultimate consumer to see what was inside the sealed bottles.¹⁵⁰

Counsel for Mr Stevenson relied upon a body of existing case law which was said to support the proposition that: “In an ordinary case such as this the manufacturer owes no duty to the consumer apart from contract.”¹⁵¹

The triumph of the Celts

The decision was reserved and speeches were not delivered until 26 May 1932. Mrs Donoghue’s appeal succeeded by a majority of 3:2. Lords Atkin, Thankerton and Macmillan constituted the majority. Lord Buckmaster and Lord Tomlin dissented. Professor Heuston referred to Lord Atkin as the leader of “the Celtic majority”: something an Irish Professor would say.¹⁵² Professor Heuston credited the phrase to Landon.¹⁵³ Lord Thankerton and Lord Macmillan were the two Scottish law lords. Lord Atkin, as we have seen, had Irish ancestors on his father’s side.

I must devote myself to Lord Atkin’s speech. However, I should not neglect the other four speeches in the case.¹⁵⁴ Lord Atkin’s speech has engaged the most attention because of its quality and distillation of the “neighbour principle”. However, Mrs Donoghue’s success and the development of tort law depended upon two other speeches. Lord Thankerton commented on Scottish authorities and, like Lord Macmillan, regarded the categories of negligence as never closed. Lord Thankerton stated that he had “the privilege of considering the discussion” of the English authorities undertaken by Lord Atkin with which he entirely agreed.¹⁵⁵ He concluded that Mrs Donoghue had “relevantly averred a relationship of duty as between the respondent and herself”.¹⁵⁶ The special circumstances were that the manufacturer had placed an article of drink upon the market and had intentionally excluded interference with, or examination of, the article by any intermediate handler of the goods, and brought himself into a “direct relationship with the consumer”. The result was that the consumer was “entitled to rely upon the exercise of diligence by the manufacturer to secure that the article shall not be harmful to the consumer”.¹⁵⁷

Lord Macmillan’s lengthy speech contained a careful review of English and American authorities which were said to be “inconclusive”. He famously stated: “The categories of negligence are never closed.” Applying a “reasonable man” test he concluded that Mr Stevenson had “exhibited carelessness in the conduct of his business”. A person who engaged for gain in the “business of manufacturing articles of food and drink” intending them for consumption “in the form in which he issues them” owed a duty of care.¹⁵⁸ There was no reason not to find a duty of care in the circumstances.

¹⁴⁹ Chapman, n 125, 36.

¹⁵⁰ Chapman, n 125, 36.

¹⁵¹ *Donoghue v Stevenson* [1932] AC 562, 565.

¹⁵² Chapman, n 125, x–xi.

¹⁵³ RFV Heuston, “Donoghue v Stevenson in Retrospect” (1957) 20 Mod L Rev 1, 3.

¹⁵⁴ An account of them appears in Chapman, n 125, Ch 3.

¹⁵⁵ *Donoghue v Stevenson* [1932] AC 562, 604.

¹⁵⁶ *Donoghue v Stevenson* [1932] AC 562, 604.

¹⁵⁷ *Donoghue v Stevenson* [1932] AC 562, 603.

¹⁵⁸ *Donoghue v Stevenson* [1932] AC 562, 619–620.

The dissenting speech of Lord Buckmaster was delivered first in time. His speech contrasts both in style and substance to Lord Atkin's. It is dense in its treatment of precedent. The general position was that no duty of care was owed in such a situation. There were only limited exceptions. One was where the article was dangerous in itself. The other was where the defect was dangerous and known by the manufacturer. In each case, the manufacturer knew that the article being sold and consumed was dangerous.

Lord Buckmaster was dismissive of authorities which did not support his conclusion. *George v Skivington*¹⁵⁹ was dismissed with the comment that "few cases can have lived so dangerously and lived so long".¹⁶⁰ The dicta of Lord Esher (then Brett MR) in *Heaven v Pender*¹⁶¹ was also dismissed with heavy sarcasm. As Chapman observes, Lord Buckmaster "goes much further than a straightforward appeal to contrary precedent would ordinarily demand. One might conclude that there is an additional, even an extra-legal, concern or some other personal animus at play".¹⁶²

Professor Heuston describes Lord Buckmaster's speech as containing "almost passionate sarcasm".¹⁶³

Although Lord Buckmaster found himself in a minority, outnumbered by Celts, and might be seen to have been on the wrong side of history, his speech warrants careful attention. He appreciated the implications of the majority's decision as extending beyond the manufacture of food. If a duty existed, then it would cover the construction of "every article" and there was no reason why it would not apply to the construction of a house. Lord Buckmaster foresaw the imperial march of negligence. Chief Justice Gleeson in the 2012 Supreme Court Oration describes the point made by Lord Buckmaster about the implications of finding a duty of care on liability for other defective products as "solid and prescient".¹⁶⁴

Lord Tomlin delivered a short speech which agreed with Lord Buckmaster. He dismissed the proposition that there was a general duty of care and considered that *Winterbottom v Wright* was wholly against Mrs Donoghue's case.

The dissenting judgments regarded Mrs Donoghue's claim as inconsistent with authority. Lord Buckmaster went further and stated: "It is difficult to see how any common law proposition can be formulated to support [Mrs Donoghue's] claim."¹⁶⁵ Lord Buckmaster's speech was delivered first, because of his seniority. He was not present to read his own speech, so Lord Tomlin did so for him. If Lord Buckmaster thought it "difficult to see how any common law proposition can be formulated to support" Mrs Donoghue's claim then he should have been there to hear Lord Atkin.

Lord Atkin's speech and the search for principle

As noted, Lord Atkin's speech began by framing the legal question for determination. The sole question was whether, as a matter of law in the circumstances alleged, Mr Stevenson owed any duty to Mrs Donoghue to take care. Lord Atkin observed that it was "remarkable how difficult it is to find in the English authorities statements of general application defining the relations between parties that give rise to the duty". Instead, the courts had been "engaged upon an elaborate classification of

¹⁵⁹ *George v Skivington* [1870] LR 5 Ex 1.

¹⁶⁰ *Donoghue v Stevenson* [1932] AC 562, 570.

¹⁶¹ *Heaven v Pender* (1883) 11 QBD 503, 509. As Lord Atkin pointed out in *Donoghue v Stevenson* [1932] AC 562, 570, 580-581, this dicta was limited by the notion of proximity introduced by Lord Esher himself, and AL Smith LJ in *Le Lievre v Gould* [1893] 1 QB 491, 497, 504.

¹⁶² Chapman, n 125, 45.

¹⁶³ RFV Heuston, *Lives of the Lord Chancellors 1885-1940* (Clarendon Press, 1964), App.

¹⁶⁴ Gleeson, n 125, 105.

¹⁶⁵ *Donoghue v Stevenson* [1932] AC 562, 577.

duties”.¹⁶⁶ After referring to some of them, he stated: “Yet the duty which is common to all the cases where liability is established must logically be based upon some element common to the cases where it is found to exist.”¹⁶⁷

The search for principle preceded the analysis of precedent. Therefore, at an early stage in his speech Lord Atkin said that he contented himself 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 the books are but instances”.¹⁶⁸

The speech then immediately formulates what has become known as the “neighbour principle”:

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 complainants 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.¹⁶⁹

The power of parable

While Lord Atkin was not the first jurist to articulate the “neighbour principle”, his grounding of the principle in the Biblical parable of the Good Samaritan was novel. The parable in the Gospel of Luke was prompted by a lawyer who asked Jesus what he had to do to inherit eternal life. In the tradition of Rabbinical teaching, the lawyer did not receive a direct reply to his inquiry but was instead guided to the answer through further questioning and the use of parable. Jesus asked the lawyer what answer was found in the law. The lawyer provided the correct response: to love God with all his heart, soul, strength and mind and love his neighbour as himself. But like all skilled advocates, the lawyer sought to justify his position and clarify what precisely was required of him by asking “Who is my neighbour?”. The parable of the Good Samaritan was Jesus’s response to this question. It would have been familiar to most in Britain in 1932.

A man travelling from Jerusalem to Jericho is attacked by robbers and left to die by the roadside. A priest and a Levite, both respected members of the Jewish community, pass by him without offering assistance. Assistance comes in the unlikely form of a Samaritan, a foreigner belonging to a highly religious sect that was segregated from the Jewish community. When asked who was a neighbour to the injured man, the lawyer correctly identifies the merciful Samaritan.

Scholars of Biblical hermeneutics debate the didactic purpose of the Good Samaritan parable. Professor Erika Chamberlain, in her excellent article “Lord Atkin’s Opinion in *Donoghue v Stevenson*: Perspectives from Biblical Hermeneutics”,¹⁷⁰ discusses how parables are variously interpreted as appeals to the “common man”, moral lessons and examples of behaviour to be imitated or avoided, riddles that deliberately invite interpretation, and as a form of subversive speech that challenges orthodox practice and accepted wisdom. The literary and rhetorical features of parable lend themselves to persuasive legal reasoning.

¹⁶⁶ *Donoghue v Stevenson* [1932] AC 562, 579.

¹⁶⁷ *Donoghue v Stevenson* [1932] AC 562, 580.

¹⁶⁸ *Donoghue v Stevenson* [1932] AC 562, 580 (emphasis added).

¹⁶⁹ *Donoghue v Stevenson* [1932] AC 562, 580.

¹⁷⁰ Chamberlain, n 125.

Treatment of precedent

Lord Atkin stated that the doctrine he adopted had been laid down in *Heaven v Pender*¹⁷¹ and *Le Lievre v Gould*.¹⁷² In other words, it had a sound provenance. I should add that Lord Atkin used the infamous “p” word – proximity – in his discussion of the doctrine.

Lord Atkin said that he could not conceive of any difficulty arising from the recognition of a duty of care in the class of case before the Court. He provided a practical hypothetical example, and the use of the word “poison” in this passage is compelling:

A manufacturer puts up an article of food in a container which he knows will be opened by the actual consumer. There can be no inspection by any purchaser and no reasonable preliminary inspection by the consumer. Negligently, in the course of preparation, he allows the contents to be mixed with poison. It is said that the law of England and Scotland is that the poisoned consumer has no remedy against the negligent manufacturer. If this were the result of the authorities, I should consider the result a grave defect in the law, and so contrary to principle that I should hesitate long before following any decision to that effect which had not the authority of this House.¹⁷³

Rather than look for authorities which supported the principle he had articulated, Lord Atkin prefaced his examination of the authorities by stating: “It will be found, I think, on examination that there is no case in which the circumstances have been such as I have just suggested where the liability has been negated.”¹⁷⁴ Lord Atkin then embarked upon a masterful analysis of the authorities.

The techniques which Lord Atkin deployed in dealing with the case law he confronted were not simply admired by his contemporaries such as Lord Thankerton. They are taught to law students to this day. For example, Lord Atkin did not attempt to overrule *Winterbottom v Wright*. He chose “the more subtle approach of agreeing with Lord Buckmaster that the case was correctly decided, but arguing that the issue of law raised in *Donoghue v Stevenson* was not an issue in the earlier case”.¹⁷⁵

The American alliance

Having undertaken what has been described as a “case by case demolition of the authorities which, it was argued, did not support his view of the law”,¹⁷⁶ Lord Atkin looked across the Atlantic:

It is always a satisfaction to an English lawyer to be able to test his application of fundamental principles of the common law by the development of the same doctrines by the lawyers of the Courts of the United States. In that country I find that the law appears to be well established in the sense in which I have indicated.¹⁷⁷

He referred to the “illuminating judgment” of Cardozo J in *MacPherson v Buick Motor Company* in the New York Court of Appeals.¹⁷⁸ That decision was said to “undoubtedly lead to a decision in favour of the pursuer in the present case”.¹⁷⁹

The result

Lord Atkin, having derived support for his statement of fundamental principle from the principles stated by Justice Cardozo, concluded:

My Lords, if your Lordships accept the view that this pleading discloses a relevant cause of action you will be affirming the proposition that by Scots and English law alike a manufacturer of products, which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in

¹⁷¹ *Heaven v Pender* (1883) 11 QBD 503.

¹⁷² *Le Lievre v Gould* [1893] 1 QB 491.

¹⁷³ *Donoghue v Stevenson* [1932] AC 562, 582.

¹⁷⁴ *Donoghue v Stevenson* [1932] AC 562, 583.

¹⁷⁵ William Twining and David Miers, *How To Do Things with Rules* (4th ed, Butterworths, 1999), 329.

¹⁷⁶ Chapman, n 125, 42.

¹⁷⁷ *Donoghue v Stevenson* [1932] AC 562, 598.

¹⁷⁸ *MacPherson v Buick Motor Co* 217 NY 382 (1916).

¹⁷⁹ *Donoghue v Stevenson* [1932] AC 562, 599.

which they left him with no reasonable possibility of intermediate examination, and with the knowledge that the absence of reasonable care in the preparation or putting up of the products will result in an injury to the consumer's life or property, owes a duty to the consumer to take that reasonable care.¹⁸⁰

The seal of common sense

The final paragraph in the speech contains a nice rhetorical flourish and a subtle put-down of lawyers who rejected the point of principle. Having stated the proposition which I have just quoted, Lord Atkin concluded:

It is a proposition which I venture to say no one in Scotland or England who was not a lawyer would for one moment doubt. It will be an advantage to make it clear that the law in this matter, as in most others, is in accordance with sound common sense.¹⁸¹

Structure and substance

As a piece of writing, Lord Atkin's speech has an elegant structure. Having framed the issue and surveyed from on high the categories of case in which a duty of care had been recognised (and which others regarded as a wilderness), he stated a "general conception" of relations giving rise to a duty of care, of which the wilderness of cases are but instances. He stated the principle and in doing so invoked the parable of the Good Samaritan. Having done so, he more or less said that there is no case standing against the recognition of the principle and that he would be amazed if there was.

The speech glides over the distinction between what the law is and what it should be. In seeking out the general principle, Atkin stated that in English law "there must be, and is, some general conception". He does not explain why there "must be", and many would argue that the common law by its nature does not generate such governing principles. For example, Professor Brian Simpson argues that:

We must start by recognising what common sense suggests, which is that the common law is more of a muddle than a system, and that it would be difficult to conceive of a less systematic body of law.¹⁸²

Despite this, Lord Atkin treated the cases on duty of care as reflective of some general principle.

The implications of *not* recognising the principle for which Lord Atkin contended are starkly illustrated in the hypothetical example of the contents of a product being "mixed with poison". The justice and social utility of recognising such a principle are said to extend beyond articles of food and drink, and the contrary position supported by the decision upon appeal would deny a remedy to other consumers of common household products where the manufacturer knows that the articles will be used by other persons than the ultimate purchaser. In a beautiful appeal to the province of law in a civilised society, Lord Atkin stated:

I do not think so ill of our jurisprudence as to suppose that its principles are so remote from the ordinary needs of civilized society and the ordinary claims it makes upon its members as to deny a legal remedy where there is so obviously a social wrong.¹⁸³

Apart from the interesting facts pleaded by Mrs Donoghue, the case of *Donoghue v Stevenson* is remembered because of Lord Atkin's articulation of the "neighbour principle". Looking back almost a century to *Donoghue v Stevenson*, the speeches of the majority, and the speech of Lord Atkin in particular, may be said to have heralded the imperial march of the law of negligence. However, Lord Atkin was not the first jurist to invoke the principle that "every man ought to take reasonable care that he does not injure his neighbour". As we have seen, it was expressed in the books as far back as 1767.

¹⁸⁰ *Donoghue v Stevenson* [1932] AC 562, 599.

¹⁸¹ *Donoghue v Stevenson* [1932] AC 562, 599.

¹⁸² AWB Simpson, "Common Law and Legal Theory" in W Twining (ed), *Common Law and Legal Theory* (1986), 15.

¹⁸³ *Donoghue v Stevenson* [1932] AC 562, 583.

Importantly, Lord Atkin did not invoke the “neighbour principle” as a basis upon which to expand the empire of negligence. The “neighbour principle” is expressly invoked as a basis upon which to limit what would otherwise be too broad a basis of liability.¹⁸⁴

Lord Atkin conjured tales of domestic horror in which the average consumer would have no remedy against a manufacturer whose negligence may cause harm to members of the consumer’s “family and his servants, and in some cases his guests”.¹⁸⁵ In so doing, he positioned his view as according with the common sense and sense of justice of most citizens who, unlike some lawyers (and presumably, by extension, some judges), would not for “one minute doubt” that a duty of care exists in such circumstances.¹⁸⁶

Yet Atkin could not have been under any misconception about the “inevitability of subsequent interpretation”¹⁸⁷ of his articulation of the “neighbour principle” and the challenge it presented to the tort law empire. In the same way that the Good Samaritan parable challenged its Jewish audience, so too did Atkin’s top-down reasoning subvert the accepted wisdom of the common law by imposing liability upon manufacturers whose negligence caused harm to third parties, a notion Lord Buckmaster described as being “little short of outrageous”.¹⁸⁸

Prior to the judgment in *Donoghue v Stevenson* being delivered, Lord Atkin had signalled his views on how Biblical principle might be appropriated in search of a unifying principle in tort law. In a speech to the Society for the Public Teachers of Law in 1931, Atkin stated that he doubted “whether the whole 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”.¹⁸⁹

Despite this confident assertion, Lord Atkin’s “neighbour principle” did not attempt to cover the whole field of tort law. It did not attempt to explore the issue of proximity in all its aspects, leaving future generations of lawyers, judges and legal scholars to debate when particular circumstances engaged the “neighbour principle” so as to give rise to a duty of care. However, by using the parable of the Good Samaritan, Lord Atkin provided the linguistic framework within which arguments about the scope of the duty of care in negligence would be articulated.¹⁹⁰

Judicial method

As compelling as the parable was in Lord Atkin’s speech, and as enduring as his articulation of the neighbour principle has been, his speech is only one of three speeches that constitute the majority. Different views may be taken about the ratio of *Donoghue v Stevenson*,¹⁹¹ but the “neighbour principle” did not feature expressly in the other speeches. Contemporary commentators adopted the minimalist approach that emerged from the speeches of Lord Thankerton and Lord Macmillan. Although some regarded their speeches as “revolutionary”,¹⁹² the recognition of a duty of care in *Donoghue v Stevenson* could be interpreted as a conventional, incremental extension. Lord Macmillan’s famous remark that “the categories of negligence are never closed” suggests that he saw his judgment as establishing a new category, not the kind of general principle for which Lord Atkin contended.¹⁹³

¹⁸⁴ The “neighbour” or “proximity” requirement as a restrictive concept, which qualified the test of reasonable foreseeability, was taken up by Deane J in *Sutherland Shire Council v Heyman* (1985) 157 CLR 424, 496. See also Chamberlain, n 125, 112-114.

¹⁸⁵ *Donoghue v Stevenson* [1932] AC 562, 582.

¹⁸⁶ *Donoghue v Stevenson* [1932] AC 562, 599.

¹⁸⁷ Chamberlain, n 125, 94.

¹⁸⁸ *Donoghue v Stevenson* [1932] AC 562, 578.

¹⁸⁹ *Donoghue v Stevenson* [1932] AC 562, 578.

¹⁹⁰ Chamberlain, n 125, 101.

¹⁹¹ See Heuston, n 153, 5-9.

¹⁹² See the commentary referred to in Ibbetson, n 133, 190 (fn 14). See also *Farr v Butters Brothers* [1932] 2 KB 606, 609-618 (Scrutton LJ).

¹⁹³ Ibbetson, n 133, 190.

Lord Rodger's 1992 analysis of Lord Macmillan's speech and an earlier draft of it indicates that Lord Macmillan originally saw no principle of law involved other than the "principle of reasonableness".¹⁹⁴

Lord Atkin's approach was quite different to that of Lord Macmillan. He sought to derive a principle rather than create a new category. It was Lord Macmillan's approach which found favour with textbook writers and many judges. Despite Lord Atkin's emphatic reversal of the law of negligence's "tendency towards fragmentation",¹⁹⁵ academic works continued to analyse the law of negligence in terms of categories of duty, after paying appropriate lip service to Lord Atkin's statement of principle. About 20 years after the decision, Professor Heuston wrote an article in the *Modern Law Review*, "Donoghue v Stevenson in Retrospect", which endorsed the approach of Lord Macmillan.¹⁹⁶ *Donoghue v Stevenson* was authority for what Professor Heuston later described as "the manufacturer principle",¹⁹⁷ rather than Lord Atkin's broader "neighbour principle".

Much has been written, and much more could be, about the legal reasoning or judicial methodology adopted by each of the Law Lords in *Donoghue v Stevenson*. Professor Neil MacCormick's paper at the Paisley Conference uses the term "structured pluralism" to describe reasoning which contains a plurality of elements, "including all of precedent, principle, logic, analogy, policy, and pragmatism".¹⁹⁸ MacCormick explains that the way in which these elements are woven together into "a convincing legal story, setting up a good case for the conclusion reached", can be explained in terms of an overall structural view of the elements of good reasoning in law.¹⁹⁹ His paper concludes with the fundamental opposition of views at stake in *Donoghue v Stevenson*:

Like all serious legal questions, this was an objective question about the right balance to strike between two tenable positions. Such a question frames an objective issue, requiring an objective scrutiny of a great mass of intersubjectively available material. But the material has to be interpreted and evaluated, and there is in such interpretation and evaluation an irreducible element of individual opinion. That is why it matters who our judges are, and why we were lucky once to have had a House of Lords that included Lords Atkin, Thankerton and Macmillan.²⁰⁰

On the issue of logic, you will recall Lord Atkin's claim that the duty "must logically be based on some element common to the cases". Professor MacCormick correctly questions this logical "must". He poses the question: "Why cannot duties, as a matter of logic, be pure individuals, each cropping up just wherever it occurs?"²⁰¹ He describes Lord Atkin's invocation of logic to be "quite misplaced".²⁰²

Justice Michael McHugh spoke in 1998 to the Australian Bar Association Conference about "the judicial method" and the role of logic in judicial decision-making.²⁰³ The process of induction and deduction was said to explain only part of the law-making function of the judicial process, and that, in novel cases, the precedents will usually yield competing premises. As he explained in the following passage, Lord Buckmaster's dissent showed that the cases were "logically explicable" without a general principle of negligence. Lord Atkin's decision was not compelled by logic:

Logic may take a judge a long way in determining a novel case. But usually it cannot take him or her all the way. Lord Buckmaster's dissenting speech in *Donoghue v Stevenson* was as much a logical

¹⁹⁴ Alan Rodger, "Lord Macmillan's Speech in *Donoghue v Stevenson*" (1992) 108 LQR 236, 242, 258.

¹⁹⁵ Ibbetson, n 133, 188.

¹⁹⁶ Heuston, n 153.

¹⁹⁷ Heuston, "An Overview of the Law of Negligence: 60 Years After Mrs Donoghue's Visit to Paisley" in Burns and Lyons, n 125, 62.

¹⁹⁸ Neil MacCormick, "Donoghue v Stevenson: Legal Reasoning" in Burns and Lyons, n 125, 196.

¹⁹⁹ MacCormick, n 198, 196.

²⁰⁰ MacCormick, n 198, 213.

²⁰¹ MacCormick, n 198, 202-203.

²⁰² MacCormick, n 198, 202-203.

²⁰³ MH McHugh, "The Judicial Method" (1999) 73 ALJ 37 (Speech delivered at the Australian Bar Association Conference, London, 5 July 1998).

deduction from the precedents as was Lord Atkin's majority speech. Lord Atkin said that there must be some general principle of negligence that explained the cases. But why? Lord Buckmaster's dissent showed that the cases were logically explicable without a general principle of negligence. Lord Atkin's decision was based on what he thought justice required, not logical compulsion. *It was his sense of justice and not logic that gave rise to the general principle that has dominated the law of negligence since 1932* [emphasis added].²⁰⁴

Judicial style

Sir Louis Blom-Cooper QC, in writing about the style of judgments in the House of Lords between 1876 and 2009, reports that not infrequently, but happily not too often, Law Lords have been tempted by "the instant subject matter to go beyond the strict discipline of determining the legal issues posed by the litigation". He continues: "It is one thing to acknowledge that judges do make law. It is altogether impermissible to indulge in sweeping statements about what ought to be the law, or commentaries on the political scene."²⁰⁵

Lord Atkin's rhetorical question "Who is my neighbour?" is said to be "well within bounds, and has indeed shaped the evolving law of torts".²⁰⁶ I have already remarked about the structure and style of Lord Atkin's speech in *Donoghue v Stevenson*, and its powerful use of parable. The contrast in styles between Lord Atkin and Lord Buckmaster is noteworthy. Lord Buckmaster was unfairly described by Lord Denning as being a "timorous soul".²⁰⁷ Contemporaries have described him as being learned, fair and having an acute mind.²⁰⁸ Sir Frederick Pollock stated:

We have to thank the Scots Lords of Appeal for overriding the scruples of English colleagues who could not emancipate themselves from the pressure of a supposed current of authority in English Courts. Lord Buckmaster and Lord Tomlin are the last men one would have suspected of timidity, but in this case they were less courageous than Lord Birkenhead would surely have been if he were still with us. Parts of their opinions read as if they had forgotten that they were judging in a Court of last resort.²⁰⁹

The last sentence is most insightful. It marks an important contrast between the speeches of Lord Atkin and Lord Buckmaster. Each had a commitment to the integrity of the law.²¹⁰ Buckmaster perceived himself as bound by previous authority to reject Mrs Donoghue's claim. Atkin saw no precedent that required him to do so and was able to discern from the categories of cases which had found a duty of care, a governing principle.

The different treatment of precedent by Atkin and Buckmaster is anchored in their different approaches. For Atkin, it was principle first. For Buckmaster, it was precedent first and an almost turgid analysis of authorities which did not bind the House of Lords. Also, when Lord Buckmaster encountered an authority which did not suit the result he favoured, he used sarcasm to dismiss it.

²⁰⁴ McHugh, n 203, 44.

²⁰⁵ Louis Blom-Cooper, "Style of Judgments" in L Blom-Cooper, B Dickson and G Drewry (eds), *The Judicial House of Lords: 1876–2009* (OUP, 2009), 151.

²⁰⁶ Blom-Cooper, n 205, 151.

²⁰⁷ Chapman, n 125, 39; *Candler v Crane, Christmas & Co* [1951] 2 KB 163, 178.

²⁰⁸ See W Goodhart, "Buckmaster, Stanley Owen, first Viscount Buckmaster (1861-1934)", *Oxford Dictionary of National Biography* (2004 Online Edition). Heuston (n 197, 2-4) described the backgrounds of the Lords who decided the case. Lord Buckmaster came from the working class and rose to be Solicitor General and then Lord Chancellor under a liberal government. Lord Dunedin regarded him as the greatest colleague he ever had. He described him as "a sentimentalist – unless he is sitting on his arse on the bench; there he is one of the most learned, one of the most acute, and the fairest judge I ever sat with; and he will leave much in the books" (quoted in Heuston, n 197, 3).

²⁰⁹ F Pollock, "The Snail in the Bottle, And Thereafter" (1933) 49 LQR 22, 22.

²¹⁰ While not defending Lord Buckmaster's dissent, Professor Chamberlain's article (E Chamberlain, "Lord Buckmaster: The Reluctant Villain in *Donoghue v Stevenson*" [1933] 3 J Rev 245) gives his decision the credit it deserves and puts Buckmaster's judicial theories in the context of his liberal political outlook.

The structure and style of Lord Atkin's speech is integral to its substance. The use of the parable of the Good Samaritan as a basis for the "neighbour principle" was inspired. Matthew Chapman reminds us that the parable of the Good Samaritan involves a conversation between Jesus and "a cunning lawyer" who seeks to catch Jesus out by asking him the question "Who is my neighbour?" Jesus avoids the trap by giving a message about compassion towards strangers. As Chapman writes: "The core message of the Good Samaritan story – that kindness should prevail over code (if you like, over precedent) – may provide a convenient metaphor for what Lord Atkin was trying to do in his formulation of the neighbour principle."²¹¹

In his analysis of the style of judgments in the House of Lords, Sir Louis Blom-Cooper QC quotes Sir Arthur Quiller-Couch, the author of *Oxford Book of English Prose*, who when asked what was the cardinal virtue for judicial prose, answered, "persuasion".²¹² Lord Atkin's speech in *Donoghue v Stevenson*, like much of his judicial prose, was highly persuasive in its style. His style did not contain the "high austerity" of which Justice Cardozo was critical in his 1925 work, "Law and Literature".²¹³ Instead, it had the quality of masterful prose: "In the best prose, whether narrative or argument, we are so led on as we read, that we do not stop to applaud the writer, nor do we stop to question him."²¹⁴

Lord Atkin's speech in *Donoghue v Stevenson* is an outstanding piece of prose.

Precursors and domestic rehearsals

As we have seen, Lord Atkin's articulation of the "neighbour principle" was not original. It was recorded in the law books of England in 1767, and its evolution has been discussed elsewhere.²¹⁵ Lord Atkin had also invoked scripture in extra-judicial speeches shortly before *Donoghue v Stevenson*. In 1930, to a speech to the University of Birmingham's Holdsworth Club, he remarked that "the demands of morality ... no doubt extend into spheres where the Law does not set its foot. But the English Law does set up a high, but not too high, attainable standard of honesty and fair dealing which ... is of the very greatest value to the whole community and especially to the commercial community".²¹⁶ As noted, in a 1931 speech about "Law as an Educational Subject", he stated: "I doubt whether the whole 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."²¹⁷

His daughter, Mrs Elizabeth Robson, recalled that her father used his powers of advocacy to persuade his family that he was right:

When he gave us the facts of a case and asked us what we thought about it, his way of presenting the problem was such that there never was any suggestion in our minds that the other side could have a leg to stand on. I remember his asking us whom we thought was our "neighbour" and he listened to us before he gave his opinion, which eventually became part of his judgment in *Donoghue v Stevenson*. He told us that he was making law by that judgment.²¹⁸

Atkin's achievement in *Donoghue v Stevenson*

Legal historians of the standing of Professor David Ibbetson have explained that, as a matter of practical reality, the tort of negligence in the 19th century was "thoroughly fragmented" and that in the 20th century there was a move in "the direction of theory as the tendency towards fragmentation was

²¹¹ Chapman Speech, n 125, 11.

²¹² Blom-Cooper, n 205, 146.

²¹³ Cardozo, "Law and Literature" (1925) 14 Yale L Rev 699.

²¹⁴ Arthur Clutton-Brock, "The Cardinal Virtue of Prose" in Arthur Quiller-Couch (ed), *Oxford Book of English Prose* (Clarendon Press, 1925), 1028.

²¹⁵ Chapman, n 125, Ch 5.

²¹⁶ Atkin, Speech to the University of Birmingham Holdsworth Club, 9 May 1930, quoted in Chapman, n 125, 111.

²¹⁷ Quoted in Chapman, n 125, 111.

²¹⁸ Lewis, n 3, 25.

reversed”.²¹⁹ Chief Justice Gleeson made a similar point in his 2012 Supreme Court Oration by reference to the second law of thermodynamics: there is a “natural and relentless trend” towards complexity and disorder.²²⁰ On that view, *Donoghue v Stevenson* was an important reversal of this trend:

Although not entirely conclusive, the formulation of a unifying principle to explain what would otherwise be a wilderness of single instances of tortious liability for careless acts or omissions was a brilliant achievement. That it was based upon a principle of morality, and explained by reference to an old religious text, does not necessarily make it ideologically unsound. A great deal of the law can be traced to the same source. Lord Atkin’s biographer was right to say that what the case did was something that every legal system requires of its lawmakers, which is of “constantly relating the law to the tacitly accepted moral principles of their own society”.²²¹

Reception at home and abroad

Viewed almost 100 years after it was delivered, *Donoghue v Stevenson* appears as a landmark in the common law world. In a special issue to mark 135 years of *The Law Reports* and the *Weekly Law Reports*, the Incorporated Council of Law Reporting included *Donoghue v Stevenson* in its “Top 10”. It came third (in chronological order) after *R v Dudley and Stephens*²²² and *Carlill v Carbolic Smoke Ball Co.*²²³

It is unsurprising that in the *Annual Survey* for 1932, *Donoghue v Stevenson* was described as “the greatest case of the year”.²²⁴ A commentator in the *Canadian Bar Review* described Lord Atkin’s speech as “one stamped as perhaps the most impressive and certainly the most authoritative effort ever made to generalise the English law of negligence”.²²⁵ Yet despite this immediate reaction from legal commentators, it is doubtful whether people spoke much about the case at bus stops. Lord Atkin’s biographer, perhaps with some element of exaggeration, questions whether lawyers spoke about it much:

The revolution brought about by *Donoghue v Stevenson* was so quiet that it passed completely unnoticed by the general public who were so closely affected by it; and its true nature was perhaps not fully understood even by the profession until Lord Devlin’s speech in 1963 in the *Hedley Byrne* Case.²²⁶

In 1933 Sir Frederick Pollock hailed *Donoghue v Stevenson* as a leading case and a “notable step ... in enlarging and clarifying our conception of a citizen’s duty before the law ... not to turn dangerous or noxious things loose on the world”.²²⁷ There were other short commentaries. However, the case did not attract the public attention that it deserved.²²⁸

Lord Atkin’s judgment received a fairly frosty reception from his former pupil master, Scrutton LJ, in *Farr v Butters Brothers Co.*²²⁹ Scrutton LJ remarked that “English judges have been slow in stating principles going far beyond the facts they are considering”.²³⁰ He later described Lord Atkin’s “general proposition” (a reference to the “neighbour principle”) as going “wider than is

²¹⁹ Ibbetson, n 133, 188.

²²⁰ Gleeson, n 125, 109.

²²¹ Gleeson, n 125, 188.

²²² *R v Dudley and Stephens* (1884) 14 QBD 273.

²²³ *Carlill v Carbolic Smoke Ball Co* [1893] 1 QB 256.

²²⁴ David GT Williams, “A Developing Jurisdiction, 1914-45” in Blom-Cooper et al, n 205, 201 (fn 29).

²²⁵ FC Underhay, “Tort Liability of Manufacturers” (1932) 10(10) *Canadian Bar Review* 615, 628-629.

²²⁶ Lewis, n 3, 67.

²²⁷ Pollock, n 209, 22.

²²⁸ Chapman, n 125, 116-117.

²²⁹ *Farr v Butters Bros & Co* [1932] 2 KB 606.

²³⁰ *Farr v Butters Bros & Co* [1932] 2 KB 606, 612.

necessary”.²³¹ As Chapman surveys, nearly a decade was to pass before the Court of Appeal had another opportunity to grapple with *Donoghue v Stevenson* and it was only Lord Denning who embraced Lord Atkin’s “neighbour principle” in *Candler v Crane, Christmas & Co.*²³² *Donoghue v Stevenson* largely languished in the United Kingdom until the 1963 decision of *Hedley-Byrne v Heller*.²³³ The slow growth in the appreciation of “the neighbour principle” (as distinct from “the manufacturer principle”) has been attributed to the fault of academics, and the fact that English practitioners were largely dependent on what they were taught as law students. Influential teachers of tort at Oxford and Cambridge gave little consideration to “the neighbour principle”.²³⁴

Donoghue v Stevenson, and Lord Atkin’s speech in particular, were more warmly received in parts of the Commonwealth. It was embraced in Canada and eventually in New Zealand.²³⁵ Justice Herbert Vere Evatt corresponded regularly with Lord Atkin. In March 1933 Evatt wrote from the High Court of Australia about the keen debate and interest that “the Snail case” had aroused at the Bar and in university law schools. Evatt wrote:

on all sides there is profound satisfaction that, in substance, your judgment and the opinion of Justice Cardozo of the USA coincide, and that the common law is again shown to be capable of meeting modern conditions of industrialisation, and of striking through forms of legal separateness to reality.²³⁶

Soon afterwards, Evatt had the opportunity to apply the principles in *Donoghue v Stevenson* in *Australian Knitting Mills Ltd v Grant*,²³⁷ in which he dissented in the result. He first referred to the judgments of Lords Macmillan and Thankerton, in deference to the submissions of counsel, before concluding that the facts of Dr Grant’s case justified a finding that a duty of care existed, however widely or narrowly the speeches of the majority in *Donoghue v Stevenson* were read.

Dr Grant, presumably encouraged by the dissenting judgment of Evatt J, took his case to the Privy Council. The only member of the *Donoghue v Stevenson* Bench who sat on that case was Lord Macmillan, and the opinion of the Privy Council was delivered by Lord Wright. Dr Grant’s appeal was upheld, but without reference to the “neighbour principle”. The principle in *Donoghue v Stevenson* was expressed as follows:

A manufacturer of products, which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him with no reasonable possibility of intermediate examination, and with the knowledge that the absence of reasonable care in the preparation or putting up of the products will result in an injury to the consumer’s life or property, owes a duty to the consumer to take that reasonable care.²³⁸

Lord Atkin’s speech was not, however, forgotten in Australia. In 1962 it was applied in *Voli v Inglewood Shire Council*²³⁹ in which an individual was injured when a stage that was negligently designed collapsed. Windeyer J stated:

Whatever might have been thought to be the position before the broad principles of the law of negligence were stated in modern form in *Donoghue v Stevenson* ... it is now beyond doubt that, for the reasonably foreseeable consequences of careless or unskilful conduct, an architect is liable to anyone whom it could reasonably have been expected might be injured as a result of his negligence. To such a person he owes a duty of care quite independently of his contract of employment.²⁴⁰

²³¹ *Farr v Butters Bros & Co* [1932] 2 KB 606, 614.

²³² *Candler v Crane, Christmas & Co* [1951] 2 KB 164.

²³³ *Hedley-Byrne v Heller* [1964] AC 465.

²³⁴ Heuston, n 197, 69-72.

²³⁵ Chapman, n 125, 144-152, 161-168.

²³⁶ Quoted in Lewis, n 3, 66-67.

²³⁷ *Australian Knitting Mills Ltd v Grant* (1933) 50 CLR 387.

²³⁸ *Donoghue v Stevenson* [1932] AC 562, 599.

²³⁹ *Voli v Inglewood Shire Council* (1962-63) 110 CLR 74.

²⁴⁰ *Voli v Inglewood Shire Council* (1962-63) 110 CLR 74, 84.

It is perhaps fitting that the guiding principle which Lord Atkin articulated should find fertile ground in the land of his birth.

It is unnecessary to track the march and partial retreat of the tort of negligence in this country over the last 50 years. Chief Justice Spigelman referred to the law of negligence as the last outpost of the welfare state.²⁴¹ I need not involve myself in debates about the word “proximity”, which was sprinkled through the speech of Lord Atkin. This, after all, is an article about Lord Atkin, and others have written about the expansion and collapse of the tort of negligence in the 20th century.²⁴² I will, however, defend Lord Atkin against the suggestion that he and the other members of the majority in *Donoghue v Stevenson* missed the opportunity to structure the English law of torts as some scholars had advocated.²⁴³ As the same author fairly points out, Lord Atkin’s conception of the law of torts as being focused on fault was the vision of other great jurists such as Oliver Wendell-Holmes, Arthur Goodhart and John Salmond, was embodied in the French Civil Code and has modern advocates.²⁴⁴ If Lord Atkin made a choice to base liability on fault rather than on the protection of particular rights, then he was in good company.

The master craftsman with a sense of justice

On any view, the majority judgments in *Donoghue v Stevenson* were a triumph. Lord Atkin, together with the two Scottish judges, did well to establish a duty of care in that case in the face of the authorities. Lord Atkin’s analysis of authority is the work of a master craftsman. Other parts of his speech, such as his resort to “common sense”, may have a persuasive power, but are far from compelling. His speech is a great work of legal prose. As Chief Justice Gleeson observed, Lord Atkin formulated “a unifying principle to explain what would otherwise be a wilderness of single instances of tortious liability for careless acts or omissions”, and this was “a brilliant achievement”.²⁴⁵ Justice McHugh was surely correct when he wrote that Lord Atkin’s decision was based on what he thought justice required and it was his sense of justice, and not logic, which gave rise to the general principle that has dominated the law of negligence since 1932.

THE WAR YEARS

Lord Atkin’s wife died in 1939 after 46 years of marriage.²⁴⁶ On 15 January 1940 he wrote to Dr Evatt about how he was “left solitary now” but had the good fortune of having married daughters in London who looked after him. His letter to Evatt discussed recent cases, including one in which he proudly reported:

We destroyed a technicality which had done injustice for 25 years from a decision of the Court of Appeal that if a workman received any part of an award he could not afterwards appeal for more because the award is one, and he cannot “approve and reprobate”. We have not given our reasons yet, but that decision is going to receive a good hard knock.²⁴⁷

He complimented Dr Evatt on his literary efforts. Lord Atkin had read with great interest Evatt’s story of Governor Bligh, and wrote:

How little the public realise how dependent they are for their happiness on an impartial administration of justice. I have often thought it is like oxygen in the air: they know and care nothing about it until it is withdrawn.²⁴⁸

²⁴¹ JJ Spigelman, “Negligence: The Last Outpost of the Welfare State” (2002) 76 ALJ 432.

²⁴² Ibbetson, n 133, Ch 10.

²⁴³ Edelman, n 125, 167-168.

²⁴⁴ Edelman, n 125, 168-169.

²⁴⁵ Gleeson, n 125, 109.

²⁴⁶ Carney, n 10, 51.

²⁴⁷ Quoted in Lewis, n 3, 222. The case to which Lord Atkin referred was *Lissenden v Bosch* [1940] AC 412, overruling *Johnson v Newton Fire Extinguisher* [1913] 2 KB 111.

²⁴⁸ Quoted in Lewis, n 3, 222.

The letter concluded: “We hear no war news that you do not get: and that seems to me precious little. However we are determined to put an end to the gangsters as you all are.”²⁴⁹

In May 1940 Atkin spoke in Gray’s Inn at a reception for refugee lawyers, including Dr Ernst Wolff, who had been President of the Berlin Bar and the General Council of the German Bar before Hitler’s rise to power. He later became President of the Supreme Court in the British Zone of Germany. After the reception Dr Wolff wrote to Lord Atkin that his “kind words of sympathy for our situation went to our hearts”. Wolff wrote about Britain’s fight against the “conspiracy of piracy” that the German lawyers had suffered, and hoped that after Nazi Germany was destroyed “law can again prevail”.²⁵⁰

LIVERSIDGE V ANDERSON

Lord Atkin’s dissenting speech in *Liversidge v Anderson* is a defining point in his judicial career. It was delivered on 3 November 1941, a few weeks before his 74th birthday. It stands, along with Lord Shaw’s dissent in the World War I case of *Zadig*,²⁵¹ as “the most significant of all the constitutional speeches from the House of Lords over the last hundred years”.²⁵²

Facts

In the summer of 1939 the British Parliament enacted emergency powers legislation which allowed regulations to provide for the detention of persons if it appeared to the Secretary of State to be expedient in the interests of public safety or the defence of the realm. After a process of all-party consultation, an amended Regulation 18B emerged, which began “If the Secretary of State has reasonable cause to believe”. The earlier provision had conditioned the power simply on the Secretary of State being satisfied of certain things.²⁵³

Between May and August 1940 the Home Secretary ordered the detention of 1,428 people, including a Mr Jack Perlzweig, who during his time in Brixton Prison assumed the name Robert Liversidge.²⁵⁴ Liversidge sued for false imprisonment and at first instance the issue was one of onus: Did he have to prove that the Secretary of State had no reasonable cause to believe, or did the Secretary have to prove that he had reasonable cause?

Unlike in *Zadig*’s case, there was no issue about the power to make Regulation 18B. The issue was one of statutory interpretation: the proper meaning of the opening words of Regulation 18B. In earlier cases the government had accepted that the words “reasonable cause” imported an objective test. But when the parallel case of *Greene*²⁵⁵ reached the Court of Appeal, the Home Secretary argued for the first time that he only had to believe that he had reasonable cause.²⁵⁶

The result

Lord Maugham acknowledged that the meaning of the words “reasonable cause” could require the existence, in fact, of a reasonable cause. However, Maugham considered that the phrase was also open to an interpretation which only required a person to act in good faith and what was thought to be a reasonable cause. In Maugham’s opinion, this latter interpretation was to be preferred as the issue in question was so “clearly a matter for executive discretion”.²⁵⁷ In deciding whether to detain a person,

²⁴⁹ Lewis, n 3, 222.

²⁵⁰ Lewis, n 3, 48.

²⁵¹ *R v Halliday; Ex parte Zadig* [1917] AC 260.

²⁵² Brigid Hadfield, “Constitutional Law” in Blom-Cooper et al, n 205, 503.

²⁵³ Tom Bingham, *The Business of Judging: Selected Essays and Speeches* (OUP, 2000), 212.

²⁵⁴ Bingham, n 253, 211.

²⁵⁵ *R v Secretary of State for Home Affairs, Ex parte Greene* [1942] 1 KB 87. The Court of Appeal decision was affirmed by the House of Lords in *Greene v Secretary of State for Home Affairs* [1942] AC 284.

²⁵⁶ Hadfield, n 252, 508-509; Lewis, n 3, 134.

²⁵⁷ *Liversidge v Anderson* [1942] AC 206, 220.

the Home Secretary could act on hearsay evidence and sensitive information which could not be disclosed even in a closed court without risk to the “defence of the realm”.²⁵⁸ Maugham thought it would be strange for a court to be able to question the decision to detain which may have been founded upon receiving such evidence. The Home Secretary was answerable to Parliament for the proper discharge of his duties. As there was no right of appeal from his decision, it was intended that the Secretary, not the court, be the final arbiter.

Lord Wright agreed with Lord Maugham that the issue was one for determination by the executive and stated that: “The safeguard of British liberty is in the good sense of the people and in the system of representative and responsible government which has been evolved.”²⁵⁹

In separate judgments, Lord Macmillan and Lord Romer made similar points.

Lord Atkin was the sole dissident. The question was said by him to be the meaning of the regulation: a matter which had not been in contest until a few months earlier. Atkin pointed to “the plain and natural meaning of the words”, and gave many examples of where the same or similar words had been held to import an objective test.²⁶⁰ As Lewis notes, “The weight of examples was and was intended to be crushing”.²⁶¹ There was no ambiguity in the language of Regulation 18B.

Atkin proceeded to reject the arguments of those who favoured a subjective interpretation. His position was that the existence of reasonable cause was a matter capable of determination by a judge. Having demolished the government’s case, Lord Atkin continued with his famous dissent:

I view with apprehension the attitude of judges who on a mere question of construction when face to face with claims involving the liberty of the subject show themselves more executive minded than the executive. Their function is to give words their natural meaning, not, perhaps, in war time leaning towards liberty, but following the dictum of Pollock CB in *Bowditch v Balchin*, cited with approval by my noble and learned friend Lord Wright in *Barnard v Gorman*: “In a case in which the liberty of the subject is concerned, we cannot go beyond the natural construction of the statute.” In this country, amid the clash of arms, the laws are not silent. They may be changed, but they speak the same language in war as in peace. It has always been one of the pillars of freedom, one of the principles of liberty for which on recent authority we are now fighting, that the judges are no respecters of persons and stand between the subject and any attempted encroachments on his liberty by the executive, alert to see that any coercive action is justified in law. In this case I have listened to arguments which might have been addressed acceptably to the Court of King’s Bench in the time of Charles I.

I protest, even if I do it alone, against a strained construction put on words with the effect of giving an uncontrolled power of imprisonment to the minister. To recapitulate: The words have only one meaning. They are used with that meaning in statements of the common law and in statutes. They have never been used in the sense now imputed to them. They are used in the Defence Regulations in the natural meaning, and, when it is intended to express the meaning now imputed to them, different and apt words are used in the regulations generally and in this regulation in particular. Even if it were relevant, which it is not, there is no absurdity or no such degree of public mischief as would lead to a non-natural construction.

I know of only one authority which might justify the suggested method of construction: “‘When I use a word,’ Humpty Dumpty said in rather a scornful tone, ‘it means just what I choose it to mean, neither more nor less.’ ‘The question is,’ said Alice, ‘whether you can make words mean so many different things.’ ‘The question is,’ said Humpty Dumpty, ‘which is to be master – that’s all.’” After all this long discussion the question is whether the words “If a man has” can mean “If a man thinks he has.” I am of opinion that they cannot, and that the case should be decided accordingly.²⁶²

²⁵⁸ *Liversidge v Anderson* [1942] AC 206, 221.

²⁵⁹ *Liversidge v Anderson* [1942] AC 206, 261.

²⁶⁰ Lewis, n 3, 136.

²⁶¹ Lewis, n 3, 136.

²⁶² *Liversidge v Anderson* [1942] AC 206, 244-245 (citations omitted).

The accusation that his colleagues in the majority had shown themselves to be “more executive minded than the executive” was sure to sting. If the *Alice in Wonderland* reference had not been included, then unnecessary offence to colleagues would have been avoided.

Views differ about the inclusion of the offending paragraphs. Many years after the events, Professor Heuston described the passage as “passionate, almost wild, rhetoric”. He referred to it as “an explosion” in Lord Atkin’s mind.²⁶³

In his review of the style of judgments in the House of Lords between 1876 and 2009, Sir Louis Blom-Cooper QC writes that Atkin’s language in dissent:

reflected a rare departure from the convention that disapproval among judicial colleagues should be couched in decorous language. Decorousness can often be achieved by the use of the polite *dubitante*, a useful device which both assuages the judicial conscience and avoids judicial disunity by the pronounced disagreement of the dissent.²⁶⁴

The ensuing controversy

A few days before the speeches were delivered, Lord Simon, who did not sit on the appeal, wrote to Atkin about his inclusion of the *Alice in Wonderland* reference. The unintended offence, as Simon saw it, was that the literary allusion “may be regarded as wounding”²⁶⁵ to Atkin’s fellow judges who would take the view that he was satirising, and at worst ridiculing, their efforts. Lord Simon wrote that “neither the dignity of the House, nor the collaboration of colleagues, nor the force of your reasoning, would suffer from the omission”.²⁶⁶

Atkin declined to remove the offending passage and wrote to Simon that he felt strongly about the matter:

I have not the slightest intent to ridicule them, nor I think does the passage you mention ridicule them. But I did mean to hit the proposed construction as hard as I could and to ridicule the method by which it is reached. I consider that I have destroyed it on every legal ground: and it seems to me fair to conclude with a dose of ridicule.²⁶⁷

Simon responded politely that he wished Atkin had seen his way to “omit the jibe”.²⁶⁸

Atkin anticipated the reaction his words would arouse in his colleagues. On 2 November he wrote to his daughter: “I am giving off my dissenting judgment in the Home Secretary Cases tomorrow: and haven’t spared the others. I hope that I shall be on speaking terms afterwards.”²⁶⁹

Atkin was “cold shouldered by his colleagues”,²⁷⁰ including by Lord Wright who had been a family friend.

Maugham was not present when the speeches were delivered.²⁷¹ He was stung by Atkin’s words, and took the extraordinary step of writing to *The Times*, ostensibly to defend the good name of counsel who Atkin had accused of advancing arguments that might have been addressed in the time of Charles I. He also was defending himself. Atkin maintained a dignified silence in the face of Maugham’s letter. Maugham came under attack in the papers and in Parliament for having written the letter to *The Times*.²⁷² Lord Davies put a question on notice asking the government whether they considered Law Lords criticising each other through the medium of a newspaper was in accordance with “the high

²⁶³ RFV Heuston, “Liversidge v Anderson in Retrospect” (1970) 86(1) LQR 33, 37.

²⁶⁴ Blom-Cooper, n 205, 153.

²⁶⁵ Quoted in Lewis, n 3, 139.

²⁶⁶ Lewis, n 3, 139.

²⁶⁷ Lewis, n 3, 139.

²⁶⁸ Lewis, n 3, 140.

²⁶⁹ Lewis, n 3, 138.

²⁷⁰ Bingham, n 253, 216.

²⁷¹ Lewis, n 3, 142-143; Bingham, n 253, 213.

²⁷² See Bingham, n 253, 217.

traditions of the judiciary and in the public interest”.²⁷³ Maugham was forced to make a personal statement to the House of Lords, which explained that he did not receive notice that the judgments were to be delivered. After they were, the only course open to him in defending counsel, who could not protect themselves, was to write his letter to *The Times*.²⁷⁴

Public opinion, or at least the opinion of editorial writers, was divided at the time about the correctness of Atkin’s decision on the point of substance.²⁷⁵ A number of senior academic lawyers, including Sir William Holdsworth, supported the conclusion of the majority. Professor Goodhart argued that Parliament had rejected, and did not subsequently adopt, the objective test supported by Lord Atkin.²⁷⁶ However, a young barrister (and future Lord Chancellor), Gerald Gardiner, wrote a letter to *The Times*. Like Lord Atkin, he pointed to the history of amendment of Regulation 18B. He wrote: “What is one to think of an Executive whose law officers now argue that the amended regulation means, and must have been intended to mean, precisely the same as the regulation which was withdrawn?”²⁷⁷

In a 1970 retrospective, Professor Heuston suggested that the intent of the legislators in amending the Regulation was not so clear, and that the majority view on the point of construction was to be preferred.²⁷⁸ Lewis addresses in some detail the legislative history, including the withdrawal of the earlier draft Regulation 18B in deference to political pressure.²⁷⁹ He concludes that discussion by legislators on the amendment was diffuse, and that it cannot be said on the basis of the extrinsic material that an objective test was actually intended.

If one places to one side the legislative history of Regulation 18B and concentrates on its language, then Lord Atkin was undoubtedly correct as a matter of statutory interpretation. His view has been vindicated in the following decades. As early as 1951, the House of Lords was distinguishing the reasoning of the majority.²⁸⁰ In 1964 Lord Reid described *Liversidge v Anderson* as “the very peculiar decision of this House”.²⁸¹ Finally, in 1980, the majority view was put to the sword in *Inland Revenue Commissioners v Rossminster*.²⁸² Lord Diplock, supported by the other Law Lords, stated: “I think the time has come to acknowledge openly that the majority of this House in *Liversidge v Anderson* were expediently and, at that time, perhaps, excusably, wrong and the dissenting speech of Lord Atkin was right.”²⁸³

In a 1997 lecture Lord Bingham said that he had:

no doubt at all but that Lord Atkin was correct in his essential argument on the meaning of the words used in the relevant version of Regulation 18B. There is a simple but crucial distinction between a condition which requires the existence of an objective fact (on the existence of which the court can, if necessary, rule) and the existence of a subjective belief (which requires little more than good faith and an absence of gross irrationality, which leave little room for review by the court). Lord Atkin’s central legal argument was surely correct.²⁸⁴

²⁷³ Lewis, n 3, 144.

²⁷⁴ Lewis, n 3, 146.

²⁷⁵ Bingham, n 253, 217.

²⁷⁶ Bingham, n 253, 218.

²⁷⁷ Quoted in Bingham, n 253, 218.

²⁷⁸ See Heuston, n 263.

²⁷⁹ Lewis, n 3, 148-152.

²⁸⁰ *Nakkuda Ali v MF De S Jayaratne* [1951] AC 66.

²⁸¹ *Ridge v Baldwin* [1964] AC 40, 73.

²⁸² *Inland Revenue Commissioners v Rossminster* [1980] AC 952.

²⁸³ *Inland Revenue Commissioners v Rossminster* [1980] AC 952, 1011.

²⁸⁴ Bingham, n 253, 220.

But Lord Bingham acknowledged that “the majority were right, in fact if not in law, in concluding that it was the subjective and not the objective which those who framed the Regulation, and Parliament, actually intended”.²⁸⁵ It seems unlikely that, during those perilous times, Parliament actually intended executive decisions about detention to be challenged in the courts on the basis that the Home Secretary was required to have more than an actual belief in the existence of the stated facts. However, the words they used in the Regulation did not convey such an intention. They required reasonable cause to exist.

After stating that Lord Atkin was undoubtedly correct on the point of statutory interpretation, Lord Bingham concluded:

In the sense much more important than the narrow legal sense, however, Lord Atkin has been proved to be triumphantly correct. At one of the lowest moments of our national history, it was no doubt easy to feel that exceptional circumstances called for exceptional remedies, that this was no time for legal niceties, that it was expedient to intern one man that the whole nation perish not. But we are entitled to be proud that even in that extreme national emergency there was one voice, eloquent and courageous, which asserted older, nobler, more enduring values: the right of the individual against the state; the duty to govern in accordance with the law; the role of the courts as guarantor of legality and individual right; the priceless gift, subject only to constraints by law established, of individual freedom.²⁸⁶

Lord Atkin was undoubtedly correct in his interpretation of the language that was used in Regulation 18B, and his interpretation has been vindicated. However, the addition of the *Alice in Wonderland* paragraph was unnecessarily provocative, and destructive of the collegiality which is an essential feature of the proper functioning of appellate courts.²⁸⁷

Lord Bingham, writing extra-judicially as Senior Law Lord, was critical of Lord Simon’s attempt to have Atkin remove the offensive passage:

It is inherent in the independence of the judges that they should be independent of each other. Even among judges sitting on the same case, points on the substance of another judgment will be made only with the utmost diffidence. It is extraordinary that such a suggestion should have been made by any one not involved in the case at all.²⁸⁸

In my view, Lord Simon was entitled, as a senior judicial colleague of Lord Atkin, to suggest that the offending and satirical passage was unnecessarily wounding to Atkin’s judicial colleagues, and that the force of Atkin’s reasoning would not suffer from its omission. Suggestions from judicial colleagues to revise draft judgments, especially from judges who did not sit on the case in question, should be exceptional, lest senior judges interfere with the essential independence of other judges. But the wounding words of Lord Atkin made *Liversidge* an exceptional case for a constructive suggestion about a point of style, not substance, by someone in Lord Simon’s position. Lord Simon did not seek to alter the result of the case or even the substance of Lord Atkin’s proposed speech. He wrote a polite note to Atkin in the interests of judicial collaboration and collegiality.

Unsurprisingly, Lord Atkin’s conclusion in the case and his ridicule of his colleagues was appreciated by one of his cousins, the novelist Berta Ruck, who wrote to him:

If the utter ignoring of our national rights proceeds to its *logical* conclusion we might as well be under *Hitler*: not one of us is safe.

²⁸⁵ Bingham, n 253, 220.

²⁸⁶ Bingham, n 253, 220-221.

²⁸⁷ For a powerful defence of judicial collegiality, see Harry T Edwards, “The Effects of Collegiality on Judicial Decision Making” (2003) 151(5) *Univ of Penn L Rev* 1639. Professor Edwards is a Senior Judge of the United States Court of Appeals for the District of Columbia Circuit and a former Chief Judge of that distinguished Court. The author benefitted from speaking to Professor Edwards at New York University School of Law during a visit there in October 2015.

²⁸⁸ Bingham, n 253, 216.

What a godsend of witty aptings (if I may say so) was your *Alice* quotation: it was a flash of brilliant lightning across all these clouds of confusion and nonsense. Surely “Lord Atkin’s Dissent” will illuminate this page of English history.²⁸⁹

She was correct to predict that Lord Atkin’s dissent would illuminate English history.

One of the targets of his ridicule was able to put the excessive language which Lord Atkin used in context. In an obituary in the *Law Quarterly Review*, Lord Wright wrote that Lord Atkin “always felt his views so strongly that he could not hesitate and prevaricate”, and that “so strong a judge would not hesitate to dissent on occasion from his brethren”.²⁹⁰ In a forgiving reference to the dissent in *Liversidge*, Lord Wright noted that the dissent was entirely based on construction, and that Parliament did not amend the regulation and nor did the country demand its alteration. Lord Atkin’s dissent was said to have shown his “habitual courage and independence”.²⁹¹ Lord Wright concluded the obituary as follows:

the value of his work will not be found to lie in particular judgments (valuable and important as they are) but in the animating motive force which inspired him. His service to the future of English law will be large and lasting.²⁹²

Lord Wright was correct. Lord Atkin’s dissent, with its forceful statement of constitutional principle, has influenced generations of judges and lawyers. It has now reached a general audience in the form of an acclaimed play, *Regulation 18B: No Free Man*, which was performed in England this year to critical acclaim.²⁹³

Lord Atkin’s dissent, along with the dissent of Lord Shaw in *Zadig*, has been praised in a review of the jurisprudence of the Judicial House of Lords as “one of the greatest constitutional law judgments ever delivered”.²⁹⁴ Professor Hadfield states that the spirit of much constitutional law history is well served by the dissents of Lords Shaw and Atkin, and that one should delight in such judgments:

Ahead of their time and well before debates on civil liberties transmuted into human rights (and before the birth of the sound-bite), these judges demonstrated that within constitutional law proper human rights values have a place. The rules of statutory interpretation when used expansively and liberally may serve every bit as well as references to the rule of law and human rights.²⁹⁵

Lord Shaw’s 1917 dissent in *Zadig* was concerned with the power to enact a law like Regulation 18B, whereas, as we have seen, *Liversidge* was about statutory construction. They concerned different issues, and in 1916 Lord Atkin sided with the majority view in upholding the lawfulness of *Zadig*’s detention. He saw “no reason for invoking any limitations”²⁹⁶ on the power given by legislation to make such a regulation. It is possible to reconcile the views of the young judge in 1916 with the views of the old judge in 1942. The issues in the two cases were quite different. In *Liversidge*, Lord Atkin stated that he could not see what *Zadig*’s case had to do with the issue of the “plain meaning of the words” of the new Regulation 18B.²⁹⁷

²⁸⁹ Quoted in Lewis, n 3, 152.

²⁹⁰ Wright, n 7, 333-334.

²⁹¹ Wright, n 7, 334.

²⁹² Wright, n 7, 334.

²⁹³ *Regulation 18B: No Free Man*, <http://www.regulation18b.com>.

²⁹⁴ Hadfield, n 252, 510.

²⁹⁵ Hadfield, n 252, 510.

²⁹⁶ *R v Halliday; Ex parte Zadig* [1916] 1 KB 738, 743.

²⁹⁷ *Liversidge v Anderson* [1942] AC 206, 239.

Professor Hadfield observes:

The contrast in his dicta in the two cases may nonetheless be dryly commented upon; it can equally be said that Lord Atkin matured in his thinking as a judge or that even at the time of Lord Shaw's dissent, Atkin J listened.²⁹⁸

Lord Shaw and Lord Atkin were each concerned with constitutional principles. Courts do not infer lightly, even in times of war and national crisis, that Parliament intends to interfere with the liberty of a citizen. Parliament has to use clear words if it intends to do so.

These constitutional principles, and the courts which uphold them, may come under pressure at times of war. The times in which Lord Atkin wrote his speech in *Liversidge* were grim. As Lewis reminds us, the time at which *Liversidge* was argued in late 1941 was "the low point in the War":

The Balkans and Crete had been overrun; the invasion of Russia had carried the Germans close to Leningrad and Moscow; the British summer offensive in the Western Desert had failed; the Japanese menaced the Malayan Peninsular and Singapore; Pearl Harbour was to follow in the next month and the United States were not yet in the War.²⁹⁹

At such a time, Lord Atkin had the courage to be the sole dissident and to resist the arguments which appealed to his colleagues. His dissent was a blow for constitutionalism and liberty. His cousin's affectionate letter made a point which has been made by others in recent times about security and liberty. In 2006, Professor Gardner wrote an article in the *London Review of Books* titled "What security is there against arbitrary government?".³⁰⁰ He imagined a government of Securitania, which deports supposed enemies and puts others under house arrest. People against whom no crime can be proved are subject to orders obtained from magistrates on hearsay evidence, and those orders make it a crime in future for persons subject to those orders to do ordinary things, such as go shopping, that would not be a crime if anyone else did them. Gardner posed the question:

Do any of these developments make the people of Securitania more secure? Probably not. But in one way they clearly make them a lot less secure: the people of Securitania are progressively being deprived of the rudimentary security of living under the rule of law.³⁰¹

A similar point was made in Lord Hoffmann's powerful speech in *A v Secretary of State for the Home Department* in which he famously (or infamously in the opinion of some) stated: "The real threat to the life of the nation, in the sense of a people living in accordance with its traditional laws and political values, comes not from terrorism but from laws such as these."³⁰²

Lord Atkin's uncompromising language in dissent was *not* directed against an ill-considered and excessive law which provided for detention by executive order. After all, he had upheld the validity of such a law 25 years earlier. It was directed at government arguments about the interpretation of a law which did *not* provide for detention on the basis of a politician's belief, and which, in plain language, required reasonable grounds to in fact exist for the stated belief. His dissent was directed, in unnecessarily harsh language, at judicial colleagues who would accept such arguments. The interest in national security was not the only interest at stake. The liberty of the citizen was at stake.

Lord Steyn said many brilliant things in his 2003 FA Mann Lecture.³⁰³ The following passage is lengthy, but deserves to be quoted in full:

At the time the terms of Lord Atkin's dissent caused grave offence to his colleagues. But Lord Atkin's view on the interpretation of provisions such as Regulation 18B has prevailed: the Secretary of State's power to detain must be exercised on objectively reasonable grounds. To that extent *Liversidge v*

²⁹⁸ Hadfield, n 252, 508 (fn 44).

²⁹⁹ Lewis, n 3, 132.

³⁰⁰ John Gardner, "What Security is there against Arbitrary Government?" (2006) 28(5) *London Review of Books* 19 (<http://www.lrb.co.uk/v28/n05/john-gardner/what-security-is-there-against-arbitrary-government>).

³⁰¹ Gardner, n 300, 19.

³⁰² *A v Secretary of State for the Home Department* [2005] 2 AC 68, 132.

³⁰³ Johan Steyn, "Guantanamo Bay: The Legal Black Hole" (2004) 53(1) ICLQ 1 (2003 FA Mann Lecture, delivered 25 November 2003 (see www.statewatch.org/news/2003/nov/guantanamo.pdf)).

Anderson no longer haunts the law. I have referred to a case sketched on the memory of every lawyer because, despite its beguiling framework of a mere point of statutory interpretation, it is emblematic of the recurring clash of fundamentally different views about the role of courts in times of crisis. How far contemporary decisions match Lord Atkin's broader philosophy is far from clear. The theory that courts must always defer to elected representatives on matters of security is seductive. But there is a different view, namely that while courts must take into account the relative constitutional competence of branches of government to decide particular issues they must never, on constitutional grounds, surrender the constitutional duties placed on them.

Even in modern times terrible injustices have been perpetrated in the name of security on thousands who had no effective recourse to law. Too often courts of law have denied the writ of the rule of law with only the most perfunctory examination. In the context of a war on terrorism without any end in prospect this is a sombre scene for human rights. But there is the caution that unchecked abuse of power begets ever greater abuse of power. And judges do have the duty, even in times of crisis, to guard against an unprincipled and exorbitant executive response.³⁰⁴

As Lord Steyn wrote, Lord Atkin's dissent, an outstanding statement of constitutional principle, is "sketched on the memory of every lawyer".³⁰⁵ His dissent has been vindicated by history and is accepted today as a correct conclusion on an important issue of statutory construction. Justice Keane stated at the unveiling of the plaque to Lord Atkin in 2012 that Lord Atkin's speech was "a ringing blow for liberty and equality under the rule of law. And perhaps most importantly for those of us who speak that language Shakespeare spoke, for the integrity of the English language itself".³⁰⁶

THE HONORARY AUSTRALIAN

In the autumn of 1943 Lord Atkin was invited to serve as the representative of the Australian Government when allied governments established a War Crimes Commission. The Lord Chancellor, Viscount Simon, attempted to dissuade Atkin from taking the position on the ground of "the character of the proposed Commission and from a feeling that Australia is bringing in a 91-ton gun to what may be a minor task".³⁰⁷ Undeterred, Atkin took up the position and the Australian High Commissioner sought to ensure that he was treated "as a full member of the Australian Delegation and not seated in a subordinate position".³⁰⁸ Atkin attended the first 12 meetings of the Commission as Australia's representative between October 1943 and March 1944. His illness made it impossible for him to continue.

Some, like Professor Goodhart, publicly advocated two kinds of responses to war crimes. Those that constituted ordinary crimes could be punished under established criminal laws in individual states. Others were described as acts of policy, which were not governed by law, and might be punished by a political act, just as Napoleon Bonaparte had been punished by his victors by imprisonment on St Helena.³⁰⁹

Lord Atkin rejected such an approach in a strongly-worded letter to *The Times* on 30 December 1943. Punishment should not depend on the provisions of the penal laws of each invaded state, since they provided no remedy for crimes committed in the country of the enemy, and possibly made lawful by the law of that country.

Atkin's opinion was that:

the trial and punishment of these war criminals should remain under the control of the allied Powers. There is a danger lest we approach the subject in too legalistic mood. The crimes of which some of the barbarian enemy have been guilty transcend all domestic laws. They are offences against the conscience

³⁰⁴ Steyn, n 303, 2.

³⁰⁵ Steyn, n 303, 2.

³⁰⁶ Keane, n 8.

³⁰⁷ Quoted in Lewis, n 3, 45.

³⁰⁸ Lewis, n 3, 45.

³⁰⁹ Lewis, n 3, 45-46.

of civilized humanity. What is desired is not revenge, but a vindication of civilization to be achieved by imposing retribution on the criminals so as to ensure so far as possible that in no war in the future shall like horrors be perpetrated.³¹⁰

If possible the crimes would be tried in the country of the crime, but the allies would decide what tribunals would decide the matter, and this might require ad hoc international tribunals to be constituted.

He concluded that, contrary to Professor Goodhart's view:

there is very little to be said for his suggestion that the British and Americans should concern themselves only with the trials of those charged with having committed crimes against their own nationals. The conscience of the whole civilized world has been aroused by these barbarities, and surely we are all concerned in seeing that the criminals should be brought to justice. I do not believe that even a small minority of British or American people would wish to stand aside at the trial of German, Japanese, or other barbarians for crimes against, for instances, the Jews in Europe.³¹¹

THE LEGACY

Lord Atkin died in Aberdovey on 26 June 1944, aged 76. Few English judges, or indeed any judges, enjoy the enduring reputation of Lord Atkin. Plaques are unveiled to honour him 150 years after his birth. Jurists and scholars make pilgrimages to a town named Paisley where Mrs Donoghue may or may not have swallowed a snail. In 2015 a play is performed about one of his finest judgments, *Liversidge v Anderson*, and is critically acclaimed.³¹²

One might say "We shall not see the likes of Lord Atkin in our lifetime". But that would be untrue. We have. Even in the lifetime of the youngest law student in this audience we have seen great jurists in this country and in others displaying the qualities which Lord Atkin embodied. I need not mention the great Australian jurists by name. We know their names. Since this is a lecture about English judges, let me mention just three great modern English judges.³¹³ Lord Bingham displayed a masterful grasp of legal principle, legal history and a sense of justice to match that of Lord Atkin. He also shared Lord Atkin's ability to write beautiful prose.³¹⁴ Lord Hoffmann exerted a similar intellectual force to that which Lord Atkin exerted during a long career in the English judiciary. Lord Bingham and Lord Hoffmann, in separate commanding judgments in the *Bellmarsh* cases,³¹⁵ stated important principles about the rule of law in times of war and crisis. Lord Steyn, in his 2003 FA Mann Lecture, addressed the need for the rule of law to apply to detainees. In arguing that alleged war criminals be brought to justice, rather than be exiled on remote islands, Lord Steyn displayed the kind of internationalist sentiments which Lord Atkin did in 1943.

So it is not as if Lord Atkin does not have his modern-day counterparts. The point surely is that modern-day counterparts like Lord Bingham, Lord Hoffmann and Lord Steyn had Lord Atkin's example to follow.

THE GOOD SAMARITAN

The early demise of Robert Atkin was a tragedy. However, his demise meant that Lord Atkin grew up in the United Kingdom and became a great English judge, rather than a great Australian.

³¹⁰ Lewis, n 3, 47.

³¹¹ Lewis, n 3, 47-48.

³¹² See Jonathan Ames, "Scott Wright's Play Depicts a Clampdown on Liberty", *The Times*, 9 July 2015, <http://www.thetimes.co.uk/tto/law/article4491678.ece>.

³¹³ With the qualification that Lord Hoffmann and Lord Steyn began their legal careers in South Africa.

³¹⁴ A short account of Lord Bingham's life appears in an obituary that the author wrote: P Applegarth, "Lord Bingham: Brilliant Barrister and a Judge for Our Age", (2016) 76 *Hearsay* (http://www.hearsay.org.au/index.php?option=com_content&task=view&id=1018&Itemid=48). Justice Edelman will give a speech about Lord Bingham as part of this year's Selden Society lecture series.

³¹⁵ *A v Secretary of State, Home Department* [2005] 2 AC 68; *A v Secretary of State, Home Department [No 2]* [2006] 2 AC 221.

Dick Atkin honoured the wish of a dying father to be “truthful and honourable”, and to grow up to be a nice, unaffected gentleman without concern for status. He benefitted from the love and nurturing of powerful women: his mother, his grandmother and his wife. By industry and intelligence, he made good on the opportunities that were presented to him. He was fortunate to enjoy the friendship and support of William Hemmant.

Today, as we pay tribute to Lord Atkin, there are disadvantaged infants and young people with the same potential for greatness as Dick Atkin, but who probably will not have the good fortune to have a modern-day William Hemmant to smooth their path to greatness.

We describe Atkin as a great English judge, although he described himself as a Welshman. Humanity and compassion, coupled with an uncompromising spirit, characterised his life and are his legacy. He searched for principles that he expected to be embodied in the law. His view was that law should reflect many, but not all, public sentiments about what is moral in our dealings with others.

In declaring and developing the law, he was motivated by a desire to achieve justice. He showed an understanding of the circumstances of ordinary citizens, and the conditions in which they lived and worked. In developing the law, he was a progressive in the sense that he believed in the potential of law to improve society. Atkin toiled for decades as a master craftsman of law and language.

In failing physical health, Atkin stood alone in *Liversidge v Anderson* in defence of liberty and the integrity of the English language. In his final days, as Australia’s representative, he advocated for war criminals to be brought to *justice* before international tribunals. The victims of crimes against humanity were owed nothing less. We are fortunate to have had a person with Atkin’s uncompromising sense of justice as Australia’s representative in devising a system of justice which would apply to enemies of democracy who committed crimes against humanity.

The parable of the Good Samaritan was not simply a clever literary device used by Lord Atkin to establish a point of principle in tort law. It was a principle by which he lived his life. It was a principle which informed value judgments which he was required to make in administering justice according to law. It was a principle which in 1940 prompted him to welcome victims of tyranny to London. In extending the hand of friendship to refugees of a different ethnicity and religion to his own, Dick Atkin was not *writing* about a Good Samaritan. He was *being* a Good Samaritan.