The Mouse and the Snail: Reappraising the Significance of *Donoghue v Stevenson* Part IV – 'Remoteness', not 'Duty'

Dr. Jonathan Brown

Senior Lecturer in Scots Law, University of Stirling

The previous article in this series sought to establish that there is a need for Scots lawyers and jurisprudents to more clearly recognise the importance of 'wrongfulness' and 'blameworthiness' in the context of the law of delict. These twin concepts are fundamental in all cases of delict, with 'wrongfulness' being logically anterior to 'blameworthiness' (*i.e.*, for a defender to be blamed for a wrongful act, there must first be a wrongful act for which they can be blamed). In cases of *damnum iniuria*, unlike in other cases of delict, there is – as the article established – an additional requirement anterior even to wrongfulness: there must have been a recognised 'loss' caused by the defender's wrongfulness. This 'loss' must not be deemed too 'remote' from the wrongfulness in question, otherwise it will be irrecoverable. Generally speaking, the 'grand rule on the subject of the subject of damages' being 'that none can be claimed except such as naturally and directly arise out of the wrong done' (*Allan v Barclay* (1864) 2. M 873, at 874 *per* Lord Kinloch), the test for determining 'remoteness of damages' has reference to the foreseeability (or otherwise) of the loss complained of. Yet as was noted in the previous article, and by the late Professor Wilson, if 'foreseeability [be] the sole criterion for the existence of a duty… [then] duty of care becomes an unnecessary concept because foreseeability is already one of the first three requirements [of liability in negligence]'.[1]

Recognising that this is in fact the case, the previous article concluded with the suggestion that, in cases of negligently inflicted physical *damnum iniuria* (as in cases which are not concerned with *damnum iniuria*, or cases which are concerned with *damnum iniuria* intentionally (or recklessly) inflicted), the language of 'duty' – to say nothing of 'duty of care' – has no meaningful place as a term of art in Scots law. With that said, Wilson's 1984 article left the door open for the possibility of fruitful invocation of the 'duty of care' concept as a 'control mechanism' for limiting the class of prospective claimants in cases of pure economic loss and pure psychiatric injury, as well as in cases of pure omissions and of liability for the acts of animals. As the present article intends to demonstrate, however, closer inspection suggests that (within Scots law, at least) the 'duty of care' concept is in fact redundant as a 'control mechanism', as the relevant limiting factors which have been juridically recognised hitherto are in fact relevant to determining 'remoteness of damage' rather than whether or not any 'directional duty of care' was in fact owed. Such can be demonstrated by considering the summary of the law of remoteness in Scotland provided by Lord Rodger in the 2004 case of *Simmons v British Steel Plc* 2004 SC (HL) 94, in which his Lordship cited a range of authorities in support of his position (at 115).

1. The starting point is that a defender is not liable for a consequence of a kind which is not reasonably foreseeable (*McKew v Holland & Hannen & Cubitts (Scotland) Ltd*

[1] William A. Wilson, 'The Analysis of Negligence' in *Introductory Essays in Scots Law*, (2nd Edition) (W. Green, 1984), at 128.

(1970), *per* Lord Reid at 25; *Bourhill v Young*, *per* Lord Russell of Killowen at 85; *Allan v Barclay*, *per* Lord Kinloch at 874).

2. While a defender is not liable for damage that was not reasonably foreseeable, it does not follow that he is liable for all damage that was reasonably foreseeable: depending on the circumstances, the defender may not be liable for damage caused by a *novus actus interveniens* or unreasonable conduct on the part of the pursuer, even if it was reasonably foreseeable (*McKew v Holland & Hannen & Cubitts (Scotland) Ltd* (1970), *per* Lord Reid at 25).

3. Subject to the qualification in (2), if the pursuer's injury is of a kind that was foreseeable, the defender is liable, even if the damage is greater in extent than was foreseeable or it was caused in a way that could not have been foreseen (*Hughes v Lord Advocate*, *per* Lord Reid at 38-40).

4. The defender must take his victim as he finds him (*Bourhill v Young*, *per* Lord Wright at 92; *McKillen v Barclay Curle & Co Ltd*., *per* Lord President Clyde at 42).

5. Subject again to the qualification in (2), where personal injury to the pursuer was reasonably foreseeable, the defender is liable for any personal injury, whether physical or psychiatric, which the pursuer suffers as a result of his wrongdoing (*Page v Smith*, *per* Lord Lloyd of Berwick at p 197F–H).

It is submitted that the 'control mechanisms' utilised in respect of victims of economic loss and psychiatric injury may be interpreted as examples of the 'qualification in (2)' outlined by Lord Rodger, rather than (indeed, more fruitfully than) as preliminary elements used for establishing whether or not a 'duty of care' were owed. Damaged caused by a *novus actus interveniens*, or situations of so-called 'contributory negligence' are not the only occurrences that can allow a defender to escape liability for causing damage which was reasonably foreseeable; hence, the examples listed by Lord Rodger in (2) cannot be read as exhaustive. For liability for loss caused by wrongful conduct to arise, there must be a sufficiently proximate connection between the wrongdoer and the victim to justify the imposition of liability; if there is no proximity, then the losses complained of are axiomatically too 'remote' even if the possibility of the pursuer incurring such loss was 'reasonably foreseeable'. But if both reasonable foreseeability and proximity must be established in order to render the loss of a kind reparable in law, then it is difficult to see what the additional requirement of a directional 'duty of care' adds to the assessment here.

This can be demonstrated by considering the requirements of establishing liability in cases of primary and secondary victims of pure psychiatric harm, and of primary and secondary victims of economic loss, generally. A pursuer who establishes that they are a 'primary victim' of pure psychiatric injury has necessarily demonstrated that they were sufficiently proximate to the wrongdoer to justify the imposition of liability if the losses complained of were reasonably foreseeable, since to be a 'primary victim' of pure psychiatric injury it is necessary for the victim to have either been in the 'zone of physical danger' and so feared for their own life (see *Weddle v Glasgow City Council* 2021 S.L.T. (Sh Ct) 277, at para.49, *per* Sheriff McFadyen), to serve as a 'rescuer' (and so, again, be in the 'zone of physical danger') or to have actively – though involuntarily – participated in an event that caused, or was about to cause, the death or injury of another (see *Alcock v Chief Constable of South Yorkshire Police*

[1992] 1 AC 310, at 408 *per* Lord Oliver of Aylmerton; approved of by the Court of Session in *Robertson v Forth Bridge Joint Board* 1995 SC 364). Hence, unless there is some other factor covered by Lord Rodger's point (2) from *Simmons*, provided that the conduct of the defender can be shown to be wrongful (i.e., the cause of the loss) and blameworthy (i.e., negligent – by falling short of the standard expected of the reasonable person in the circumstances, *per Hunter v Hanley* 1955 SC 200), the pursuer's claim will succeed and liability will attach to the defender. It is difficult to see what a 'duty of care' analysis would add (other than additional complexity and confusion) to this analysis.

The position in respect of secondary victims of psychiatric injury is much the same: to establish that they are entitled to claim damages for their loss, they too must show that the loss was reasonably foreseeable and that they were sufficiently proximate to the wrongdoing to be entitled to raise a claim. Proximity is here established with reference to the 'limiting factors' described by Lord Wilberforce in the English case of *McLoughlin v O'Brien* [1983] 1 AC 410, at 422, as approved by the Appellate Committee of the House of Lords in *Alcock v Chief Constable of South Yorkshire Police*[1992] 1 AC 310 and *Page v Smith* [1996] AC 155, and received into Scots law.[2] These 'limiting factors' require that a pursuer must demonstrate close ties of love and affection between themselves and the primary victim, proximity in time and space to the event which harmed the primary victim, including 'direct visual or aural perception' of the event'.[3] As is obvious from the incorporation of 'proximity' into the requirements of the 'limiting factors', it can clearly be said that a secondary victim of pure psychiatric injury who fails to meet the requirements has suffered loss which is 'too remote' to be reclaimed. Again, then, it appears that any 'duty of care' analysis is redundant, since if it is demonstrated that the losses are not too remote, and that the defender is blameable for a wrongful act, then *prima facie* reparation ought to be afforded.

Where economic losses are concerned, there is presently no avenue for secondary victims to recover damages. This, it is submitted, is not because no 'duty of care' is ever owed by anyone to prevent such losses, but rather because such losses have hitherto been treated as axiomatically too remote from the event of wrongdoing to be reclaimed. Such, it is thought, is substantiated by the fact that the 'exclusionary rule' that has consistently been applied by the Scottish courts is rooted in the case of *Allan v Barclay*,[4] which as discussed above was principally concerned with matters of 'remoteness' rather than with 'duties of care'.[5] Again, then, it appears that the law of Scotland can be usefully analysed with reference to the tripartite concepts of remoteness, wrongfulness and blameworthiness, without any need to introduce the language of 'duty' as a control mechanism. The law may yet come to recognise the reparability of loss caused to secondary victims of pure economic loss, subject to 'limiting factors' such as those which operate in respect of secondary victims of pure psychiatric injury, but if it does so

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[2] See Elspeth C. Reid, *The Law of Delict in Scotland*, (Edinburgh University Press, 2022), para.6.05.

[3] See Brian Pillans, *Delict: Law and Policy*, (W. Green, 2014), para.11.56.

[4] *Ibid.* para.11.40.

[5] Indeed, the idea of a 'directional' duty of care (that is, the notion that a duty must be owed by A to B before negligence on the part of A which causes loss to B can be actionable) did not, in fact, become 'firmly fixed' within English law until the case of 1883 case of *Heaven v Pender* (1883) 11 QBD 503., where it emerged as a result of the 'contract/tort fallacy' (a fallacy which, ultimately, Donoghue came to extinguish within the Common law): see Robert Black, *A Historical Survey of Delictual Liability in Scotland for Personal Injuries and Death: Part III, English Accretions* [1975] CILSA 318, at 319.

then again such limiting factors will be employed to test whether or not the losses complained of are too 'remote', rather than whether or not a 'duty of care' can (or should) be imposed.

The position of primary victims of pure economic loss in Scotland is, it is submitted, curious, because the case most usually cited as 'making an important turning point',[6] and 'acknowledg[ing] that the law of negligence might permit a claim for pure economic loss',[7] is the English case of *Hedley Byrne v Heller and Partners* [1964] AC 465. The curiosity arises because the problem faced by the court in *Hedley Byrne* arose as 'a by-product of the doctrine of consideration' (at 525 *per* Lord Devlin.), a doctrine which is unknown to the law of Scotland.[8] Ultimately, in that case, the House of Lords concluded in that case that a 'duty of care' would arise in the course of relationships 'equivalent to a contract', defined as one in which 'where there is an assumption of responsibility in circumstances in which, but for the absence of consideration, there would be a contract' (at 529, *per* Lord Devlin). Such is all well and good for English law, which predicates its idea of 'contracts' on an exchange of promises underpinned by consideration, but this conceptualisation of the concept of 'contracts' is utterly alien to Scots law. In Scotland, 'promises' are binding without any need for acceptance on the part of the beneficiary (*MacFarlane v Johnston* (1864) 2 M 1210) and contracts are underpinned by consent, rather than by 'consideration'.[9] Indeed, as Lord Reid in fact noted in Hedley Byrne itself, 'by Scots law there can be a contract without consideration' (at 492). To talk of a relationship 'equivalent to a contract' in Scots law is, thus, meaningless: a situation 'where there is an assumption of responsibility in circumstances in which, but for the absence of consideration, there would be a contract', in this jurisdiction, is a contractual situation.

Accordingly, it is thought, were the facts of *Hedley Byrne* in fact to be repeated in Scotland, the case should plainly be treated as contractual, rather than delictual. To make a pursuer a 'primary victim' of pure economic loss in a delictual claim, some factor other than a 'relationship equivalent to a contract' in the *Hedley Byrne* conceptualisation of such is needed. Indeed, as McBryde noted in a 2011 speech to Compass Chambers, the Scottish case of *Junior Books v Veitchi* 1982 SC (HL) 244, judicially 'accepted as an application of *Hedley Byrne*'[10] which is 'not now well-regarded',[11] could more readily – and more straightforwardly – been pled on the basis of *jus quaesitum tertio*, the Scots common law doctrine allowing for the enforceability of third party rights.[12] Indeed, McBryde also suggests that the case of *Donoghue* itself could have been pled on this basis, since Ms. Donoghue's friend clearly bought the ginger beer from Minghella, who must have understood that the agreement existed to benefit both Ms. Donoghue and the unnamed friend. 'This is the model of a *jus quaesitum tertio*', a case which

[6] Reid, n.2, para.5.27.

[7] Pillans, n.3, para.11.31.

[8] See Hector L. MacQueen, *MacQueen and Thomson on Contract Law in Scotland*, (Bloomsbury Professional, 2020), at para.1.11.

[9] Jonathan Brown, *Obligations, Consent and Contracts: Re-Analysing the Basis of Medical Malpractice Liability in in light of Montgomery v Lanarkshire Health Board*, [2021] Legal Studies 156.

[10] Elspeth C. Reid, *The Law of Delict in Scotland*, (Edinburgh University Press, 2022), at para.5.82.

[11] William W. McBryde, *Contract Law: A Solution to Delictual Problems?* [2012] SLT (News) 45, at 46.

[12] Of which, see William W. McBryde, *Contract Law in Scotland*, (3rd edn.) (W. Green, 2007), para.10.01.

was regrettably not pled (though action was commenced – but later dropped – against Mr. Minghella at an early stage in proceedings).[13]

MacFarlane, recently, has suggested that 'a third party rights claim would have been unsuccessful' in *Donoghue* and *Junior Books* alike 'because the contracting parties did not expressly or impliedly confer a right [on the third parties]',[14] but this suggestion seems strange. In fact, it is thought that in both such cases an implicit intention to confer a benefit could have been found by considering the overarching purpose(s) of the contracts in each case. Accordingly, though there has been a 'retreat from *Junior Books*' (*Realstone Ltd. v J & E Shepard* [2008] CSOH 31, at para.22 *per* Lord Hodge) marked in both the Scots law of delict and English law of torts alike,[15] on the basis of McBryde's argument it is submitted that cases of this kind might too be more properly categorised as contractual, rather than delictual. Indeed, the avenue for such an analysis is now open for English jurisprudence as well as Scots, since the passing of the Contracts (Rights of Third Parties) Act 1999. Whatever position comes to prevail in England, however, it is clear that Scottish jurisprudents must bear in mind the unitary nature of the law of obligations when considering instances of prospective liability, and should not artificially constrain themselves by relying on constrained precedent and reasoning from outwith (nor, indeed, within) the jurisdiction.

Regardless of the particulars of past case law concerning 'pure economic loss', it is apparent that for liability to be established for causing such, what is necessary is a sufficiently proximate relationship between the victim and the alleged wrongdoer to justify the imposition of liability in the circumstances (combined with foreseeability of the loss suffered). Again, while it is possible for one to say that this relationship of proximity is necessary to first impose a 'duty of care', this language adds nothing to the analysis, save perhaps for descriptive purposes, since the substantive requirements of the imposition of said 'duty of care' have already been demonstrated (unless it is thought that there ought to be an additional requirement that it be 'fair, just and reasonable' to impose liability). As such, it seems again that the determination of Aquilian liability for wrongdoing in Scotland can be assessed with reference simply to remoteness of damage, the 'wrongfulness' of the defender's conduct, and the blameworthiness of the defender. To say that the defender must have owed the pursuer a 'duty of care' in order to incur liability is inaccurate and has the possibility to mislead; in Scots law, everyone owes a duty to all others to behave reasonably,[16] but breach of that duty (which necessarily amounts to *culpa*)[17] will only incur delictual liability if said breach causes loss and is not too remote from the event which led to the loss.

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[13] Matthew Chapman, *The Snail and the Ginger Beer: The Singular Case of Donoghue v Stevenson*, (Wildy, Simmonds and Hill, 2011) at 23-24.

[14] Lorna J. MacFarlane, *Privity of Contract and its Exceptions*, (Edinburgh Legal Education Trust, 2021), ch.4 fns.88 and 102

[15] Reid, n.2, at para.5.84.

[16] Within Scotland, it was from an early stage common for lawyers and jurisprudents to speak utilise the language of 'duty', meaning here both 'moral' and 'legal' duty, and 'Guthrie Smith's 1864 treatise (on *Reparation*) is 'peppered with references to "duty" and "neighbours", however, as Black stressed in his *Historical Survey*, such never denoted 'a duty of care in the technical English sense', but rather only the general expectation that all persons were expected to take reasonable care, with breach of such care amounting to *culpa*: see Robert Black, *A Historical Survey of Delictual Liability in Scotland for Personal Injuries and Death: Part III, English Accretions*, [1975] CILSA 318, at 322.

[17] *Ibid*.

The 'duty of care' concept, then, can be shown to be vacuous in respect of the Scots law of delict pertaining to intentional and reckless conduct (in all instances) as well as negligently caused physical, economic and psychiatric injury. Following Wilson's analysis, there are now only two occasions in which the concept may be of some utility to Scots lawyers: In analysing matters concerned with liability for straying animals and those concerned with liability for so-called 'pure omissions' (i.e., situations in which loss arises as a result of the lack of any action on the part of the defender). A cursory consideration of the law relating to the latter demonstrates that, again, the 'duty of care' concept is empty; in respect of such, the determinative factor is once more a relationship of proximity combined with foreseeability of harm.[18] Hence, if the 'duty of care' concept is to be thought meaningful in Scots law, it can only be in respect of the imposition of liability for the acts of animals which have caused loss.

It is interesting to note one early Scottish case which appears to suggest that animals might themselves be held legally blameworthy for wrongdoing: that of *James of* (1481) 1 Brown's Supp. 113. This was described as a 'primitive perception that animals could themselves be culpable' by Norrie,[19] however with recent moves in some jurisdictions to grant legal 'personhood' to non-human entities and animals, rather than primitive it may be thought of as a rather precocious development. Nonetheless, insofar as animal liability is concerned in modern times, 'strict liability has long been the rule for damage caused by animals, and in some circumstances it remains the rule in Scots law today'.[20] The language of 'duty', here, is clearly redundant as anything other than a descriptive term denoting again the general expectation that the owner or possessor of an animal will keep it under control. Failure to do so – if such generates a reparable loss – will constitute wrongful conduct, with blameworthiness being assigned to the owner or possessor regardless of moral culpability. Consequently, it can thus be said that the imposition of strict liability has the effect only of removing the need to establish *culpa* to prove the blameworthiness of the defender, which had been a necessary element of blameworthiness – at least for the 'first offence' – at common law (see *Webb v M'Feat* (1878) Journal of Jurisprudence 699, at 700 *per* Sheriff Barclay). The remaining factors which must be proven to sustain a claim of damages are the wrongfulness of the conduct (that is, the fact of the animal causing some loss) and the proximity of the animal (not the defender) to the loss-causing event combined with the foreseeability of the animal causing the loss in question.

While there exists a statutory scheme of strict liability, it does however remain possible for a pursuer to 'claim damages on the basis that the owner or possessor of an animal owed the pursuer a duty of care, breached that duty by failing to exercise due care in the control of the animal, and caused the pursuer loss thereby due to the animal's actions which, with reasonable care by the defender, ought to have been prevented'.[21] One again, however, though the language of 'duty of care' is used to parse the nature of the claim, it would seem that the true test for liability is 'remoteness'; colloquially speaking, one is always burdened with a duty to exercise control over one's animal, or an animal in one's possession, and failure to exercise such control may amount to *culpa* (*Webb v M'Feat* (1878) Journal of Jurisprudence 699, at 700

[18] Wilson, n.1, at 138.

[19] Kenneth McK. Norrie, 'Liability for Animals' in Joe Thomson (ed.), *Delict*, (W. Green, 2007), para.21.01.

[20] *Ibid*.

[21] *Ibid.*, para.21.08. Norrie notes too (at fn.3) that it is also possible 'to show fault sufficient to establish liability in the form of intent to injure rather than mere negligence', and does not appear to think it necessary to invoke the language of 'duty' in respect of such.

per Sheriff Barclay). Culpability is again an aspect of blameworthiness, with the causing of the loss complained of constituting the 'wrongfulness' element of the claim. Since the criteria for establishing the existence of a 'duty of care' in these instances again mirrors the criteria required for establishing that the loss is not too remote from the wrongful conduct to be reclaimed, it seems once more that the concept of 'duty of care' adds nothing to the analysis of liability for negligence in Scots delict.

Against this background, then, it would appear that although the case of *Donoghue v Stevenson* confirmed the place of the 'duty of care' in Scottish jurisprudence, the concept does not in fact add anything of value to the principles which already operated in this area prior to 1932. Indeed, as was recently pointed out by MacLeod, 'a plausible case can be made for rejection of the duty of care as part of the intellectual apparatus of negligence' even within Anglo-American jurisprudence.[22] Whatever the position in respect of the law of torts, however, it seems there are sounder reasons still for the ejection of the concept from the law of delict, as has been discussed in this article as well as the foregoing. That the concepts of 'duty of care' and 'remoteness of damage' are parallel ideas designed to fulfil the same function in law is (correctly) implied by Lord Jamieson in the case of *Bourhill v Young* 1941 SC 395; as his Lordship observed, whether or not a pursuer is entitled to recover damages for negligently caused loss 'may be approached from two angles' (at 425). The first is the traditional Scottish approach – by asking 'whether the injury [i.e., the loss] was a natural and probable consequence of the [wrongdoer's] careless act, or… was such as a man placed in his position could reasonable have foreseen as a probable consequence of what he did'. The second approach is predicated upon the imposition of a 'duty of care', necessitating the asking of whether 'the [defender], in the circumstances in which they were placed, owed a duty towards the pursuer not to injure her'. While, based on a broad application of the principles of foreseeability and proximity as outlined by the court in *Donoghue*, 'both angles of approach [might be thought to] lead to the same result' (at 425), if the Common law courts are to retreat into incrementalism in determining the existence of duties of care, there is significant scope for divergence between the principle-based approach of 'remoteness' and the precedent-orientated 'duty of care' approach.

Scots lawyers may, therefore, be said to stand at a crossroads following the mission statement issued by the Supreme Court in the case of *Robinson*. Either they can fully embrace the principle-based, deductive reasoning necessitated by the 'remoteness of damages' analysis, and jettison reference to the (redundant) language of 'duties of care'. Or, following the lead of English jurisprudence, they can abandon their own legal tradition in favour of the unstructured and incremental approach of the Common law. The former approach would, it is submitted, follow the 'spirit' of the decision in *Donoghue*, expressly enjoining the idea that 'the categories of negligence are never closed', while rejecting the letter of the decision which 'proceeded on the footing that the law applicable to the case was the same in England and in Scotland' (*Donoghue v Stevenson* 1932 SC (HL) 31, at 70 *per* Lord MacMillan). The latter would do just the opposite; paving the way for the ossification of a 'delicticle' of 'negligence' within the system, but allowing Scots lawyers to freely borrow (and be led by) cases from the wider Common law world. The present author would certainly prefer that the former option is adopted by Scots lawyers. They may be hoping for too much. In any case, it is thought that practitioners,

[22] John MacLeod, *Harm Is Where One Starts From: Khan v Meadows and Manchester Building Society v Grant Thornton LLP*, [2022] Edin. L. R. 123, at 127.

teaching and scholars of Scots law should be aware of the significance of the *Robinson* decision from the standpoint of our legal system, and – provided that full Anglicisation is not advocated for – that an altogether more sceptical view of cases from Common law jurisdictions should be taken in future. As Brodie recently observed when commenting on the present state of the 'law of negligence, 'uncritical adherence is unlikely to be a good thing'.[23]

Conclusion

From the above, as well as the three previous articles in this series, it should ultimately be clear that while the case of *Donoghue v Stevenson* – following on from *Mullen v AG Barr* – cemented the idea that the Scots law of negligence was and is conterminous with the position that prevails in the Common law world, such is in fact a wrongheaded and overly simplistic view. The overall structure of the law of delict differs considerably from the schema of torts, or 'torticles', which abides in Anglo-American jurisprudence, with significant consequences for the development of jurisprudence in both legal traditions. While a 'duty of care' must be breached in order to engage the tort of negligence in the Common law world, Scots lawyers – having no nominate 'delicticle' of negligence in their system – need not conceptualise the law of delict as being concerned with the imposition of such 'duties'. Rather, it would seem, the general principle of 'remoteness of damage', which was traditionally used as the primary test to limit claims for *damnum iniuria* in this system, functionally fulfils the same role as the 'duty of care' concept does within the Common law, albeit that since the decision in *Donoghue*, it has come to be thought that the 'duty of care' stands as an independent, additional requirement for the establishment of (Aquilian) liability in Scots delict, in spite of its practical and theoretical redundancy. This, it is thought, is an idea which should be jettisoned from Scottish jurisprudence: rather than conceptualising the law of delict as concerning the search for a directional duty owed by one person to another, the law should instead recognise that generally speaking all persons are expected, *ex lege*, to behave reasonably, and that should they fail to do so – and wrongfully cause loss which is not too remote from their acts or omissions as a result – they should be liable to remedy that loss.

Though some might take the view – as, indeed, Lord Rodger of Earlsferry did – that the fact that Lord MacMillan, in *Donoghue*, presented a 'more coherent… stronger and more compelling' speech in his final judgment than in his earlier draft which purported to decide the case on the basis of Scots law alone,[24] ultimately by promulgating the impression that Scots and English law were as one in respect of the law of negligence, the case set Scottish jurisprudence on a retrograde path. Authorities from the Common law world – such as *Hedley Byrne v Heller and Partners* – which should, logically, be dealt with under other headings of law within Scotland, have been accepted uncritically as informing the law of delict in this jurisdiction. This has meant that when the opportunity has presented itself to develop, say, the law relating to *jus quaesitum tertio*, the relevant facts have been presented on the wrong basis. This has had a deleterious impact on the development of Scots law and, it might be said, has led to unsatisfactory jurisprudence in Scotland and England alike.[25] The differing views that

[23] Douglas Brodie, *Pursuing the Police and Assumption of Responsibility: Tindall v Chief Constable of Thames Valley*, [2022] Jur. Rev. 100, at 104.

[24] Alan Rodger, *Lord MacMillan's Speech in Donoghue v Stevenson*, [1992] LQR 236, at 242.

[25] Recall McBryde's submission that *Junior Books* is 'not now well-regarded': William W. McBryde, *Contract Law: A Solution to Delictual Problems?* [2012] SLT (News) 45, at 46. It is notable that at the time of the decision, while English lawyers bemoaned the decision, 'commentators in Scotland initially hailed its reasoning as stating

have been taken in respect of cases such as *Junior Books* may be rationalised by accounting for the different legal traditions in which Scots and English lawyers operate.

As English jurisprudence retreats into incrementalism following the decision in *Robinson*, then, Scots lawyers should bear in mind that they need not follow their southerly neighbours on this path. Rather than 'adopt[ing] an approach based, in the manner characteristic of the Common law, on precedent', it remains possible for Scots to recognise the Civilian roots of their legal system and to maintain an open approach based on principle. This must, necessarily, involve Scots lawyers treating precedential authorities with some degree of scepticism (i.e., demonstrating a willingness to distinguish, rather than be guided by) whatever their provenance, and affording greater weight to *a priori* reason and deduction than to past concrete cases. If Scots lawyers fail to take this path, then assimilation of the Scottish law of delict and the English law of torts is inevitable; the Scottish system allows for the development of nominate 'delicticles' at common law and, if negligence is to ossify into such, then irreparable damage would be done to the coherence of the Scottish system. Rather than flexibly allowing for novel claims based on broad principles of liability, the Scots law of delict would come to be fettered in like manner to the Common law prior to its (partial) liberation from the legacy of the 'forms of action' which followed from *Donoghue*.

Scots lawyers should thus bear in mind that when judges and jurists refer to 'obligation[s]', this term is not to be understood as a synonym of 'duty', but rather as denoting the personal bond tying together a creditor and debtor as a result of some legally significant event. This will necessarily entail our teachers of law in the Scottish universities propounding a view of delict which does not see the subject as something sequestered from the wider Scots law of obligations, but rather as an integral part of a system which recognises that claims treated as tortious in Common law jurisdictions can in fact be dealt with under other headings of obligations, such as 'contract' and 'promise', within Scottish jurisprudence. Such will, it is hoped, allow for the maturation of a generation of new lawyers who are able to correctly identify that the Scots law of delict is capable of functioning as an ordered system, rather than a disorganised schema of nominate actions *a la* the position in the Common law world. Scots jurisprudence is fortunate to have been bequeathed an ordered system which is well rooted in the rational institutional tradition of Civil law jurisprudence. It would be a tragedy to lose this, particularly through the dramatic irony of the legacy of a decision as celebrated – and revelled in by Scots – as *Donoghue*.

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the "general lines of liability for all cases of primary [economic] loss'": Reid, n.1, para.5.84, citing A. B. Wilkinson and A. D. M. Forte, *Pure Economic Loss: A Scottish Perspective*, [1985] Jur. Rev. 1, at 25.