A SNAIL IN A BOTTLE BECOMES A HOLE IN THE POCKET

By G. P. Standen, Menai, N.S.W.

The parable of the Good Samaritan was given in response to a lawyer's question. Appropriately, it was a lawyer, who, by grasping its basic principle, in 1932 transformed the modern law of negligence by gathering the earlier "disconnected slabs exhibiting no organic unity of structure"[1] into a general principle capable of wide application.

That principle was formulated, of course, in the celebrated case of *Donoghue v. Stevenson*.[2] Miss Donoghue noticed the decomposed remains of a snail floating out of a bottle of ginger beer as the contents thereof were being poured into a tumbler (she already having partaken thereof). That somewhat nauseating circumstance, together with resultant shock and severe gastro-enteritis, prompted her to sue the manufacturer of the ginger beer, successfully. The decision contains the classic formulation by Lord Atkin of the foundation principle of negligence:

> "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."

That general criterion has been used, albeit slowly, to develop those relational interests which give rise to a duty of care. Concurrently therewith has been an expansion of the scope of that duty. The latest expansion is found in *Junior Books Ltd. v. Veitchi Co. Ltd.*[3]

The Facts:

The appellant/sub-contractor (hereinafter called "the Sub-contractor") was a specialist contractor in the laying of flooring. In 1969-70 the respondent/Proprietor had a factory erected by main contractors. In July 1978, the Proprietor's architect had nominated the appellant as sub-contractor to lay the flooring in the production area of the factory. There was no contract between the Proprietor and the sub-contractor. The flooring was duly laid. The Proprietor alleged that in 1982 the flooring showed defects allegedly due to bad workmanship or bad materials or both. The flooring apparently was not in a dangerous state, nor was its condition such as to cause danger to life or limb or to other property. The repair work was said to cost fifty thousand pounds, to which was added certain other items of economic and financial loss. The total amount claimed exceeded two hundred thousand pounds.

The Issue:

The basic issue was whether the law extends the duty of care beyond a duty to prevent harm being done by faulty work to a duty to avoid such faults being present in the work itself. In other words, was the Sub-contrator liable for economic loss flowing from defective work which neither caused danger to the health or safety of any person nor risk of damage to any other property?

Obviously, such is a fundamental issue. It directly raises the scope of the duty of care (the Sub-contractor admitting, incidentally, that some duty of care existed). It had not been dealt with in any previously decided case. Certainly, it has earlier been decided, for instance, that:

(a) the duty of care extends to avoiding physical injury or physical damage to the person or property of the person to whom the duty of care is owed[4]; and

(b) there is liability in negligence for economic loss where, for example:
   (i) it is consequential upon injury or damage (whether imminent or actual) to the plaintiff's person or property[5]; and
   (ii) generally speaking, a careless statement is made in the context of a special relationship between the parties and one places reliance upon the statement of the other[6] (that is to say, where there is no physical damage but where the required degree of proximity between the parties exists).

However, although the law has dramatically developed in such respects, the frontiers of negligence had not been pushed to the limit represented by the abovementioned issue.

The arguments:

The arguments revolved around the scope of the duty of care. The Sub-contractor submitted that its duty was limited to exercising reasonable care so as to mix and lay the flooring as to ensure that it was not a danger to persons or property (excluding for this purpose the flooring itself). To hold

otherwise would, it was argued, permit a person in Miss Donoghue's shoes, for example, to recover not only for personal injury suffered, but also for the diminished value of the offending bottle of ginger beer. In short, the "floodgates" would be opened, introducing "liability in an undeterminate amount for an indeterminate time to an indeterminate class".[7]

That argument was unenthusiastically received by the Court. Lord Fraser of Tullybelton said that it would lead "to drawing an arbitrary and illogical line just because a line has to be drawn somewhere".[8] Lord Roskill voiced a similar sentiment:

> "My Lords, although it cannot be denied that policy considerations have from time to time been allowed to play their part in the tort of negligence since it first developed as it were in its own right in the course of the last century, yet today I think its scope is best determined by considerations of principle rather than of policy. The floodgates argument is very familiar. It still may on occasion have its proper place but if principle suggests that the law should develop along a particular route and if the adoption of that particular route will accord a remedy where that remedy has hitherto been denied, I see no reason why, if it be just that the law should henceforth accord that remedy, that remedy should be denied simply because it will, in consequence of this particular development, become available to many rather than to few."[9]

That Proprietor's argument was two-pronged:

(a) the duty, if as alleged by the Sub-contractor, included a duty to take reasonable care to avoid damage to the flooring itself; but otherwise
(b) the duty was to exercise reasonable care so as to mix and lay the flooring as to ensure that it was free of any defects, whether dangerous to persons or property or not.

The Decision

The Sub-contractor's appeal was dismissed. The decision may be summarised thus:

(a) the principles to be applied are those stated by Lord Wilberforce in *Anns v. Merton London Borough Council*[10], namely, whether there was a "sufficient relationship of proximity" and whether there were any considerations negativing, reducing or limiting the scope of the duty or the class of person to whom it is owed or the damages to which a breach of the duty may give rise;
(b) there was a sufficient degree of proximity between the Sub-contractor and the Proprietor so as to give rise to a duty of care. Indeed, it fell just short of a direct contractual relationship. Of crucial importance to that conclusion were the following facts:

    (i) the Sub-contractor was nominated;
    (ii) the Sub-contractor was a specialist in flooring;
    (iii) the Sub-contractor knew what products were required by the Proprietor and the main contractors and specialised in the production of those products;
    (iv) the Sub-contractor alone was responsible for the composition and construction of the flooring;
    (v) the Proprietor relied upon the Sub-contractor's skill and experience;

(vi) the Sub-contractor, as nominated sub-contractor, must have known that the Proprietor relied upon its skill and experience;

(vii) the relationship between the parties was as close as it could be short of actual privity of contract; and

(viii) the Sub-contractor must be taken to have known that if it did the work negligently (it being assumed that it did) the resulting defects would at some time require remedying by the Proprietor expending money upon the remedial measures as a consequence of which the Proprietor would suffer financial or economic loss; and

(c) there were no considerations whatsoever negativing, reducing or limiting the scope of that duty of care. The only reason advanced for limiting the damage recoverable (such being purely economic or financial) was that the law had not previously allowed such recovery and therefore ought not to do so in the future. That contention was quickly disposed of. As Lord Roskill said:[11]

> "My Lords, with all respect to those who find this a sufficient answer, I do not. I think this is the next logical step forward in the development of this branch of the law. I see no reason why what was called during the argument 'damage to the pocket' simpliciter should be disallowed when 'damage to the pocket' coupled with physical damage has hitherto always been allowed. I do not think that this development, if development it be, will lead to untoward consequences."

Significance

The decision has expanded the frontiers of negligence in terms both of the scope of the duty of care and of recovery of economic loss. Its relevance is not limited to nominated sub-contractors. It extends to all those who may be in "a sufficient relationship of proximity" to another. If the elements of expertise, relationship, reliance and knowledge are present, a breach of a duty of care involving defective workmanship now prima facie imposes liability in terms of the cost of remedying such defects, together with resultant financial loss consequential upon that replacement. The importance of the obligation upon contractors and sub-contractors alike to perform in a workmanlike manner has thus been considerably reinforced. A snail in the bottle has indeed become a hole in the pocket. ■

FOOTNOTES

1 *Candler v. Crane, Christmas & Co* [1951] 2 K.B. 164 at p. 188.
2 [1932] A.C. 562.
3 [1982] 2 W.L.R. 477.
4 *Donoghue v. Stevenson*, supra.
5 *Dutton v. Bognor Regis Urban District Council* [1972] 1 Q.B. 373; *Spartan Steel & Alloys Ltd v. Martin & Co (Contractors) Ltd* [1973] 1 Q.B. 27; *Anns v. Merton London Borough Council* [1978] 1 Q.B. 554.
6 *Hedley Byrne & Co Ltd v. Heller & Partners Ltd* [1964] A.C. 465.
7 per Cardozo C. J. in *Ultramares Corporation v. Touche* (1931) 174 N.E. 441 at p. 444.
8 supra, p. 483.
9 supra, at p. 488
10 [1978] A.C. 728 at p. 751.
11 supra, at p. 495. ■