Section 2B of the Acts Interpretation Act (added in 2011) contains a definition of 'commencement' of an Act of Parliament to mean 'the time at which the Act or provision comes into operation'.

Section 3A of the Acts Interpretation Act (added in 2011) provides that an Act (apart from an Act to alter the Constitution) will commence on the 28th day after it receives the Royal Assent (by the Queen or by her representative, the Governor General).

Some legislation provides that it will commence on a date to be set out by 'proclamation' (ie, usually in the *Gazette*).

[¶1-350] Sources of the law: (2) case law — *Donoghue v Stevenson*

Let us examine a reported court case as an example of unenacted law or case law (¶1-190).

Donoghue v Stevenson is the case which sets out the liability of a manufacturer in the tort of negligence (¶4-060) to the ultimate consumer of its product where there was no contract between them.

This decision changed the law as it then stood, and it laid the foundations for the whole of the modern law of negligence — a law which includes products liability (¶7-206ff), professional negligence (¶4-230ff) and motor accident law.

Case example

***Donoghue v Stevenson* [1932] UKHL 100**

On a summer evening on 26 August 1928, at about 9 pm, Mrs May Donoghue, a shop assistant from Glasgow, and a friend stopped at Mr Francis Minchella's Wellmeadow Cafe in Paisley, a town about 20 km from Glasgow.

It was Mrs Donoghue's friend who ordered ice cream and ginger-beer for her; it was Mr Minchella who poured the drink — with decomposed snail — into the glass for Mrs Donoghue.

Mrs Donoghue, who suffered severe shock, and later gastroenteritis, mental depression, and loss of wages following time off work, sued the defendant, David Stevenson, Aerated-Water Manufacturer of Paisley, for £500 plus interest as damages and £50 costs, alleging negligence. Mr Stevenson's defence was that no reasonable cause of action was disclosed, ie, that no law existed to support the plaintiff's claim.

The legal ramifications of Mrs Donoghue's success are discussed at ¶4-080ff.

The case was decided in her favour by a majority of the five members of the House of Lords. In her favour were Lord Atkin[41] and Lords Thankerton and Macmillan; against her were Lords Buckmaster and Tomlin. With her victory in the House of Lords on the preliminary legal point, Mrs Donoghue was in a position to take her case back to the lower court for proof of the facts. Before this was possible, Mr Stevenson died and it is reported that his executor settled the case for £200.[42]

41 James Richard (Dick) Atkin was born to Irish/Welsh parents in Brisbane in 1867. His family returned to Wales when he was four. He became a barrister in the UK in 1891, High Court judge 1913–1919, Lord Justice of Appeal 1919–1928, and was appointed a Lord of Appeal in Ordinary and a Life Peer in 1928. *Donoghue v Stevenson* followed four years later. He died in 1944.

42 Its 80th anniversary is detailed in J Plunkett, 'Snail in a bottle leaves trail' (2012) 86(7) *Law Institute Journal* 56. There are many links at <www.en.wikipedia.org/wiki/Donoghue_v_Stevenson>.

The case, which appeared in the English Law Reports in 1932, is extracted in ¶1-360, with some discussion of the style and method of law reporting.

What *Donoghue v Stevenson* stands for — its *ratio decidendi* — is discussed at ¶1-380.

[¶1-360] Case law: analysis of a law report

The extracts on the following pages are reproduced from the important case of *Donoghue v Stevenson* as an example of unenacted case law and how it is reported.

[¶1-370] Case law: reporting law cases

Law is made up of enacted law (statutes, legislation, Acts of Parliament) and unenacted law (judgments or cases). Some judgments are delivered orally in open court and are occasionally televised or streamed on the internet (eg, Federal Court). The most important judgments are researched and written ('reserved').[43]

One aspect of the rule of law (¶1-015) is that all people are equal before the law. To help achieve this, the law must be available and easily accessible.

Judgments could not make law if they were not known — they are made known by law reporting.[44] Early Australian reports were published privately, usually by lawyers, before official (authorised or semi-authorised) reports started in the 1860s.

There are now many series of Australian law reports. These include the authorised reports of the various courts by the Incorporated Councils of Law Reporting, which are published either by the council itself or by a commercial publisher on behalf of the council.[45]

Commercial publishers also publish law reports. Increasingly, law reporting is published electronically on the internet, and CD-ROM reports, statutes and databases.[46]

The final say on Australian law reporting is the free online database published by the Faculties of Law at the University of Technology Sydney and University of New South Wales on <www.austlii.edu.au>. It was established in 1995 and has almost one million hits per day. It also has free links to world legal resources.

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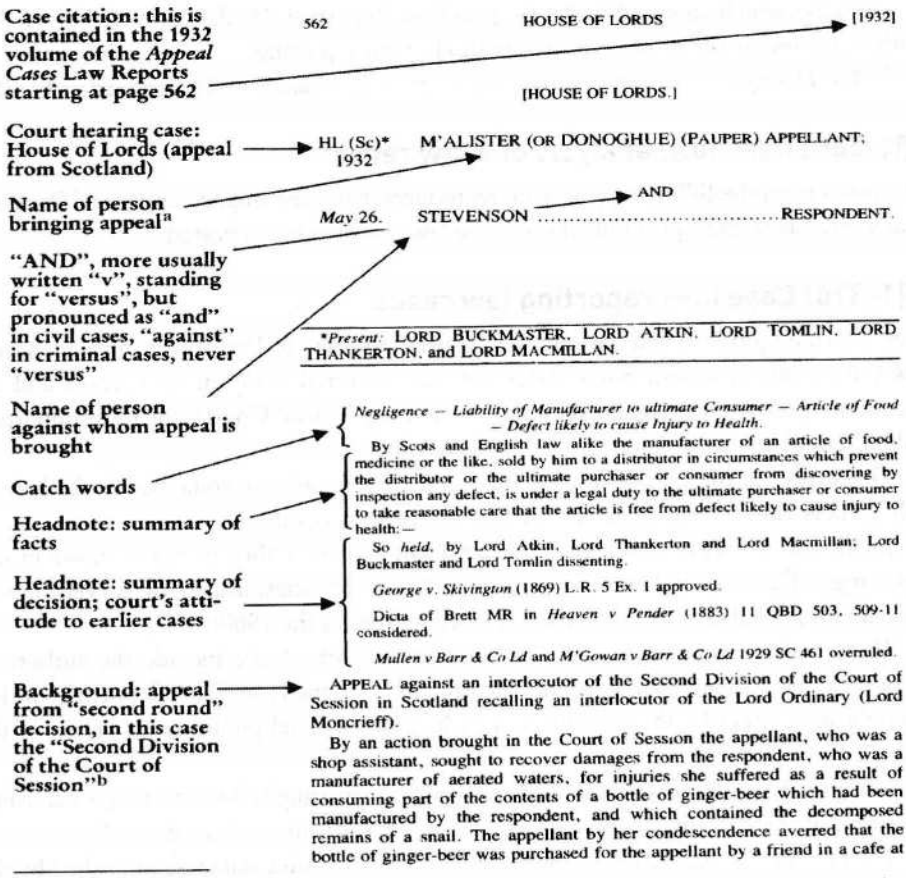
43 The judgment in *The Bell Group Ltd (in liq) v Westpac Banking Corporation* (No 9) [2008] WASC 239 was 2,643 pages, one million words, 404 days in court, judgment against the banks for $1.58b to the liquidators of The Bell Group and a court order of $82.5m in legal costs. A few years later, commentators can say that judgments need not be long and should focus on the real issues: 'Judgment writing' (2014) 88 ALJ 292.

44 Law reporting in the common law system began in England with the *Year Books* (written in 'law-French': ¶3-040) in the 14th century. These were followed by the *nominate reports*, a series of reports published privately by judges, barristers and other writers, and they were superseded by semi-official or 'authorised' law reports.

45 Eg, 'The danger of relying on unauthorised law reports' (1998) 72 ALJ 498 (incorrect word in WLR removed in revision published in the authorised reports (Appeal Cases — (AC)).

46 Eg, 'High quality law reporting is the building block on which the common law depends', *Current issues* (2000) 74 ALJ 415. See, eg, N Haxton, 'Law reporting: rebutting some assumptions' (2006) 80 ALJ 341.



Case citation: this is contained in the 1932 volume of the *Appeal Cases* Law Reports starting at page 562

562 HOUSE OF LORDS [1932]

[HOUSE OF LORDS.]

Court hearing case: House of Lords (appeal from Scotland)

HL (Sc)* 1932

Name of person bringing appeal[a]

M'ALISTER (OR DONOGHUE) (PAUPER) APPELLANT;

"AND", more usually written "v", standing for "versus", but pronounced as "and" in civil cases, "against" in criminal cases, never "versus"

AND

May 26. STEVENSON ..... RESPONDENT.

Name of person against whom appeal is brought

**Present:* LORD BUCKMASTER, LORD ATKIN, LORD TOMLIN, LORD THANKERTON, and LORD MACMILLAN.

Catch words

Negligence — Liability of Manufacturer to ultimate Consumer — Article of Food — Defect likely to cause Injury to Health.

Headnote: summary of facts

By Scots and English law alike the manufacturer of an article of food, medicine or the like, 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 a 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: —

Headnote: summary of decision; court's attitude to earlier cases

So *held*, by Lord Atkin, Lord Thankerton and Lord Macmillan; Lord Buckmaster and Lord Tomlin dissenting.

George v. Skivington (1869) L.R. 5 Ex. 1 approved.

Dicta of Brett MR in *Heaven v Pender* (1883) 11 QBD 503, 509-11 considered.

Mullen v Barr & Co Ld and *M'Gowan v Barr & Co Ld* 1929 SC 461 overruled.

Background: appeal from "second round" decision, in this case the "Second Division of the Court of Session"[b]

APPEAL against an interlocutor of the Second Division of the Court of Session in Scotland recalling an interlocutor of the Lord Ordinary (Lord Moncrieff).

By an action brought in the Court of Session the appellant, who was a shop assistant, sought to recover damages from the respondent, who was a manufacturer of aerated waters, for injuries she suffered as a result of consuming part of the contents of a bottle of ginger-beer which had been manufactured by the respondent, and which contained the decomposed remains of a snail. The appellant by her condescendence averred that the bottle of ginger-beer was purchased for the appellant by a friend in a cafe at

a In Scotland, a married woman does not give up her unmarried name for legal purposes, although she takes her husband's name. In litigation, her unmarried name is placed first, and her married name is given as an alternative. The correct citation of the case is by the married name. Mrs Donoghue, the original plaintiff, is now called the appellant; Stevenson (the original defendant), the respondent. "Pauper" approximates a person suing today with legal aid. To sue *in forma pauperis* meant suing in the form of a pauper without liability for legal costs.

b This is in effect the Scottish High Court. A decision of a Divisional Court indicates that the Court comprised two or more judges. The appeal was an appeal from the "first round", the trial judge Lord *Moncrieff*. The background of the case was:

First round: trial judge (Lord *Moncrieff*); Mrs Donoghue (plaintiff) v Stevenson (defendant); judgment for plaintiff.

Second round: appeal to High Court (Court of Session); Stevenson (appellant) v Donoghue (respondent); judgment for appellant Stevenson.

Third round: appeal to House of Lords; Donoghue (appellant) v Stevenson (respondent); judgment for appellant Donoghue.

Paisley, which was occupied by one Minchella; that the bottle was made of dark opaque glass and that the appellant had no reason to suspect that it contained anything but pure ginger-beer; that the said Minchella poured some of the ginger-beer out into a tumbler, and that the appellant drank some of the contents of the tumbler; that her friend was then proceeding to pour the remainder of the contents of the bottle into the tumbler when a snail, which was in a state of decomposition, floated out of the bottle; that (p 563) as a result of the nauseating sight of the snail in such circumstances, and in consequence of the impurities in the ginger-beer which she had already consumed, the appellant suffered from shock and severe gastro-enteritis. (p 564) The appellant further averred that the ginger-beer was manufactured by the respondent to be sold as a drink to the public (including the appellant); that it was bottled by the respondent and labelled by him with a label bearing his name; and that the bottles were thereafter sealed with a metal cap by the respondent. She further averred that it was the duty of the respondent to provide a system of working his business which would not allow snails to get into his ginger-beer bottles, and that it was also his duty to provide an efficient system of inspection of the bottles before the ginger-beer was filled into them, and that he had failed in both these duties and had so caused the accident.

Arguments of counsel for appellant consumer: not all law reports provide a summary of the arguments of the lawyers appearing in the reported case, yet these arguments often lay the foundation of the court's decision

The respondent objected that these averments were irrelevant and insufficient to support the conclusions of the summons.

The Lord Ordinary held that the averments disclosed a good cause of action and allowed a proof.

The Second Division by a majority (the Lord Justice-Clerk, Lord Ormidale, and Lord Anderson; Lord Hunter dissenting) recalled the interlocutor of the Lord Ordinary and dismissed the action.

1931. Dec 10, 11. *George Morton KC* (with him *WR Milligan*) (both of the Scottish Bar) for the appellant. The facts averred by the appellant in her condescendence disclose a relevant cause of action. In deciding this question against the appellant the Second Division felt themselves bound by their previous decision in *Mullen v Barr & Co Ld* (1929 SC 461). It was there held that in determining the question of the liability of the manufacturer to the consumer there was no difference between the law of England and the law of Scotland — and this is not now disputed — and that the question fell to be determined according to the English authorities, and the majority of the Court (Lord Hunter dissenting) were of opinion that in England there was a long line of authority opposed to the appellant's contention. The English authorities are not consistent, and the cases relied on by the Court of Session differed essentially in their facts from the present case. No case can be found where in circumstances similar to the present the Court has held that the manufacturer is under no liability to the consumer. The Court below has proceeded on the general principle that in an ordinary case a manufacturer is under no duty to any one with whom he is not in any contractual relation. To this rule there are two well known exceptions: (1.) where the article is dangerous per se, and (2.) where the article is dangerous to the knowledge of the manufacturer, but the appellant submits that the duty owed by a manufacturer to members of the public is not capable of so strict a limitation, and that the question whether a duty arises independently of contract depends upon the circumstances of each particular case.

Precedent: English and Scottish law the same

... yet English authorities are not consistent

Facts in present case are different

Law at date of case required a contract between consumer and manufacturer as basis of liability ... with two exceptions

Arguments of counsel for respondent manufacturer:[c] ... rejects a third exception to principle of manufacturer's liability to consumer

(p 565) *WG Normand*, Solicitor-General for Scotland (with him *JL Clyde* (of the Scottish Bar) and *T Elder Jones* (of the English Bar)) for the respondent. In an ordinary case such as this the manufacturer owes no duty to the consumer apart from contract. Admittedly the case does not come within either of the recognized exceptions to the general rule, but it is sought to introduce into the law a third exception in this particular case — namely, the case of goods

c The appearance of the Solicitor-General does not indicate government intervention in a public interest suit. Until 1946, the Scottish Solicitor-General retained the right to a private practice: Edwards, JLJ, *The Attorney-General, Politics and the Public Interest*, London, Sweet & Maxwell, 1984, pp 290-292.

intended for human consumption sold to the public in a form in which investigation is impossible.

George Morton KC replied.

(p 566) The House took time for consideration.

Judgment → 1932, May 26. LORD BUCKMASTER (read by LORD TOMLIN).

Date of judgment (note, date of hearing of appeal, 10 and 11 December 1931) →

So far, therefore, as the case of *George v Skivington* (LR 5 Ex 1) and the dicta in *Heaven v Pender* (11 QBD 503, 509) are concerned, it is in my
(p 576) opinion better that they should be buried so securely that their perturbed spirits shall no longer vex the law.

(p 577) The principle of tort lies completely outside the region where such considerations apply, and the duty, if it exists, must extend to every person who, in lawful circumstances, uses the article made. There can be no special duty attaching to the manufacture of food apart from that implied by contract or imposed by statute.

(p 578) LORD ATKIN. My Lords, the sole question for determination in this case

Scots for plaintiff → is legal: Do the averments made by the pursuer in her pleading, if true, disclose a cause of action? I need not restate the particular facts.

(p 579) I do not think a more important problem has occupied your Lordships in your judicial capacity: important both because of its bearing on public health and because of the practical test which it applies to the system under which it arises.

The law of both countries appears to be that in order to support an action for damages for negligence the complainant has to show that he has been injured by the breach of a duty owed to him in the circumstances by the defendant to take reasonable care to avoid such injury. In the present case we are not concerned with the breach of the duty; if a duty exists, that would be a question of fact which is sufficiently averred and for present purposes must be assumed. We are solely concerned with the question whether, as a matter of law in the circumstances alleged, the defender owed any duty to the pursuer to take care.

It is 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. The Courts are concerned with the particular relations which come before them in actual litigation, and it is sufficient to say whether the duty exists in those circumstances. The result is that the Courts have been engaged upon an elaborate classification of duties as they exist in respect of property, whether real or personal, with further divisions as to ownership, occupation or control, and distinctions based on the particular relations of the one side or the other, whether manufacturer, salesman or
(p 580) landlord, customer, tenant, stranger, and so on. In this way it can be ascertained at any time whether the law recognizes a duty, but only where the case can be referred to some particular species which has been examined and classified. And 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. To seek a complete logical definition of the general principle is probably to go beyond the function of the judge, for the more general the definition the more likely it is to omit essentials or to introduce non-essentials. The attempt was made by Brett MR in *Heaven v Pender* (11 QBD 503, 509), in a definition to which I will later refer. As framed, it was demonstrably too wide, though it appears to me, if properly limited, to be capable of affording a valuable practical guide.

At present I content myself with pointing out that in English law there must be, and is, some general conception of relations giving rise to a duty of care, of which the particular cases found in the books are but instances. The liability for negligence, whether you style it such or treat it as in other systems as a species of "culpa", is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay. But acts or omissions which any moral code would censure cannot in a practical world be treated so as to give a right to every person injured by them to demand relief. In this way rules of law arise which limit the range of 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. This appears to me to be the doctrine of *Heaven v Pender* (11 QBD 503, 509).

(p 599) 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 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.

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. I think that this appeal should be allowed.

LORD TOMLIN. My Lords, I have had an opportunity of considering the opinion (which I have already read) prepared by my noble and learned friend, Lord Buckmaster. As the reasoning of that opinion and the conclusions reached therein accord in every respect with my own views, I propose to say only a few words.

First, I think that if the appellant is to succeed it must be upon the proposition that every manufacturer or repairer of any article is under a duty to every one who may thereafter legitimately use the article to exercise due care in the manufacture or repair. It is logically impossible to stop short of this point. There can be no distinction between food and any other article. Moreover, the fact that an article of food is sent out in a sealed container can have no relevancy on the question of duty; it is only a factor which may render it easier to bring negligence home to the manufacturer.

(p 600) I am unable to explain how the cases of dangerous articles can have been treated as "exceptions" if the appellant's contention is well founded. Upon the view which I take of the matter the reported cases — some directly, others impliedly — negative the existence as part of the common law of (p 601) England of any principle affording support to the appellant's claim, and therefore there is, in my opinion, no material from which it is legitimate for your Lordships' House to deduce such a principle.

Order of the court →

Interlocutor of the Second Division of the Court of Session in Scotland reversed and interlocutor of the Lord Ordinary restored. Cause remitted back to the Court of Session in Scotland to do therein as shall be just and consistent with this judgment. The respondent to pay to the appellant the costs of the action in the Inner House and also the costs incurred by her in respect of the appeal to this House, such last mentioned costs to be taxed in the manner usual when the appellant sues in forma pauperis.

Lords' Journals, May 26, 1932.

Agents for the appellant: *Horner & Horner, for WG Leechman & Co., Glasgow and Edinburgh.*

Solicitors — London agents for Glasgow and Edinburgh principals →

Agents for the respondent: *Lawrence Jones & Co. for Niven, Macniven & Co., Glasgow, and Macpherson & Mackay, WS, Edinburgh.*

[¶1-380] Case law: the *ratio decidendi*/proposition of a case

How to write a judgment

Like students' essays, judgments written by people who are judges can vary from outstanding to a bare pass or worse.

Judgments are sometimes hard to read because of the traditional layout — they usually start with the facts, then they state the law, then they apply the law to the facts, and then they conclude. That is why some readers start at the end of the judgment.

The ideal judgment should be like a good student essay — or lawyer's letter — and start with a short statement of the issue, the conclusion (or a summary of the conclusion), the facts, the application of the law to the facts and then a final conclusion with a restatement or further elaboration. Having the conclusion up-front would give the context of the rest of the judgment.[47]

Judgments are written in formal language because they make the law. Sometimes there are light moments in judgments, like this opening from a drug case in the US Supreme Court, which flashed around the world on the internet:

> North Philly, May 4, 2001. Officer Sean Devlin, Narcotics Strike Force, was working the morning shift. Undercover surveillance. The neighbourhood? Tough as a three-dollar steak. Devlin knew. Five years on the beat, nine months with the Strike Force. He'd made fifteen, twenty drug busts in the neighbourhood.
>
> Devlin spotted him: a lone man on the corner …[48]

Ratio decidendi

The *ratio decidendi* (Latin for 'the reason for the decision') is what the case stands for (its proposition). This makes the case a precedent for the future.

Working out the *ratio* is not always an easy task, and it will usually involve:

- separating the unimportant facts from the important facts
- determining which precedents were applied and which were overlooked or overruled, and
- reading the case in the light of interpretations of the case in later decisions.

Determining the *ratio decidendi* may be further complicated if no reasons were given, or if differing reasons were given, or if the important facts were not separated from the unimportant facts. Furthermore, how far can one generalise from one decision?

What is the ratio of *Donoghue v Stevenson*?

What exactly did *Donoghue v Stevenson* [¶4-080] decide?

Is it only a case about snails? Drinks? Drink manufacturers? Manufacturers? Retailers? Or any person in a relationship with any other person requiring the exercise of a duty of care?

47 P Butt, 'The structure of judgments', *Letter to the Editor* (2009) 83 ALJ 75.

48 *Pennsylvania v Dunlap* 555 US (2008) (Roberts CJ).

Professor Julius Stone QC raised the following problems in determining the actual *ratio decidendi* of this case:[49]

> The assumption that 'the material facts' will thus yield only one *ratio* would imply, if true, that there is only one set of such 'material facts' which is to be related to the holding. And this immediately confronts the theory with a main difficulty. This is that, apart from any explicit or implicit assertion of materiality by the precedent court, there will always be more than one, and indeed many, competing versions of 'the material facts'; and there will therefore not be merely one but many *rationes*, any of which will explain the holding on those facts, and no one of which therefore is strictly *necessary* to explain it. For apart from any selection by the precedent court, all the logical possibilities remain open; and in the logician's sense it is possible to draw as many general propositions from a given decision (each of which will 'explain' it) as there are possible combinations of distinguishable facts in it. It is in these terms that, it has been said, the question — What single principle does a particular case establish? is 'strictly nonsensical, that is, inherently incapable of being answered'.
>
> If the *ratio* of a case is deemed to turn on the facts in relation to the holding, and nine fact-elements (a)–(i) are to be found in the report, there may (so far as logical possibilities are concerned) be as many rival *rationes decidendi* as there are possible combinations of distinguishable facts in it. What is more, each of these fact-elements is usually itself capable of being stated at various levels of generality, all of which embrace 'the fact' in question in the precedent decision, but each of which may yield a different result in the different fact-situation of a later case. The range of fact-elements of *Donoghue v Stevenson*, standing alone, might be over-simplified into a list somewhat as follows, each fact being itself stated at alternative levels.

(a) Fact as to the Agent of Harm

Dead snails, *or* any snails, *or* any noxious physical foreign body, *or* any noxious foreign element, physical or not, *or* any noxious element.

(b) Fact as to Vehicle of Harm

An opaque bottle of ginger-beer, *or* an opaque bottle of beverage, *or* any bottle of beverage, *or* any container of commodities for human consumption, *or* any container of any chattels for human use, *or* any chattel whatsoever, *or* any thing (including land or buildings).

49 J Stone, *Legal System and Lawyers' Reasonings* (Sydney, Maitland Publications Pty Ltd, 1968) 269–270.

(c) Fact as to Defendant's Identity

A manufacturer of goods nationally distributed through dispersed retailers, *or* any manufacturer, *or* any person working on the object for reward, *or* any person working on the object, *or* anyone dealing with the object.

(d) Fact as to Potential Danger from Vehicle of Harm

Object likely to become dangerous by negligence, or whether or not so.

(e) Fact as to Injury to Plaintiff

Physical personal injury, *or* nervous or physical personal injury, *or* any injury.

(f) Fact as to Plaintiff's Identity

A Scots widow, *or* a Scotswoman, *or* a woman, *or* any adult, *or* any human being, *or* any legal person.

(g) Fact as to Plaintiff's Relation to Vehicle of Harm

Donee of purchaser from retailer who bought directly from the defendant, *or* the purchaser from such retailer, *or* the purchaser from anyone, *or* any person related to such purchaser or donee, *or* other person, *or* any person into whose hands the object rightfully comes, *or* any person into whose hands it comes at all.

(h) Fact as to Discoverability of Agent of Harm

The noxious element being not discoverable by inspection of any intermediate party, *or* not so discoverable without destroying the saleability of the commodity, *or* not so discoverable by any such party who had a duty to inspect, *or* not so discoverable by any such party who could reasonably be expected *by the defendant* to inspect, *or* not discoverable by any such party who could reasonably be expected *by the court or a jury* to inspect.

(i) Fact as to Time of Litigation

The facts complained of were litigated in 1932, *or* any time before 1932, *or* at any time.'

[¶1-390] Case law: *obiter dicta*/non-binding observations of a case

In addition to the *ratio decidendi* (the proposition: ¶1-380) of a case, the judgment may contain observations or statements by the judge which have less force than the actual ruling in the case. These are known as *obiter dicta* (sayings by the way), often abbreviated as 'dicta'. A judge can hypothesise in dicta, and can also raise examples and comparisons in dicta. Because dicta are observations, they are not binding as precedents.

For example, the views of the judges in *Hedley Byrne & Co Ltd v Heller & Partners Ltd*[50] (¶4-240) on the existence of liability for negligent advice were said *obiter* because the disclaimer clause in that case stopped liability from being imposed on the bank which gave the negligent advice. This announcement by the judges that liability would extend to negligent advice in the right circumstances was applied three years later.[51]

The *obiter* of Denning LJ (in dissent) in the forerunner to *Hedley Byrne* shows the challenges for the judge as a law reformer:[52]

> This argument about the novelty of the action does not appeal to me in the least. It has been put forward in all the great cases which have been milestones of progress in our law, and it has always, or nearly always, been rejected. If you read the great cases ... you will find that in each of them the judges were divided in opinion. On the one side there were the timorous souls who were fearful of allowing a new cause of action. On the other side there were the bold spirits who were ready to allow it if justice so required. It was fortunate for the common law that the progressive view prevailed.

[¶1-400] Case law: legal cases as precedents

A precedent is a previous case which is used as an example (principle, authority) for later cases:

- in law, a precedent (the *ratio decidendi* of a previous case decision: ¶1-380) will be used as an authority for deciding a later legal case which involves a similar set of facts, and
- a judge who does not apply a relevant precedent is legally 'wrong' and the judge's decision may be *reversed* if there is an appeal to a higher court. A decision which does not follow precedent may be *overruled* if there is an appeal to another court of the same or higher status in the court hierarchy (¶1-060ff).

An appeal (¶1-170) which raises the correctness of a precedent may lead to the precedent being modified (distinguished, clarified, confined, refined) due to further research and analysis, or new developments, such as new approaches arising with the passage of time.

A court lower in the court hierarchy is bound to follow a precedent, yet may strongly *disapprove* of the decision.

However, the law is not stagnant and unchanging, and it does evolve over time. Some attitudes change. Some precedents fade over time. If this did not happen, the law would be 'bound to the morality and culture of a past age'.[53]

Precedents can be *distinguished* or limited in application to perhaps the identical facts. A later court could have limited *Donoghue v Stevenson*[54] to facts only involving snails in

50 *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1963] UKHL 4.

51 *WB Anderson & Sons Ltd v Rhodes (Liverpool) Ltd* [1967] 2 All ER 850.

52 *Candler v Crane, Christmas & Co* [1951] 2 KB 164, 178; ¶4-240.

53 Justice Young, 'The aging of precedent', *Current issues*, (1997) 71 ALJ 483, 484.

54 *Donoghue v Stevenson* [1932] UKHL 100; ¶1-350, ¶1-360, ¶4-080.

ginger-beer bottles instead of applying it to the many circumstances where it has been applied.

If a precedent is thought to be wrong, it will be applied to cases raising exactly the same issue. If a precedent is thought to be correct, the lightest *obiter dictum* may be important.

Binding or persuasive precedents

Precedents may be:

- *binding* — a binding precedent is the *ratio* of a case decided by a court of a higher level in the court hierarchy. The Federal Court of Australia, for example, is bound by decisions of the High Court
- *persuasive* — a persuasive precedent does not bind the court but can influence its decision. This is how decisions of overseas courts (eg, the USA and Europe) can influence Australian law, but they are not binding precedents in Australia. In the words of Kirby J:[55]

> I was insistent that the Court should look beyond the traditional English sources of judge-made law. In an early case I tried this out on Mr RP Meagher QC, telling him that I had seen relevant authority in a recent decision of the Supreme Court of Iowa. His immortal response was: 'Your Honour is such a tease.' But nothing is stable in this uncertain world. He has been known of late to cite international human rights norms in support of his opinions. I am now patiently waiting for him to use feminist legal theory to overrule Lord Eldon.

[¶1-410] Case law: law-making by judges

Because of the separation of powers in the Constitution among (1) the legislature (parliament), (2) the executive (administration) and (3) the judicature (judges) (¶1-490), the constitutional model says that parliament makes law (enacted law, statutes, legislation and Acts of Parliament) and judges interpret the law that parliament makes (unenacted law and case law).

Sometimes it is said that judges do not make law — they only 'state' (declare) it — but this is not demonstrated by the lawmaking in so many cases — like in *Donoghue v Stevenson* (¶1-350; ¶4-080).

Does lawmaking by judges replace parliament?

Courts recognise that judges, as well as parliament, make law:[56]

> [26] The argument that judicial alteration of judge-made law is usurpation of Parliament's role is untenable. The fiction that 'the common law has never changed but is only declared by the judges' (see Blackstone, *Commentaries on the Laws of England*, vol 1, 15th ed 1809, pp 68–69) and that what might appear to be alterations are only corrections of judicial misunderstanding of the common law is a notion which should not be regarded seriously …

55 P Kirby, *Farewell speech*, Court of Appeal, 2 February 1996, reported (1996) 70 ALJ 271, 272.

56 *State Government Insurance Commission (SA) v Trigwell* [1979] HCA 40 [26] (Murphy J) (edited).

> [27] Some have accepted Blackstone's 'fiction' as a fundamental proposition. But he admitted, and this is sometimes overlooked, that a judge in a common law system may rightly refuse to follow a precedent which is absurd, contrary to reason, or plainly inconvenient ... The virtue of the common law is that it can be adapted day by day through an inductive process which will achieve a coherent body of law. The legislatures have traditionally left the evolution of large areas in tort, contract and other branches of the law to the judiciary on the assumption that judges will discharge their responsibility by adapting the law to social conditions. It is when judges fail to do this that Parliament has to intervene. The extreme case is where the judiciary recognizes that a rule adopted by its predecessors was either unjust or has become so and yet still maintains it, suggesting that the legislature should correct it. This is the nadir of the judicial process. The results of legislative intervention often produce difficulties ... because legislation does not fit easily with 'the seamless fabric of the common law'.
>
> [28] Before *Donoghue v Stevenson*, there were many areas in which it could have been said that it was 'settled' law that there was no liability in negligence ... In 1932, *Donoghue v Stevenson* unsettled them all ... *Donoghue v Stevenson* itself, which established the products liability of manufacturers, is a prime example of reversal without Act of Parliament of 'settled' common law.

[¶1-420] Sources of the law: (3) Law Reform Commissions, inquiries, reports

A new law or a change to the law may come about from a recommendation after planned and systematic research by a government law reform commission or inquiry.

There are law reform commissions in all jurisdictions.

For example, the Australian Law Reform Commission (ALRC) (established in 1975) has led the way in areas such as criminal investigation, privacy, sentencing of federal offenders and, of special importance in Australian business law, manufacturers' liability (¶7-215), insolvency (¶13-558) and insurance (¶17-035).

Law reform commissions in Australia are very active, and their work is detailed in the periodical *ALRC Reform Journal* published by the ALRC.

Royal Commissions, parliamentary committees, review committees and inquiries often lead to new laws and procedures.

There are many examples of new laws in the business law area resulting from the work of committees of inquiry, such as the Senate Committee on the national companies scheme (1987: ¶9-370), the Rae Committee on national stock exchange regulation (1974), the Wallis Committee on financial regulation (1997), the Ipp Committee on the tort law crisis (2002: ¶4-061), the Ripoll Committee which gave us the Future of Financial Advice reforms in 2012 (¶16-060), and the Cameron and Milne Committee review of insurance which led to big changes to insurance law in 2013 (2004: ¶17-035).

The Companies and Markets Advisory Committee (and its predecessors going back to 1984: ¶9-380) has researched many difficult areas and has been responsible for some important changes to the law.