Chapter 7

Milestones in Negligence in the 19th and Early 20th Century

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This chapter explains some milestones in the development of the law of negligence in the 19th and the early 20th century. It will not venture far into what could be called the modern law of negligence except to explain the foundations of that law set down in the early 20th century and to note some significant changes in the modern law. We all know that, in one sense, the end of the "history" of negligence is probably still marked by *Donoghue v Stevenson*,[1] a case on appeal to the House of Lords from Scotland in 1932. Yet a history of negligence, particularly in a commercial context, would not be complete unless we finished in 1964, when the law of negligence was on the cusp of a new age of development, resting on the other "twin pillar"[2] of the modern law of negligence: the decision of the House of Lords in *Hedley Byrne & Co Ltd v Heller & Partners Ltd*.[3] So we will have to make some leaps and bounds if we are to get through a century and a half of significant developments in a mere chapter.

Professor Lunney in Chapter 2 of this volume explains the origins of the modern law of negligence in the form of action known as the "action on the case", as it developed from the 14th through to the 18th century. He notes that, by the early 19th century, parties had greater flexibility than in the previous century, when a more rigid delineation between trespass and case had generally[4]

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1 [1932] AC 562.

2 Millner, *Negligence in Modern Law* (Butterworths, London, 1967), 5

3 [1964] AC 465.

4 Lunney, Chapter 3 of this volume, p 64, citing Ibbetson, *A Historical Introduction to the Law of Obligations* (OUP, New York, 1999), 162, who notes that Blackstone J accepted that the "same evidence that will maintain trespass, may also frequently maintain Case but not e converso", a view later adopted authoritatively by the Court of Common Pleas in *Williams v Holland* (1833) 2 LJCP (NS) 190 (131 ER 848). The exception, stated by the latter case, and still applied in Australia today, perhaps more in theory than in practice, is that a plaintiff alleging a direct interference inflicted intentionally cannot bring an action in negligence: *Williams v Milotin* (1957) 97 CLR 465, 470; *Lepore v New South Wales, Samin*