**CHAPTER 8**

**LAW REFORM (CONTRIBUTORY NEGLIGENCE) ACT 1945: COLLISIONS OF A DIFFERENT SORT**

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**I. Introduction**

The tort of negligence as we currently know it in English law emerged through significant developments in the 1930s and 1940s. This assertion will typically bring to mind the case of *Donoghue v Stevenson* and the launch of a general duty of care.[[2]](#footnote-2) But there were other equally transformative developments in these two decades, which did not flow from *Donoghue*. In fact it is doubtful whether they were even influenced very deeply by *Donoghue*, though their impact has certainly been intensified in combination with that case. These other developments include the resurgence of tort liability with the repeal of the Workmen’s Compensation Acts in 1946 and its survival despite the ambitious national insurance scheme introduced in this period,[[3]](#footnote-3) the further liberalisation represented by the abolition of Crown Immunity in 1947,[[4]](#footnote-4) and, no doubt less obviously, the eventual exorcism of absolutes associated with mid-nineteenth century common law, and importation of ideas which enabled the sharing of responsibility and liability.[[5]](#footnote-5) None of these developments required the emergence of a generalised duty of care since all could operate on the basis of previously recognised duties; and many of them are applicable to the law of tort in general, rather than narrowly to negligence. All of them, it will be noticed, were strongly influenced by legislation.

The focus of this chapter is the Law Reform (Contributory Negligence) Act 1945 (1945 Act).[[6]](#footnote-6) This Act is illustrative of several of the strands of development just identified, but is most evidently bound up with the last – the exorcism of absolutes.[[7]](#footnote-7) It exemplifies the sharing of responsibility and denial of ideas of sole responsibility or sole cause. It is a key mover in the trend towards ‘shades of grey’ in the law of tort, which has undoubtedly enabled the advance of liability by drawing in more parties, in more circumstances, to its reach – and which is not immune from reversal.[[8]](#footnote-8) Further, as will be explained, the way in which the eventual wording of the Act was influenced into an entirely novel form, not modelled on existing maritime rules as originally recommended, is indicative of changing perceptions of personal injury liability in particular, since this was very clearly the focus of its framers. It is suggested that attention to the origins of the 1945 Act and the historical place which it occupies will therefore clarify the significance of some of the less heralded, but extremely significant elements in the emergence of today’s law of tort. It will also, in doing so, underline the far-reaching importance of statutory influence in shaping the common law.

In the next two sections, I briefly outline the nature of the 1945 Act and introduce elements of the legal and political context of the reform. In the following section, I briefly highlight certain features of the operation of the contributory negligence defence today, in order to provide some context for the discussion of the reform process. In the remainder of the discussion, I first consider the origins of the reform proposal in the Law Revision Committee’s 8th Report (LRC’s 8th Report),[[9]](#footnote-9) touching on general features of the Law Revision Committee and its work, and exploring both its reasoning and its recommendation where contributory negligence was concerned. Second, and turning to the process of enactment, I reflect upon the way in which this lawyers’ proposal became embroiled in larger questions about compensation and support for illness and injury. Finally, I consider major drafting changes made to the Bill (actually more than one Bill given a failed attempt at reform in 1943), and the reasons for them, and discuss what this process might reveal about the law of tort as we know it today.

**II. Section 1 and the Paradigm of Negligence Thinking**

Section 1 of the 1945 Act abolishes the rule by which contributory negligence on the part of the claimant was a complete bar to success in a claim, but requires a reduction in the claimant’s damages where the claimant’s fault has contributed to the harm suffered. This reduction is to be as the court thinks ‘just and equitable’. When first included as part of a draft Bill, the reform was very different: it was expressed as introducing apportionment of liability between parties whose fault had caused loss.[[10]](#footnote-10) This treated both (or all) parties as potentially liable to one another; requiring the full damage to be divided according to fault. The difference between these ideas will be further explained below. The apportionment of liability on the basis of degrees of fault was very closely modelled on Admiralty practice in cases of collision at sea, as refined by the Maritime Conventions Act 1911 (1911 Act).[[11]](#footnote-11) As a model for reform of personal injury, this provision suffers from serious shortcomings, which were gradually exposed during the process of enactment. The effect was that instead of pulling a set of existing terms and concepts from one part of the lawyer’s store cupboard of precedents to another (a staple feature of legal evolution and one of the causes of conceptual cross-fertilisation in the law),[[12]](#footnote-12) a much more novel provision was created.[[13]](#footnote-13) That this novelty flowed from questions asked by a Committee concerned primarily with industrial injury underlines the influence of wider changes on this lawyers’ reform.

This could be described as merely an accident of history, but the major drafting change can instead be seen as both reflecting, and significantly influencing the trajectory of development in the law of tort for personal injury. The provision as finally enacted is more closely suited to the frame of thinking associated with the modern law of tort in personal injury cases than the maritime model, and has undoubtedly influenced that frame of thinking. This is because it focuses on the claimant’s injury and extent of the defendant’s responsibility for it, rather than the sharing of liability between parties more or less equally exposed to loss. It is therefore strongly centred on injury, and the causal link with another party’s default, accepting that this may be a matter of degree. Further, while the wording was significantly altered during the process of enactment, the actual impact of those words has in turn been altered by surrounding changes, particularly by shifting notions of responsibility encapsulated in concepts such as ‘remoteness’ and duty. The full extent of change now effected by the statute demonstrably goes beyond the intentions of those who devised it, but the 1945 Act and the influences upon it provide important information about the ‘genealogy’ of modern tort law.[[14]](#footnote-14)

To put the point in more explicitly ‘evolutionary’ terms, the retention of the Admiralty collision rule for maritime cases after 1873 could be seen as an unconscious exercise in legal biodiversity, the previously belittled ‘rough justice’ of the maritime rule later being used to instigate far-reaching change in the very common law which had so nearly engulfed it. This broadly commercial heritage continues to be of undoubted significance, as we will see. But the reform as finally enacted illustrates a different kind of evolutionary process. Lord Simon’s provision could be described as taking an ‘evolutionary leap’, creating a new provision or ‘concept’ (reduction of damages, not sharing of liability) with a new type of focus on responsibility. The legislative history shows that industrial accidents, rather than ships and cars, provided the context for this leap to seem necessary. As current evolutionary approaches to law would predict,[[15]](#footnote-15) in no sense was the eventual impact of the change fully appreciated, or fully within the intentions of the law-makers. The paradigmatic nature of responsibility sharing and of the exorcism of absolutes *could* only become clear over time; and whether these developments are beneficial, still less functionally ideal, is an entirely different question, on which views are undoubtedly still adapting.

Illustrating the significance of the step taken, contributory negligence in its revised form has come to be regarded by many as the pre-eminent defence in the modern law of tort, not only in terms of the frequency with which it is applied, but also in terms of its suitability for (most of) this area of law today.[[16]](#footnote-16) For example, the late Tony Weir in his *Introduction to the Law of Tort* entitled his chapter on defences ‘Contributory Negligence’, dealing with ‘other defences’ towards the end of the same chapter.[[17]](#footnote-17) In *Vellino v Chief Constable of the Greater Manchester Police*,[[18]](#footnote-18) Sedley LJ considered an argument (drawn from breach of statutory duty cases) that a defence of *ex turpi causa* in the law of tort was actually *inconsistent with* the 1945 Act. He rejected this, but nevertheless concluded that ‘the power to apportion liability between claimant and defendant in tort actions of all kinds has afforded a far more appropriate tool for doing justice than the blunt instrument of turpitude’.[[19]](#footnote-19) He could ‘see little substantive justice in … sacrificing a judicial apportionment of responsibility on the altar of a doctrinaire refusal to adjudicate’,[[20]](#footnote-20) and would have awarded reduced damages.[[21]](#footnote-21) These remarks exemplify an idea that shared responsibility is the most appropriate and most nuanced response. The different view of the majority shows that this is open to disagreement and change, and illustrates the potential ebb and flow of ideas of responsibility.[[22]](#footnote-22)

**III. Road Traffic and Industrial Accidents**

The proposed reform of contributory negligence was initially put to Parliament with a controversial exclusion for claims by employees against their employers. In the process it raised a degree of political attention which was unwelcome to a Home Office seeking to resolve the very future of damages alongside industrial injury benefits after the Report on Social Insurance and Allied Services (Beveridge Report),[[23]](#footnote-23) and the encounter with discussions around this Report were decisive in the creation of a novel, rather than an ‘off the shelf’, provision. It is the collision between a lawyers’ reform, broad in effect but narrow in its field of vision, and these debates about the future of social provision for (amongst others) illness and incapacity, that gives the reform process much of its interest. The history also illustrates the process by which legal reform may both influence, and be influenced by, broader processes of change.

From a distance, the reform of contributory negligence seems to fit seamlessly with the Labour government’s post-War reforms. In its pre-1945 form, the doctrine was recognised to be one of the legal ‘fictions’ which had severely restricted the usefulness of common law for injured workers.[[24]](#footnote-24) But the reform of contributory negligence was not part of the post-War legislative programme. Lord Simon narrowly secured the enactment in June 1945, before the end of the War, which he considered a matter of some priority.[[25]](#footnote-25) Its origins lie in the concerns of lawyers, as expressed in the LRC’s 8th Report. More strikingly given the history of the defence and judicial development of the law in the 1930s, cases of injury to workmen were not mentioned in the report, other than through a recommendation that contributory negligence should continue to have no application under the Workmen’s Compensation Act 1925.[[26]](#footnote-26) Despite the breadth of application of the 1945 Act, the concerns of its framers would appear, both from the Report and from the later arguments in its support from Lord Simon, to have been almost entirely focused on road traffic accidents.[[27]](#footnote-27) The process of reform therefore illustrates the dominance of road traffic in shaping legal attitudes to tort liability. At the same time, the presence of industrial accidents as an irritating and delaying factor was significant for the nature of the eventual reform.

Returning to the reformers’ focus on road traffic, the potential for unfairness in such cases had been highlighted by, for example, the case of *McLean v Bell*.[[28]](#footnote-28) A girl crossing a Glasgow street after alighting from a tram had been knocked down by a car. It appears from the report that she was dragged by the car for some 20 yards before it stopped, and sustained ‘very serious injuries’ from which it was said ‘she may never recover’.[[29]](#footnote-29) In order to secure her damages she had to pursue her claim to the House of Lords as, in the words of a memorandum prepared for the Law Revision Committee ‘the insurance company had twice succeeded in getting a verdict in her favour set aside…’.[[30]](#footnote-30) On each occasion, it was held by the Second Division that the jury’s decision was contrary to the weight of the evidence: there was contributory negligence on the part of the girl, and as a matter of law, she could not succeed in her claim. On appeal to the House of Lords, the key judgment was delivered by Lord Wright, Chair of the Law Revision Committee at the time of its 8th Report. He argued that even if the girl had contributed to the accident through inattentiveness, this was not decisive against her: the jury was therefore free to decide which act of carelessness was the operating cause of the accident, and its decision should stand. By ‘operating cause’, the House meant ‘legal cause’. The case illustrates that fine decisions as to legal cause – in this instance, on the part of a jury – would make the decisive difference between compensation, and no compensation. It also illustrates how ‘legal cause’ was used by the courts to evade contributory negligence doctrine. As we will see, the Law Revision Committee did not intend to sweep away legal cause in its earlier form, though this has been an unintended consequence of the Act in harmony with other developments.

Proposing his reform, Lord Simon remained preoccupied with road traffic. He explained that ‘the ordinary case’ to be dealt with was the road traffic accident, the type of case which he said occupied the majority of time of the courts of King’s Bench.[[31]](#footnote-31) The reform was put forward as a fair and logical step by which the law of collisions on land would be brought into line with the law of collisions at sea. Lord Simon wanted, as he put it, to secure ‘fair play’ for ‘the ordinary wayfarer’.[[32]](#footnote-32)

Even so, the initial exclusion of employees’ claims against employers was not Lord Simon’s idea, for the significance of these claims did not cross his mind. Rather, the exclusion came at the instigation of the Home Office. This state of affairs appears surprising: in a war-time coalition, a Labour Home Secretary (Herbert Morrison) was confirming that employees should be excluded from a measure abolishing what was described at around the same time (admittedly on the other side of the Atlantic) as ‘the harshest doctrine known to the common law of the nineteenth century’.[[33]](#footnote-33) Much more recently, the old doctrine has been referred to as ‘vicious’.[[34]](#footnote-34) The role of the Home Office can only be understood in the context of the relative roles played by common law and workmen’s compensation in respect of work injuries at this time, and the continuing negotiations over the future of both in light of the Beveridge Report, to which we will return.

**IV. The Present Role of the Defence: Some Observations**

Before looking further at the origins of the 1945 Act, it is worth considering some features of its operation today. In cases of tort liability involving personal injury, the reformed defence is used on a daily basis. It is applied regularly by courts, but is used much more frequently by parties (including of course insurers) negotiating settlements. Thus the statute’s core provision that damages are to be reduced according to the judgment of ‘the court’ as to what would be just and equitable[[35]](#footnote-35) rarely reflects the impact of the modern defence. Far more often, ‘contributory negligence’ operates to reduce the level of settlements. It is therefore operated chiefly by lawyers and other negotiators,[[36]](#footnote-36) rather than by courts. The exact impact of contributory negligence is not easy to identify. In the UK, valuable empirical evidence in respect of the manner of its operation, and to some extent its scale is available in Harris *et al*, *Compensation and Support for Illness and Injury* (Oxford Survey).[[37]](#footnote-37)

The continuing value of the Oxford Survey lies in the fact that it focused specifically on contributory negligence as an element of its research design.[[38]](#footnote-38) Around half of settlements in the Oxford survey were reported, by legal advisors, to have been reduced to reflect a potential element of contributory negligence. In the majority of these, the claimant had initially taken the view that someone else was entirely to blame. Harris further argued that the possibility of contributory negligence is one of the ‘litigation risks’ which are negotiating weapons (or ‘bargaining chips’)[[39]](#footnote-39) available to defendants and must be assessed by claimants’ advisors in determining whether to accept an offer. As he put it, ‘[t]his legal doctrine places a powerful negotiating weapon in the hands of the defendant’s solicitors or insurance company, which is extensively used’.[[40]](#footnote-40) Of course, contributory negligence is not the sole ‘litigation risk’. But it is capable of affecting claimants whose case, in terms of the principles of liability, appears relatively clear-cut, and it may be folded into other discussions around the quantum of damages.[[41]](#footnote-41)

In terms of the pattern of compensation for the victims of tort, there is an added significance to reductions of damages because few personal injury claimants carry first party insurance. Such reductions in damages therefore typically lead to uncompensated and uninsured elements of loss.[[42]](#footnote-42) In this respect, contributory negligence in its proportionate form is a striking embodiment of the fault principle, despite its heritage in a practical rule of maritime commerce, since it treats an element of uncompensated loss as justifiable on the basis of personal responsibility. But rarely is that judgment of responsibility made by a court. Rather, the chance of such a judgment operates to influence bargaining and decision-making positions. We can illustrate this by returning to *McLean v Bell*.[[43]](#footnote-43) It seems certain that such a claimant today would not be forced to take her case to the House of Lords in order to secure damages – nor, indeed, to court at all. On the other hand, it also seems certain that the claimant’s damages would be reduced through settlement to reflect a degree of contributory negligence. The route taken by the House of Lords in that case, to secure full compensation, would be virtually unattainable.[[44]](#footnote-44) Practically, more claims are met since the 1945 Act, and few of these require a court to determine liability. But at least a substantial number of claims for personal injury are subject to reductions. And those reductions, unlike the defendant’s liability, will tend to reflect the fault principle in their impact as well as in principle, because this portion of the loss will generally be uninsured. A full-blooded fault principle is wielded primarily by insurers and other negotiators and is not the precision instrument it may appear to be.

This point about the association with fault leads to a different aspect of the role of contributory negligence. It has already been pointed out that the partial defence is sometimes seen as quintessentially suited to the modern law of tort, or at least to the part of the law of tort which deals with personal injury. It offers a refinement of the fault principle, which it strongly reflects despite not being confined to cases of carelessness or deliberate harm, in that it allows division in a very wide range of circumstances according to relative responsibility. One result of this is that it gives courts the capacity to mediate between situations in which arguments based on individual claimant responsibility (for example in cases of drug-taking, suicide, and foolhardy risks) and arguments based on defendant responsibility (for example in cases involving protection of the dependent or vulnerable or health, safety and risk reduction more generally) may otherwise come into irreconcilable conflict. The way of making these positions commensurable is through adjustments to quantum of damage.

On the other hand, this outlook too may be susceptible to change. Reduction in damages is *not* always seen as sufficiently reflecting the responsibility of one party or the other, even if courts now have to find different routes (no duty, or *ex turpi causa,* for example) to avoid it. One perspective has been that the rise of contributory negligence in a relative form renders some complete defences less appropriate.[[45]](#footnote-45) Indeed it was suggested very soon after enactment that there ought as a consequence of the 1945 Act and its logic to be less willingness to reject a causal link between breach and damage, replacing legal causation questions with responsibility sharing, though as we will see there is conclusive evidence that neither the Law Revision Committee, nor Lord Simon, shared this view.[[46]](#footnote-46) But this is not always the approach taken. Reduction of damages frequently appears fair; and sometimes it provides a useful compromise position. But at other times it is still avoided, rather as the old total defence was avoided, though the available arguments have changed.

**V. Origins: the Law Revision Committee**

As we have seen, the 1945 Act was part of a sequence of reforms originating in pre-War reports of the Law Revision Committee. [[47]](#footnote-47) This was quintessentially a Committee of lawyers. The Committee was formally appointed in 1934 by the then Lord Chancellor Viscount Sankey, and it was the successive Lord Chancellors who referred questions to the Committee. It appears from the available correspondence however that the guiding spirit behind its establishment was Permanent Secretary Claud Schuster.[[48]](#footnote-48) Schuster seems to have been inspired by a debate in the House of Commons to propose to the Lord Chancellor that such a Committee should exist, also strongly influencing its composition and the questions with which it would initially be asked to deal.[[49]](#footnote-49)

The Committee achieved significant reforms of civil liability during the 1930s and 40s. Indeed its influence on the shape of civil liability has arguably not been sufficiently appreciated. While the attention of common lawyers tends to be focused on *Donoghue v Stevenson* as the key influence on the development of the law of tort during this period,[[50]](#footnote-50) it is by no means clear that this case was more significant than the body of legislation which introduced the first provision for contribution between tortfeasors, the reduction of damages for contributory negligence, and the survival of actions on the death of tortfeasors and claimants. This was in addition to reforms and intended reforms to the law of contract. While lawyers are eager to find patterns in case-law, no attempt has been made to identify the common threads in these statutory reforms, or their lasting influence. It is significant that these reforms have in common an approach to the sharing of responsibility and division of liability and/or damages, and a pecuniary interpretation of harm. They apply a sense of fairness to the law of tort, and particularly the law of damages, which was strongly influenced by commercial practice.[[51]](#footnote-51) Commercial fairness is apt to produce legal rules around which parties will make their own arrangements, and which may raise distinct implications for personal injury claimants (rather as the law of contract may raise particular issues for ‘consumers’). This commercial context to personal injury law is not often noted, in much the same way that essential processes of indemnity and contribution are filtered out by legal theory. It might also be noted that these statutes affect all negligence claims and much else besides. Despite its famous generalisation, *Donoghue* could be argued not to have altered the key cases of road and work injuries. Even the important area of negligence around the margins of contractual duties might have developed to a considerable extent without the embellishment of the ‘neighbour principle’.[[52]](#footnote-52) In core personal injury cases, these reforms may have been more significant than *Donoghue* in shaping the law, although *Donoghue* too has undoubtedly had effects beyond those applicable to ‘duty’.[[53]](#footnote-53)

The terms of reference of the Committee were explicitly linked to the reform of ‘legal maxims and doctrines’.[[54]](#footnote-54) The aim was not, as Claud Schuster put it in a letter proposing the Committee to the Master of the Rolls, to deal with ‘questions where any political issue arises’.[[55]](#footnote-55) This division between legal and political questions may be thought to have been consciously aimed at improving the chances of reform, given Schuster’s expressed view about the Commons that ‘one tires of ploughing sand’.[[56]](#footnote-56) Much of the Committee’s work dealt with issues where the common law had arrived at results (‘doctrines’) which the courts themselves considered unsatisfactory. The Committee’s work was thus consciously defined as lawyers’ work and the methods adopted were not consultative – nor was the Committee representative in its membership.[[57]](#footnote-57)

Continuing the apolitical theme, the reform proposed in the LRC’s 8th Report was expressed to be based in simple fairness. Its terms suggest a conviction that reform of such issues was a matter of principle (not, here, to be contrasted with practical fairness), and that its impact in a variety of contexts did not need laborious consideration. The Committee largely confined itself to analysis of case-law, but even then, every one of the instances discussed was an illustration of one kind of case, namely collisions (on land, or at sea). It was simply argued that the Admiralty rule applying to collisions between ships, which allowed for ‘apportionment of liability’ according to degrees of fault, was the fairest, and should also be applied to collisions on land. The Committee issued its proposal in simple terms as follows:

That in cases where damage has been caused by the fault of two or more persons the tribunal trying the case (whether that tribunal be judge or jury) shall apportion the liability in the degree to which each party is found to be in fault.[[58]](#footnote-58)

This was intended to replicate the effect of section 1 of the 1911 Act. Indeed the model was so close that the Committee thought there would be no need expressly to provide that the Admiralty rule was unaffected by the reform: the proposal simply ‘assimilates Common Law to that of the Court of Admiralty’.[[59]](#footnote-59) Since this is precisely what Lord Simon set out to do, it is worth considering the relevant part of the 1911 Act:

‘Where, by the fault of two or more vessels, damage or loss is caused to one or more of those vessels, to their cargoes or freight, or to any property on board, the liability to make good the damage or loss shall be in proportion to the degree to which each vessel was in fault.’

This provision is expressly confined to property damage. Section 2 of the 1911 Act dealt with personal injury and death in maritime collisions:

‘Where loss of life or personal injuries are suffered by any person on board a vessel owing to the fault of that vessel and of any other vessel or vessels, the liability of the owners of the vessels shall be joint and several …’.

The terms of the personal injury provision are quite different and this is because it deals with a quite different issue. The injured *person* in the second provision is not the *vessel* at fault in the first. The liability of a vessel may depend on the fault of various members of her crew, and is shorthand for the liability of, generally, the shipowner. The first provision deals with the question of how the *total liability* for property loss is divided where two or more ‘ships’ (understood in this way) are at fault in a collision. Generally speaking, both ships (and their cargo) will suffer damage. In its origins, the Admiralty rule was a response to a recognised hazard of maritime commerce and was not about reduction of damages so much as sharing of loss. The second provision deals with the question of *which vessel* is liable to those injured in the collision, with the answer that both are liable. This is a sign that the model of the maritime property rule does not easily translate to road traffic accidents, despite the terms of the LRC’s 8th Report. We do not divide liability for motor accidents according to the negligence of ‘vehicles’, but according to the negligence of individuals who may be drivers, passengers, pedestrians, cyclists, and so on, and any of these might be injured, or suffer property damage. Indeed, the Admiralty courts before the 1911 Act had no jurisdiction over personal injury claims, which were therefore not treated in terms of the relative liability of the colliding vessels; and the Fatal Accidents Act of 1846 did not confer power on the Admiralty Court to try an action for damages for death. Such actions were the subject of common law principles, and the rule of division of loss did not apply to such claims. This was to the advantage of passengers and those members of the crew who had not through their own fault contributed to the collision;[[60]](#footnote-60) and the principle remained under the 1911 Act despite changes in competence.[[61]](#footnote-61) This makes it all the more surprising that this precedent should have been proposed as the model for personal injuries on the roads.

Continuing this theme, the terms of the Committee’s Recommendation, and of section 1 of the 1911 Act on which it was modelled, when compared with the eventual provisions of the 1945 Act give a clue to some of the key issues which complicated its drafting. Section 1 of the 1911 Act is premised on the possibility or even the likelihood that both parties (in the maritime case, both ‘vessels’) have suffered harm, and that each is potentially liable to the other. Where maritime collisions were concerned, the usual approach was to determine liability ‘in consolidated cross-actions in which each party attributes the whole blame to the other party’.[[62]](#footnote-62) Courts applying the Admiralty rule would add the total damage together and divide it according to fault, producing liability on one side only (treated as a ‘single damage’). This was replicated in the first draft of the reform, clause 3 of the Law Reform (Frustrated Contracts and Contributory Negligence) Bill 1943:

‘Where, as the result of the fault of two or more persons, damage (including loss of life or personal injury) is caused to one or more of those persons, the defence of contributory negligence shall not lie against any of those persons, but the liability in respect of the whole of the damage so caused shall be apportioned among those persons according to the degree to which each of those persons was at fault.’[[63]](#footnote-63)

If applied in an ordinary road traffic accident, was it always to be necessary to determine what damage the defendant – and indeed anyone else – had suffered before determining what was due *to* the claimant – or, potentially, *from* the claimant?[[64]](#footnote-64) The inappropriateness was magnified in an industrial context given the difference in economic status between claimant and defendant. For example, were the relatives of a dead miner to be held to account for a proportion of the damage to the fabric of the mine, or to expensive machinery, if he had been partly to blame for the accident that led to his death? This original version, like the Admiralty Rule, had much in common with contribution between tortfeasors.[[65]](#footnote-65)

Apart from these observations about the brevity of the proposal (and the fact that it proved to be not quite suitable), it is also notable how many things are absent from the Report. Some of these omissions are probably entirely symptomatic of the general approach to the Committee and its role. Others, and particularly the lack of reference to case-law relating to employees for injuries at work, are more mysterious.

First, the Committee apparently did not seek or receive the views of ‘interested’ parties, such as insurers or (since the focus was on road accidents) solicitors conducting personal injury work. This was consistent with the general approach of the Committee, which was not consultative.[[66]](#footnote-66) Only one letter on file suggests any fact-finding about the likely effect on the insurance position. This was a reply to AL Goodhart from the Ontario Department of Insurance, confirming that third party insurance premiums were ‘at present lower than they were during the years 1929 and 1930’.[[67]](#footnote-67) This suggests that insurance costs were at least in the minds of the reformers,[[68]](#footnote-68) though one would have thought that the difference between marine insurance for collision damage, and motor insurance for personal injury liabilities (then quite newly subject to a compulsory third party regime), would have been worth exploring.

The most glaring omission however is any single reference to employment claims at common law. Few people could have been more aware of the role of contributory negligence in such cases than Lords Wright and Porter. Both were involved in hearing the case of *Caswell v Powell Duffryn Associated Collieries* at the very time the Report was published.[[69]](#footnote-69) Lord Wright had, before that, been centrally involved in the decision in *Flower v Ebbw Vale Steel, Iron and Coal Company Ltd*.[[70]](#footnote-70) In both of these cases, while accepting that contributory negligence was an available defence in an action for breach of statutory duty, Lord Wright argued strongly that very tight criteria applied to the contributory negligence defence in cases where the defendant had breached a statutory duty, plainly intending to limit its application in such cases. In *Flower*, Lord Wright had been the only member of the House of Lords prepared to make a statement as to the applicable principles, rather than merely reinstating the judge’s opinion of the facts.[[71]](#footnote-71) A similar approach to the relevant principles was articulated by another member of the Committee, Goddard LJ, after the Report. In *Hutchinson v London and North Eastern Railway*,[[72]](#footnote-72) Goddard LJ said that it was ‘only too common’ to see pleas of contributory negligence where an employer had breached a statutory duty. In such a case, ‘I always direct myself to be exceedingly chary of finding contributory negligence where the contributory negligence alleged was the very thing which the statutory duty of the employer was designed to prevent’. But the direction of development was not uniform. It was Lord Simon himself who concluded in 1940 that a teenage apprentice who had caught his fingers in an unguarded circular saw was unable to recover for his loss because although the employer was in breach of statutory duty, the child was not using a ‘push stick’ as instructed. Lord Atkin reluctantly acquiesced but was clearly concerned about undermining *Caswell*; the other judges merely concurred.[[73]](#footnote-73) There may have been considerable distance between Lord Simon, and the Committee members whose recommendations he was pursuing, when it came to the unmentioned category of employee claims.

Notably, in *Caswell* Lord Wright used notions of legal or proximate cause, referring to *Swadling v Cooper*,[[74]](#footnote-74) one of the road traffic cases discussed in the LRC’s 8th Report,in order to outline the circumstances in which a defendant’s breach of duty, not the claimant’s carelessness, would be considered the legal cause of the accident. Not only does Lord Wright’s use of *Swadling v Cooper* show cross-fertilisation between these classes of case, not replicated in the LRC’s 8th Report, but it might appear to employ the very approach which the Report was designed to sweep away. This leads to the important question of how broad the reach of the reform was intended to be.

In fact, the approach taken in these cases helps to explain an underlying complexity in the argument of the LRC’s 8th Report which is not captured in its brief recommendation looked at alone. From this, we can see both that the impact of a legal reform may be intensified by putting in motion, or interacting with, other changes in legal concepts, and that the Committee may have been trying to protect its own judicial project of reform where industrial injuries were concerned. The LRC’s 8th Report reserved the position by which the fault of one of the parties may be considered to be the sole legal cause of an accident, even where both are at fault, and both may be said to be a *sine qua non* of the damage. This was captured by the Committee in terms of ‘causation’, by which was plainly meant *legal* rather than ‘factual’ causation. As already hinted, what the Committee had in mind was something more multi-faceted than today’s approach to legal cause (or what is left of it), which is typically expressed in terms of ‘remoteness’ based on reasonable foreseeability (or, much more recently, in terms of ‘scope of duty’).[[75]](#footnote-75)

Remoteness, compared to legal cause, is intended to be a simpler notion which does not engage in fictions. Importantly, it also does not aim to equip courts to select *between competing causes*, asking only about the connection between the defendant’s breach, and the damage suffered – notwithstanding any rival causes. This reflects a general recognition of multiple causes and sharing of responsibility, fundamental to the loss-spreading effects of tort law today. Even so, ‘legal cause’ in its older sense has not entirely disappeared. The awkward persistence of thinking in terms of *novus actus* (breaks in the chain of causation), for example, is recognised to be a symptom of the difficulties involved in ridding the law of the language of all aspects of legal cause. The LRC’s 8th Report went further and deliberately left a role for what might be called ‘sole cause’, without the discredited terminology of ‘last opportunity’, but preserving the authority of some of the key decisions. Just as ‘last opportunity’ was not killed by the 1945 Act alone, it is not the 1945 Act alone which has confined ’sole cause’ to history, so much as its interaction with the other forces of change that led to *The Wagon Mound*. The Committee expressed the point as follows:

… while we recommend that the principle of apportioning the loss to the fault should be adopted at Common Law, we do not recommend any change in the method of ascertaining whose the fault may be, nor any abrogation from what has been somewhat inaptly called the “last opportunity rule”. In truth there is no such rule – the question, as in all questions of liability for a tortious act, is, not who had the last opportunity of avoiding the mischief, but whose act caused the wrong?[[76]](#footnote-76)

In *Davies v Swan Motor Co (Swansea) Ltd*, an early application of the 1945 Act, the Court of Appeal applied pre-1945 decisions on legal causation, holding however that this was a case where causation was shared between both parties so that section 1 applied.[[77]](#footnote-77)‘Last opportunity’ was either not part of the law, or inapplicable in this case, *because* the claimant’s negligence was still an ‘operating’ or ‘efficient’ cause. This is wholly consistent with pre-1945 approaches to causation. The case was also significant in deciding that no duty had to be owed by the claimant to the defendant for the provisions of the 1945 Act to have effect.[[78]](#footnote-78) Still more significant for present purposes however is that Denning LJ, in a prescient judgment, expressed the view that the practical effect of the 1945 Act on causal principles was wider than what he called its ‘legal effect’. Denning LJ argued that the very idea of sole cause had been created in order to mitigate the harshness of contributory negligence:

But the practical effect is wider than its legal effect. Previously, in order to mitigate the harshness of the doctrine of contributory negligence, the courts in practice sought to select, from a number of competing causes, which was *the* cause – the effective or predominate cause – of the damage and to reject the rest. Now the courts have regard to all the causes and apportion the damages accordingly.[[79]](#footnote-79)

It is important to note that the search for sole cause is described here not as the basis or origin of the injustice perpetrated by the common law’s version of contributory negligence,[[80]](#footnote-80) which *depended upon* multiple causes, but as the courts’ device for mitigating the effects of that common law rule. Either way, sole cause in such cases had become a purposive legal doctrine in the hands of the court. That is exactly how it seems to have been used by members of the Law Revision Committee in cases of workplace injury around the time of the LRC’s 8th Report, and there was no plan to give it up.

Because the idea of ‘cause’ is not unpacked in the wording of the 1945 Act, from today’s perspective decisions such as *Caswell* and *Flower* would appear impossible on an application of its provisions. Section 1(1) *requires* the court to reduce damages where the harm to the claimant is the result partly of his or her own fault. ‘The result of’ is causal language. And yet, in the context of breach of statutory duty claims in particular, subsequent courts have continued to maintain the developing pre-Act position by which ordinary inadvertence of the worker does not generally operate as contributory negligence sufficient to justify a reduction in damages: protection of workers from the effect of tiredness or even from an habitual neglect of safety routines is regarded as part of the employer’s duty of risk reduction.[[81]](#footnote-81) Yet the same reasoning is capable of application in cases involving common law duties,[[82]](#footnote-82) and in neither case does it appear to fit well with the statutory language, given the depleted meaning of legal cause. This is indeed similar to the effect predicted by Denning LJ, but has been broadened in its scope by other changes.

Returning to the LRC’s 8th Report, there are various ways to explain the absence of employee cases from its discussion. One possibility is that the rarity of such claims at common law was genuinely thought to justify the focus on road traffic, for the great bulk of employee claims were for workmen’s compensation. Alternatively, the Committee may have avoided mentioning employee claims because they inhabited an area where political discussion was ongoing,[[83]](#footnote-83) and their presence could only make reform harder to achieve. But finally, it is possible that the Committee thought these claims could and (given the previous point) should be largely kept out of the range of contributory negligence in other than unusual cases, employing the idea of sole cause. This was very much judicial work in progress. Referring back to the causal issues just explored, the approach taken in employee cases during the period underlines that the *general* intention was not to change ‘all or nothing’ to shades of liability in every case where there was partial fault on the side of the claimant, even if that fault was a *sine qua non*. It was to adopt Admiralty practice, which did not engage in apportionment unless both parties’ fault was considered a *legal* cause. The courts used this idea to achieve desired outcomes immediately before and after the 1945 Act in road traffic cases, maritime cases, and employment cases, with cross references between them. Since the judges in those cases were in some instances also the framers of the reform, there can be no doubt that the causation ideas referred to in the 1945 Act would have been understood by them to mean ‘legal’ or ‘proximate’ cause. Often overlooked, in particular, is Viscount Simon’s judgment in *The Boy Andrew* after his efforts in securing the 1945 Act, determining that as there was only one party whose fault operated as a legal cause, there was no ground for division of liability.[[84]](#footnote-84)

Given the narrower range of ‘legal cause’ (remoteness) today, the current equivalent of such arguments is to be found in direct appeal to ‘responsibility’ and in reference to the ‘purpose of the duty’ breached by the defendant. For example, the restrictive approach to contributory negligence still to be seen in statutory duty cases was identified, and not criticised, by Lord Hoffmann in *Reeves v Commissioner of Police for the Metropolis*.[[85]](#footnote-85) Buxton LJ in the Court of Appeal had applied both *Hutchinson* and *Staveley*, arguing that there should be no reduction in damages for contributory negligence where the deceased had taken his own life in prison, the defendants owing him a duty to protect him as a known suicide risk. To hold otherwise would undermine or contradict the duty. The importance of *Hutchinson* was said by Lord Hoffmann to be diminished because it had been heard before the 1945 Act.[[86]](#footnote-86) But Lord Hoffmann also argued that the citation of the post-Act case of *Staveley*:

performs the valuable function of reminding us that what section 1 requires the court to apportion is not merely degrees of carelessness but ‘responsibility’ and that an assessment of responsibility must take into account the policy of the rule, such as the Factories Acts, by which liability is imposed. A person may be responsible though he has not been careless at all, as in the case of breach of an absolute statutory duty. And he may have been careless without being responsible, as in the case of ’acts of inattention’ by workmen.[[87]](#footnote-87)

The language of ‘responsibility’ here is used to deliver in a different way what the LRC’s 8th Report – and contemporaneous case-law – sought in the court’s judgment as to legal causation. As a matter of statutory interpretation, it is not clear that this is a legitimate route to take, because according to the wording of the statute, the extent of the claimant’s ‘responsibility’ for the damage is only to affect the *extent* to which damages are reduced. The opening words of the section *require* that damages should be reduced wherever harm is caused through the fault of the claimant and of any other person. This requirement can be satisfied by connecting causation to responsibility, but is not obviously satisfied through the idea of responsibility alone. But the truth is that Lord Hoffmann in *Reeves*, and the Law Revision Committee in 1939, had broadly the same idea in mind. This is exemplified in the judgment of Lord Wright in *McLean v Bell*, in which he expressly explained the ruling in favour of the claimant in terms of ‘responsibility’, whilst deploying precisely the same ideas so often encapsulated in ‘legal cause’:

‘The decision, however, of the case must turn not simply on causation, but on responsibility. The pursuer’s negligence may be what is often called *causa sine qua non*, yet, as regards responsibility, it becomes merely evidential or a matter of narrative if the defender acting reasonably could and ought to have avoided the collision.’[[88]](#footnote-88)

There are still circumstances in which today’s courts reach directly for an earlier understanding of legal cause, and there is nothing in the 1945 Act which makes this illegitimate.[[89]](#footnote-89) Rather, such cases indicate that the reasons why complex causal ideas were elaborated by the courts have not entirely died away with the 1945 Act and other changes.

Among less mysterious omissions in the LRC’s 8th Report, no consideration was given to the likely practical impact of the reforms on settlement of actions. It might appear this could only have been considered with hindsight, but that is not the case. When the Bill was before Parliament, the Lord Chancellor’s office received a letter from a Mr Leslie Hale, a solicitor, who was concerned that the impact of the Bill would be to encourage defendants in motoring cases to pay smaller amounts into court on a regular basis. Given the fear of an order of costs being made against them, claimants would feel under increased pressure to accept these lower awards.[[90]](#footnote-90) This anticipates the findings of the Oxford Survey outlined above, albeit with the additional reference to payments into court. Mr Hale received a letter suggesting that costs were considered an improper subject for an Act of Parliament.[[91]](#footnote-91)

**VI. The Reform Process: Lawyers’ Law and the Implementation of Beveridge**

It was a purportedly apolitical lawyers’ reform, premised on the maritime model and justified almost exclusively by reference to collisions on the roads, that Lord Simon initially put to the War Cabinet’s Legislation Committee as part of the Law Reform (Frustrated Contracts and Contributory Negligence) Bill 1943 (the 1943 Bill). In persuading the Cabinet that the legislative measure was worthwhile, he had a helping hand in the high profile of certain running down claims – including claims raising the question of the pedestrian’s duty to the driver – during the black-out.[[92]](#footnote-92)

The Lord Chancellor’s Office received a communication from the Home Office, ostensibly pointing out a technical difficulty in the interaction between the planned reform, and the Workmen’s Compensation Act 1925. Workers were generally required to choose between their statutory compensation, and damages at common law, but the workman who had *failed* in a common law claim had the right to have the court assess his compensation (subject to costs). He could therefore fall back on statutory compensation in the same tribunal, albeit with the costs and the delay involved in the common law action. The argument put to Lord Simon by the Home Office was that the planned reform might disadvantage a worker who may not *fail* in his common law claim, but might instead be subject to a significant reduction for contributory negligence, thereby being awarded less than he would have achieved in the no-fault statutory scheme, to which contributory negligence (as opposed to wilful default) was irrelevant. He would then be unable to fall back on his statutory compensation.

Lord Simon accepted that he should withdraw the measure,[[93]](#footnote-93) but became less persuaded by the need to resolve this issue ahead of his reform as the delay increased. In reality, his proposed reform of contributory negligence had played into an area where difficult negotiations were already under way.

The Beveridge Report had included short sections on the ‘case for special provision for industrial disability’, and on ‘alternative remedies’.[[94]](#footnote-94) Here, Beveridge appeared to question the extent to which common law remedies should survive alongside his proposed revised national insurance scheme, which would now incorporate industrial disablement though continuing to deal with it to some extent in a special way.[[95]](#footnote-95) Certainly Beveridge appeared to take the view that common law liability should be restricted to cases where the employer was ‘responsible morally and in fact’,[[96]](#footnote-96) and that common law damages should not remain unaffected by social security provision, on the basis that ‘the needs of an injured person should not be met twice over’. These were very controversial statements from the point of view of the union movement.[[97]](#footnote-97) They reflected the general Beveridge approach which was to prioritise the alleviation of poverty and need. With their element of (low level) income replacement, industrial benefits were an exception to the Beveridge approach. Yet Beveridge also wished to encourage the use of first party insurance and other private provision against loss, thus underlining the ambiguous position of the law of tort even at this stage in its history. Should it be seen as akin to private provision, since it depends on individual wrongs, or should it be seen as a system of compensation and/or deterrence, since the law imposes its liability rules on a defendant enterprise? The picture has since been complicated by the introduction of more income-related benefits (and contributions) by various Governments and, on the damages side, by the prevalence of strict and absolute duties upon employers, increasingly seen as giving rise to civil liability.

Beveridge did not declare a decided view, suggesting that the issues were too technical to be dealt with in his Report, and recommending that an expert committee be established to consider them, but the tone of his remarks raised suspicions. By the time Lord Simon made his proposal to implement the LRC’s 8th Report, the Monckton Committee,[[98]](#footnote-98) including representatives of employers, unions, and insurers, had been convened to discuss the disputed issue of the ‘Alternative Remedy’. What might be overlooked is that by focusing on the ‘alternative remedy’, the discussion of workmen’s compensation had been transformed into a discussion including the contribution of common law damages, earlier thought to have been fruitless in this area. The judicial reforms of the 1930s (and of course earlier) played a significant part in making this change possible, and silence on such cases in the LRC’s 8th Report (chaired by one of the most active reformers) looks all the more deliberate. This process, by which tort came back into the area previously occupied by the no-fault workmen’s compensation remedy, is the reverse of the trajectory seen in the United States, where tort was fully ousted from the area and had no opportunity to develop its remedies where industrial injury was concerned. [[99]](#footnote-99)

Lord Simon responded by initiating consultation, particularly in the form of a planned meeting with TUC Representatives. But a memorandum which seems to reveal a settled Home Office view, probably directly influenced by the Beveridge line on common law claims, warned: [[100]](#footnote-100)

The T.U.C. may well be persuaded by the argument (if the Lord Chancellor puts it forward) that the passing of Clause 3 would on the whole be a benefit to workmen. If the T.U.C. take this view, will it not be more difficult for the Lord Chancellor and the Government to adopt the Home Office view that clause 3 should not apply at all to workmen against employers? If the arguments mentioned in the Home Office letter, and discussed yesterday (the fact that the negotiations with the employers and insurance companies ought not to be prejudiced by a change in the law at this stage) are to prevail, I should have thought that a meeting between the Lord Chancellor and the T.U.C. might prove embarrassing.

The question of contributory negligence and the status of workers within the proposed reform was instead referred for negotiation (as the memorandum accurately described it) to the Monckton Committee. The issue of concern to the Home Office was the very status of the law of tort in relation to workmen in the context of plans for the post-War welfare state, and the effect Lord Simon’s reform might have on attitudes to it.

Lord Simon met with members of the Monckton Committee, and it is possible to discern in the detailed memorandum of this meeting something of a culture clash.[[101]](#footnote-101) The Committee may have been representative, but it still contained a great deal of legal experience. Lord Simon did his best to deal with a wide range of detailed questions but also continued to return to the core or ‘ordinary’ instance of a woman being knocked over by a car. The first question put by the Chairman was, quite simply, ‘whether the liability intended [in clause 1] was the liability to pay damages or the liability to bear the consequences of the act which resulted in the damage’.[[102]](#footnote-102) This question led Lord Simon to realise that the terms of the reform needed changing. [[103]](#footnote-103) On the other hand, the result of this meeting and subsequent discussion was a unanimous Report advising that employee claims should indeed be omitted from the reform.[[104]](#footnote-104)

The redrafted Bill was therefore put to Parliament with a provision (Clause 2) excluding employee claims against employers from the reform. As might be expected, this proved impossible to justify before the House of Commons once the value of the reform in general was set out. The debates were feisty at points, with references to ‘suspicions’ being intensified that the Government would be seeking to abolish workers’ common law rights altogether.[[105]](#footnote-105) Ness Edwards (MP for Caerphilly) argued that in light of the Beveridge Report and the present Bill, ‘we are steadily being led on to a position which, in the new political circumstances, might offer the opportunity of completely cancelling the worker’s common law rights’. The Miners’ Federation, he explained, ‘have the greatest apprehension as to the tendency of this legislation’. The intentions toward common law associated with the Beveridge Report were thus brought into the spotlight. Ness Edwards stated the view that ‘[i]n the Beveridge Report there was a proposal to abolish the common law rights of the workman but, in our view, the common law rights of the workman are the only penalty on the bad employer’.

As a consequence of the Parliamentary debates, an official Labour party policy against the exclusion of employee claims was adopted, and an amendment was moved to reverse it, instead amending the Workmen’s Compensation Act 1925 to remove the issue. The Lord Chancellor’s Office was concerned only to have a chance to influence the wording of the new clause 2, designed to be temporary in light of the review of Workmen’s Compensation which was inherent to the Monckton Committee’s deliberations, and to implementation of Beveridge (itself official policy). But there was a remaining political difficulty. A unanimous recommendation of a Committee whose chairman had sensitive negotiations to conduct was about to be overridden, and with the acquiescence (naturally) of the Lord Chancellor. But the Lord Chancellor was increasingly reluctant to await the final report from the Monckton Committee. The political solution was to seek an equally unanimous and directly contradictory second interim recommendation from the Monckton Committee. Despite very different attitudes to contributory negligence displayed in the evidence to the Committee, this second unanimous recommendation was duly received.[[106]](#footnote-106) The rationale for the *volte face* was (a) that the Committee had now heard evidence from interested parties; and (b) that the provision no longer suffered from some of the defects of the original version.[[107]](#footnote-107) Perhaps the very unanimity of the first recommendation allowed a sense that all members of the Committee were showing a willingness to be swayed.

Whether or not the reasons for the change of view were genuine, the truth is that attitudes to the value of common law to workers were in the process of being settled. Evidence considered by the Committee includes a number of examples of union support for the common law rights to damages of workers, suggesting an undiminished sense that the remaining elements of exclusion from this ‘ordinary’ remedy was an injustice for which no-fault provision under the Workmen’s Compensation Acts was insufficient compensation. This supports the argument that union attitudes to common law were in the process of becoming more positive.[[108]](#footnote-108) There is also some evidence to support the view that the generosity of damages in motor accident cases highlighted the inadequacy of workmen’s compensation – and nothing offered by Beveridge could come anywhere close to redressing this difference.[[109]](#footnote-109) It can be argued that the increasing elements of fairness which reforming lawyers were able to inject into common law both by statute and by judicial decision, together with the very attempt to suggest that workers should be excluded from the developing remedies, were of some influence in securing a political attachment to common law rights – just as the Home Office had feared. In this sense, the vacillations over contributory negligence reform are at least a microcosm of the settlement of the important question of the role of the alternative remedy, and through its timing and its liberalisation the reform will have played a role in the progress toward that settlement.

**VII. Drafting Issues**

The task of drafting the Bill fell essentially to a Parliamentary draftsman by the name of HS Kent,[[110]](#footnote-110) and the Lord Chancellor himself, with input from a relatively small number of others. Kent and Simon had a number of differences of view, and the novel terms of section 1, which are far removed from the 1911 Act model as we have seen, was produced at Lord Simon’s instigation (perhaps largely his own work), inspired by the questions asked of him by the Monckton Committee.

The influence of the Monckton Committee over section 1 is essentially derived from the fact that the Committee looked at the provision in terms of industrial accidents rather than only collisions. As we have seen, the heritage of the first draft in the 1911 Act provision relating to ships and cargo was exposed by a series of questions about the ‘total damage’ for which the liability was to be ‘shared’. The origins of the first draft in apportionment of liability (rather than of damages) were also revealed through a provision in the initial draft Law Reform (Contributory Negligence) Bill (Clause 1(2)) requiring that the share in liability of *all* potential parties in respect of the damage suffered was to be determined by the court. This might have meant exploring the liability of those who were not parties to the proceedings, and would have greatly complicated ordinary personal injuries actions. Similarly, there was initially a provision, taken from section 1 1911 Act, that if the court was unable to determine the proper share in the damage attributable to the claimant’s fault, the liability should be apportioned equally (Clause 1(1)(a)).

I have also suggested that the 1945 Act is significant for the very fact that it allows the division or sharing of responsibility for the consequences of harm. In this it continues to treat personal injury in the same way as commercial risks, despite the importance of the drafting changes in other respects. The significance of this may be less easy to appreciate because it does not touch on a familiar strand in contemporary critique, or even analysis, of the law of tort. Some features of the Bill associated with this were not easily grasped even by the Parliamentary draftsman: he and Lord Simon exchanged a number of notes about the wording of the new (post-Monckton) clause 1. Even after the new version had been produced, Kent wanted to rephrase it to say not that the ‘damages’ were to be reduced, but that ‘the *damage* in respect of which judgment may be recovered shall be reduced …’. Similarly, he wanted section 1(2) to require a court to ‘to find and record the total *damage* suffered by the claimant’, rather than the total damages that would be recoverable in the absence of contributory negligence. Lord Simon rightly argued that the distinction between ‘damage’ (caused by the fault of both parties) and ‘damages’ (which were to be reduced) was correct, adding:

The true construction, I venture to think, is not that the claimant’s ‘damage’ is reduced, eg that though he has lost two legs he is to be treated as though he has only lost one, but that the total damage is shared owing to his share of fault, and therefore the damages are proportionately reduced.[[111]](#footnote-111)

Why would the difference between ‘damage’ and ‘damages’ cause such difficulty? The Law Reform (Frustrated Contracts) Act 1943 and Law Reform (Married Women and Tortfeasors) Act 1935, with the 1945 Act, could be said to be occupied with division of responsibility in contexts where this was not yet familiar. As we have seen, the 1945 Act also appears to have been particularly strongly supported by commercial lawyers. Personal injuries, through this process, were approached chiefly in terms of roughly measurable, and divisible, losses of money or money’s-worth, and with enhanced opportunities for sharing and transferring liabilities, their location became increasingly fluid. This is a private law development, emerging after and operating alongside the last days of what can loosely be called the ‘insurance’ of workmen through the Workmen’s Compensation Acts.[[112]](#footnote-112)

Many more technically legal questions about the reform could be addressed. Of these, one does deserve mention because it sheds some light on another aspect of the understanding of the law of tort during this formative period, and our usual perception of it. This is the relationship between actions in contract and tort where contributory negligence was concerned. Two provisos to section 1(1) of the 1945 Act were concerned to restrict the application of the reform in contractual cases, and their wording (which was redrafted several times) caused some considerable difficulty. As enacted, the first of these provides that the subsection ‘shall not operate to defeat any defence arising under a contract’. The second provides that where a contract sets out a limitation of liability, the amount recoverable by the claimant under the section is not to exceed that limit.

The difficulty surrounding these provisos was by no means fleeting. Although the first had been redrafted by a small Committee consisting of Simon, Kent, Wright, and Napier, Simon still wrote a troubled memo to his draftsman during the Parliamentary debates to say that he could not explain it to the House because (as he said) ‘I do not know what it means’.[[113]](#footnote-113) The original version of the proviso said that it would not ‘affect’ any claim under a contract. This was rejected on the basis of vagueness. Did it mean that an insurer could argue that although they had insured against liability, their contractual obligation was not ‘affected’ by the reform, so that they could count the claim as barred in full by the old doctrine of contributory negligence? The second version, drafted by the small Committee and put to the House of Lords, stated that Clause 1 ‘shall not apply to any claim in a contract and shall not operate to defeat any defence under a contract’. The first part was eventually dropped. It seems worth exploring the discussions between the drafters on this point because it has been asked relatively recently whether the application of contributory negligence ought to be extended to contractual claims more generally; and it has been suggested that the framers of the legislation will not have envisaged the growth in ‘concurrent’ claims in contract and tort.[[114]](#footnote-114)

The second of these comments seems a little wide of the mark, even though the LRC’s 8th Report did not contain much reflection on contract. Firstly, it seems clear that the drafters of the legislation thought it important not to change the principles of the law of contract generally. As Kent put it in a letter dated 1 January 1945,

The law of contract defines the rights and remedies of parties to contracts and the cases in which damages are recoverable and it would be disastrous in my opinion if subsection (1) were regarded as applicable to ordinary claims for breaches of contract.

It was because of the definition of ‘fault’ in the statute that he felt there was no risk of this happening. The goal in including the contractual provisos was to ensure that apportionment for contributory negligence disturbed neither the law of contract, nor the bargains of contracting parties. At the same time, the drafters were clearly alive to the problems that could be posed by their provisos for cases which would now be expressed in terms of ‘concurrency’. Rejecting a suggestion that the reform should be expressly confined to claims ‘in tort’, Lord Simon is recorded as having pointed out that ‘many claims for damages for personal injuries were laid both in tort and as a breach of a contract to carry safely, and a plea of contributory negligence could be raised which, if successful, would defeat the plaintiff’.[[115]](#footnote-115) And he expressed a fear during the parliamentary debates that if the contractual proviso was read too broadly, his reform would end up applying only to cases of tort ‘between parties who are strangers, eg two colliding motor cars or a running down case’, and that it would be argued that ‘it has no application at all where there is a contract between the parties, eg a railway ticket’. It is for these reasons that the first part of the proviso (‘shall not apply to a claim under a contract’) was deleted. Just as Kent felt strongly about affecting contract claims generally, Simon would be ‘wholly unwilling to father the Bill’ if its application in such cases should be in doubt.[[116]](#footnote-116) At around the same time, Kent raised cases of employment, doctor-patient cases, and railway or common carrier cases to argue that there was a risk that claims based on negligence would be defeated by the ‘old defence’ of contributory negligence if the proviso was too widely drawn.[[117]](#footnote-117) The limited proviso, therefore, was very carefully chosen with ‘concurrency’ in mind.

The evidence is that the drafters of the legislation wanted to avoid incursion of the statutory division of responsibility into plain contractual cases, but that they were troubled by cases of overlap in contract and tort duties and equally keen to have the reform assist the claimant in these cases. Despite the preoccupation with road traffic expressed in advancing the proposals, Lord Simon was vividly aware that road traffic was not the whole law of tort. And indeed, it is perhaps today’s perspective, not that of the 1930s and 40s, which gives the impression that the law of negligence is primarily about duties between strangers.

**VIII. Conclusions**

At a time when judicial precedents were often read with too much precision and reverence,[[118]](#footnote-118) the 1945 Act pursued a broad and simple idea based on fairness. This might challenge some modern assumptions about the relative nature of legislation and common law. The achievements of the Law Revision Committee as a whole tend to illustrate that legislative programmes, like patterns of case-law, can embody general trends and display broad intentions which have been sought more often in common law principle.

The 1945 Act originated in an era when judges were perhaps at their most involved in legislative reforms and when the larger part of their legislative work was engaged with private law, transforming the approach to damages and division of liability to far-reaching effect. These reform efforts were directly aimed at the common law itself, not at the creation of alternatives, and helped secure the survival of the ‘alternative remedy’. The solution adopted, based in interpersonal fairness and transplanted (with amendment) from the context of ships, to road traffic, to industrial injury, and of course ultimately to many other contexts (such as prisoners’ suicides and physical or financial self-harming), is deeply embedded today. All of these contexts have left their mark upon contributory negligence, and thus on the overall shape of the law of tort.

The 1945 Act illustrates that in the expansion of tort liability, and particularly of negligence liability, we should not underestimate the statutory innovations of the lawyer reformers. They sought to sweep away illogical doctrinal boundaries in the name of common sense fairness, and continued to do this at the very time that an organised public response to need, including need created by accidental injury, was being discussed. The reform of contributory negligence is a microcosm of this process, occurring at the meeting point of two equally important eras of legal and political reform of response to accidental injury. For this reason, the tangled reform of contributory negligence anticipates some of the continuing problems of the tort of negligence today.[[119]](#footnote-119) More than this however, while tort is seen as a ‘legal’ category, held together by principles in contrast to the ‘contextual’ unity of certain other branches of law,[[120]](#footnote-120) the history of the 1945 reform suggests that even the most general principles of tort have been deeply affected by the diverse contexts in which the law must operate. The long-forgotten repeal of section 2 (dealing with workmen’s compensation), and the silence as to employee claims in the LRC’s 8th Report, have made inaccessible to later readers the decisive role of workmen’s claims in the production of an entirely new provision, as opposed to the import of a model based on mutual liability. Equally importantly, the suitability of this entirely new provision for later twentieth century approaches to personal injury damages became clear only over time, and will not have been wholly apparent to any of those involved in the process of legislation. In the redrafting of section 1, and the gradual change in understanding of legal cause which followed, we can see the emergence of an approach which focuses primarily on an injured party and a party in breach, with the emphasis on the link between injurer and injured in terms of responsibility for the injury.

In this sense, the impact of the Act on legal principle, even legal theory, has been much deeper than its provisions read alone would suggest. But we can also go further, by contemplating the 1945 Act in relation to other largely unheralded changes outlined at the start of this chapter. Contributory negligence in its current form is part of a series of developments encouraging transfer and division of civil liabilities which, between them, signify major changes from the law of the previous century. Though achieved largely through legislation, these were perceived by their framers as developments internal to private law. Between them, they underpin the loss-spreading effects of the law of tort.

1. \* Professor of Law, University of York. My thanks to TT Arvind, James Goudkamp, and Phillip Morgan, for their comments on drafts of this chapter, as well as to the participants at the *Tort Law and the Legislature* workshop. [↑](#footnote-ref-1)
2. *Donoghue v Stevenson* [1932] AC 562. [↑](#footnote-ref-2)
3. Industrial Injuries Act 1946; Law Reform (Personal Injuries) Act 1948. This represented a political choice made after deliberation in the Departmental Committee on Alternative Remedies (Monckton Committee): *Final Report of the Departmental Committee on Alternative Remedies* (Cmd 6860, 1946). It is not well known that the Monckton Committee also deeply influenced the drafting used in the reform of contributory negligence, as explained in this chapter. [↑](#footnote-ref-3)
4. Crown Proceedings Act 1947, the subject of TT Arvind’s chapter in this volume (Ch 19). [↑](#footnote-ref-4)
5. Aside from the reform of contributory negligence explored in this chapter, see also the Law Reform (Married Women and Tortfeasors) Act 1935 (contribution between tortfeasors); Law Reform (Frustrated Contracts) Act 1943; and (in the courts) the decline of *volenti* and ‘sole cause’. The continued rise of liability insurance is also a contributory factor because of the widespread practice of insurers joining other potential parties in order to test the location of liability between different insurers: see the effect of this in combination with expanded duties of care in for example *Stovin v Wise* [1996] AC 923. Legislation had a major role in this, most obviously through the introduction of compulsory third party insurance on the roads in the Road Traffic Act 1930, but also much earlier through the creation of employer liability in the Employers’ Liability Act 1880, which is widely regarded as having led to the immediate growth in liability insurance in the UK. The effect was further intensified by the Workman’s Compensation Act 1897: B Supple, *The Royal Exchange Assurance: A History of British Insurance 1720-1970* (Cambridge, Cambridge University Press, 1970), ch 10. [↑](#footnote-ref-5)
6. The 1945 Act applied to England and Wales, and to Scotland. For comparison of contributory and comparative negligence doctrines across a number of civil and common law jurisdictions, including the mixed picture in the United States, see U Magnus and M Martin-Casals (eds), *Unification of Tort Law: Contributory Negligence* (The Hague, Kluwer, 2003). [↑](#footnote-ref-6)
7. Its framers, as we will see, had no intention of going so far – but considered responsibility-sharing to be the ‘fairest’ course. [↑](#footnote-ref-7)
8. There are shades of a reversal in English law through the assertion of ‘no duty’ areas, and in the *ex turpi causa* defence. Australian law has developed further in this direction. See J Dietrich, ‘The decline of contributory negligence and apportionment: choosing the black and white of all or nothing over shades of grey?’ (2003) 11 *TLJ* 51; the analysis by James Goudkamp in this collection; and B McDonald, ‘Teaching Torts: where to start in an age of statutes?’ (August 2010) Sydney Law School, Legal Studies Research Paper 10/83 (focusing on contributory negligence). [↑](#footnote-ref-8)
9. Law Revision Committee, *Contributory Negligence* (Cmd 6032, 1939) (LRC’s 8th Report). [↑](#footnote-ref-9)
10. Cl 3 of the Law Reform (Frustrated Contracts and Contributory Negligence) Bill 1943, extracted in Section V below dealing with the Law Revision Committee’s recommendations (text to n 62). [↑](#footnote-ref-10)
11. Prior to the 1911 Act, the practice in maritime cases both in Admiralty courts, and after the Judicature Act 1873 in common law courts, was to apportion losses equally. In most circumstances, subject to limitations on liability, those responsible for the vessel suffering less damage had to pay a sum of damages to the vessel suffering more damage. This rule was the subject of an express saving in the Judicature Act 1873 (though not in its first draft: see RG Marsden, *A Treatise on the Law of Collisions at Sea* (London, Stevens & Sons, 1880) 51). The shift to division on the basis of relative fault in the 1911 Act followed the Brussels Convention 1910. In some circumstances the fault of one of the parties was treated by English courts as the sole legal cause, independently of each being a *causa sine qua non*. Williams argued that this was an unfortunate import to maritime cases from the common law: G Williams, ‘The Law Reform (Contributory Negligence) Act 1945’, (1946) 9 *MLR* 105-186, 120. See also G Williams, *Joint Torts and Contributory Negligence* (London, Stevens & Sons, 1951). This remains the leading exploration of English law on the subject. [↑](#footnote-ref-11)
12. S Deakin and F Wilkinson, *The Law of the Labour Market: Industrialization, Employment and Legal Evolution* (Oxford, Oxford University Press, 2005) particularly 34-5. [↑](#footnote-ref-12)
13. Ontario, which switched to a proportionate rule in 1924, modelled its new provision very closely on the Brussels Convention. The initial intention was to adopt very similar wording to the Ontario provision. [↑](#footnote-ref-13)
14. For the significance of ‘genealogy’ see Deakin and Wilkinson (n 11) 12. Genealogical accounts stress the importance of origins and ‘initial conditions’ from which legal institutions develop, rather than assuming that development follows a smooth path to (for example) efficient outcomes (‘teleological’ accounts). Legal development is always contingent and bears the hallmarks of that contingency, including cross-fertilisation. For discussion of genealogy in relation to ‘pure principled’ accounts, see the concluding chapter. [↑](#footnote-ref-14)
15. For discussion relevant to many of these points, particularly identifying the role of legal ‘concepts’ in evolutionary development and the restricted influence of individual human intentions, see S Deakin, ‘Evolution for our Time: A Theory of Legal Memetics’ (2002) 55 *CLP* 1-42. [↑](#footnote-ref-15)
16. The definition of ‘fault’ in s 4 is much broader than negligence. However, it has been held that there is no room for contributory negligence in an action for deceit, where the defendant intends the claimant to rely to their detriment (*Standard Chartered Bank v Pakistan National Shipping Corporation* [2002] UKHL 43, [2003] 1 AC 959) or, more recently, in an action for assault or battery (on the basis that there are no pre-1945 instances of the defence applying): *Co-operative Group v Pritchard* [2011] EWCA Civ 329, [2012] 1 All ER 205. [↑](#footnote-ref-16)
17. T Weir, *Introduction to the Law of Tort*, 2nd edn(Oxford, Oxford University Press, 2009). [↑](#footnote-ref-17)
18. *Vellino v Chief Constable of the Greater Manchester Police* [2001] EWCA Civ 1249, [2002] 1 WLR 218, [55]. [↑](#footnote-ref-18)
19. ibid [55]. [↑](#footnote-ref-19)
20. ibid [46]. [↑](#footnote-ref-20)
21. The majority disagreed, holding that the action should fail either for lack of duty or because it was barred *ex turpi causa*. [↑](#footnote-ref-21)
22. See also n 7. [↑](#footnote-ref-22)
23. Sir W Beveridge, *Report on Social Insurance and Allied Services* (Beveridge Report) (Cmnd 6404, 1942). [↑](#footnote-ref-23)
24. The Departmental Committee on Workmen’s Compensation (Holman Gregory Committee) which reviewed the area in 1919-1920 suggested that apart from common employment and *volenti* operating to protect employers, a counter-charge of contributory negligence ‘has almost always to be met’ in a common law claim (*Report of the Departmental Committee on Workmen’s* *Compensation* (Cmd 816, 1920) 5). Its appraisal of the Employers’ Liability Act 1880 as having ‘somewhat modified’ the common law is apt. The provisions of that Act removed obstacles to some aspects of common employment, while capping damages at a maximum of three years’ earnings where its provisions allowed a claim. The courts confined its effects still further by holding that employers and employees could contract out of its provisions: *Griffiths v Earl of Dudley* ([1881-82] LR 9 QBD 357). Later courts therefore used non-delegable and statutory duties to evade the restrictions of the 1880 Act itself, and not just the common law doctrine which it somewhat restricted. For the link between this and the 1945 Act, see n 70 and related discussion in the text. [↑](#footnote-ref-24)
25. TNA LCO 2/3563, Letter dated 7 April 1945:’The rapidity of our advance into Germany increases the prospect of an early break-up of the Government, and we must really have this Bill before that happens’. This may seem a unique set of priorities, but the Labour Party would cross to the opposition benches once the coalition was dissolved. As we will see, the Labour party’s support for the reform was equivocal. [↑](#footnote-ref-25)
26. Compensation under this consolidating Act was excluded where there had been wilful default by the claimant, but not for negligence alone. Strikingly, after the Workmen’s Compensation Act 1906, even in a case of wilful default, compensation was not barred in case of serious and permanent injury, or death (s 1(2)(c)). Compensation was the prime objective. [↑](#footnote-ref-26)
27. The draftsman, HS Kent, described the 1945 Act in his memoirs as a reform ‘that dealt with the rights and liabilities of ordinary citizens whenever they ventured out in motor cars’ (HS Kent, *In on the Act: Memoirs of a Lawmaker* (London, Macmillan, 1979) 149). [↑](#footnote-ref-27)
28. *McLean v Bell* (1932) 147 LT 262 [↑](#footnote-ref-28)
29. ibid 26. Her claim would appear strong, since a speed of 20-30mph was at this time considered ‘excessive’. [↑](#footnote-ref-29)
30. TNA LCO 2/1992, Memorandum on Contributory Negligence. This is a rare direct comment on the role of insurers in the deliberations of the Committee. [↑](#footnote-ref-30)
31. TNA LCO 2/3563, Note of evidence given by the Lord Chancellor, 25 October 1944, to the Monckton Committee. [↑](#footnote-ref-31)
32. ibid 3. [↑](#footnote-ref-32)
33. L Green, ‘Illinois Negligence Law’ (1944-45) 39 *Ill L Rev* 36, tracing the rise and fall of a proportionate rule in that state. A number of US writers linked the rise of the complete defence of contributory negligence in that nation to a judicial protectionism toward the industrial interest (particularly railways) in the mid-nineteenth century and an associated individualism of outlook. Apart from Green, see for example F James Jr, ‘Contributory Negligence’ (1953) 62 *Yale LJ* 691, although the latter also attributed the ‘all or nothing’ version of the defence to a doctrinal attachment to unique or ‘proximate’ cause. The Law Revision Committee chose to explain the old doctrine as a consequence of the forms of pleading. [↑](#footnote-ref-33)
34. Weir (n 16) 123. [↑](#footnote-ref-34)
35. 1945 Act, s.1(1). [↑](#footnote-ref-35)
36. This reflects the findings of Ross’s classic study, HL Ross, *Settled Out of Court: the Social Process of Insurance Claims Adjustments* (Chicago, Aldine Publishing, 1970), described by Tom Baker as a classic of the ‘gap-study’ era (exploring the gap between law in action and ‘law in the books’): T Baker, *Insurance in Socio-Legal Research* (2010) University of Pennsylvania Law School, Institute for Law and Economics, Research Paper No 10-07. See also J Fulbrook, ‘Cycle Helmets and Contributory Negligence’ [2004] *JPIL* 171-91, pointing out that insurers making settlements were operating a standard reduction in damages for cyclists who were not wearing cycle helmets even before courts had ruled definitively on the issues. One consequence was that the limited extent to which cycle helmets can prevent injury did not operate as strongly as it should in limiting the impact of contributory negligence in cycling cases: see now *Smith v Finch* [2009] EWHC 53*,* [2009] All ER (D) 158 (Jan) and *Stanton v Collinson* [2010] EWCA Civ 81, [2010] RTR 26 for a reminder of the importance of causation in a seatbelt case. [↑](#footnote-ref-36)
37. D Harris *et al*, *Compensation and Support for Illness and Injury* (Oxford, Clarendon Press, 1984). [↑](#footnote-ref-37)
38. This contrasts with more recent sources such as the ABI/IUA, *Fourth UK Bodily Injury Awards Survey* (London, International Underwriters Association and Association of British Insurers, 2007). [↑](#footnote-ref-38)
39. Harris *et al* (n 36) 89 [↑](#footnote-ref-39)
40. ibid 91 [↑](#footnote-ref-40)
41. Harris also reported that in some cases the claimant may never know that there was a reduction for contributory negligence, since settlements are not always itemised. [↑](#footnote-ref-41)
42. In marine collision cases by contrast, first party insurance was historically the norm, collisions being treated as a ‘peril of the sea’ whether caused with or without fault. The reluctance of underwriters to cover collision *liabilities* (to third parties) in full led to a shortfall which was taken up by mutual insurers, leading to the creation of the first Protection and Indemnity Clubs. [↑](#footnote-ref-42)
43. *McLean* (n 27). [↑](#footnote-ref-43)
44. While causation issues remain central (see *Stanton* (n 35)), the kind of causation in question is now more limited. It is unlikely that the claimant’s inattentiveness would fail to be considered a ‘cause in fact’. [↑](#footnote-ref-44)
45. See text to nn 14-20. [↑](#footnote-ref-45)
46. Williams, ‘Law Reform’ (n 10), criticised the LRC’s 8th Report on this basis, but the same view was expressed by Lord Simon judicially both before and after he achieved the reform as Lord Chancellor. In time, the 1945 Act has indeed had this effect, as ideas of legal cause have altered. See for example *Spencer v Wincanton Holdings* [2009] EWCA Civ 1404, [2010] PIQR P8 reducing damages for contributory negligence and distinguishing *McKew v Holland & Hannen & Cubitts* [1969] 3 All ER 1621 (a case of *novus actus* on the part of a claimant), the Court of Appeal pointing out that the 1945 Act had not been advanced in argument in that case. [↑](#footnote-ref-46)
47. Earlier reports of the Committee had all been entitled ‘Interim Report’. No difference is signified by the lack of the word ‘Interim’, but one member of the Committee queried whether it might give the impression there was a fuller version to follow, and it was removed from the title. [↑](#footnote-ref-47)
48. For reflection on the extent of Claud Schuster’s influence, see R Stevens, *The Independence of the Judiciary: the View from the Lord Chancellor’s Office* (Oxford, Oxford University Press, 1993) chs 2-5. [↑](#footnote-ref-48)
49. In correspondence with one of the speakers, Donald Somervell (Solicitor General from September 1933 and later Lord Somervell), Schuster variously suggested that the real problems with law reform were not that the Lord Chancellor’s office was understaffed as Somervell had suggested, but that no Lord Chancellor since Lord Birkenhead had been in office long enough to achieve much (‘we dealt with the law of property’ – Letter dated 24 February 1933); and (more bluntly) there was an obstacle to reform in the shape of the House of Commons, particularly the Party Whips: TNA LCO 2/3565, Letter dated 13 January 1933. He was equally waspish about the Statute Law Committee, ‘a body of leisurely disposition which moves slowly’, which he nevertheless invited Somervell to join (‘the work involved is very slight and the meetings are few’). [↑](#footnote-ref-49)
50. *Donoghue* (n 1). Donald Somervell appeared either not to have heard of *Donoghue* or not to have thought much of itwhen, on 27 February 1933, he wrote to Schuster with some suggested topics for law reform. Some of these (frustration of contracts, recovery against dead tortfeasors) were put into effect, but he also suggested review of ‘the non-liability for damage caused by negligence except on a highway or to persons to whom a contractual duty is owed’. Contributory negligence seems to have been taken up after a suggestion by Lord Wright, TNA LCO 2/3565, Letter to Schuster dated 2 April 1937. [↑](#footnote-ref-50)
51. The Law Revision Committee’s notes expressly identify that proportionate division of liability (as they proposed) would be consistent with the trend of legislation including the Law Reform (Married Women and Tortfeasors) Act 1935. Lord Simon reported later that ‘the commercial lawyers’, naming Wright and Porter, were fully behind his reform of contributory negligence. And the 1935 Act, like the reform of contributory negligence, was heavily influenced by maritime practice and the provisions of the Maritime Conventions Act 1911: see the Law Revision Committee’s *Third Interim Report* (Cmd 4637, 1934) 6, recommending ‘to adopt with any necessary modification Admiralty practice as to apportionment of contribution’. [↑](#footnote-ref-51)
52. Note Lord Macmillan’s judgment in *Donoghue* (n 1). [↑](#footnote-ref-52)
53. For example, through the attempt to harmonise legal cause with duty through the concept of ‘reasonable foreseeability’: n 73 [↑](#footnote-ref-53)
54. LRC’s 8th Report (n 8) 3. [↑](#footnote-ref-54)
55. TNA LCO2 /3565, Letter from Claud Shuster to the Master of the Rolls dated 31 October 1933. [↑](#footnote-ref-55)
56. Letter, referring to the impossibility of getting certain sorts of legislative reform through the House of Commons dated 13 January 1933 (n 48). [↑](#footnote-ref-56)
57. When its establishment was announced, the Committee of Provincial Solicitors wrote a letter requesting representation on the Committee. The Master of the Rolls (Lord Hanworth) firmly rejected the suggestion. There were already two solicitors on the committee, and this was enough. He had already personally rejected a similar plea from the Association of Women Solicitors (31 January 1934). Schuster was none too keen on academic representatives. He did, however, come up with a handful of potential names (‘all of whom are Cambridge men’), including McNair who did serve on the Committee (11 December 1933). By the time of the 8th Report, both Percy Winfield and Arthur Goodhart were recent additions. [↑](#footnote-ref-57)
58. LRC’s 8th Report (n 8) 19. [↑](#footnote-ref-58)
59. ibid 16. [↑](#footnote-ref-59)
60. This is all illustrated by *The Bernina* (1888) LR 13 App Cas 1. Actions were maintained against one ship in respect of a passenger and crew member of another ship, both of whom were drowned in a collision. There was fault on the part of both ships, but not on the part of either of the deceased parties. The doctrine of common employment was then applicable at sea, since seamen did not fit the definition of ‘workman’ within the Employers’ Liability Act 1880. Neither the passenger, nor the crew member, was ‘identified with’ the negligence of the ship on which they were travelling, so that full liability on the part of the other ship could follow. [↑](#footnote-ref-60)
61. S 5 extended competence in respect of loss of life and personal injury to the Admiralty jurisdiction; but it was the principles of common law, not maritime law, that applied – presumably recognising that different issues arose in such cases: HB Hurd, *The Law and Practice of Marine Insurance relating to Collision and other Liabilities to Third Parties*, 2nd edn (London, Sir Isaac Pitman & Sons, 1952) 24-5. [↑](#footnote-ref-61)
62. Hurd (n 60), 20. [↑](#footnote-ref-62)
63. TNA, LCO 2/1993. This clause was never put to Parliament. [↑](#footnote-ref-63)
64. The difference between being due compensation, but being potentially liable to compensate, and being on balance liable to a smaller extent, is very significant if losses and/or liabilities are subject to insurance. [↑](#footnote-ref-64)
65. Indeed the Committee was asked to consider whether the provisions on contribution in the 1935 Act would require any consequent amendment. [↑](#footnote-ref-65)
66. A contrast may be drawn both with the Monckton Committee, and with the consultative process by which the approach to collision liabilities came to be standardised around fault in the Brussels Convention 1910 (and hence the 1911 Act): L Franck, ‘A New Law for the Seas’ (1926) 42 *LQR* 25-36. [↑](#footnote-ref-66)
67. TNA, LCO 2/1992, Letter from Hartley D McNairn dated 15 December 1937. [↑](#footnote-ref-67)
68. It would have been surprising if this were not the case. Lord Wright’s practice at the Bar had been in marine insurance:R Stevens, ‘Wright, Robert Alderson, Baron Wright (1869–1964)’ in *Oxford Dictionary of National Biography* (Oxford, Oxford University Press, 2004); online edn, Sept 2010  . In correspondence the Ministry of War Transport proposed that there should be a saving for the Maritime Conventions Act 1911 partly because ‘the whole fabric of insurance of maritime collision liabilities is to-day based upon that Act’: TNA LCO 2/1993, Letter dated 11 June 1943. [↑](#footnote-ref-68)
69. *Caswell v Powell Duffryn Associated Collieries* [1940] AC 152. The case was argued before the House of Lords in May 1939, and judgment was given on July 25. The LRC’s 8th Report (n 8) was dated June 1939. [↑](#footnote-ref-69)
70. *Flower v Ebbw Vale Steel, Iron and Coal Company Ltd* [1936] AC 206. [↑](#footnote-ref-70)
71. Lord Wright (together with Lord Atkin) had earlier been a member of the House of Lords which held that breach of statutory duty was an aspect of the employer’s personal ‘negligence’, for the purposes of the Workmen’s Compensation Act 1925, so that the employee could elect to pursue an action for damages: *Lochgelly Iron & Coal Company v M’Mullan* [1934] AC 1. This case was probably as significant in its day as the decision of Lord Wright in *Wilsons & Clyde Coal v English* [1938] AC 57 in extending the personal duties of the employer at common law to which common employment (and therefore the restricted remedy under the Employers’ Liability Act 1880) did not apply. For an appraisal of Lord Wright’s contribution, and his jurisprudence, more generally see N Duxbury, ‘Lord Wright and Innovative Traditionalism’ (2009) 59 *UTLJ* 265-339. Clearly however, the common law was working at an agonisingly slow pace: *Wilsons & Clyde Coal* was reported a century after *Priestley v Fowler* (1837) 3 M & W 1. [↑](#footnote-ref-71)
72. *Hutchinson v London and North Eastern Railway* [1942] 1 KB 481 [↑](#footnote-ref-72)
73. *Lewis v Denye* [1940] AC 921. Lord Atkin: ‘all your Lordships and all the judges in the Court below are of the opinion that the plaintiff was guilty of contributory negligence, and I suppose I must be wrong’ (932-3), also pointing out that the Court of Appeal’s decision was reached before *Caswell* (n 68) in the House of Lords. Lord Wright was not part of the Panel in this case. [↑](#footnote-ref-73)
74. *Swadling v Cooper* [1931] AC 1. The driver’s inadvertence was found not to have been a proximate cause of the accident. Lord Wright had also used the same reasoning in finding for the pedestrian in *McLean* (n 27). [↑](#footnote-ref-74)
75. Reasonable foreseeability was adopted as the measure of legal causation, expressed in terms of ‘remoteness’, in *The Wagon Mound* [1961] AC 388. This was expressly intended to rid the law of many of the arguments of causation which had been employed by the courts, and were indeed employed in the LRC’s 8th Report (n 8). *The Wagon Mound* has undoubtedly changed the application of the contributory negligence defence in a way its framers did not intend. Williams, ‘Law Reform’ (n ), advocated such a development. In turn, the 1945 Act will undoubtedly have influenced the route to *The Wagon Mound*. [↑](#footnote-ref-75)
76. LRC’s 8th Report (n 8) 16. [↑](#footnote-ref-76)
77. *Davies v Swan Motor Co (Swansea) Ltd* [1949] 2 KB 291. The deceased was partly to blame for his own death because of the position he had taken up (in defiance of instructions) on the outer steps of a dustcart. Bucknill LJ said that there had been no intention to change the rules of causation, only the impact of a finding that the claimant’s negligence had contributed to the damage. Williams, ‘Law Reform’ (n ), had wanted change in the approach to causation and expressed relief that the LRC’s 8th Report (n 8) was not admissible evidence in interpreting the 1945 Act; but Bucknill LJ did refer to it for that purpose. [↑](#footnote-ref-77)
78. It is important to be clear that in general, no such duty needed to be shown for the operation of contributory negligence at common law. If such a duty had been taken to be required, this would have been largely the impact of the reform, as it would have been consistent with the idea of two potentially liable parties as in the maritime case (though there the law did not proceed on the basis of ‘duties’). The picture is not fully consistent because the maritime model did influence some courts even before the 1945 Act, paving the way for it (see the later discussion of *Sparks* (n 91)). The 1945 Act as finally drafted put a stop to this trend. In *Davies* (n ) Bucknill LJ noted mildly that the wording of s 1 differed from the equivalent provision in the 1911 Act, adding that ‘There may be a good reason for that’. There was indeed, and he did succeed in giving effect to the intention behind the drafting even if he did not appreciate the reasons for the difference. [↑](#footnote-ref-78)
79. *Davies* (n ) at 322. P Atiyah, ‘Common Law and Statute Law’ (1984) 48 *MLR* 1-28, argued that Denning’s approach had been vindicated, but that he ought to have recognised that the broader effect of the statute was as much a ‘legal’ effect as its narrower one: ‘the effect of the Act was indeed to enable the judges to alter the law beyond the scope of the direct enactment.’ Note the reference to *enabling* (not requiring) change in the law. [↑](#footnote-ref-79)
80. James (n ) regarded contributory negligence as one manifestation of a general adherence to the idea of sole cause. [↑](#footnote-ref-80)
81. See *Staveley Iron & Chemical Ltd v Jones* [1956] AC 627; [MA Jones](http://www.wildy.com/books?author=Jones,%20Michael%20A.) and [AM Dugdale](http://www.wildy.com/books?author=Dugdale,%20Anthony%20M), *Clerk and Lindsell on Torts*, 20th edn (London, Sweet & Maxwell, 2010) 13.64. For discussion see N Tomkins, ‘Getting contributory negligence right’ [2008] *JPIL* 249. It is important to be clear that this is not an argument from ‘de minimis’ carelessness, associated with the (contested) possibility of ‘0% contributory negligence’. [↑](#footnote-ref-81)
82. See for example the duty in *Reeves* *v Commissioner of Police for the Metropolis* [2000] 1 AC 360. [↑](#footnote-ref-82)
83. Workmen’s compensation was the subject of committee discussion throughout the 1920s and 1930s, until the Beveridge Report (n 22) highlighted its relationship with tort by centring the ‘alternative remedy’. [↑](#footnote-ref-83)
84. *The Boy Andrew v The St Rognvald* [1948] AC 140. This was a maritime collision so did not raise the question of the 1945 Act. Viscount Simon explained that the doctrine of last opportunity was ‘inaptly phrased’, and ‘likely in some cases to lead to error’ – not that it was itself in error. He explained the result in *Davies v Mann* (1842) 10 M & W 546 from which the doctrine was derived in terms of sole legal cause: ‘As by driving more carefully [the driver] could have avoided hitting the donkey, his negligence was the sole cause. The negligence of the donkey-owner was therefore a fault not contributing to the collision: it was merely a causa sine qua non’: 149. He clearly regarded *Davies v Mann* as good law. This was applied to a contributory negligence case in *Davies v Swan Motor* (n 76). [↑](#footnote-ref-84)
85. *Reeves* (n 81). [↑](#footnote-ref-85)
86. This indicates how far the continuity between pre-1945 Act and post-1945 Act cases has generally been forgotten. *Staveley* (n 80) is consistent with *Hutchinson* (n ) – as the authors of LRC’s 8th Report (n 8) would have expected. [↑](#footnote-ref-86)
87. *Reeves* (n 81). [↑](#footnote-ref-87)
88. *McLean* (n ) [↑](#footnote-ref-88)
89. The Court of Appeal in *St George v Home Office* [2008] EWCA Civ 1068, [2009] 1 WLR 1670 deployed the idea of causation in the legal sense (seeing a rare terrestrial outing for *The Volute* [1922] AC 129) when deciding that there should be no reduction for contributory negligence where a prisoner with a drug addiction fell out of a bunk: his actions in forming an addiction were not a ‘potent’ cause of the fall. But the Court added that in case that approach was wrong, it would also not be fair and equitable to reduce damages. A ‘straight’ responsibility approach (without falling back on causation) was employed at around the same time by a different court of Appeal in *Calvert v William Hill* [2008] EWCA Civ 1427, [2009] Ch 330 (gambling addiction). [↑](#footnote-ref-89)
90. TNA LCO 2/3563, Letter dated 24 January 1945. [↑](#footnote-ref-90)
91. TNA LCO 2/3563, Letter from Napier dated 3 February 1945. Perhaps a member of the Association of Provincial Solicitors ought to have been admitted to the Law Revision Committee after all. [↑](#footnote-ref-91)
92. Amongst others *Sparks v Edward Ash* [1943] KB 223, which was described by the Court of Appeal as raising an issue of broad public importance, namely the applicability of regulations devised for conditions of full visibility to the use of pedestrian crossings during blackout conditions – particularly the duties of *pedestrians* using such crossings to car drivers. Goddard LJ (a member of the Law Revision Committee) was joined in this case by Scott LJ, who had signed the Brussels Convention in 1910, and who analogised from collisions between ships to consider whether there was any alleviation of the *pedestrian’s* duty while using a controlled crossing. This underlines the distance travelled from the maritime model by the reform as enacted. [↑](#footnote-ref-92)
93. Initially Lord Simon said that he ‘blamed himself’ for not thinking of this area of law; in writing to give notice that he would withdraw the clause he said that it was a ‘very serious matter’ (10 June 1943). [↑](#footnote-ref-93)
94. Beveridge Report (n 22) paras 81, 98, and 258-264. [↑](#footnote-ref-94)
95. The ‘industrial preference’ at this stage marked an exception to the Beveridge view that benefits and contributions should be set at a flat rate. [↑](#footnote-ref-95)
96. Beveridge Report (n 22) para 81. [↑](#footnote-ref-96)
97. Throughout its history, workmen’s compensation had not been warmly embraced by the union movement as a whole. In the appraisal of Joseph Cohen, an economist and student of Pigou, ‘No understanding of the discontent of the working class with the existing compensation system is possible, unless it is realised that about two-thirds of the total money loss resulting from accidents, in addition, of course, to the pain, is still borne by injured workmen’, J Cohen, *Workmen’s Compensation in Great Britain* (London, Post Magazine, 1923) 30. [↑](#footnote-ref-97)
98. Initially set up as the ‘Hetherington Committee’, with the same Chair as the disbanded Committee set up by Chamberlain to consider the future of Workmen’s Compensation. With the Beveridge Report (n 22), the issues had changed. [↑](#footnote-ref-98)
99. Ironically perhaps, Friedman and Ladinsky suggested in 1967 that Britain had progressed further than the United States in the extent to which it had collectivised risks, since its national insurance scheme was far more general in its coverage than the US workers’ compensation provision, marking a further shift from liability to social insurance: LM Friedman and J Ladinsky, ‘Social Change and the Law of Industrial Accidents’ (1967) 67 *Colum L Rev* 50, 81. But the history of contributory negligence reform and the ‘alternative remedy’ is also the story of how common law damages were fully restored to this part of UK law. [↑](#footnote-ref-99)
100. Lord Chancellor’s Office, Memo dated 17 June 1943, GPC (Coldstream). [↑](#footnote-ref-100)
101. See n 29. [↑](#footnote-ref-101)
102. ibid. [↑](#footnote-ref-102)
103. Simon wrote to Kent after the meeting to report that on its present wording, the Bill had been taken to mean that the claimant might be liable to the defendant in damages, and that a revised version would be needed to make clear that this was not the intention: letter dated 13 December 1944. Other correspondence makes clear Lord Simon was to attempt the required redrafting. [↑](#footnote-ref-103)
104. *Workmen’s Compensation: Interim Report of the Departmental Committee on Alternative Remedies (Contributory Negligence)* (Cmd 6580, 1944). Lord Simon was surprised by the TUC’s position in this, mentioning that the recommendation to exclude workers was particularly supported by George Isaacs MP, a TUC representative (Simon to Morrison, 21 December 1944). Isaacs was later described as the only member of the Parliamentary Labour party likely to vote against an amendment to the 1945 Act, to include workers’ claims. [↑](#footnote-ref-104)
105. HC Deb 22 Feb 1945, vol 408, cols 988-1035, Stephen Davies MP, Merthyr Tydfil. [↑](#footnote-ref-105)
106. *Workmen’s Compensation: Second Interim Report of the Departmental Committee on Alternative Remedies (Contributory Negligence)* (Cmd 6642, 1945). [↑](#footnote-ref-106)
107. A note on file records an apology to Monckton and a promise to explain on meeting – it seems this refers to the decision to put the revised Bill forward for Committee approval before his second interim report was received – in terms of ‘practical politics’ it was the only option. [↑](#footnote-ref-107)
108. PWJ Bartrip, *Workmen’s Compensation in Twentieth Century Britain* (Aldershot, Gower, 1987), particularly identifies cases of the 1930s such as *Lochgelly* and *Wilsons & Clyde Coal* (n 70) and text, as instrumental in this. [↑](#footnote-ref-108)
109. Bartrip (n 107) 223, citing various secondary sources. Evidence from the National Society of Friendly Societies to the Monckton Committee referred to the impact of ‘the wide disparity between what is awarded in road accident cases and under workmen’s compensation’. TNA LCO 2/3779, Evidence from WH Thompson, founder of Thompsons Solicitors and author of a text on Workmen’s Compensation, identified the ‘misery and injustice inflicted upon the workman by the grossly inadequate weekly payments’, while criticising common law as a ‘lottery’ (well ahead of more famous uses of the description):. [↑](#footnote-ref-109)
110. In his autobiography, Kent refers to himself as the draftsman to the Law Revision Committee (n 26) 148. [↑](#footnote-ref-110)
111. LCO 2/3563, Note from Lord Simon to HS Kent dated 9 January 1945. [↑](#footnote-ref-111)
112. The description of workmen’s compensation as similar to insurance can be found in a variety of contrasting contemporaneous sources. See for example the Court of Appeal in *Simpson v Ebbw Vale* [1905] 1 KB 453 (‘it gives them a sort of state insurance, it being thought they are not sufficiently intelligent nor sufficiently in funds to insure themselves’, Collins MR); J Cohen (n 96) 95 (‘the collectivist legislation .. practically insured the workman against accidents at the expense of the employer’); and WH Thompson, *Workmen’s Compensation: an Outline of the Acts*,rev’d edn (London, Labour Publishing Co, 1924) 10, ‘In short, it was more like an insurance of the workman against accidents at work’). [↑](#footnote-ref-112)
113. TNA LCO 2/3563, 22 January 1945. [↑](#footnote-ref-113)
114. Law Commission, *Contributory Negligence as a Defence in Contract* (Law Com Working Paper No 114, 1990) 3.31. [↑](#footnote-ref-114)
115. LCO 2/3563, Memorandum of meeting dated 16 January 1945. [↑](#footnote-ref-115)
116. LCO 2/3563, Memorandum dated 22 January 1945. [↑](#footnote-ref-116)
117. LCO 2/3563, 17th January 1945. [↑](#footnote-ref-117)
118. This is Lord Wright’s word: ‘Contributory Negligence’ (1950) 13 *MLR* 2-23, 23. [↑](#footnote-ref-118)
119. Evidence from the Home Office to the Monckton Committee was headed, ‘How far is damages for tort compensation and how far is it a penalty for wrongdoing?’ In its origins, the maritime rule was about neither, but about sharing of losses. [↑](#footnote-ref-119)
120. This contrast is derived from P Birks, *Introduction to the Law of Restitution* (Oxford, Clarendon Press, 1985) 73-4, and referred to by Deakin and Wilkinson (n 11). [↑](#footnote-ref-120)