

## The Development of the Concept of Contributory Negligence in English Common Law

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### 1. Introduction

A dustman working for Swansea Corporation was injured when he was standing on the steps of a dustcart – a dangerous place – while the vehicle was in motion. An omnibus that tried to overtake the lorry collided with it and, by doing so, caused fatal injuries to the dustman. The deceased dustman's wife claimed damages from Swansea Corporation, which was the owner of the dustcart. The Court of Appeal held the Corporation liable but, due to the contributory negligence of the dustman, reduced the amount of damages by a half.<sup>1</sup> Comparable accidents, in which the accident is not only caused by the fault of the wrongdoer but also by the conduct or activity of the injured party, often occur. This kind of contributory conduct by the injured party, and its consequences for delictual liability, have been central issues in the study of private law for centuries. As the development of the concept of contributory negligence in civil law has been extensively dealt with in the literature,<sup>2</sup> this article will concentrate on its development in English common law. It analyses how questions of what later became known as 'contributory negligence' – i.e. cases in which the behaviour of the injured party contributed to the occurrence of his damage – were historically solved in the common law system. The key question will be what the historical development was of the solutions provided for cases in which the behaviour of the injured party contributed to the occurrence of his damage in the common law tradition.

The contribution of the injured party's own conduct to the damage which he suffered has been a bar to the recovery of damages for centuries. When studying this topic, it is important to realise that the legal concept of contributory (or: comparative) negligence as we know it today was unknown in the medieval and early modern periods.<sup>3</sup> This article will consider the developments from that period up until the beginning of the 20th century, when the concept of contributory negligence firmly established itself in English law. We will show that, historically, contributory conduct was linked to the (broader) question of causation – just like it was in civil law. The development of the way in which cases concerning contributory conduct were

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1 *Davies v. Swan Motor Co. (Swansea) Ltd.* [1949] 2 K.B. 291.

2 See E.G.D. van Dongen, *Contributory Negligence. A Historical and Comparative Study* (2014). See also already on this topic e.g. P. Aumann, *Das mitwirkende Verschulden in der neueren juristischen Dogmengeschichte* (diss. University of Hamburg) (1964); D. Looschelders, *Die Mitverantwortlichkeit des Geschädigten im Privatrecht* (1999); K. Luig, 'Überwiegendes Mitverschulden', (1969) 2 *Ius Commune*, pp. 187-238; C.J.H. Jansen, 'Mitverschulden: einige Betrachtungen über D. 9,2,11 pr.', in L. de Ligt et al. (eds.), *Viva vox iuris Romani. Essays in Honour of J.E. Spruit* (2002), pp. 103-114. Further literature can be found in the bibliography included in the first work of this footnote especially on pp. 408 et seq.

3 The following summary is based on Van Dongen, *supra* note 2, and also on E.G.D. van Dongen, 'Hollandsche IJzeren Spoorwegmaatschappij/Morré. Enige rechtsvergelijkende en rechtshistorische beschouwingen over de gevolgen van eigen schuld van de gelaedeerde voor de aansprakelijkheid voor onrechtmatig handelen', (2014) *Pro Memoria*, no. 1, pp. 78-79.

solved in the common law tradition will be dealt with in two parts. The first part gives an overview of the main theories within the common law tradition, in which contributory negligence, if legally relevant, could only lead to a denial of a claim for damages. This part is presented chronologically, i.e. first the medieval and early modern period (Section 2) and then the 19th and 20th century (Section 3). The second part will single out cases that, in one way or another, indicate some rebellion against, or mitigation of, the leading case law and thus paved the way for a partition of damages. This part will end with the introduction of the partition of damages in the Law Reform Act 1945 (Section 4). Section 5 will contain a conclusion.

## 2. Contributory conduct of the injured party in medieval and early modern common law

### 2.1. Introduction

Although Roman law was not received in English common law to the degree that it was received on the continent, it has definitely had some influence on the concepts, terminology and principles of English common law.<sup>4</sup> Some thoughts on the topic of contributory negligence have been taken from Roman law as well.<sup>5</sup> It is interesting that the 13th century English jurist Henry de Bracton (c. 1210-1268),<sup>6</sup> an ecclesiastic and royal judge, referred to Roman law, namely Digest 9.2.11pr., in his exposé on homicide through misadventure and accidents.<sup>7</sup> Apparently in cases of (criminally sued) crimes, the behaviour of the injured party was irrelevant.<sup>8</sup> However, the concept of contributory negligence cannot be found as such in the medieval common law of delicts. Nevertheless, there are some cases which, when considered from a modern contemporary perspective, deal with the problem of ‘contributory negligence’. A general principle of contributory negligence in this period is implausible, due to the various narrow forms of action. This article will focus on the tort of negligence. Two groups of cases in which the contributory conduct of the injured party was relevant can be distinguished: the first group concerns cases in which the courts dealt with the contributory conduct of the injured party by looking at the causal relations of the act of the wrongdoer and the act of the injured party with the loss that occurred; in the second group, some considerations of negligence can already be discerned.<sup>9</sup>

### 2.2. Interruption of the causal connection between an act and damage

The courts in the medieval and early modern period gave form to almost all contemporary institutions of limitation of liability by means of causal imputation. This also applied to ‘contributory negligence’. Rather than using a concept of contributory negligence, it was examined whether the harm was caused by the plaintiff’s own act, i.e. whether the plaintiff was himself responsible for the proximate cause. That the proximity of causation was the prerequisite for the liability of the defendant becomes clear from the *Cattle* case, also referred to as *Godfrey v. Godfrey* (1470).<sup>10</sup> In this case the plaintiff – the injured party – sued the defendant for trespass because the defendant’s animals had strayed from the road into the adjoining close which belonged to the plaintiff. The Court argued that because this close had not been properly secured, this was what caused the damage.<sup>11</sup> Thus the plaintiff’s claim was denied, since the damage was caused by his own conduct.<sup>12</sup> The result of this reasoning was that the plaintiff’s claim was either accepted or denied

4 See elaborately E.D. Re, ‘The Roman Contribution to the Common Law’, (1961) 29 *Fordham L. Rev.*, no. 3, pp. 447 et seq.

5 F. Wharton, *A Treatise on the Law of Negligence* (1874), p. 265, even claimed that the principle of Pomponius in D. 50.17.203 – stating that he who suffers loss due to his own negligence is not considered to have suffered loss – was reaffirmed in Anglo-American jurisprudence.

6 On H. de Bracton see e.g. E. Foss, *Biographica juridica* (1870), pp. 112 et seq.

7 Bracton, *De legibus*, 384 (ed. with an English translation by S.E. Thorne, *Bracton on the Laws and Customs of England* (1968), Vol. II).

8 The discourse on homicide by Bernard of Pavia was transplanted and by that the scheme of responsibility: in a case of accidental homicide, a man was only acquitted if his act was lawful and if he had used due care. See F. Pollock & F.W. Maitland, *The History of English Law before the Time of Edward I* (1923), Vol. II, p. 477.

9 P.J.R. Koppe, *Das mitwirkende Verschulden des Verletzten (contributory negligence) im englischen und irischen Schadensersatzrecht* (diss. Kiel) (1970), p. 32.

10 See also W. Holdsworth, *A History of English Law* (1966), Vol. III, pp. 379-380; E.A. Turk, ‘Comparative Negligence on the March’, (1950) 28 *Chi.-Kent L. Rev.*, no. 3, p. 194.

11 *Godfrey v. Godfrey* (1470) Y.B. 10 Ed. IV Pasch pl. 19. See also Holdsworth, supra note 10, p. 378, and Turk, supra note 10, pp. 195 et seq.

12 Holdsworth, supra note 10, p. 378; Luig, supra note 2, p. 223.

in full, no halfway solution was possible – i.e. an all-or-nothing approach.<sup>13</sup> No contributory negligence was at stake in this case, because the notion of negligence had not yet arisen.<sup>14</sup> Because liability for trespass was strict, rather than fault-based, all issues, such as ‘contributory negligence’, had to be based on causation.<sup>15</sup> The wrongdoer’s responsibility only extended to the direct consequences of his act; the (negligent) conduct of the injured party could be used to question the direct connection between the damage and the behaviour of the wrongdoer. The injured party could not therefore claim damages if his act had been the effective cause (direct, proximate cause) of the damage.<sup>16</sup>

In some 17th and 18th century cases in which the conduct of the injured party contributed to his loss, the causal connection between the act and the damage was also of major importance. Two cases will be discussed as examples.<sup>17</sup> In *Smith v. Pelah* (1746) a dog owner kept a dog that had previously bitten a person on one occasion, after which another person was bitten. The court decided that the dog owner could be held responsible even if the accident was caused because the injured party had stepped on the dog’s foot. The reasoning seems to be that it was due to the dog’s owner that the dog was not put down at first notice – knowing that it had previously bitten someone,<sup>18</sup> so he should not have endangered the safety of other people afterwards.<sup>19</sup> In a later case, *Brock v. Copeland* (1794), someone was bitten when he went into a yard where a dog was left untethered.<sup>20</sup> Lord Kenyon (1732-1802)<sup>21</sup> decided there was no fault on the part of the owner in such a case, since the dog had been properly untethered; the injury had been caused due to the fault of the plaintiff himself, who without any caution had entered the defendant’s yard after it had been shut. It was decided that if the dog was kept on the premises of the defendant, and the injury was due to the imprudence of the plaintiff entering those premises, the action could not be maintained.<sup>22</sup>

### 2.3. Appearance of negligence

Only in the late 18th century did judges come to the conclusion that negligence could serve as the basis for liability. So only from that period onwards did a denial of a claim based on contributory negligence become possible.<sup>23</sup> Nevertheless, there are some cases that could point to an early acceptance of the relevance of (contributory) negligence for liability, or at least to a reformulation of the old doctrine in terms of negligence. These occur in the 16th and 17th centuries, when the concept of negligence, as a ground for liability, worked its way into common law.<sup>24</sup> In the following cases the courts solved contributory negligence by considering the element of negligence, i.e. by denying the claim because the injured party himself had been negligent.<sup>25</sup> In the first case of *Sanders v. Spencer* (1567) an innkeeper informed the plaintiff that he could only warrant the goods in the plaintiff’s safe if he placed it in a certain chamber secured by a special key-operated lock.

13 Koppe, supra note 9, pp. 33 et seq.

14 The simple principle of ‘a man acts at his peril’ was followed; see Holdsworth, supra note 10, pp. 378 et seq.; Looschelders, supra note 2, p. 93.

15 D.J. Ibbetson, *A Historical Introduction to the Law of Obligations* (1999), pp. 58 et seq.

16 Holdsworth, supra note 10, p. 378; W. Holdsworth, *A History of English Law* (1966), Vol. VIII, p. 449; R.F.V. Heuston & R.A. Buckley, *Salmond and Heuston on the Law of Torts* (1996), p. 485; Looschelders, supra note 2, p. 93. This way of thinking was clearly influenced by the canon law distinction between *causa proxima* and *causa remota* (see Van Dongen, supra note 2, pp. 150 et seq.). See also Luig, supra note 2, p. 223. Furthermore, according to the latter (on pp. 225, 237), the proximate cause rule corresponds, as a result, to the prevailing theory of *culpa maior* in the period of *usus modernus*.

17 Koppe, supra note 9, also mentioned *Blyth v. Topham* (1607) 79 E.R. 139 and *Mitchil v. Alestree* (1676) 86 E.R. 190. The former case concerned the owner of a mare that stumbled in a pit that someone else had dug. Because the mare had been there unlawfully, the digging of the pit was lawful as far as the owner of the mare was concerned. This case concerned the question of unlawfulness rather than the causal connection. In the latter case an unruly horse broke free from his rider in a crowded field and injured another person. Although contributory conduct seemed to be at stake, the court did not take that into account and only looked at the conduct of the wrongdoer. Although it was not shown what right the injured person had to be there, the court argued that the horseman was at fault for bringing a wild horse into a crowded place where mischief might occur.

18 If he did not know that the dog was dangerous, he would not be held liable; see *Buxendin v. Sharp* (1696) 91 E.R. 564.

19 *Smith v. Pelah* (1746) 93 E.R. 1170/1171.

20 *Brock v. Copeland* (1794) 170 E.R. 329.

21 On Lloyd Kenyon, 1<sup>st</sup> Baron Kenyon, see, e.g., G.T. Kenyon, *The Life of Lloyd, First Lord Kenyon: Lord Chief Justice of England* (1873).

22 See *Brock v. Copeland*, supra note 20. See also later *Lowery (Pauper) v. Walker* (1910) [1911] AC 10. However, it was stated that if the same incident happened on a public road or if the owner of a mischievous animal allowed a way over his close to be used as a public way while he kept such an animal in his close, he had to answer for any injury to any person.

23 See also Turk, supra note 10, p. 195.

24 Heuston & Buckley, supra note 16, p. 485.

25 See also Koppe, supra note 9, pp. 33 et seq.

Notwithstanding this warning, the plaintiff placed the goods in an outer court, where they were stolen. According to the Court's decision, this was the plaintiff's own default.<sup>26</sup> In the second case, *Bayley v. Merrel* (1615), the defendant had hired the plaintiff to carry a load of madder (a herb which was commonly used as a dye) from Exhall to Uppingham and fraudulently deceived him regarding the weight of the goods. Due to the weight of the load which was too heavy, seven of the plaintiff's horses died. The Court denied the horse owner's claim despite the apparent fraud, as it considered that the accident was due to his own – gross – negligence for making a horse carry a weight which far exceeded the declared weight, without noticing or checking the true weight.<sup>27</sup> In the third case, *Cruden v. Fentham* (1799), the defendant was driving his carriage on the wrong side of the road, while the plaintiff was on horseback. Although the road was wide enough for both to pass without difficulty, the plaintiff crossed over to the side where the carriage was being driven. In endeavouring to pass between the carriage and the pavement, the horse was killed.<sup>28</sup> Lord Kenyon informed the jury that by acting in this way the injured party had voluntarily put himself in the way of danger. Thus the injury was of his own making.<sup>29</sup> The jury, however, found a verdict for the plaintiff.<sup>30</sup> The latter argumentation by Lord Kenyon was clearly based on an argumentation based on negligence rather than on causation.

### 3. Contributory negligence in 19th and 20th century England

#### 3.1. *Butterfield v. Forrester*: the idea of 'ordinary caution'

The concept of negligence as an independent ground for liability took a clear shape in the 18th and early 19th century.<sup>31</sup> The defence of contributory negligence originated from *Butterfield v. Forrester* (1809), the leading case on contributory negligence in the early 19th century,<sup>32</sup> although the term contributory negligence was not yet mentioned.<sup>33</sup> Remarkably, the rule provided in *Butterfield v. Forrester* was stated to be a well-settled rule – readily accepted by the legal profession without any argument against it.<sup>34</sup> The case concerned a man riding a horse which collided with a pole erected on a public road and where, as a result, the rider was thrown from his horse and injured. The man was denied his claim for damages because he was found to have ridden at an extreme speed, not taking ordinary care. According to the judge before whom this case was brought at first instance, an injured party could not recover his loss if he could have avoided the accident or injury by exercising 'ordinary caution'. A subsequent move for an appeal before the King's Bench was rejected by Lord Chief Justice Ellenborough (1750-1818),<sup>35</sup> apparently a controversial and tempestuous tort judge in his own day,<sup>36</sup> who declared, without any supporting authority:

26 *Sanders v. Spencer* (1566) 73 E.R. 591.

27 *Bayley v. Merrel* (1615) 79 E.R. 331. See also Holdsworth Vol. VIII, supra note 16, p. 459 note 7. The defendant argued that '(...) it was his own folly to overload his horses (...) and being his own negligence he is without a remedy (...)'. See also Looschelders, supra note 2, p. 93, who argues that contributory negligence was for the first time used as a justification for a denial of a claim for damages at the beginning of the 17th century. See also Luig, supra note 2, p. 223. It took until the beginning of the 19th century before the concept of negligence was completely accepted as a ground for liability, see Holdsworth Vol. VIII, supra note 16, p. 459.

28 *Cruden v. Fentham* (1799) 170 E.R. 496.

29 According to F.V. Harper & F. James Jr., *The Law of Torts* (1956), Vol. II, p. 1241, the first decisions, i.e. *Cruden v. Fentham*, *Clay v. Wood*, *Butterfield v. Forrester* and *Flower v. Adam*, deal with cases in which the plaintiff's negligence was later in time than the defendant's. The crucial question was whose wrongful act came last in time.

30 *Cruden v. Fentham*, supra note 28.

31 Harper & James, supra note 29, p. 1195. Elaborately on the history of negligence in tort law see P.H. Winfield, 'The History of Negligence in the Law of Torts', (1926) 42 L.Q. Rev., pp. 184 et seq.

32 On the development of the consequences of contributory negligence in 19th century England see also G. Williams, 'The Law Reform (Contributory Negligence) Act, 1945', (1945) 9 Mod. L. Rev., pp. 105 et seq.; J. Scott, 'Some Reflections on Section 1(1)(a) of the Apportionment of Damages Act 1956 and Contributory Intent', in J. van der Westhuizen et al. (eds.), *Huldigingsbundel Paul van Warmelo* (1984), p. 171; C. von Bar & E. Clive (eds.), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR). Full Edition* (2009), Vol. I/IV, p. 3640.

33 *Butterfield v. Forrester* (1809) 11 East 60/103 E.R. 926 (K.B. 1809). See also Holdsworth Vol. VIII, supra note 16, pp. 406 et seq.; K. Wester, *Mitverschulden im deutschen, englischen und amerikanischen Zivilrecht* (diss. Cologne) (1976), p. 17; W.P. Keeton et al., *Prosser and Keeton on the Law of Torts* (1984), p. 451; Heuston & Buckley, supra note 16, p. 486; Charlesworth/Percy, *Negligence* (2014), p. 246.

34 F.H. Bohlen, 'Contributory Negligence', (1907-1908) 21 Harv. L. Rev., p. 233.

35 On Lord Ellenborough see e.g. M. Lobban, 'Law, Edward, first Baron Ellenborough (1750-1818)', *Oxford Dictionary of National Biography*, available at <<http://www.oxforddnb.com/view/article/16142>> (last visited 11 January 2016).

36 P.N. Swisher, 'Virginia should abolish the Archaic Tort Defense of Contributory Negligence and adopt a Comparative Negligence Defence in its Place' (2011), p. 359.

'A party is not to cast himself upon an obstruction which has been made by the fault of another, and avail himself of it, if he do not himself use common and ordinary caution to be in the right.'<sup>37</sup> In cases of persons riding upon what is considered to be the wrong side of the road that would not authorize another purposely to ride up against them. One person in fault will not dispense with another's using ordinary care for himself. Two things must concur to support this action, an obstruction in the road by the fault of the defendant, and no want of ordinary care to avoid it on part of the plaintiff.'<sup>38</sup>

Although there was no doubt that the defendant's careless conduct was a significant cause of the damage, he was not held liable. The court ascribed the accident to the carelessness of the injured party who had ridden violently through the unlit streets and had not detected the obstacle in time. According to the court, if the plaintiff would have exercised usual care, he would have seen that obstacle. Therefore the accident had occurred entirely as a result of his own fault.<sup>39</sup> The rationale of the decision is that the contributory negligence of the injured party is a complete defence against an action in negligence for any claim for damages. This leads to the extreme rule that even the slightest amount of contributory negligence bars the injured party's action, even though the wrongdoer's negligence might have been far more severe.<sup>40</sup> The decision nevertheless prejudiced the law for the following 140 years.<sup>41</sup> If damage was caused by both parties, neither of them could recover anything from the other: 'The loss lies where it falls' – also called the stalemate rule, because it resulted in a draw.<sup>42</sup>

Doctrinal justifications for the denial of claims for damages in case of contributory conduct by the injured party are mainly found in the theory of causality.<sup>43</sup> In the event of contributory negligence the act of the injured party, rather than that of the wrongdoer, is regarded as the proximate cause.<sup>44</sup> Other possible justifications provided are based on the voluntary assumption of risk or the idea that the injured party should come to court with 'clean hands'<sup>45</sup> or are derived from the construction of the injured party and the wrongdoer as joint tortfeasors.<sup>46</sup>

Historically, the development of the doctrine of contributory negligence can be understood in light of the context at the time. Several factors might have played a role in the ready acceptance of the rule in *Butterfield v. Forrester*. While the doctrine has been explained from the perspective of policy, and has been attributed a certain penal function,<sup>47</sup> it has also been stated that the defence of contributory negligence demonstrates the individuality of early capitalism, and that it can be attributed to the historical inertia of the common law.<sup>48</sup> The acceptance of the defence might also be explained by the coincidence of its emergence with the

37 *Butterfield v. Forrester*, supra note 33; W.L. Prosser, 'Comparative Negligence', (1953) 51 *Mich. L. Rev.*, no. 4, pp. 467-468. In cases of persons riding on what is considered to be the wrong side of the road, that would not authorise another to ride up purposely against them. One person in fault will not dispense with another's using ordinary care for himself. Two things must concur to support this action, an obstruction in the road by the fault of the defendant and no want of ordinary care to avoid it on the part of the plaintiff. See *Butterfield v. Forrester*, supra note 33 and Koppe, supra note 9, p. 29.

38 *Butterfield v. Forrester*, supra note 33.

39 See also Koppe, supra note 9, pp. 28 et seq.

40 Swisher, supra note 36, p. 359. See also B. Weyts, *De fout van het slachtoffer in het buitencontractueel aansprakelijkheidsrecht* (2003), p. 327. A.M. Honoré, 'Causation and Remoteness of Damage', in A. Tunc (ed.), *Encyclopedia of Comparative Law. Volume XI. Torts. Part I* (1983), p. 96 (unless a wrongdoer had acted intentionally). The reasoning departed from the ideals of accountability and deterrence, because it completely relieved the defendant from any liability whatsoever, even if he had been the most negligent by far. However, as D.B. Dobbs, *The Law of Torts* (2000), pp. 494 et seq. stated, a regime of accountability would, in contrast, hold the defendant liable for a proportional share of the harm.

41 Koppe, supra note 9, p. 28.

42 Williams, supra note 32, p. 106.

43 See Lord Atkin in *Caswell v. Powell Duffryn Associated Collieries* (1940) AC 152 (165): 'I find it impossible to divorce any theory of contributory negligence from the concept of causation.' See also *Thomas v. Quartermaine* (1887) 18 Q.B.D. 685 (697) who stated that contributory negligence rests upon the view that although the wrongdoer had been negligent, the injured party had by his own carelessness severed the causal connection between the wrongdoer's negligence and the accident that had occurred; and that the wrongdoer's negligence was accordingly not the true proximate cause of the injury. Elaborately on the dogmatic justifications of the doctrine of contributory negligence see Wester, supra note 33, pp. 21 et seq.

44 P.A. Landon, *Pollock's Law of Torts* (1951), p. 356; Koppe, supra note 9, p. 30.

45 See also Keeton et al., supra note 33, p. 452.

46 See W. Schofield, 'Davies v. Mann: Theory of Contributory Negligence', (1889-90) 3 *Harv. L. Rev.*, pp. 267 et seq.; Koppe, supra note 9, p. 30.

47 Schofield, supra note 46, pp. 270, 271. See also Landon, supra note 44, p. 354.

48 Koppe, supra note 9, p. 31, referring to F.H. Bohlen, 'Voluntary Assumption of Risk', (1906-1907) 20 *Harv. L. Rev.*, pp. 17 et seq., note 2; Bohlen, supra note 34, p. 258 and Holdsworth Vol. VIII, supra note 16, p. 459.

rise of the Industrial Revolution (i.e. a matter of legal and social policy) and the expansion of the economy.<sup>49</sup> Its development might have been encouraged by the uneasy distrust of the plaintiff-minded jury in the earlier part of the 19th century, the desire to keep the liabilities of growing industries within boundaries, as well as the tendency of the courts to look for the proximate cause of every injury and the inability of the courts to conceive a satisfactory method for the partition of damages in the case of a single injury.<sup>50</sup>

### 3.2. Award of damages despite negligence

The rule in *Butterfield v. Forrester* that an injured party could not recover if there was any negligence on his part was followed in other early 19th century cases.<sup>51</sup> A very strict interpretation of the rule can be found in *Hawkins v. Cooper*, in which a horse and cart knocked down a woman while she was crossing the road. The cart was driving on the wrong side of the road in order to overtake an omnibus, and it was found that the horse did not have a proper bit. The judge of the Court of Common Pleas instructed the jury that they could only find for the woman if the accident was attributable to the driver's fault and 'to that, and that alone'.<sup>52</sup> If, on the other hand, the accident was occasioned in any degree by improper conduct by the woman herself, the jury had to deny an action for damages.<sup>53</sup>

Although the consequences of this rule might seem very far-reaching, juries, who judge upon questions of fact, might have neglected less significant contributions of injured parties while, strictly speaking, such a contribution was indeed present.<sup>54</sup> This was for example the case in *Vanderplank v. Miller* (1828), where the jury understood the judge's instruction that the plaintiff's action could only be maintained if there was no want of care on both sides and that the accident was entirely attributable to the fault of the defendants. Although there seems to have been some careless acts on the side of the plaintiff, these were not considered as such, as the jury maintained the action for the plaintiffs.<sup>55</sup> Thus the all-or-nothing rule might have been applied less harshly than it seems at first sight.

In other cases the idea of 'ordinary' care seems to act more as a threshold, in the sense that the amount of negligence on the part of the injured party, to deprive him of his action, must be such that he did not exercise ordinary care. If there was some negligence on the part of the injured party, but not to such a degree that it can be said that he did not exercise ordinary care, his claim would be upheld. Examples of cases in which the injured party was excused from his negligence because it was insignificant compared to the improper behaviour of the wrongdoer cannot only be found in cases concerning traffic accidents, but also in cases concerning trespass, theft, the demolition of a house and accidents between boats navigating on a river.<sup>56</sup> Thus, the ordinary care doctrine in these cases was dealt with in a way that created some room for judgements in which the injured party was awarded the total amount of damages regardless of the negligence on his part.

In 1838, this interpretation of the 'ordinary care' rule was confirmed by the Court of Exchequer in *Bridge v. Grand Junction Railway Company*, a case concerning a collision between two trains.<sup>57</sup> Mr. Justice Parke's

49 Suggested as a reason in the US by Swisher, *supra* note 36, p. 362, but also applicable in the UK. See also Turk, *supra* note 10, p. 198. Furthermore, according to Bohlen, the most important reason to adhere to the strict form of contributory negligence until the contemporary period was the spirit of the age of liberalism it came to meet. See Bohlen 1906-1907, *supra* note 48, pp. 17 et seq., note 2, who argues that the form of contributory negligence is possibly the strongest expression that the individualism has found in the law.

50 These factors are taken from Keeton et al., *supra* note 33, pp. 452 et seq.

51 See, e.g., *Deane v. Clayton* (1817) 129 E.R. 196, *Ilott v. Wilkes* (1820) 106 E.R. 674, *Chaplin v. Hawes* (1828) 172 E.R. 543, *Bradley v. Waterhouse* (1828) 173 E.R. 1114, *Lack v. Seward* (1829) 172 E.R. 628, *Luxford v. Large* (1833) 172 E.R. 1036, *Woolf v. Bird* (1838) 173 E.R. 538, *Hughes v. Macfie* (1863) 159 E.R. 308.

52 *Hawkins v. Cooper* (1838) 3 Car. & P. 474.

53 Even if the preponderant blame was of the wrongdoer, see Lord Campbell in *Dowell v. General Steam Navigation Company* (1855) 119 E.R. 454 (459). A parallel can be drawn with the civil law, where this denial of a claim for damages in cases of contributory negligence was also still applied in the early 19th century (see Van Dongen, *supra* note 2).

54 Koppe, *supra* note 9, p. 37.

55 *Vanderplank v. Miller* (1828) 173 E.R. 1119 (1120).

56 For examples see: *Chaplin v. Hawes and Others* (1828) 172 E.R. 543, *Davies v. Mann* (1848) 152 E.R. 588 and *Thorogood v. Bryan* (1849) 137 E.R. 452, *Bird v. Holbrook* (1828) 130 E.R. 911, *Lynch v. Nurdin* (1841) 113 E.R. 1041, *Jordin v. Crump* (1841) 151 E.R. 1256, *Barnes v. Ward* (1850) 175 E.R. 277, *Walters v. Pfeil* (1829) 173 E.R. 1189 and *Sills v. Brown* (1840) 173 E.R. 452. For an overview of the subsequent development in the US, see Swisher, *supra* note 36, pp. 361 et seq.

57 Williams, *supra* note 32, p. 107 states that the last opportunity rule had already been decided in this judgement, although in rather careless language.

judgement explicitly acknowledged the idea that the plaintiff could be entitled to recover damages even when he had been negligent:

‘The rule of law is laid down with perfect correctness in the case of *Butterfield v. Forrester*: and that rule is that, although there may have been negligence on the part of the plaintiff, yet, unless he might, by the exercise of ordinary care, have avoided the consequences of the defendant’s negligence, he is entitled to recover: if by ordinary care he might have avoided them, he is the author of his own wrong.’<sup>58</sup>

The negligence of the injured party could therefore no longer be used to bar his claim for damages, unless his negligence was the direct cause of the injury.<sup>59</sup> In the same year, in the case *Woolf v. Beard*, Mr. Justice Coleridge remarked that ‘no one has a right of action, if he meets with an accident which by ordinary care he might have avoided’ and instructed the jury that their verdict should depend on whether they thought the plaintiff contributed to the accident.<sup>60</sup> A few years later the same judge gave a similar direction to the jury in *Sills v. Brown*, stating that the central question was whether the plaintiff had ‘substantially contributed’ to the occurrence of the accident.<sup>61</sup> In a later case, *Thorogood v. Bryan* (1849), the wrongdoer’s barrister similarly held that the true inquiry was whether the injury complained of was ‘fairly attributable’ to the wrongful act of the defendant.<sup>62</sup> Likewise, Lord John Campbell (1779-1861)<sup>63</sup> used the phrase ‘materially contributed to the accident’ to denote the contributory negligence on the part of the injured party in *Senior v. Ward*, and in *Morgan v. Rarey* Mr. Justice Pollock questioned whether the injured party had ‘contributed to the loss, so as, that but for such negligence, it would not have occurred’.<sup>64</sup> The question whether the injured party had “substantially contributed” to the accident thus became a common test to determine whether the injured party is entitled to recover his damages.<sup>65</sup>

In these cases, the courts no longer seemed to consider just any degree of contributory negligence to be enough to bar someone from claiming damage: the negligence had to be substantial. One started to look at the role of the injured party’s fault in relation to the wrongful behaviour on the part of the defendant in causing the injury. The relevance of the way in which the faults on both sides related both to each other and to the accident was explicitly acknowledged by Sir W.H. Maule (1788–1858),<sup>66</sup> a judge of the Court of Common Pleas, who remarked that ‘there may be a distinction between cases where the act of the defendant is an unlawful act, and those in which the injury arises out of a matter of negligence only’.<sup>67</sup> Apparently, the seriousness of the fault had become important for the consequences of the contributory negligence of the injured party.<sup>68</sup>

58 *Bridge v. Grand Railway Company* (1838) 150 E.R. 1134. Something caused by the injured party cannot be imputed to someone else: ‘The plaintiff cannot recover for an injury occasioned to him by his own wrongful act’, see *Bird v. Holbrook* (1828), supra note 56. This reasoning was even followed after the Reform of 1945 as revealed in the words of Viscount Simon in *Nance v. British Columbia El. Ry. Co.* (1951) AC 601 (611): ‘For when contributory negligence is set up as a shield (...) the principle involved is that where a man is part author of his own injury he cannot call on the other party to compensate him in full’. See also Koppe, supra note 9, p. 30.

59 See Harper & James, supra note 29, p. 1243.

60 *Woolf v. Beard* (1838) 173 E.R. 538.

61 *Sills v. Brown*, supra note 56.

62 *Thorogood v. Bryan*, supra note 56.

63 On J. Campbell see G.P. Macdonell, ‘Campbell, John, first Baron Campbell of St Andrews (1779-1861)’, *Oxford Dictionary of National Biography*, available at <<http://www.oxforddnb.com/view/article/4521?docPos=123>> (last visited 11 January 2016).

64 *Senior v. Ward* (1859) 1 EL. & EL. 387 and *Morgan v. Rarey* (1860) 175 E.R. 1062. The requirement that the negligence of the injured party contributed to the loss can also be found in several cases concerning banks being sued for financial losses. See *Bank of Ireland v. Trustees of Evans’ Charities* (1855) V.H.L.C. 390 and the cases referred to therein.

65 See also the commentary of Foster & Finlason on *Springett v. Ball* (1865) 4 F. & F. 471.

66 On Sir W.H. Maule, see J.D. FitzGerald, ‘Maule, Sir William Henry’, *Oxford Dictionary of National Biography*, available at <<http://www.oxforddnb.com/view/article/18369>> (last visited 11 January 2016).

67 See *Marriot v. Stanley* (1840) 133 E.R. 458.

68 In the same context it is interesting to note that in criminal cases, where the wrongdoer was culpable of causing a loss of life, the courts were very clear in their judgement that the negligence of the victim could never be a defence for the wrongdoer against a manslaughter charge. See, among others, *Regina v. Swindall* (1846) 2 Car. & K. 228 and *Regina v. David Dant* (1865) LE. & Car. 567.

### 3.3. *Davies v. Mann* and the last opportunity rule<sup>69</sup>

As shown in the previous section, the question whether the injured party's conduct was culpable eclipsed the inquiry into whose behaviour came last in the early 19th century. Although there were still some cases in which theories of causal computation could be found, the focus came to lie on the extent of the culpability on the side of the injured party. The attention given to the timing of the parties' respective negligence in the courts of Kings Bench and Common Pleas would, however, re-emerge after the decision in *Davies v. Mann* in 1842.<sup>70</sup>

Around the middle of the 19th century, the requirement that the behaviour of the injured party had substantially contributed to the accident developed into the 'last opportunity rule', which locates the blame on the party that had the last chance to avoid the accident or injury.<sup>71</sup> The last opportunity rule frames the question regarding contributory negligence in terms of causation, with the key question being whether a causal link can be established between the behaviour of the injured party and the (occurrence of) the accident. The use of causal imputation in cases where there was negligence on the side of the injured party in early common law was already discussed in Section 2.2. The same reasoning and use of terms of causation can be found in some early 19th century cases, such as *Flower v. Adam* (1810), in which the jury decided that if the proximate cause of the damage was the unskilfulness of the injured party, although the primary cause was the misfeasance of the wrongdoer, the injured party could not recover his damages.<sup>72</sup> Another example is *Deane v. Clayton* (1817), where the court decided that the plaintiff could not recover his damages because his own wrongful intrusion was the 'immediate cause' of his pain.<sup>73</sup>

In 1840, new light was shed on the importance of causation in cases of contributory negligence by Mr. Justice Coleridge in *Sills v. Brown*.<sup>74</sup> According to Coleridge, what mattered was not whether the injured party had contributed to the extent of the injury or damages, but whether he had (substantially) contributed to the occurrence of the injury.<sup>75</sup> This emphasis on the relation between contributory negligence and the occurrence of the injury ties in nicely with the last opportunity rule, which judges contributory negligence according to the question of whether the occurrence of the injury could have been avoided. This consideration is often referred to in later cases.<sup>76</sup>

The leading direction on the last opportunity rule was given two years later in *Davies v. Mann* (1842).<sup>77</sup> In this case, someone who was driving a waggon negligently hit a donkey that had been left behind on the road. The donkey was crushed, severely injured and died.<sup>78</sup> At first instance, Mr. Justice Erskine argued that, while the act of the plaintiff might be illegal, if the proximate cause of the injury was attributable to the want of proper conduct on the part of the driver of the waggon, the action could still be maintained against the defendant.<sup>79</sup> In the following procedure on appeal the defendant contended that the principle of law was that where an accident was the result of faults on both sides, neither party could maintain an

69 See also e.g. Schofield, *supra* note 46, pp. 263 et seq.; M.M. MacIntyre, 'The Rationale of Last Clear Chance', 1940 *Harv. L. Rev.* 53, pp. 1225 et seq.; G.L. Williams, *Joint Torts and Contributory Negligence*, 1951, pp. 223 et seq.; Keeton et al., *supra* note 33, pp. 462 et seq.; Wester, *supra* note 33, pp. 99 et seq.; Honoré, *supra* note 40, pp. 119, 125 et seq.; S.D. Juge & V.R. Boyette, 'Comparative Negligence in the United States – the Advent of its Adoption in Louisiana', (1976-1977) 51 *Tul. L. Rev.*, p. 1227; Heuston & Buckley, *supra* note 16, p. 486; Looschelders, *supra* note 2, pp. 94 et seq.; Weyts, *supra* note 40, pp. 329 et seq.

70 See Harper & James, *supra* note 29, p. 1242, who refer amongst others to *Vanderplank v. Miller* (1828), *Luxford v. Large* (1833), *Pluckwell v. Wilson* (1832), *Sills v. Brown* (1840), *Raisin v. Mitchell* (1839).

71 The phrase 'the last opportunity' seems to have been used for the first time by Salmond in 1912, see Heuston & Buckley, *supra* note 16, pp. 486 et seq.

72 *Flower v. Adam* (1810) 127 E.R. 1098. See also *Cattlin v. Hills* (1849) 137 E.R. 455.

73 *Deane v. Clayton*, *supra* note 51.

74 This case was already mentioned in Section 3.2.

75 *Sills v. Brown*, *supra* note 56.

76 Carrington & Payne also mention the judgement as one of the key cases in establishing the last opportunity rule; see the commentary of Carrington & Payne on *Raisin v. Mitchell* (1839) 173 E.R. 979

77 *Davies v. Mann*, *supra* note 56. According to Bohlen, *supra* note 34, pp. 238 et seq., *Davies v. Mann* did expand on the rule in *Clay v. Wood* (1803) 170 E.R. 732, where the defendant was held liable although the plaintiff had driven on the wrong side of the road, as he did not pass between the horse and the other side of the road but instead collided (merely omissive negligence) which amounted to successive conscious and intended misconducts.

78 See also Prosser, *supra* note 37, p. 471.

79 *Davies v. Mann*, *supra* note 56.

action.<sup>80</sup> The Court of Exchequer, however, reached the same conclusion as Mr. Justice Erskine. According to Mr. Justice (Baron) Parke: 'the mere fact of negligence on the part of the plaintiff in leaving his donkey on the public highway was no answer to the action, unless the donkey's being there was the immediate cause of the injury'.<sup>81</sup> There is, in other words, no claim for damages if the immediate cause of the accident lies in the behaviour of the injured party, or, as it is often put, if the injured party's fault has 'directly contributed' to the occurrence of the injury. The key question is which party had the last, and therefore the better, opportunity to avoid the damage; that party should then bear the damage.<sup>82</sup>

After the introduction of the last opportunity rule, case law searched for a legal basis for this rule. One view based the rule on the intensity of fault or on comparative fault: the fault of the person who had the last opportunity to avoid the damage would be considered more serious than the fault of the other party.<sup>83</sup> Another view is based on the causal character between the fault and the damage: the fault of the injured party was not the legal or proximate cause of the damage if the wrongdoer could have avoided the damage (contributory negligence then breaks the link between the fault of the wrongdoer and the damage which occurred).<sup>84</sup> However, possibly the only reason for this last opportunity rule was the growing aversion to the contributory negligence rule.<sup>85</sup> In that sense case law, based on equity, intended to mitigate the rigidity of the old contributory negligence rule.<sup>86</sup>

### 3.4. Confirmation of the last opportunity rule

The ruling in *Davies v. Mann* set a standard for following cases.<sup>87</sup> In *Tuff v. Warman*, brought before the Exchequer Chamber in 1858, the rule in *Davies v. Mann* was applied. This case concerned a collision between two ships on the River Thames. There appeared to be fault on both sides: the defendant's ship was on a wrong course, but the plaintiff's ship lacked a look-out. At first instance, the judge had directed the jury to find for the defendant if they thought that the accident had been partly caused by the plaintiff's own negligence, thereby referring to *Davies v. Mann* and with the remark that the plaintiff's negligence would not be relevant if it was not a direct cause of the injury.<sup>88</sup> On appeal, the Exchequer Chamber did offer some interesting thoughts on the way in which the jury should be instructed in such cases. According to Mr. Justice Wightman,<sup>89</sup> the proper question to put to the jury in a case concerning contributory negligence should be:

'whether the damage was occasioned entirely by the negligence or improper conduct of the defendant, or whether the plaintiff himself so far contributed to the misfortune, that, but for his own negligence or want of ordinary and common care and caution on his part, the misfortune would not have happened. In the first case, the plaintiff would be entitled to recover, in the latter not; as, but for his own fault, the misfortune would not have happened. Mere negligence or want of ordinary care or caution would not, however, disentitle him to recover, unless it were such, that, but for that negligence or want of ordinary care and caution, the misfortune could not have happened; nor, if the defendant might by the exercise of care on his part have avoided the consequences of the neglect or carelessness of the plaintiff.'<sup>90</sup>

80 *Davies v. Mann*, supra note 56 (with reference to *Butterfield v. Forrester*). A similar judgment was delivered a few years earlier, in 1832, in the case of *Vennall v. Garner* (1832) 149 E.R. 298, a case in which two ships had collided. There it was decided that if an accident was the result of combined negligence, neither can recover against the other.

81 *Davies v. Mann*, supra note 56.

82 N. Jansen, '§ 254, Mitverantwortlichkeit des Geschädigten', in R. Zimmermann (ed.), *Historisch-kritischer Kommentar zum BGB, Bd. 2 Schuldrecht Allgemeiner Teil, 1. Teilband: vor §241–§304* (2007), p. 668.

83 According to MacIntyre, supra note 69, p. 1225, the underlying reason for the escape from the harshness of the contributory negligence bar in last clear chance cases is that the defendant's negligence was relatively greater than that of the plaintiff.

84 Weyts, supra note 40, p. 331, with references.

85 See also Williams, supra note 69, p. 247; Keeton et al., supra note 33, p. 464.

86 Williams, supra note 69, p. 236; Koppe, supra note 9, p. 42.

87 In *Dowell v. General Steam Navigation Company*, supra note 53, for example, Mr. Justice Campbell explicitly referred to *Davies v. Mann* whilst applying the last opportunity rule.

88 The rule was also followed in the Exchequer Chamber, where Mr. Justice C.E. Pollock (1823-1897) stated that 'where negligence of the party injured did not in any degree contribute to the immediate cause of the accident, such negligence ought not to be set up as an answer to the action'. See *Greenland v. Chaplin* (1850) 155 E.R. 104. A similar judgement by the Exchequer Chamber was given in *Rigby v. Hewitt* (1850) 155 E.R. 103.

89 On Sir W. Wightman, see J.A. Hamilton, 'Wightman, Sir William (1785–1863)', *Oxford Dictionary of National Biography*, available at <<http://www.oxforddnb.com/view/article/29373?docPos=4>> (last visited 11 January 2016).

90 *Tuff v. Warman* (1858) 5 C.B. (N.S.) 572.

This question, which is a clear application of the rule in *Davies v. Mann*, was subsequently referred to as the standard when it comes to contributory negligence. In *Walton v. The London, Brighton and South Coast Railway Company*, where a horse had crashed through the window of a shop along the road, the verdict of the jury was overturned because they did not read along the lines of the example given in *Tuff v. Warman*.<sup>91</sup> Another example of the adherence to *Tuff v. Warman* can be found in *Witherley v. The Regent's Canal Company*, where a man had fallen off a bridge and drowned. The jury in this case asked the judge whether any degree of negligence on the part of the man would have prevented his widow from claiming damages (as the defendant's counsel claimed it did). The judge rejected this suggestion and used exactly the same phrasing as used in *Tuff v. Warman* to further instruct the jury.<sup>92</sup>

In 1875, the last opportunity rule even made it to the House of Lords. In *Radley v. London and North Western Railway Company*, a truck had been left behind by its owners and was subsequently damaged. The House of Lords decided that the accident would not even have happened if the truck had not been left behind, but it would not be enough to prevent the injured party from recovering damages. The House acknowledged the general proposition that a plaintiff could not recover if he contributed to the accident, but also noted that the last opportunity rule was 'equally well established' and concluded that this rule could thus not be ignored. The original direction to the jury, which claimed that the accident must be caused 'solely by the negligence of the defendant' in order for the plaintiff to recover, was judged to be contrary to the last opportunity rule and wrong in point of law.<sup>93</sup> The House of Lords thereby confirmed the last opportunity rule and the judgements in *Davies v. Mann* and *Tuff v. Warman* on which this rule was based.

### 3.5. The extension and the restriction of the last opportunity rule

In 1916, the last opportunity rule was stretched by the Privy Council in the *Loach* case to include cases in which the defendant did not in fact have the last opportunity to avoid the disaster, but would have had such an opportunity if he had exercised due care.<sup>94</sup> The person who would have had the last opportunity to avoid the damage if he had exercised due care (the so-called constructive last opportunity) had to bear the damage<sup>95</sup> – this preceding negligent act being the decisive cause of the damage. The same reasoning can be found in some cases from the next two decades.<sup>96</sup> The rule was extended in *The Eurymedon* (1938) where the Court of Appeal applied the rule from the *Loach* case to contemporaneous negligence. It was stated that if one of the parties (the plaintiff or the defendant) in a common law action had actually, by observation, been aware of the negligence of the other party and failed to exercise reasonable care towards the negligent injured party, that party was solely responsible.<sup>97</sup> In this case neither party had had the last opportunity to avoid the damage, but one would have had this opportunity – because one would have been aware of the danger – if it had not been for his own negligence.<sup>98</sup>

A first restriction on this rule was made by the House of Lords in *Volute* (1922),<sup>99</sup> which applies only when a clear line between contributing acts can be made: when two acts can be distinguished in time, only the second one is relevant; however, when this is not the case and when the second act stands in such a close relation with the first that it would not have been possible without the preconditions set by that act, the plaintiff can also rely on the first negligent act, so that the contributory negligence doctrine applies

91 *Walton v. The London, Brighton and South Coast Railway Company* (1868), H. & R. 424.

92 *Witherley v. The Regent's Canal Company* (1862) 176 E.R. 28.

93 *Radley v. London and North Western Railway Company* (1875) L.R. 10 Ex. 100. See also Lord Blackburn in *Dublin Wicklow & Wexford Ry. v. Slattery* (1878) 3 App. Cas. 1207 (if the injured party by exercising due care could have avoided the consequence of the wrongdoer's negligence he cannot recover).

94 *British Columbia Electric Railway v. Loach* [1916] 1 AC 719; P. Birks (ed.), *English Private Law* (2000), Vol. II, p. 467. On this case see Williams, supra note 69, pp. 234 et seq. It has been argued that in this case it superseded the last opportunity rule in favour of the rule of greater fault. See MacIntyre, supra note 69, pp. 1245 et seq. (where he considers the last clear chance doctrine to be a disguised escape, by way of comparative fault, from contributory negligence as an absolute bar; see p. 1251); Williams, supra note 32, p. 107.

95 Weyts, supra note 40, p. 330.

96 See Koppe, supra note 9, p. 44, with references.

97 *The Eurymedon* (1938) P. 41; Williams, supra note 69, p. 224.

98 Williams, supra note 69, p. 225.

99 *Admiralty Commissioners v. S.S. Volute* [1922] 1 AC 129 (HL).

here.<sup>100</sup> A second restriction was applied in *Swadling v. Cooper* (1930),<sup>101</sup> concerning a collision between a motor car and a motor cycle, where the judge at first instance directed the jury that if they found both parties to be substantially to blame for the accident, they should absolve the defendant. According to this judge, the element of who was responsible for the last act of negligence did not necessarily need to play a role. The Court of Appeal set the decision aside because the principles of the last opportunity rule had not been respected. In contrast the House of Lords decided that from the moment the parties became aware of their respective positions, there could have been no time for the defendant to take any action to avoid the impact and therefore the negligence of both parties had contributed to the collision.<sup>102</sup> The applicability of the last opportunity rule for cases of simultaneous negligence was denied; the jury had to decide which fault preponderantly caused the damage that occurred.<sup>103</sup>

#### 4. Towards partial damages

Although the general approach to contributory negligence in relation to the partition of damages as recorded in the Law Reform (Contributory Negligence) Act of 1945 (see below) seems to have been one of 'all or nothing',<sup>104</sup> the law in action might have been different. Juries often allowed recovery in cases of contributory negligence, and a compromise in the jury room resulted in some diminution of the damages awarded due to the fault of the injured party (see below). These juries had a good precedent for their rulings: the admiralty courts – which based their decisions on admiralty law, not common law – in fact used the same rule as juries in cases of contributory negligence (weighing the negligence of both parties and striking a balance between them).<sup>105</sup> Various variants of damage partition can be found.<sup>106</sup> The simplest possible and the oldest method of apportionment<sup>107</sup> is to divide the damages equally between the negligent parties. This was the method which had been developed, around 1700, by the English admiralty courts,<sup>108</sup> which of course had no jury, and were strongly influenced by international rules derived from the civil law.<sup>109</sup> The rules which were applied in the earliest decisions in collision cases were however not uniform.<sup>110</sup> This was settled in 1815 in *The Woodrop-Sims* when it was decided that a partition in halves was also to be applied when faults were not equally serious;<sup>111</sup> where a collision is caused by want or due diligence or of skill of both sides, the loss must be apportioned between them.<sup>112</sup> However this may be, English law continued to adhere to this rule of equal partition<sup>113</sup> until the enactment of the Maritime Convention Act in 1911,<sup>114</sup> when

100 Ibid.; Wester, supra note 33, p. 101.

101 Koppe, supra note 9, p. 46.

102 *Swadling v. Cooper* (1930) [1931] AC 1.

103 Koppe, supra note 9, p. 48.

104 Prosser, supra note 37, p. 469. See also J.N. Ulman, *A Judge takes the Stand* (1933), pp. 30 et seq., who indicated that judges should instruct juries to reject an action in case of a small contributory negligence according to the law in the books. Juries have decided on cases as if no such rule existed. In the cases mentioned the jury decided to award part of the damages, in proportion to the respective negligence (no actual proof of this was however available, the evidence came from notebooks), i.e. after balancing the carelessness of both parties. See also F.H. Lawson, *Negligence in the Civil Law* (1950), pp. 55 et seq., who states that until 1842 juries were apparently permitted, even encouraged, to reduce the amount of damages to be paid to the injured party.

105 Ulman, supra note 104, p. 33. Also W.J. Zwalve, *C.A.E. Uniken Venema's Common Law & Civil Law* (2008), p. 462, remarks that in the states (of the USA) where the old common law rule still applies, one needs to remember that the determination of the scope of damages is left to the juries who take into account the extent to which the claimant has contributed to the occurrence of the damage.

106 The idea of the distribution of damages as mentioned in *Exodus XXI.35-36* can also be found in Anglo-Saxon England in law 23 of the laws of King Ine. See *Ancient Laws and Institutes of England* (1840), Vol. I (reprint B. Thorpe 2004), p. 51.

107 Early admiralty cases, from 1614 onwards, even divided the loss evenly where only the defendant's ship was at fault. See K.C. McGuffie, *Marsden on the Law of Collisions at Sea* (1953), pp. 139 et seq.

108 *Beckham v. Chapman* (1695) Burrell 270, 167 E.R. 568; *Noden v. Ashton* (1706) Burrell 290, 167 E.R. 577. See McGuffie, supra note 107, pp. 142 et seq.

109 Prosser, supra note 37, p. 475. See also Turk, supra note 10, pp. 226 et seq.

110 H. Hillyer, 'Comparative Negligence in Louisiana', (1936) 11 *Tul. L. Rev.*, p. 115.

111 McGuffie, supra note 107, p. 144.

112 *The Woodrop-Sims* (1815) 165 E.R. 1422.

113 *Hay v. La Neve* (1824) 2 Shaw Sc. App. Cas. 395; *The Milan* (1861) 167 E.R. 167 (a 50/50 partition in case both ships were to blame, calling it a *judicium rusticorum*); *Cayzer, Irvine & Co. v. Carron Co.* (1884) 9 AC 873.

114 See *Admiralty Commissioners v. S.S. Volute* [1922] 1 AC 129, 144, HL, per Viscount Birkenhead, arguing that the Maritime Conventions Act with its provisions for convenient qualifications as to the quantum of blame and the proportions in which a contribution is to be made may be taken to some extent as being declaratory of the Admiralty rule in this respect.

it conformed with (Article 4 of) the Brussels Maritime Convention of 1910<sup>115</sup> by adopting a statute providing for a division of the damages ‘in proportion to the degree in which each vessel was at fault.’<sup>116</sup>

In the common law, the principle of the partition of damages was not officially introduced until the Law Reform (Contributory Negligence) Act of 1945.<sup>117</sup> The case of *Cayzer, Irvine & Co. v. Carron Co.* (1884) made it clear that the practices of Admiralty law did not extend to common law. In this case, which was brought before the Admiralty division of the House of Lords, Lord Blackburn (1813-1886)<sup>118</sup> declared that ‘the rule of [common, EvD & HV] law is that if the blame causing the accident lies on both sides, however small that blame may be on one side, the loss lies where it falls’, thereby rejecting the application of a partition of damages outside the scope of Admiralty law.<sup>119</sup> Within the common law one had to abide by the traditional ‘all or nothing’ rule.

However, as already mentioned above, juries might have often disregarded the official rule in favour of the mitigation or partition of damages. Several examples can be found in 19th century case law. In *Smith v. Dobson* (1841) where, despite the fact that strict instructions were given to the jury as to the effect of contributory negligence (namely, an absolute bar), the jury decided to award one quarter of the damages. The reasoning of the jury based on comparative faults was left unaffected on appeal.<sup>120</sup> Another example is the case of *Raisin v. Mitchell* brought before the Court of Common Pleas in 1839. This case concerned an accident between two ships. One of the ships ran into the other ship, causing it to sink. The defence claimed that there were several factors on the side of the injured ship that contributed to the accident. After hearing the case, the jury decided to award only half of the damages claimed. This partial award of damages came as a surprise to both parties as well as to the judge, Lord Chief Justice N.C. Tindal (1776-1846),<sup>121</sup> who had not given any instruction in this direction. When asked for a clarification, the foreman of the jury declared that ‘there were faults on both sides’.<sup>122</sup> Despite the objections of the defendant, Tindal upheld the verdict after the jury confirmed that they had considered the whole matter. *Raisin v. Mitchell* thus offers a practical application of the principle of the partition of damages long before it became an official rule. In their report of the case a few years later, Carrington and Payne noted that the verdict ‘seems to be quite correct, and sustainable in point of law’ and substantiated their judgement with references to earlier cases such as *Bridge v. Grand Junction Railway Company*, *Marriot v. Stanley* and *Sills v. Brown*.<sup>123</sup> Remarkably, Carrington and Payne seem to have considered the decision to award partial damages to be in line with the last opportunity rule, which could also be discerned in other cases around the same period, almost viewing it as a logical conclusion to these developments.<sup>124</sup>

Signs of a discussion about the consequences of the all-or-nothing rule can also be found in two cases from 1850, *Greenland v. Chaplin* and *Rigby v. Hewitt*.<sup>125</sup> In both cases the jury had awarded, contrary to their instruction by the judge, full damages to the injured party, despite evidence of (some) contributory

115 I.e. the International Convention for the Unification of Certain Rules to Govern the Liability of Vessels in Case of Collisions, and a protocol thereto (signed in Brussels on 23 September 1910). For the text see e.g. A.W. Knauth, *Knauth's Benedict on Admiralty* (1958), Vol. 6, pp. 39 et seq. (see especially Art. 4, on p. 39).

116 See Maritime Conventions Act of 1911, 1 & 2 George V, c. 57, § 1 (1). This provision provided that if, having regard to all the circumstances of the case, it is not possible to establish different degrees of fault, the liability shall be apportioned equally; Prosser, supra note 37, p. 476.

117 See 8 & 9 Geo. VI, c. 28.

118 On Baron C. Blackburn, see J. McMullen Rigg, ‘Blackburn, Colin, Baron Blackburn of Killearn (1813–1896)’, *Oxford Dictionary of National Biography*, available at <<http://www.oxforddnb.com/view/article/2510?docPos=2>> (last visited 11 January 2016).

119 *Cayzer, Irvine & Co. v. Carron Co.*, supra note 113. See also e.g. A.C. Mole & L.P. Wilson, ‘Study of Comparative Negligence’, (1932) 17 *Cornell L. Rev.*, no. 3, pp. 340 et seq.; ‘Something caused by the injured party cannot be imputed to someone else: ‘The plaintiff cannot recover for an injury occasioned to him by his own wrongful act’. See *Bird v. Holbrook*, supra note 56. This reasoning was even followed after the Reform of 1945 as revealed in the words of Viscount Simon in *Nance v. British Columbia El. Ry. Co.*, supra note 58: ‘For when contributory negligence is set up as a shield (...) the principle involved is that where a man is part author of his own injury he cannot call on the other party to compensate him in full’. See also Koppe, supra note 9, p. 30.

120 *Smith v. Dobson* (1841) 133 E.R. 1057; MacIntyre, supra note 69, pp. 1229 et seq.

121 On Sir N.C. Tindal, see J.A. Hamilton, ‘Tindal, Sir Nicholas Conyngham (1776–1846)’, *Oxford Dictionary of National Biography*, available at <<http://www.oxforddnb.com/view/article/27464?docPos=5>> (last visited 11 January 2016).

122 *Raisin v. Mitchell*, supra note 76. See also MacIntyre, supra note 69, p. 1229.

123 Commentary of Carrington & Payne on *Raisin v. Mitchell* (1839) Car. & P. 613.

124 Ibid.

125 *Greenland v. Chaplin* (1850) 155 E.R. 104 and *Rigby v. Hewitt* (1850) 155 E.R. 103.

negligence on his side.<sup>126</sup> When the cases were brought before Mr. Justice C.E. Pollock on appeal, he repealed the jury decisions, but did express his doubts as to whether the consequences of the current doctrine would be appropriate in all cases. In *Greenland v. Chaplin* Pollock admitted that he was not sure whether it would be reasonable to hold a person responsible for ‘all the consequences which may under any circumstances arise, and in respect of mischief which could by no possibility have been foreseen, and which no reasonable person would have anticipated’.<sup>127</sup> In *Rigby v. Hewitt*, Pollock similarly remarked that he had some doubts as to the extent of the damages which were recoverable.<sup>128</sup> He acknowledged that a person should be responsible for all foreseeable consequences, but seemed to have had some doubts concerning the coverage of consequences that no one could have foreseen. In both cases, however, the emphasis of Pollock’s comments seems to lie on the causal link to the damage, which should not be too remote from the accident itself, and less on the rules regarding contributory negligence. Moreover, Pollock was very careful to point out that these doubts did not apply to the cases at hand and he went to great lengths to clarify that he did not want to question earlier precedents or to go against the doctrine as a whole.<sup>129</sup>

More interesting in the context of contributory negligence is the case of *Springett v. Ball*, which occurred about ten years later, in 1865. In this case, the jury came to a verdict similar to the one in *Raisin v. Mitchell*.<sup>130</sup> Although the judge’s direction to the jury in this case was along the same lines as the last opportunity rule, the jury seemed to have considered the outcome of that rule to be unsatisfactory and they awarded mitigated damages instead. Although the jury did not explicitly state their reason for doing this, Chief Justice Sir Alexander J.E. Cockburn (1802-1880)<sup>131</sup> noted that ‘it is evidently the result of a compromise’. From his conclusion that the jury obviously evaded ‘the difficulty and responsibility of a decision’, which was ‘most unsatisfactory’, it is clear the Chief Justice was not very pleased with the verdict. The commentary accompanying the report of this case in Foster & Finlason’s law reports is not very positive either. The commentary argues that the incident either occurs or not and thus there is no question of any degree when considering who caused it, thereby giving a clear insight into the arguments against the partition of damages.<sup>132</sup>

All in all, it is interesting to note that all three juries in *Smith v. Dobson*, *Raisin v. Mitchell* and *Springett v. Ball* quite independently of each other decided to mitigate the awarded damages. Apparently there was a shared sense in these cases that the all-or-nothing approach when awarding damages was unfair in the given circumstances. Not everyone shared this outlook, however. Although the jury’s verdict in *Raisin v. Mitchell* was considered to be in line with earlier case law (by Carrington and Payne), a similar verdict in *Springett v. Ball* was met with harsh criticism. Likewise, it is interesting to note that although in the Exchequer Chamber Mr. Justice Pollock expressed some doubts on the matter in both *Greenland v. Chaplin* and *Rigby v. Hewitt*, he was very careful not to go too far in his suggestions and also made sure to show his deference to the contemporary regime of awarding either all, or none of the damages. Thus, it is not surprising that it would still take several decades until these ideas made it into legislative drafting (i.e. in 1945).<sup>133</sup> Meanwhile, the broadening of the last opportunity rule, as discussed in Section 3, had paved the way for a less stringent understanding of contributory negligence.

The principle that an injured party who was partly responsible for his own harm could not recover damages in tort would remain the official doctrine until the Law Reform (Contributory Negligence) Act of 1945.<sup>134</sup> This Act provided the rule that in such cases the claim does not fail, but the defence of contributory

126 Ibid. See also Foster & Finlason’s commentary on *Springett v. Ball* (1865) 4 F. & F. 471.

127 *Greenland v. Chaplin*, supra note 125.

128 *Rigby v. Hewitt* (1850) 155 E.R. 104.

129 *Greenland v. Chaplin*, supra note 125.

130 *Springett v. Ball* (1865), 4 F. & F. 471.

131 On Sir A.J.E. Cockburn see e.g. M. Lobban, ‘Cockburn, Sir Alexander James Edmund, twelfth baronet (1802–1880)’, *Oxford Dictionary of National Biography*, available at <<http://www.oxforddnb.com/view/article/5765>> (last visited 11 January 2016).

132 Commentary on *Springett v. Ball* (1865) in 4 F. & F. 471: ‘For if he [the defendant, EvD & HV] could, but for his negligence, have seen and avoided the deceased, notwithstanding his negligence, then the negligence of the deceased was not, even in part, the cause of his death, but the negligence of the driver in not seeing and avoiding him (...) it was not, therefore, a question of degree; but the negligent act and injury was one, entire, and indivisible; so also was the damage; if any of it was owing to the act of the driver, the whole of it was so.’

133 See also Lindsey L.J. in *Mills v. Armstrong (The Bernina)* (1887) 12 P.D. 58 (89): ‘But why in such a case [i.e. where the injury was caused by the injured party’s own negligence and by the negligence of the wrongdoer, EvD & HV] the damages should not be apportioned, I do not profess to understand.’

134 See elaborately Williams, supra note 32, pp. 105 et seq.; Heuston & Buckley, supra note 16, pp. 489 et seq.

negligence may apply and if it applies it may lead to a reduction of the amount of damages to be paid.<sup>135</sup> This reduction is based on the respective degrees of the responsibility of the parties. The question to be answered is not only to what extent the behaviour involved was likely to cause the event, but above all what is needed is a balancing of the respective faults by the judge.<sup>136</sup> Ultimately decisive is what the court/judge considers to be 'just and equitable'.<sup>137</sup> With the Act, the contributory negligence rule, with its all-or-nothing approach, and the last opportunity rule became inoperative.<sup>138</sup>

## 5. Concluding remarks

This article has described the development of the solutions provided for and the consequences given to the behaviour of the injured party which contributed to the occurrence of his damage in the tradition of English common law. Before a concept of contributory negligence existed, contributory conduct was considered from the point of view of causation: the wrongdoer's act had to be the proximate cause of the damage. This point of view can be discerned in several cases in the early modern period.<sup>139</sup> Around the same period, a gradual acceptance of the concept of negligence can be seen; in some cases the negligence of the injured party was already considered. With the rule in *Butterfield v. Forrester*, the result of 'contributory negligence' was one of all or nothing. Subsequently, the way in which cases involving contributory negligence were dealt with slowly developed from a very strict rule, depriving the injured party of its action even in the presence of the slightest degree of negligence on his side, into a more lenient approach, in which attempts aimed at doing justice to the relation in which both parties contributed to the accident were made during the 19th century. The introduction of the last opportunity rule, as formulated in *Davies v. Mann*, shifted the focus increasingly towards the seriousness of the fault, rather than the occurrence of the negligence, and laid the emphasis more on the timing of the negligence. In some 19th century cases, thoughts on a partition of damages can also be discerned. Juries regularly mitigated the damages they awarded, rather than applying the all-or-nothing rule. The idea of a partition of damages thus seems to have emerged in English common law around the end of the 19th century. In 1945, the possibility of a reduction, based on the respective degrees of the responsibility of the parties was officially introduced with the Law Reform (Contributory Negligence) Act, which is still in force today. ■

135 See Sect. 1(1) of the Law Reform (Contributory Negligence) Act of 1945. On this provision see e.g. Charlesworth/Percy, *supra* note 33, pp. 247 et seq.; C. Elliott & F. Quinn, *Tort Law* (1999), pp. 90, 93.

136 Looschelders, *supra* note 2, p. 95; Wester, *supra* note 33, pp. 263 et seq. See Denning L.J. in *Davies v. Swan Motor Co. Ltd.* [1949] 2 K.B. 291 (326). On the last opportunity rule after 1945 see e.g. Koppe, *supra* note 9, pp. 53 et seq.

137 See also Honoré, *supra* note 40, pp. 123 et seq.

138 See Looschelders, *supra* note 2, p. 96, with further references. On the existence of the last opportunity rule after the Law Reform (Contributory Negligence) Act, see e.g. Wester, *supra* note 33, pp. 120 et seq. See on the development from all-or-nothing to a partition of damages, the development from contributory to comparative negligence in the USA, e.g. Looschelders, *supra* note 2, pp. 97 et seq., with further references. On the rise of comparative negligence in the 19th and 20th centuries in the USA, see also E.A. Turk, 'Comparative Negligence on the March. Part II', (1949-1950) 28 *Chi.-Kent. L. Rev.*, pp. 304 et seq.

139 This way of thinking could still be seen in some early 19th century cases in common law, see Section 3.3.