

**DAVIES v. MANN AND CONTRIBUTORY NEGLIGENCE
STATUTES.***

The vigorous oral judgment of McPhillips, J.A., in the recent case of *Morgan v. The British Columbia Electric Railway Co.*¹ indicates very clearly that that learned Judge retains very little respect for the famous "Donkey Case"² and for the doctrine of the "Last Clear Chance" which it enunciated. The facts of the British Columbia case seem to be briefly as follows: The plaintiff, in breach of a municipal by-law and with considerable lack of consideration for the safety and convenience of others, on a dark and wet night, had

the effrontery to place his truck, a heavy truck, in such a position that it was bound to be struck by the street cars.

The truck was struck by a street car but the finding of fact, which the Appeal Court did not seek to disturb, was that the motorman could, had he been keeping a good lookout, have avoided the collision, notwithstanding the perilous location of the truck. The plaintiff then had the further

extreme effrontery to bring an action founded upon the admitted facts . . . and come into the Court of Appeal and say that he should be given four-fifths of the damage his truck sustained. That the British Columbia Electric Railway Company must, out of its coffers, pay practically for a new truck.

The learned Judge at the trial found negligence on both sides and he gave the plaintiff four-fifths and the defendant one-fifth of the damages under the local Contributory Negligence Act.³ The appeal appears to have been brought either for the purpose of having the defendant exonerated *in toto* or in order to have this apportionment altered. Martin, J.A., thought that the case was within *Davies v. Mann*. McPhillips, J.A., referring to the reference of Martin, J.A., to the "Donkey Case" is reported, at p. 781, to have said the following:

Now my brother Martin refers to the very celebrated case of *Davies v. Mann* (1842), 10 M. & W. 546, 12 L.J. Ex. 10. They were Judges of the long ago, and we are the Judges of the present. We have equal power and right to declare the law. It is true under our jurisprudence we pay attention to precedents, but that distinguished jurist Lord Shaw said⁴ . . . the

* Since writing this note, a note on the *Morgan Case* by I. S. Fairty, Esq., has appeared. (9 C.B. Rev. 52). The conclusions reached by Mr. Fairty coincide with the views independently reached by the writer of this note.

law must adapt itself to the changing condition of trade and society. There were no street cars in the time of *Davies v. Mann*. The citizens of the country are entitled to protection in these days of the lightning express, and street-car traffic.

The street railway company must keep to its schedule or the people won't be able to keep their appointments or get to their work. I am satisfied, with great respect to the learned trial Judge, that upon the evidence in this case there is such a preponderance of negligence upon the part of the plaintiff that I would have been disposed to have allowed the appeal *in toto*.

Whatever may be the relative merits of the "Judges of the long ago" and the "Judges of the present" and whatever may be the effect of the transition from the regime of donkeys and carts to the era of motor trucks and street cars,^{4a} the doctrine of *Davies v. Mann* (*supra*) has been so often accepted by "Judges of the present" that it would appear to require the brute force of a statute to displace the doctrine which that case applied. Lord Shaw, to whose opinion McPhillips, J.A., quite properly paid great respect, so recently as 1924 found no incongruity in applying the rule in *Davies v. Mann* to a case of collision of modern steamships in a crowded river and that too, in an Admiralty case in which the doctrine of apportionment might apply.⁵ The Supreme Court of Canada in many recent cases (some subsequent to the British Columbia case) likewise saw no unsuitability in the *Davies v. Mann* rule for a modern environment.⁶ Since the date at which the British Columbia case was decided, the House of Lords (whose decisions we are told are binding on all Canadian Courts, (*Robins v. National Trust* [1927] A.C. 515) has reiterated the *Davies v. Mann* rule and has declared that subsequent "discussions have (not) in any way qualified or lessened the authority" of the earlier decision.⁷ The Judicial Committee, too, in several cases has acted on or accepted the *Davies v. Mann* doctrine, one of these cases coming from British Columbia.⁸ In the face of these decisions coming from Courts whose authority is usually looked upon as irrefragable, it would appear to require a great deal of judicial temerity to abolish, without legislative assistance, a rule which has worked itself into the very texture of our law of negligence.⁹

Assuming the competency of a Court to abolish the *Davies v. Mann* rule, it is not clear that, as a matter of policy, that course ought to be taken.¹⁰ At common law, when a plaintiff was defeated on the ground of his contributory negligence, the result was not reached by a comparison of the *culpability* of the plaintiff with the *culpability* of the defendant. The question was not decided by ascertaining on whose side was the mere preponderance of negligence

or moral obliquity. The "comparative negligence" view as a common law doctrine seems to have been abandoned everywhere¹¹ although there is an echo of it in the second paragraph quoted from the judgment of McPhillips, J.A., in the present case. Even in the limited class of cases to which the contributory negligence statutes apply and in which comparison of culpability is permissible, it would seem that preponderance of negligence alone ought not to defeat a party *in toto* but that it ought to affect the question of proportion only (see judgment of Mignault, J., in *Laporte v. C. P. R.*, [1924] S.C.R. at 287). The Courts, at common law, were not primarily concerned with punishing the plaintiff contributorily negligent although that may have been the inevitable but untoward result of a judgment for the defendant. ". . . the question is not one of *desert*¹² or the lack of it, but of the *cause* legally responsible for the injury."¹³ In the cases in which the contributory negligence statutes apply, or in Admiralty, the Courts are directed to estimate relative culpability, if possible, but that is a modern refinement as far as non-maritime common law Courts are concerned and, as will be seen later, it is confined to cases of substantially simultaneous negligence.¹⁴ The common law problem was not to determine *blameworthiness* but *cause*. If the plaintiff's conduct was the sole effective cause¹⁵ or if the defendant's and the plaintiff's negligence respectively were each a substantially simultaneous and multiple cause¹⁶ or if the defendant's negligence had no effect on the result, the plaintiff failed.¹⁷ In cases in which the plaintiff's negligence was severably antecedent in point of time, there is strong authority for saying that the plaintiff's negligence was a *condition* or *causa sine qua non* and not a *cause*, in the legal sense, and that the doctrine of contributory negligence in the strict sense, has no application.¹⁸ If the plaintiff, by his extreme negligence has put himself in a dangerous position, there would seem to be no ground for treating him as *caput lupinum* insofar as definitely subsequent acts of the defendant are concerned. If we make the defendant liable in such case we create an additional motive for careful action on his part. If we deprive the plaintiff of a cause of action in such a case, we can only do so on the ground that we wish to punish him for something which is past.¹⁹ The antecedent negligence of the plaintiff which is a condition or a *causa sine qua non* or a *causa remota* of the injury which he has sustained, is only one of the circumstances which the defendant must take into account in subsequently ordering his conduct as a reasonably prudent man acting in view of all the factors of the situation, of which the plaintiff's situation is

one.²⁰ If this doctrine was appropriate in an era of carts and donkeys, it would seem to be appropriate *a fortiori* at the present when mechanization is the rule and when no potential safeguard of life or property can be disregarded.

The application of the doctrine of the "Last Clear Chance" has not always escaped criticism (see note 10). Courts have sometimes required juries to re-enact the affair with a stop-watch in their hands. This strictness in drawing the line between contemporaneous and sequent negligence has proceeded from a non-recognition of the fact that men do not act with the rapidity and certainty of electrical machines. Even the "reasonably prudent man" has a reaction time and his judgment and conduct are not infrequently affected by such things as the "agony of the collision." The Courts have recently insisted upon the doctrine of *Davies v. Mann* being applied in a "commonsense" way. The respective negligences of the plaintiff and the defendant must be substantially severable. It is not enough that they be separated by an infinitesimal interval of time. The doctrine is that of the "Last Clear Chance."²¹ Similarly, in determining whether the defendant acted as a reasonably prudent man after the plaintiff's negligence was, or ought to have been discovered, the Courts recognize that the "reasonably prudent man" might be perturbed and his conduct influenced by an unexpected emergency.²²

A further difficulty in connection with the application of the "Last Clear Chance" doctrine springs from the gloss put on the doctrine by the Judicial Committee in the *Loach* case.²³ A discussion of that case is beyond the scope of this paper.²⁴ It is clear, however, that we cannot blame the "Judges of the long ago" who formulated the *Davies v. Mann* rule, for an addendum to their rule which has been evolved by the subtlety of the "Judges of the present."

All the learned Judges in the British Columbia Court of Appeal seem to have thought that the case was a proper one for the apportionment of damages under the local Contributory Negligence Act. If the defendant was negligent and his negligence was severable and substantially subsequent to that of the plaintiff within the *Davies v. Mann* rule, it is difficult to see why the statute had any application. It is generally thought that the various contributory negligence statutes were intended to be ameliorative, to meet the views of those who cast "wistful eyes"²⁵ at the Admiralty and Civil Law rule which allowed apportionment in cases in which the plaintiff at common law was totally defeated because his negligence

was substantially *concurrent* with that of the defendant. The weight of authority is to the effect that the Acts, in their ordinary form, have no application to cases in which the plaintiff would have been successful at common law without the assistance of the statute. The Acts were for the relief of plaintiffs—not for the amelioration of the condition of negligent defendants.²⁶ The Admiralty and Civil Law rules certainly were to that effect.²⁷ If, in the British Columbia case, the defendant, if he had been keeping a good lookout, could have avoided the plaintiff's whole damage by the exercise of reasonable care, it would appear that the plaintiff ought to have recovered all the damage he suffered, however, reprehensible and inconsiderate we may consider his conduct to have been, the Contributory Negligence Act notwithstanding.²⁸

NOTE.—For the sake of convenience we have grouped the authorities cited in this article as follows:

¹ (1930) 2 W.W.R. 776 at pp. 780, 781; [1930] 4 D.L.R. 30; 42 B.C.R. 382.

² *Davies v. Mann*, 10 M. & W. 546.

³ See note 26, below, for a discussion of the applicability of this statute to a case of negligences severable in time. In *Key v. B.C. Electric* (1930), 3 W.W.R. 569, decided after the *Morgan* case, the Court which decided the *Morgan* case apparently thought the Contributory Negligence Act had no reference to such a case, i.e. to a case of so-called "ultimate" negligence.

⁴ *McPhillips, J.A.*, does not refer to any specific speech of Lord Shaw. Although Lord Shaw had no particular affection for "the spade of the legal resurrectionist" [1929 A.C. at 623], he apparently did not feel reluctant to apply *Davies v. Mann* in 1924. See *Anglo-Newfoundland etc. v. Pacific, etc.*, (*infra*). If one may be permitted to quote a Judge "of the long ago" it will be seen that the desirability of importing a flexibility and an elasticity into the common law is not an idea which has suggested itself for the first time to the Judges "of the present." In 1628 *Dodderidge, J.*, used the following language: "In these matters the law is like apparel which changes with the times." (*Palm*, 536).

^{4a} See remarks of *Lamont, J.*, in *Stanley v. National Etc.*, 1931, S.C.R. at 68, regarding higher duty of care imposed on drivers of dangerous mechanical vehicles than was imposed on drivers of slow-moving horse-drawn vehicles.

⁵ *Anglo-Newfoundland etc. v. Pacific etc.*, [1924] A.C. 406 (H.L.);

In this case the question was whether each of two ships was a contributory cause of an accident or whether one of the ships was the sole cause. The *Bogota*, in alleged violation of a *Clyde Navigation By-law*, got into a certain position in the stream. The *Alconda* ran into her. Lord Shaw says: "It is not, in the view which I take, sufficient in law to say that the *Bogota* should not have been, on the view that *r. XIX* applies, crossing the river, for it is not suggested that she was crossing the river in any sense which was faulty; and, so far as the *Alconda* and the collision are concerned, the *Bogota* from the time that the vessels sighted each other was in the river as an obstruction, known by the *Alconda* to exist, and therefore to be avoided.

"The principle does not apply to shipping law alone, but to all the law of contributory negligence, from *Davies v. Mann* downwards. And I take the principle to be that, although there might be—which for the purpose of this point I am reckoning there was—fault in being in a position which makes

an accident possible, yet, if the position is recognized by the other prior to the operations which result in an accident occurring, then the author of that accident is the party who, recognizing the position of the other, fails negligently to avoid an accident which with reasonable care on his part could have been avoided. Unless that principle be applied it would always be open to a person negligently and recklessly approaching and failing to avoid a danger, to plead that the reckless encountering of danger was contributed to by the fact that there was a danger to be encountered. There is a period of time during which the causal function of the act of approach operates and it is not legitimate to extend that cause backwards to an anterior situation. The anterior situation may be brought about either innocently or by some mistake; but if it has nothing to do with the subsequent operations which contributed to produce an accident or collision, it is not legitimate to treat it as a contributory in liability for the result thus produced.

"In Admiralty Commissioners v. S.S. *Volute*, [1922] 1 A.C. 129, 136, Lord Birkenhead (then Lord Chancellor) in a valuable judgment applies this principle: "In all cases of damage by collision on land or sea, there are three ways in which the question of contributory negligence may arise. A is suing for damage thereby received. He was negligent, but his negligence had brought about a state of things in which there would have been no damage if B had not been subsequently and severably negligent. A recovers in full." That appears to me to completely fit the situation of the *Bogota* . . ." (419-20). This case seems to determine the *Morgan* case. In the House of Lords case the position of the *Bogota* was seen. In the *Morgan* case the dangerous position of the truck ought, by the exercise of reasonable care, to have been seen. See also *Ontario Gravel etc. v. Mathews, etc.* [1927] S.C.R. 92; [1927] 1 D.L.R. 1045; *Canada Steamship etc. v. Steamer Ketchum*, [1925] S.C.R. at 91-92. "There was evidence sufficient to support the finding that the determining cause of the accident in this case was the negligence of the defendant's motorman, but for which he might have prevented the collision after he became or *should have been aware* of the plaintiff's danger." (Anglin, J., in *Calgary v. Harnovis*, 48 S.C.R. at 496). In the case just mentioned the plaintiff's van was driven carelessly upon the street car tracks of the defendant. The motorman saw or ought to have seen the peril into which the plaintiff had negligently allowed himself to get. The defendant's servant could, after becoming so aware, have avoided the accident by the exercise of reasonable care. He did not do so. The Supreme Court of Canada did not seem to have any doubt about the result. See *Stanley v. National, etc. (infra)*.

* See, for instance, *Stanley v. National Fruit Co.*, 1931, S.C.R. 60; [1931] 1 D.L.R. 306 (S.C.C.); "*Hochelaga v. Dreyfus, etc.*, [1930] 1 D.L.R. 529; "*Kingdoc v. Canada Steamships*, [1931] 1 D.L.R. 146 (S.C.C.); *Newcombe, J.*, in *C.N.R. v. Saint John etc.*, [1930] S.C.R. at 493; *Ship Paisley v. Canada Steamship Lines*, [1929] S.C.R. at 381 (but see [1930] 2 D.L.R. 257); *McLaughlin v. Long*, [1927] S.C.R. 303; *Ontario Gravel etc., v. Mathews, (supra)*; *Canada Steamship etc. v. Ship Ketchum, (supra)*; *Columbia etc. v. B.C. Electric*, 55 S.C.R. 1; *G.T.P. v. Earle*, [1923] S.C.R. 397; *Sincennes etc. v. "Brulin"*, [1929] 3 D.L.R. 536, 557; *Calgary v. Harnovis, etc., (supra)*; *Long v. Toronto etc.*, 50 S.C.R. 224; *C.P.R. v. Hinrich*, 48 S.C.R. 557; *Gavin v. Kettle Valley Railway etc.*, 58 S.C.R. 501; *Steamer Maplehurst v. Hall Coal Co.*, [1923] S.C.R. 507.

The case last cited bears certain analogies to the British Columbia case discussed in this note. Ship A, in disregard of navigation rules, had improper lights. These lights acted as a trap to ship B. Ship B, by appropriate action, probably could have avoided the effect of the improper use of lights by Ship A. Nevertheless the action of the officers of ship B in the emergency was influenced by the conduct of ship A in having improper lights. Ship A had in effect led ship B into a trap and although ship B by appropriate action might have escaped in spite of the previous wrong of ship A, yet the negligence of ship A was continuing in the sense that is had, to the last moment, a confusing effect on the action of the officer in charge of ship B. Duff, J., applied the "common-sense" doctrine of the *Volute*, (*infra*), and

treated both ship A and ship B as contributing to the accident although the defaults were temporally and strictly sequent. The negligence of ship A was continuing and its effects, up to the last, had an influential effect upon the conduct of the officer in charge of ship B. The damage was divided. (See *The Otranto*, 47 T.L.R. 163, H.L.). It is recognized by the Court that in cases in which the respective negligences are clearly sequent and severable and the negligence first in point of time does not continue to operate to confuse the party guilty of the second negligence in the course he takes in view of the results of the first negligence, the party guilty of the later negligence is solely responsible. It is submitted that this latter case corresponds with the B.C. case. The fact that the truck was on the track did not in any way incapacitate the motorman from keeping a proper lookout. Cf. *Canada Steamship etc. v. Ship Ketchum*, (*supra*), 91-92; *Ontario Gravel etc. v. Mathews*, (*supra*). Speech of Lord Shaw in *Anglo-Newfoundland etc. v. Pacific*, (*supra*); *Stanley v. National Fruit Co.*, (*supra*).

⁷*Swadling v. Cooper* (1930), 46 T.L.R. 597 (H.L.). This case is cited with approval and followed by McPhillips, J.A., in *Key v. B.C. Electric* (1930), 3 W.W.R. at 573. Cf. *Straus v. Crocker*, (C.A.) unreported, L.J. (newsp.) Vol. 71 [N.S.] 254.

⁸"Neither is it true, as the learned Judge apparently supposes, that according to the law of England a plaintiff who is guilty of negligence cannot recover damages. On the contrary a plaintiff whose negligence has directly contributed to the accident, that is, that his action formed a material part of the cause of it, can recover, provided it be shown that the defendant could by the exercise of ordinary care and caution on his part have avoided the consequence of the plaintiff's negligence." (Lord Atkinson in *G.T.R. v. McAlpine*, [1913] A.C. at 845-46); see remarks of Lord Atkinson in *C.P.R. v. Frechette*, [1915] A.C. at 878-879; the case of *B.C. Electric v. Loach*, [1916] 1 A.C. at 719 is of course, now the *locus classicus* on the subject of the "Last Clear Chance" doctrine insofar as Canadian Courts are concerned. That case clearly recognized the *Davies v. Mann* doctrine. It refined upon it. The *Frechette* case (at 879) recognizes the distinction between inoperative negligence and contributory negligence. See *Salmond: Law of Torts*, 7th ed. 50; 62 S.C.R. at 234.

⁹The case of *Swadling v. Cooper*, (*supra*), is conclusive that the rule of *Davies v. Mann*, given a "commonsense" interpretation is now part of the law of England. This case represents a unanimous judgment of the House of Lords. See for discussion of effect of *Swadling v. Cooper*, the case of *Strauss v. Crocker* (unreported), C.A. referred to in 71 L.J. (newsp.) N.S. 254. See also: *Commissioners etc. v. Volute*, [1922] 1 A.C. 129; *Anglo-Newfoundland etc. v. Pacific, etc.*, (*supra*); *The Loach case*, (*supra*); *Grayson v. The Ellerman Lines*, [1919] 2 K.B. 514; [1920] A.C. 464; *Radley v. L.N.W.R.*, 1 App. Cas. 754; *Tuff v. Warman*, 2 C.B.N.S. 76 (applied in the *Loach case*); *Columbia etc. v. B.C. Electric*, (*supra*); *Ontario Gravel etc. v. Mathews*, (*supra*); *G.T.P. v. Earle*, (*supra*); cases cited in note (6); *Brenner v. Toronto*, 13 O.L.R. 423; 40 S.C.R. 540; *H.M.S. Acton* 1920, 2 L.L.R. 505; *Manorbier Castle* (1922), 129 L.T. 31; *Alter v. Soloway*, 66 O.L.R. 610; *Ballantine v. International etc.*, 61 O.L.R. at 291; *Mort v. Hamilton*, 62 O.L.R. at 405; *Hanley v. Haynes*, 55 O.L.R. 361; *Morris v. Hamilton*, 54 O.L.R. 208; *Judson v. Haines*, 42 O.L.R. 620; *Sims v. Port Arthur*, 2 O.W.N. 864; *Gallagher v. Toronto*, 41 O.L.R. 143; *Ont. Hughes-Owens etc. v. Ottawa*, 40 O.L.R. 614; *Sitkoff v. Toronto*, 36 O.L.R. 97; *Therrien v. De Lux etc.*, 31 O.W.N. 323; *Young v. Degan* (1923), 2 W.W.R. 982; *McKinney v. Rout* (1929), 2 W.W.R. 340; *Nelson v. Dennis*, [1930] 3 D.L.R. 215; *Symons v. Winnipeg Electric* (1927), 3 W.W.R. 650; *Hones v. B.C. Electric*, 36 D.L.R. at 305; *Dowser v. C.N.R.* (1929), 2 W.W.R. 654; *Kenzie v. Hart*, [1927] 3 D.L.R. 389; *McDonald v. Bezancon*, [1929] 1 D.L.R. 272; *Cook v. G.T.R.*, 31 O.L.R. 183; *Walker v. Forbes*, 56 O.L.R. 532; *Jones v. Toronto*, 23 O.L.R. 331; *C.N.R. v. LePage*, [1927] 3 D.L.R. at 1034; *Foster v. Stubbs*, 26 O.W.N. 223; *Mess v. Calver*, [1929] 3 D.L.R. 685; *Engel v. Toronto*, 59 O.L.R. 514; *Paul v. Dines*, [1929] 3 D.L.R. 617; *Turpie v. Oliver* (1925), 3 W.W.R. 687; *Dixon v. G.T.R.*, 47

O.L.R. 115; Magill v. Township of Moore, 43 O.L.R. 372; Hendrie v. G.T.R., 51 O.L.R. 191; Wise v. T.T.C., [1928] 2 D.L.R. 557; Banbury v. Regina, 35 D.L.R. 502; Inland etc. v. Tolson, 139 U.S. 551; Clark v. Hetherton (1930), 1 W.W.R. 165; Nason v. Hodne, [1929] 4 D.L.R. 490; Johnson v. MacMorran, [1927] 4 D.L.R. 335; Dent v. Usher, [1930] 2 D.L.R. 736; Maloney v. Hamilton, [1930] 1 D.L.R. 268; Wilson v. R., [1930] 1 D.L.R. 273; Jones v. Toronto, 25 O.L.R. 158; Nelson v. Dennis, [1929] 4 D.L.R. 282; [1930] 3 D.L.R. 215; The "Vectis" (1929), 140 L.T. 563; Parsons v. Toronto Ry., 45 O.L.R. 627; Field v. Sarnia, 50 O.L.R. 260; Morris v. Hamilton, 54 O.L.R. 208; Smith v. Regina (1917), 1 W.W.R. 1444; Critchley v. C.N.R. (1917), 2 W.W.R. 538; 34 D.L.R. 245; Trueman v. Hydro-Electric etc., 53 O.L.R. 434; Leech v. Lethbridge etc., 62 S.C.R. 123; Hornby v. Patterson, [1930] 1 D.L.R. 95-96; Paul v. Dines, [1929] 3 D.L.R. 617; Skidmore v. B.C. Electric, 68 D.L.R. 32; Allen v. Edmonton (1930), 2 W.W.R. 25; Neenan v. Hosford (1920), 2 Ir. R. 258; Paul v. G.E.R., (1920), 36 T.L.R. 344; Service v. Sundell, 46 T.L.R. 12; Dancier v. Hollis, Times, Nov. 2, 1929; Hargrove v. Burn, 46 T.L.R. 59; C.P.R. v. Kelvin etc., 138 L.T. 369 (H.L.); Key v. B.C. Electric, (*supra*); Langset v. Duff, [1930] 2 D.L.R. 142; 21 Hals. 446. The Roman Law seems to have got close to the "last chance" doctrine or at least to that aspect of it enunciated in *Butterfield v. Forrester* (11 East 60). See D. 9.2.28 pr.; D. 9.2.28.1; Greuber; *Lex Aquilia*, 111-112.

²⁰ See 3 H.L.R. 263 for a discussion of *Davies v. Mann* by Schofield. Cf. Falconbridge: Desirable changes in the Common Law, at p. 5-6; 1 Cambridge Law Rev. 185; see judgment of Raney, J., in *Dent v. Usher*, [1929] 4 D.L.R. at 718; 18 H.L.R. 537; 16 H.L.R. 365; 26 H.L.R. 369; 27 H.L.R. 757; 21 H.L.R. 233.

²¹ Street: Foundations of Legal Liability, Vol. I, pp. 147-148; 8 H.L.R. 279; 356; 16 H.L.R. 365; 26 H.L.R. 369; 27 H.L.R. 757; Holdsworth, (History of English Law, Vol. VIII, p. 462), seems to think that the Loach case is paradoxical inasmuch as it is the first case in which a comparison of the negligences of the plaintiff and the defendant respectively was the decisive matter. Lord Sumner certainly discloses nothing to suggest that this was the reason underlying his judgment. See Salmond, 7th ed. p. 51(n).

²² Lord Sumner in the Loach case. There are cases in which learned Judges have expressed a different view. Thus Lord Halsbury says in the *Wakelin* case (12 A.C. 45); "the plaintiff fails because *in pari delicto potior est conditio defendantis*." It seems fairly clear that, in cases in which the respective negligences of plaintiff and defendant are sequent and not concurrent, the Courts are not concerned with the merits or demerits of the parties. The question is to determine, as between the parties, what was the "decisive" cause of the accident. This was the problem in the Loach case and the Judicial Committee found, by somewhat subtle reasoning, that the defendant's negligence was subsequent to that of the deceased. Although as between a plaintiff and a defendant who have both been negligent, it is determined that the defendant's negligence was the decisive cause of the plaintiff's injury, it might well be that the plaintiff would, nevertheless, be liable to a third non-negligent party for damage sustained in the same affair. See note (13), for a further discussion of the causation view. In cases of concurrent or substantially concurrent negligences on the part of the plaintiff and the defendant each contributing to the result, the common law allowed no recovery to either party. Why this attitude was taken is not clear. Thus in the *Bernina* case, Lindley, L.J., in speaking of the Common Law rule in this respect, while admitting that the law refused recovery to the plaintiff, was quite unable to see any reason for refusing to apportion the damage (*The Bernina*, L.R. 12 P.D. at 89). In *Reg. v. Longbottom*, 3 Cox C.C. 439, Baron Rolfe, in comparing the effect of contributory negligence in a civil case under Lord Campbell's Act and in a prosecution for manslaughter, suggests that, in the civil case, there is a balancing of blame. In so doing he seems to have stumbled upon the Roman Law doctrine of *Culpa-compensation*. There is strong reason for believing that the Roman doctrine really rested on a causation theory and that the so-called *culpa-compensation* explanation was merely a figurative expression. The sugges-

tion of Baron Rolfe does not seem to be followed elsewhere in the English cases. He points out that there is no such balancing of blame in the criminal case and that contributory negligence is therefore, no defence as against the King who is legally incapable of fault. In *Earle v. G.T.P.*, [1923] S.C.R. at 406, Anglin, J., while admitting that the English rule as to concurrent negligence was part of the law of Alberta, expressed a strong preference for the civil law doctrine whereby the damage was apportioned according to culpability. Duff, J., in the same case (398-399) cast "wistful eyes" at the civil law rule which allowed an equitable apportionment, while admitting that the common law rule prevented a tribunal in assessing damages from apportioning according to relative fault. The defendant is liable for the whole or not at all. See *C.P.R. v. Frechette*, [1915] A.C. at 878; In *Black v. Calgary*, 24 D.L.R. at 59. Walsh, J., uses the following language: "In dismissing the action I do so without costs. The law as it now stands in actions such as this is most unsatisfactory and unjust. No matter how great may have been the negligence of a defendant, if the plaintiff has by his own negligence contributed to the accident, he cannot recover except, of course, in cases where ultimate negligence is brought home to the defendant. The result is that although the damage done is due to their concurrent negligence the plaintiff must bear the whole of the loss." See 1 C.B.R. 844; *Proceedings Canadian Bar Association 1926*, 170. Holdsworth thinks the anomalous nature of the common law on this question of concurrent negligence is due to an attempt to fuse together two "incompatible theories of civil liability—the mediaeval theory that liability is based on an act which causes damage, and the modern theory that liability is, as a general rule, based upon some moral fault, either of the negligent, or intentional variety." Holdsworth, H.E.L., vol. VIII, 462, Salmond, 7th ed. 52. Another view is that the common law rule, harsh as it appears, is merely an illustration of the strongly individualistic attitude of the common law. Men ought to take care of themselves. If they don't, they are not to expect the Courts to waste time over them. "They are the authors of their own damage." The cases in which our present doctrine was established come from an age when *laissez faire* was the dominant doctrine. The doctrine of *caveat emptor* and the wide latitude for puffery in the law of sales are illustrations of the same tendency. (See *Smith v. Hughes*, L.R. 6 Q.B. 597.) Common Employment which we now look on as a monstrosity was a product of the same attitude. See 21 H.L.R. 233 cf. 25 H.L.R. 353-354. In the cases in which the common law refused a negligent plaintiff recovery because his own negligence was one of the multiple, synchronous causes of his own damage, it seems that the common law did adopt what was, in effect, a punitive attitude. It was thought best that men should be encouraged to look out for themselves. If they didn't, the Courts had no time to waste over them, and they deserved what they got. In the change from the intensely individualistic attitude of law and economics which prevailed in the earlier part of the last century, to what Dicey calls the "Collectivist" attitude, the go-by has been given to many typically common law doctrines. Workman's Compensation Acts have rendered negligence, whether of master or servant immaterial. Factory Acts out of which the parties cannot contract, are common. The common employment doctrine which was a typical product of the individualistic age in which freedom of contract was a fetish, has been practically nullified. The contributory negligence acts are indicative of the same trend. Jurists and economists have progressed from an individualistic to a sociological point of view. It is realized that mechanized industry is not an individual affair. If we deprive a plaintiff who has been in part a cause of his own injury of all remedy, we now realize that the effect will probably be to throw the injured party and his family on the rates. The negligent defendant ought not to go scot free. Besides, it was only in the latter part of the 19th Century that the doctrine of fault and liability should go together was definitely established. With the acceptance of this doctrine it was to be expected that there would be an attempt to acquiesce more accurately suffering and fault in cases of concurrent negligence of plaintiff and defendant. (See the judgments of Anglin, J. and Duff, J. in *Earle v. G.T.P.* (*supra*))

and of Walsh, J., in *Black v. Calgary*, (*supra*). The harsh and crude result of the common law doctrine which deprived plaintiff of all recovery although his fault was merely one cause of his injury seemed incongruous in a system which was beginning to make liability depend on fault. (See Holdsworth, H.E.L. vol. VIII, 462). The example of Admiralty and of the Civil Law pointed the way to Legislatures. In extenuation of the crudity of the common law doctrine, it must be remembered that the Industrial Revolution forced the Courts to deal in short notice with a new type of cases arising out of the machine system. The dominant contributory negligence cases come from the earlier half of the 19th Century and those decisions, coming in a short period of time, fixed the law until recent legislative changes. Judges may be forgiven for not envisaging at once the implications of the new machine age. So, too, it must be remembered that the Courts had not the tools in the earlier part of the Century for conducting the nice inquiries which apportionment entails. Then, as now, there was the impediment of the jury. But, until the middle of the Century, the law excluded practically all evidence which would be material in reaching the results which we now treat as proper. Parties, their spouses, and all parties potentially interested, were excluded from the witness box. This exclusionary rule shut out, in many cases, the evidence of servants as well. With the door closed to intelligent inquiry by these rules, it is doubtful whether any refined system involving apportionment, would have worked before substantial changes were made in the adjective law. To-day with our more effective rules of evidence, apportionment is, in many cases, a mere matter of guess-work. See note 13 for a further discussion of the grounds upon which the peculiar common law rule is sometimes placed. Whatever the origin of the rule, where contributory negligence acts have been passed, the Admiralty or Civil Law rule has been applied and the Courts can apportion damage in accordance with fault which is, as Holdsworth points out, the modern doctrine generally. But these acts, as will be seen later, are concerned with cases in which the plaintiff was defeated because of the common law doctrine as to concurrent negligence. They, or the Admiralty, or the Civil Law rule, are not applicable, in general, to cases in which there was ultimate as distinguished from concurrent negligence at common law. (See notes 26 and 27).

²⁶ The quotation is from the judgment of Lord Sumner in the *Loach* case ([1916] A.C. at 727). On the same page he also says: "The object of the inquiry is to fix upon some wrong-doer the responsibility for the wrongful act which has caused the damage. It is in search not merely of a causal agency but of a responsible agent. When that has been done, it is not necessary to pursue the matter into its origins; for judicial purposes they are remote." ". . . it might be better, after pointing out that the inquiry is an investigation into responsibility, to be content with speaking of the cause of the injury simply and without qualification." (Lord Sumner in the *Loach* case at 728). In the same case Lord Sumner uses the following language in dealing with a hypothetical state of facts: "He would have owed his death to his own fault, and whether his negligence was the sole cause or the cause jointly with the railway company's negligence would not have mattered." ([1916] 1 A.C. at 722). "What actually killed Sands was the negligence of the railway company, and not his own, though it was a close thing." (Lord Sumner at 723). See Lord Shaw in *Anglo-Newfoundland etc. v. Pacific etc.* (*supra*). In *Weld-Blundell v. Stephens*, ([1920] A.C. 956 at 933) Lord Sumner makes clear that there may be more direct causes than one, operating at the same time and leading to a common result. See judgment of Duff, J. in *Canada etc. v. Levesque*, [1928] S.C.R. at 349-50: In *McLaughlin v. Long*, [1927] S.C.R. 303, the Supreme Court of Canada clearly places the matter upon a causation basis. In that case a boy wrongfully rode upon a truck. The defendant's servant knew of his perilous position but did not avert the accident. There was a negligent operation of the truck by the defendant's servant, and a local statute, apart from the question of the boy's alleged contributory negligence, made the defendant liable. Anglin, C.J.C. was of opinion that the plaintiff's contributory negligence might be a defence to an action founded on a breach of a statutory duty to

the same extent it would be if the duty were merely a common law one. (See on this point *G.T.P. v. Earle* (*supra*)). The question was whether the boy's improper conduct was "contributory negligence" within the meaning of the local Contributory Negligence Act. Anglin, C.J.C., emphasized the distinction between *causa proxima* and *causa remota* (but see 25 H.L.R. 106-108) which is recognized even in Admiralty although in that Court apportionment takes place where the plaintiff's and the defendant's negligences are each concurrent "proximate" or "efficient" causes of the damage. (*Spaight v. Tedcastle*, 6 A.C. at 219; 21 Hals. 446 and cases cited). "An omission ought not to be regarded as contributory negligence if it might in the circumstances which actually happened have been unattended with danger but for the defendant's fault, and if it has no proper connection as a cause with the damage which followed as its effect." (Lord Selborne in the *Spaight* case, at 219, quoted with approval by Anglin, C.J.C.). A cause which is merely a *sine qua non* is not adequate to make the person responsible for it guilty of contributory negligence even at common law. (See 25 H.L.R. 108-111; 18 H.L.R. 537). To be a "cause" within the meaning of the Contributory Negligence Act in question, it was necessary that the plaintiff's act be an "efficient" or "proximate" cause in the common law sense. If it was merely a "*causa remota*" or a "*causa sine qua non*" no question of contributory negligence, either under the statute or at common law was raised. *Davies v. Mann* is not an exception to the Contributory negligence doctrine. It shows that plaintiff's negligence in that case was not contributory (18 H.L.R. 537). Contributory negligence involves multiple proximate causation. There may be more direct proximate causes than one. If the defendant and the plaintiff each furnish one, there is contributory negligence, strictly speaking, both in the common law, the Admiralty and the statutory sense. *Aliter non*. Newcombe, J., puts the matter succinctly: ". . . in my opinion the infant plaintiff's negligence was not a cause, or any part of the cause, of the injury which he suffered, and therefore, the Contributory Negligence Act has nothing to do with the case." (313-14). See extracts from judgments cited in note 15. D. 9.2.28. pr.; D. 9.2.28.1.; Greuber: *Lex Aquilia* 228; Holland: *Jurisprudence* 11th ed., p. 153; in the recent case of *Swadling v. Cooper* (*supra*), the House of Lords approved of a direction which asked the question: "Whose negligence was it that substantially caused the injury?" The case, on the facts, was, in the opinion of the House, one of substantially concurrent negligence and the *Davies v. Mann* rule was inapplicable. The jury had been told that if the plaintiff's and the defendant's negligences, respectively, were each a cause of the damage, then the plaintiff could not recover. This was a case of multiple concurrent proximate causation and it would be governed by the contributory negligence acts. In the cases just cited the emphasis was placed on causation. There are many other cases, English and Canadian. See, for example, *Service v. Sundell*, 46 T.L.R. 12. C.A.; *C.P.R. v. Kelvin Shipping Co.*, 138 L.T. 369 (H.L.) especially at 370; *Calgary v. Harnovis* (*supra*); "Kingdoc" v. *Canada Steamship, etc.* (*supra*), in which a question of contributory negligence has arisen and in which the Court has resorted to the causation theory to solve the difficulty. See also, *Bowen, L.J.*, in *Thomas v. Quartermain*, 18 Q.B.D. at 697, cf. 21 H.L.R. at 234, 242; *Blenkinsop v. Ogden*, [1898] 1 Q.B. 783, cf. 21 H.L.R. 234-242. In so doing the Courts have shown an affection for a great number of epithets which they have attached to the word "cause." Cause is referred to as being "efficient," or "effective" or "immediate" or "direct" or "substantial" or "resultant" or "determining" or "main" or as "cause in the legal sense" or as "*causa causans*" or as being "decisive" or as "real." Pollock approves of the expression "decisive cause." (Pollock on Torts, 13th ed. 480). Lord Sumner favors "direct cause," [1920] A.C. at 983-984; referred to by Duff, J., 1928 S.C.R. at 349-50; O'Connor, L.J. (as he then was), approves the expression "real cause" or "whose fault was it?" (38 L.Q.R. at 23); see Lord Sumner's comments on the various epithets used—*Loach case*, [1916] 1 A.C. 727, 728; see also, his speech in *Weld-Blundell v. Stephens*, [1920] A.C. at 983; see judgment of Duff, J., in *Canada etc. v. Levesque*, [1928] S.C.R. 349-50; in *Service v. Sundell*, 46 T.L.R. at 13, the Court of Appeal held that merely

to ask what was the "real" cause was inadequate. There may be several causes. See 46 L.Q.R. 5; 68 L.J. (News) 284; for an interesting discussion on the doctrine of "cause" see the speech of Lord Shaw in *Leyland etc. v. Norwich, etc.*, [1918] A.C. 368 *et seq.*; *Clan steamers v. Board of Trade*, [1929] A.C. 514. The two cases last cited are insurance cases. See on the use of metaphors in connection with causation, 43 L.Q.R. 304 Lord Sumner, himself, in *Weld-Blundell v. Stephens*, [1920] A.C. at 986, indulges in an orgy of metaphors, some of them mixed, in dealing with causation.

Although, as between a plaintiff and a defendant, each negligent, the negligence of one is treated as the "sole" or "decisive" or "proximate" cause of the entire injury, it must be remembered that the plaintiff and the defendant may each be severally liable to an unconnected third party for damage which he sustains in the affair. So also in a criminal prosecution for manslaughter the negligence of the deceased is no defence unless the negligence alleged against the accused had no causal relation to the death. *R. v. Yarmouth, etc.*, 34 C.C.C. 1; *Rex v. Field* (1928), 3 W.W.R. 757. The negligence of the deceased cannot be imputed to the King. If the negligence of the accused is a cause of the death, that is enough. See the judgment of Baron Rolfe in *Reg. v. Longbottom*, (*supra*); *Reg. v. Lidger*, 2 F. & F. 857; in *Rex v. Rose*, 20 Cr. A.R. 165, the Court of Criminal Appeal treated the contributory negligence of the deceased as a ground of mitigation. See *Blenkinsop v. Odgen*, [1898] 1 Q.B. 783. If the defendant in a civil case is not merely negligent but is guilty of deliberate wrong, the contributory negligence of the plaintiff, although sequent, is probably not a defence. The Romans under their culpa-compensation doctrine treated *culpa* and *dolus* as being incommensurable. The common law reaches a similar result but explains it differently. If a person intends a result, it will hardly lie in his mouth to say that the act whereby the result was brought about, in whole or in part, was merely *causa remota* and not *causa proxima*. The result reached by the Courts in these cases has been urged as an objection against the causation explanation of the common law doctrine of contributory negligence. (See on the subject generally, Bohlen, *Contributory Negligence*, Harvard Selected Essays on the Law of Torts, 469; 16 H.L.R. 365; 26 H.L.R. 369; cf. 18 H.L.R. 537; 3 H.L.R. 263). In the case in which A's negligence and B's negligence are each a concurrent cause of damage to a third person, there is no difficulty in saying that such third party should be able to recover against either the amount of the whole damage. In such a case the civil law rule whereby the liability of a negligence party is mitigated by the contributory fault of the victim, does not apply. The victim is not guilty of fault and he is not identified with the other guilty party whom he has not chosen to sue. (*Napierville etc. v. Dubois*, [1924] S.C.R. 375 (Que.); *G.T.R. v. McDonald*, 57 S.C.R. 268; (Que.)). In cases in which one party has had the last chance, the Courts say that the party having the last chance, is as between those parties, the sole cause of the result. Nevertheless a third party, may, in certain circumstances, sue either for the whole damage sustained. (*Carter v. Van Camp*, [1929] 4 D.L.R. 625; S.C.C.; cf. *Harding v. Edwards*, [1929] 4 D.L.R. 598; 1931, S.C.R. 167; *Mills v. Armstrong*, L.R. 12 P.D. 58, 13 App. Cas. 1; *The Koursk*, [1924] P. 140; *Plant v. Normanby*, 10 O.L.R. 16; *Smith v. Campbell*, 65 O.L.R. 59; *MacDonnell etc. v. Petch* (1930), 3 W.W.R. 455; cf. *Gauley v. C.P.R.*, 65 O.L.R. 477; *Morton v. National etc.*, [1930] 4 D.L.R. 785; *Wellwood v. King* (1921), 2 I.R. 274; *Smith v. C.P.R.*, 62 S.C.R. 134; *Toronto v. Lambert*, 54 S.C.R. 200; *Kitchener v. Robe etc.*, [1925] S.C.R. 106; *Algoma Steel v. Dube*, 53 S.C.R. 481; *Winnipeg Electric v. C.N.R.*, 59 S.C.R. 352, especially at 372; *Krahn v. Bell*, [1930] 4 D.L.R. 480; *MacDonnell v. Jordan* (1930), 3 W.L.R. 455; *Topping v. Ottawa etc.*, 66 O.L.R. 618; *Lechtzier v. Levy*, 1931, 1 W.W.R. 425; *Mara v. Hartley*, 1931, 2 D.L.R. 734; *Greuber, Lex Aquilia*, 288 (n); in *Dent v. Usher*, [1929] 4 D.L.R. at 718, *Raney, J.*, seemed to think that the party having the last clear chance was exclusively liable to an unconnected third party injured in the affair. He seemed to think that the negligent party not having the last chance was not liable at all to the third party. On the appeal, it was not necessary to deal with this but at least one Judge, (Rid-

dell, J.A., Diss.) disagreed with the view of Raney, J., on this point. Smith, J., in *Carter v. Van Camp*, (*supra*), at 638, seems to have entertained a view somewhat similar to that of Raney, J. The matter seems to be settled by authority against the view of Raney, J. In *Winnipeg Electric v. C.N.R.*, (*supra*), Anglin, J., uses the following language: "Assuming due care by its co-defendant would have enabled it to avoid running down the plaintiff's unfortunate wife, notwithstanding the peril in which she had been placed by the appellant's negligence, that fact could afford the latter no answer to the plaintiff's claim. *City of Toronto v. Lambert*, (*supra*); *Algoma Steel Corporation v. Dube*, (*supra*). Although as between a plaintiff and a defendant, the one having the last clear chance is liable, it does not follow that, apart from statute, the one not having the last clear chance, who has been sued successfully by a stranger, for damage arising in the same affair, can recover by way of indemnity from the party having the last clear chance, the sum he has had to pay to such third party by way of damages. In *Toronto v. Lambert*, (*supra*), the City of Toronto was negligent in having certain improper insulation in connection with its power poles. The Interurban Company was negligent in not having a proper inspection made before sending the deceased to do work. The negligence of the Interurban Company was clearly sequent. The plaintiff was entitled to recover against both defendants who were severally liable. The question was whether the City could get indemnity against the Interurban Company. There was a contract dealing with indemnity but it was held, in its terms, not to apply to a case in which the City was itself at fault. No person seems to have suggested that there would be indemnity apart from the contract. Probably public policy would not have precluded a contract specifically providing for indemnity notwithstanding the City's negligence but that was not decided. See *Winnipeg Electric v. C.N.R.*, (*supra*); compare *Kitchener v. Robe*, etc., (*supra*); *MacGregor v. C.N.R.* (1930), 3 W.W.R. 392, 397. There is one American case in which the party having the last clear chance was held liable to indemnify another, liable to a third party, (*Nashua Iron v. Worcester*, etc., 62 N.H. 159). This case is usually looked upon as anomalous. (See 21 H.L.R. 242-43). For statutory changes on the question of contribution between persons negligently injuring a third, see *Mara v. Hartley*, 1931, 2 D.L.R. 734; *Lecomte v. Bell* etc., 1931, 2 D.L.R. 241. Of course, "there is a distinction between negligently causing an injury and merely creating the occasion upon which the injury was caused by some one else's negligence" 43 L.Q.R. at 304; *S.S. Singleton Abbey v. S.S. Paludino*, [1927] A.C. 16. Cf. *C.P.R. v. Kelvin* etc., (*supra*). On the question whether a third party suing at common law under the *per quod* is barred by the contributory negligence of the servant, child or wife, as the case may be, see the remarks of Anglin, C.J., in *McLaughlin v. Long*, [1927] S.C.R. at 311. *Qua* such a plaintiff, Anglin, C.J.C., is inclined to treat the delinquent actors as being in the position of joint tortfeasors. The position of such a plaintiff cannot (semble) be assimilated to the position of a master suing in respect of a servant injured in the course of his service. But see *McKittrick v. Byers*, 58 O.L.R. 158; *Knowlton v. Hydro-Electric*, 58 O.L.R. 80; *Dority v. Ottawa* etc., 65 O.L.R. 360. The Ontario Courts take the view that such a plaintiff is affected by the negligence of the wife or child or servant, as the case may be, and that the damages recoverable by him are caught by the apportionment acts. In *Key v. B.C. Electric* (1930), 3 W.W.R. at 571, the question whether the British Columbia Contributory Negligence Act applied to actions under Lord Campbell's Act was left open. Although Anglin, C.J., in the *McLaughlin* case, (*supra*), treats parties in the relation in which a plaintiff and defendant normally are in a contributory negligence case, as "in the position of joint tortfeasors" *quoad* an unconnected third person. (See also per Mignault, J., in *Winnipeg Electric v. C.N.R.*, (*supra*), (at 378 with which compare statement at 360) it seems clear that they are not technically joint tortfeasors. There is not that element of acting with a common design which is requisite to constitute that relation though there is the common *damnum*. (*The Koursk*, (*supra*); 21 H.L.R. 242-243). An unsatisfied judgment against one is no bar to an action against the other. (*The Koursk*; *Nowell v. Yellow Cab*, [1930] 1 D.L.R. 491). In *G.T.R. v. McDon-*

ald, 57 S.C.R. 268, a Quebec case, it was assumed that liability of independent defendants causing a common *damnum* was joint and several (at 270, 279-280).

The unsoundness of the view sometimes expressed that the common law contributory negligence doctrine is a special application of the rule of the common law denying indemnity or contribution to a joint wrongdoer is dealt with by Bohlen in the article cited above. Bohlen also shows that the contributory negligence doctrine is distinct from the *Volenti non fit injuria* rule. See also 14 H.L.R. 75; 20 H.L.R. 17-18; 8 H.L.R. 457-461; 469-470.

³⁴ See note (26).

³⁵ ". . . it is equally certain that in Quebec, as in England, a plaintiff suing for damages in respect of an injury sustained by him cannot recover if his own negligence be the sole effective cause of the injury." (Lord Atkinson in *C.P.R. v. Frechette*, [1915] A.C. at 879. See judgment of Mignault, J., in *Laporte v. C.P.R.*, [1924] S.C.R. at 287). "He would have owed his death to his own fault, and whether his negligence was the sole cause or the cause jointly with the railway company's negligence would not have mattered" (Lord Sumner in the *Loach* case, at 722); ". . . he should have . . . instructed the jury to ascertain the cause of the collision, and, if there was negligence on both sides, to find, by the application of the principles of the common law, whether it was the negligence of the plaintiff, or that of the defendant, which operated directly as the effective cause." Newcombe, J., in *C.N.R. v. Saint John etc.*, [1930] S.C.R. at 493.

³⁶ "He would have owed his death to his own fault, and whether his negligence was the sole cause or the cause jointly with the railway company's negligence would not have mattered." (Lord Sumner in the *Loach* case at 722). ". . . the appellants could and ought to have avoided the consequences of that negligence and failed to do so, not by any combination of negligence on the part of Sands and their own but solely by the negligence of their servants . . ." (Lord Sumner in the *Loach* case at 728). "And, finally, though it might be considered a penetrating glimpse of the obvious, what was complained of might be the result of the simultaneous and combined negligence of both the plaintiff and the defendant—negligence so inextricably mingled together that they could not conscientiously say that the real fault was the fault of the one or the other. The negligence of the one might be so mixed up with the negligence of the other in causing the accident as to render discrimination impossible. In such case the plaintiff failed. It was as if two children upset the jam, the disaster might be the fault and the unapportionable fault of both." (Lord Hewart, C.J., in *Hargrove v. Burn*, 46 T.L.R. at 60). See the judgment of Viscount Hailsham in *Swadling v. Cooper*, 46 T.L.R. 597 (H.L.). ". . . in my opinion the infant plaintiff's negligence, was not a cause or any part of the cause, of the injury which he suffered and therefore (the) Contributory Negligence Act has nothing to do with the case." (Newcombe, J., in *McLaughlin v. Long*, (*supra*), 313-314). "The Lord Chief Justice asked the jury to consider what was the real cause of the accident. But juries must be warned that there might be two, or even three, causes of an accident." (Scrutton, L.J., in *Service v. Sundell*, 46 T.L.R. at 13). See judgment of Lord Esher in *Thomas v. Quartermaine*, 18 Q.B.D. at 688. *Judson v. Haines*, 42 O.L.R. 629; *Morris v. Hamilton etc.*, 52 O.L.R. 120; *Straus v. Crocker*, (unreported), C.A., Dec. 12, 1930. Referred to in 71 L.J. (newsp.) N.S. 254.

³⁷ See *C.P.R. v. Frechette*, [1915] A.C. at 879-80; *G.T.R. v. McAlpine*, [1913] A.C. at 846; *Salmond*, 7th ed. 50; *Rex v. Field* (1928), 3 W.W.R. at 761. *Wakelin v. L.S.W. Ry.*, 12 A.C. 41 (especially in speech of Lord Watson). *Gauley v. C.N.R.*, 65 O.L.R. 477. Cf. judgment of Mignault, J., in *Laporte v. C.P.R.*, [1924] S.C.R. at 287.

³⁸ "In this case, considering the conduct of the victim, in relation to the conduct of the motorman, and the elements of knowledge on the one hand, and the ignorance on the other, above mentioned, I think the proper view is that the *causa proxima* or direct cause, or if you like, the *cause* in the legal sense, was the failure of duty on the part of the motorman, and that Long's

want of care ought rather to be considered one of the conditions or circumstances on which the motorman's failure of duty took effect." (Duff, J., in *Long v. Toronto*, 50 S.C.R. at 248). For a discussion of the difference between causa and condition see *Regent Taxi etc. v. Congregation etc.*, [1929] S.C.R. at 668; 711; "... a cause which is merely a *sine qua non* is not adequate. As in the case of primary negligence charged against the defendant, there must be proof, or at least evidence from which it can reasonably be inferred, that the negligence charged was the proximate, in the sense of the effective cause of the injury." (Anglin, C.J., in *McLaughlin v. Long*, [1927] S.C.R. at 310). The learned Chief Justice then quotes from Beven, Can. Ed. at 155. In the quotation which the learned Chief Justice approves appears the following: "... The *causa sine qua non* of an accident is not that on which depends the legal imputability of an accident. The legal liability depends not on that but on the *causa efficiens*." See *Stanley v. National*, (*supra*) (judgment of Lamont, J., at 314); *Ship Paisley v. Canada Steamship Lines*, [1929] S.C.R. at 381; *Rudlen v. Bridgeman*, 65 O.L.R. at 226, per Riddell, J.A.; *Alter v. Soloway*, 66 O.L.R. at 614; *Black v. N.Y. etc.* (193) Mass. 448; *Canada Gulf etc. v. Levesque*, [1928] S.C.R. at 354. *Toronto v. Lambert*, 54 S.C.R. at 216 (Anglin, J.); *Kitchener v. Robe etc.*, (*supra*), at 109 (Anglin, C.J.C.); cf. *Topping v. Ottawa etc.*, 66 O.L.R. at 623; *Brain v. Crinnian*, 66 O.L.R. at 227; *Salmond*, 7th ed. at 49, objects to the indiscriminate use of the expressions *causa sine qua non* and *causa causans*. He seems to think that their use betrays a sloppiness of thought and resort to them may be "merely a deceptive substitute for the formulation of definite legal principles" (at 49). See 25 H.L.R. 110-111; see *Erickson v. Klatt*, [1929] 3 D.L.R. at 299.

¹⁹ See 3 H.L.R. 263.

²⁰ See quotation from the judgment of Duff, J., in *Long v. Toronto*, (*supra*), given in note 18; 18 H.L.R. 537. If defendant's act is a wilful causing of damage to the plaintiff, the latter's negligence directly connected with the causing of the injury is immaterial.

²¹ *The Volute*, [1922] 1 A.C. at 144; *The Chatwood*, [1930] P. 272, 290; *Stanley v. National, etc.*, (*supra*), (Lamont, J.); *S.S. Maplehurst v. Hall Coal Co.*, [1923] S.C.R. at 511; *The Otranto*, 47 T.L.R. 163 (H.L.); Duff, J., in *Earle v. G.T.P.*, [1923] S.C.R. at 399; *McLaughlin v. Long*, [1927] S.C.R. at 313 (Newcombe, J.); *S.S. Singleton Abbey v. S.S. Paludino*, [1927] A.C. at 25; "*Hochelaga*" v. *Dreyfus*, [1930] 1 D.L.R. at 538; (Newcombe, J.) *Hulme v. Creelman*, 66 O.L.R. at 363; *Chambers v. Sampson*, 1931, 1 W.W.R. 251; *Straus v. Crocker*, *supra*. In the recent case of *Swadling v. Cooper*, 46 T.L.R. 597, the "commonsense" view of concurrent negligence was applied to a common law case, thus making it clear that Lord Birkenhead's views on substantial concurrence are not confined to Admiralty cases. One can only wonder whether the *Loach* case would be decided in the same way after the *Swadling* case. As Lord Sumner admits, it was a "close thing." In the *Volute* case the House may have been ready to find the negligences of the respective ships were substantially concurrent in order to bring the case within the apportionment doctrine of Admiralty. In the *Loach* case the Judicial Committee probably unconsciously strove to find that the negligence of the defendant was subsequent in order to evade the harsh common law rule as to non-apportionability. If the same case arose to-day in British Columbia where there is now an apportionability statute, the Courts might not be so astute in finding a means of postdating the negligence of the defendant.

²² *Steamer Maplehurst v. Hall Coal Co.*, [1923] S.C.R. 507; *Canada Steamship Lines v. Steamer Ketchum*, [1925] S.C.R. 91-92; *United States etc. v. Laird Line*, [1924] A.C. 286; *Wilson v. United Counties Bank*, [1920] A.C. at 125; *Leyland v. Norwich*, [1918] A.C. 350; *Singleton Abbey v. Paludino*, [1927] A.C. 16; *C.P.R. v. Kelvin*, [1928] 138 L.T. 369; *Swadling v. Cooper* (*supra*), 46 T.L.R. at 508 (H.L.); *Harding v. Edwards*, [1929] 4 D.L.R. 598; 1931, S.C.R. 167; *The Volute*, [1922] 1 A.C. at 136; *Carter v. Van Camp* [1929] 4 D.L.R. 625; cf. *McGintie v. Gondreau*, (1921) 3 W.W.R. 250;

Brandon v. Osborne, [1924] 1 K.B. 548; Maclean v. Segar, [1917] 2 K.B. at 335; Bartlett v. Winnipeg Electric (1920), 1 W.W.R. 95; S.C.C.; Price v. B.C. Motor Transport, 1931, 2 W.W.R. 350; Prescott v. Connell, 22 S.C.R. 147; "Princess Adelaide" v. Olsen & Co., [1930] 4 D.L.R. at 784; The Bywell Castle, 4 P.D. 219; Jones v. Boyce, 1 Starkie 493; Pressley v. Burnett, [1914] S.C. 874; G.T.R. v. MacDonald, 57 S.C.R. at 273, 280-281; 21 Hals. 448, 452; Squires v. Toronto, 54 D.L.R. 575; Wallace v. Bergius, [1915] S.C. 205.

²⁰ [1916] 1 A.C. 719; 8 W.W.R. 1263; 23 D.L.R. 4. The case of Stanley v. National, 1931, S.C.R. 60; ([1931] 1 D.L.R. 306), contains the most recent authoritative discussion of the bearing of this case on the doctrine of the "Last Clear Chance." (Judgment of Anglin, C.J., at 307).

²¹ The precise effect of the Loach case has not appeared clear to some Courts. See judgment of Anglin, C.J., in Stanley v. National (*supra*), referring to this matter (at 306), Lamont, J., in Smith v. Regina (1917), 2 W.W.R. 1444 reached a different conclusion as to its meaning from that reached by the Appellate Division in Alberta in Critchley v. C.N.R. (1917), 2 W.W.R. 538; 34 D.L.R. 245; in Scott v. Calgary etc., (1927) 1 W.W.R. 524, the Loach case seems to be ignored. In Service v. Sundell, 46 T.L.R. 12, Scrutton, L.J., reached a conclusion which he later said was based upon the Loach case (see 46 T.L.R. 76), which is opposed to the interpretation of the Loach case enunciated in the Critchley case but which is consistent with that of Lamont, J., in Smith v. Regina. In Cooper v. Swadling (46 T.L.R. at 76), Scrutton, L.J., made it clear that he was not to be taken as intimating that the Loach case was part of the law of England. He appeared to entertain some doubts as to whether it would be accepted there. Competent critics have thought that cases such as the Loach case have made the law too complicated for juries. It is suggested that we have made our tools too sharp to cut. (See O'Connor, L.J., in 38 L.Q.R. 17; see also 1 Cambridge Law Rev. 185). In Swadling v. Cooper (*supra*), the trial Judge in effect asked the jury to answer the question; whose negligence substantially caused the injury? In formulating the question in this way, the Judge at the trial was apparently acting on a suggestion made by O'Connor, L.J., in the article cited, that the jury ought to be asked a similar question as to who really caused the accident. The Court of Appeal (46 T.L.R. 73) thought that this question was too cryptic. It was cutting the knot—not untying it. There ought to be a further question embodying the Davies v. Mann doctrine of the "Last Chance." If an amplified instruction is not given, the jury will treat the question as really being "Who do you think ought to pay for the accident?" This will probably be treated as meaning "Who has the deeper pocket?" The Court of Appeal ordered a new trial. The House of Lords decided that the direction of the trial Judge was adequate in view of the facts of the particular case. There was no room for the application of the Davies v. Mann doctrine because the respective negligences were substantially synchronous.

²² See judgment of Duff, J., in G.T.P. v. Earle (*supra*), at 398-99; Walsh, J., in Black v. Calgary (*supra*); Anglin, J., in the Earle case (*supra*), at 406; see paper by Anglin, J., in Proceedings of Canadian Bar Association, 1922, 231-232; 1 C.B. Rev. 48-49; paper by Angus MacMurchy Proceedings of Canadian Bar Association, 1923, 338; paper by R. I. Towers, Proceedings Canadian Bar Association, 1926, 170; cf. Falconbridge, Desirable changes in the Common Law, a paper read before the Canadian Bar Association, in 1927, published in pamphlet form, 1-6.

²³ The judgment of the Supreme Court of Canada in McLaughlin v. Long, [1927] S.C.R. 303; [1927] 2 D.L.R. 186 seems conclusive on the matter unless the particular statute expressly determines otherwise. A plaintiff's negligence is not "contributory" if its effects could have been avoided by the exercise of reasonable care by the defendant after the defendant's position was known or ought to have been known. This seems to be the view of Anglin, C.J., following the Admiralty decisions. Newcombe, J., thought that, in such a case, the plaintiff's negligence was not a cause or a part of the cause of the damage (313-14). See C.P.R. v. Frechette (*supra*), at 879.

In *Key v. B.C. Electric* (1930), 3 W.W.R. 569, the Court of Appeal in British Columbia apparently thought that the Contributory Negligence Act of that province had no reference to a case of "ultimate" negligence. This case was subsequent to the *Morgan* case but there is no reference to the *Morgan* case in the *Key* case. Cf. remarks of D. A. McDonald, J., in *Harper v. McLean*, 1928, 1 W.W.R. at 446; *Chambers v. Sampson*, 1931, 2 W.W.R. 251; *Lloyd v. Hannofin*, 1931, 1 W.W.R. 415. See *Battistone v. Thomas* (1930), 3 W.W.R. 617; *Leary v. Commissioners, etc.* (1930), 1 W.W.R. 97; *Johnson v. McMorran*, [1927] 4 D.L.R. 335; *Tedlock v. McKelvie*, [1929] 4 D.L.R. 691; *Olsen v. "Princess Adelaide,"* [1929] 3 D.L.R. 383; *Elliott v. Johnson* (1928), 1 W.W.R. 390; [1928] S.C.R. 408; *Hornby v. Patterson*, [1930] 1 D.L.R. 86; *Walker v. Forbes*, 56 O.L.R. 532; *Farber v. T.T.C.*, 56 O.L.R. 537; *Mondor v. Luchini*, 56 O.L.R. 576; *Engel v. T.T.C.*, [1926] 4 D.L.R. 986; *Penrose v. Barr*, [1927] 4 D.L.R. 467; *Ballantine v. International Ry. Co.*, [1927] 4 D.L.R. at 958; *Knowlton v. Hydro-Electric*, 56 O.L.R. 537; *Imerson v. Nipissing etc.*, 57 O.L.R. 588. See judgment of Raney, J., in *Dent v. Usher*, [1929] 4 D.L.R. at 718; *Morrison v. Ferguson*, [1930] 1 D.L.R. 913; *Halsbury: Shipping & Navigation*, Pt. XI s. 749, approved by Newcombe, J., in [1930] 1 D.L.R. at 537. "Ultimate Negligence and the Contributory Negligence Acts" (8 C.B. Rev. 466).

²¹ Admiralty:—The *Volute* (*supra*); *Anglo-Newfoundland etc. v. Pacific, etc.* (*supra*); *Manorbier Castle* (1922), L.T. 31; The "*Vectis*" (1929), 140 L.T. 563; *H.M.S. Acton*, [1920] 2 Ll. LL.R. 505; "*Kingdoc*" v. *Canada Steamships*, [1931] 1 D.L.R. 146 S.C.C.; "*Hochelaga v. Dreyfus*" [1930] 1 D.L.R. 529 (S.C.C.); *Olsen v. "Princess Adelaide,"* [1929] 3 D.L.R. 383; *Canada Steamship etc. v. Ship Ketchum* (*supra*); *Marsden on Collisions*, 5th ed. 17; *Cayzer & Co. v. Carron*, 9 A.C. 873; (referred to by Anglin, C.J.C., in *McLaughlin v. Long*, [1927] 2 D.L.R. at 189, and by Newcombe, J., at 192); *Spaight v. Tedcastle* (*supra*), discussed in *McLaughlin v. Long* (*supra*); *H.M.S. Sans Pareil*, [1900] p. 267; *Ontario Gravel v. Mathews*, [1927] S.C.R. 92; [1927] 1 D.L.R. 1045; 18 H.L.R. 537; article by R. I. Towers, *Proceedings Canadian Bar Association*, cited (*supra*); *Steamer Maplehurst v. Hall Coal Co.*, [1923] S.C.R. 507. (see reference to this case in note (6)). Civil Law: *G.T.R. v. McAlpine*, [1913] A.C. 838; *C.P.R. v. Frechette*, [1915] A.C. 871; paper by Angus MacMurchy, *Proceedings of Canadian Bar Association*, 1923, p. 338; *Montreal Locomotive Works v. McDonnaugh*, 61 S.C.R. 232, 234; *G.T.R. v. LaBriche*, 64 S.C.R. 15; *Laporte v. C.P.R.*, [1924] S.C.R., at 287.

²² The Court of Appeal in British Columbia seems to have thought that this was so in the case of *Key v. B.C. Electric* (*supra*), which was decided after the *Morgan* case. See also *Lloyd v. Hannofin*, *supra*; *Price v. B.C. Motor Transport*, 1931, 2 W.W.R. 350.

J. A. WEIR.

University of Alberta.