FIRSTFRUITS OF THE CONTRIBUTORY NEGLIGENCE ACT 1945

> "Transition stages there are also when an observer can mark the law in the very process of 'becoming.' "—Cardozo, *Paradoxes of Legal Science.*

The Law Reform (Contributory Negligence) Act 1945 opens with the words: "Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the Court thinks just and equitable having regard to the claimant's share in the responsibility for the damage."[1] Taking the causal phrase in its ordinary, natural meaning, this provision would enable the Courts in all situations of bilateral fault to distribute the loss in proportion to the respective degrees of blameworthiness, a course which certainly commends itself to the contemporary view of justice. But age-old and wise canons of construction require that the vital phrase be read against the background of preceding law. In this context, causal words have a wholly artificial meaning not completely but largely divorced from the ordinary idea of causation.

The problem which the legal profession saw in 1945 was whether the Courts would or would not adhere to the rule in *Davies v. Mann*[2] in construing the words, "as the result . . . of."[3] In the cases since 1945, the Courts have, in my opinion, shown an almost overwhelming tendency to rub away the established rule of legal causation in *Davies v. Mann* and to apportion the damages in all cases of bilateral fault coming before them. In effect, as will be shown, the Courts may ultimately write an amending gloss upon the Contributory Negligence Act. The present paper takes the form of a study of the contributory negligence cases and the Acts relating thereto, describing the cycle of life, as it were, of the rule in *Davies v. Mann* or last opportunity rule, and the power of the judicial sense of social policy and desire to do justice to develop and even to alter the law without the legislature's intervention.

Rationale of legal causation in Tort.

Any treatment of the doctrine of contributory negligence must be prefaced by a discussion of the doctrine of legal causation; for

[1] 8 & 9 Geo. 6, c. 28, s. 1 (1).
[2] (1842) 10 M. & W. 546.
[3] Thus, as soon as the Act was passed, was the problem canvassed in new editions of *Winfield, Salmond* (ed. Stallybrass), and *Underhill* (ed. Sutton).

this is the seat of much confusion. The rationale of legal causation, in my opinion, derives from the policy informing each branch of the law in which causation plays a part. Profoundly interesting though the pursuit of this overall study may be, it is here only feasible to outline the basis of legal causation in tort.

The first point to make is that the rules of remoteness of consequences in Tort are only partially concerned with what, for the sake of distinction, I shall call natural causation; that is, causation in the ordinary sense of the word. Thus, in terms of natural causation, the absence of the horseshoe nail was a relevant cause of the loss of the kingdom; in terms of natural causation, both *causa causans* and *causa sine qua non* are equally relevant causes. In Anglo-Saxon times, it is true, legal causation tended to be commensurate with natural causation;[4] but, today, natural causation enters into legal causation only to this extent, that no defendant will ever be held liable in tort unless his act was at least *a* cause of the harm that occurred. The vital question, however, whether his act was the *cause* for the legal purpose of imposing liability in damages will thereafter depend not on a causal notion but on a moral notion of culpability.[5] In other words, the limit of a man's liability in tort is fixed by the judicial view of the blameworthiness of his act in relation to the damage under consideration; and this is just as true in the case of the traditional reasonable foresight test as of the immediate physical consequences test in *Re Polemis*.[6] Both are assessments of culpability which the judges, following the moral notions of their time, have considered as justifying liability for damage flowing from a tortious act.

In a bilateral fault situation of the contributory negligence kind, the judges have drawn upon the concept of legal causation which they had inherited to determine which party was the "sole" cause of the damage by selecting that party whose blameworthiness merited that he should bear the loss or suffer the liability for the harm done.[7] The degree of blameworthiness necessary was formulated in the well-known rule that the party who might by the exercise of reasonable care have avoided (or taken the last opportunity he had of avoiding) the accident, but did not do so, should be deemed to have "solely" or "decisively" caused the accident.[8] In other words, if a party showed blameworthiness of the nature described he was treated fictionally as if he alone had caused the damage. The *causa-culpa* pattern of legal causation in "remoteness" was thus reproduced in what may be called "the rule of sufficient blameworthiness" in *Davies v. Mann*.

[4] See Holdsworth, *H.E.L.*, ii. 52.
[6] [1921] 3 K.B. 560.
[7] Cf. MacIntyre, *The Rationale of Last Clear Chance*, 18 Can. Bar Rev. 665, at 666 etc.
[5] See Holdsworth, *H.E.L.*, iii. 379; Holmes, *The Common Law*, 95.
[8] Cf. Lord Hailsham in *Swadling v. Cooper*, [1931] A.C. 1, at 10; Lord Wright in *M'Lean v. Bell* [1932] S.C. (H.L.) 21, at 29, 147 L.T. 262, at 264.

Accordingly, I cannot endorse the theory propounded that the *Davies v. Mann* rule was devised simply and solely to mitigate the harsh operation of the "stalemate rule" on the plaintiff, so that it has never passed into the corpus of the doctrine of legal causation.[9] In my opinion, the judges appear always to have been sincerely concerned with a problem of legal causation alone; and I would adduce the following facts as evidence militating against the view that is here criticised:

(i) there is no judicial support for the theory advanced;

(ii) on the contrary, the judges have been unanimous in conceiving of the *Davies v. Mann* rule as part of the doctrine of legal causation;[10]

(iii) the judges have also been unanimous in recognising the impartially double-edged nature of the rule;[11] and

(iv) both in the earliest decision of *Butterfield v. Forrester,* and in an imposing list of subsequent decisions, the rule was successfully invoked *against the plaintiff*.[12]

Returning, then, to my main theme, in analysing the cases before and since the 1945 Act, the important distinction between natural and legal causation and the dual character, i.e., the *causa-culpa* character, of legal causation must be borne clearly in mind.

[9] See MacIntyre *op. cit.*, at 665; G. L. Williams, *The Law Reform (Contributory Negligence) Act 1945,* 9 Mod. Law Rev. 105, at 107; and cf. Denning, L.J. in *Davies v. Swan Motor Co. Ltd.* [1949] 1 All E.R. 620, at 629.

[10] See, for example, Lord Blackburn in *Cayzer, Irvine & Co. v. Carron Co.,* (1883-4) L.R. 9 A.C. 873, at 882, 883, 884; Lords Dunedin and Sumner in *Cork S.S. Co. v. Kiddle,* [1920] 2 Ll.L.R. 505, 506; and Lord Atkin in *Caswell v. Powell Duffryn Associated Collieries Ltd.,* [1940] A.C. 152, at 165.

[11] It is true that the rule is found stated in an anti-defendant form, as by the House of Lords in *Radley v. L. & N.W.R.,* (1875-6) L.R. 1 A.C. 754, at 759, and by the Judicial Committee in *British Columbia Electric Rly. Co. Ltd. v. Loach,* [1916] 1 A.C. 719, at 724-5. But it is found equally in the reports in an anti-plaintiff form; e.g., *Butterfield v. Forrester,* (1809) 11 East 60, at 61; *Bridge v. Grand Junction Rly. Co.,* (1838) 3 M. & W. 244, at 248; *Davies v. Mann* (1842) 10 M. & W. 546, at 548-9; *Dublin, Wicklow & Wexford Rly Co. v. Slattery,* (1878) L.R. 3 A.C. 1155, at 1207 (per Lord Blackburn). Again, the rule may be found in its full double-edged form, as in *Tuff v. Warman,* (1858) 5 C.B. (N.S.) 573, at 585.

[12] Apart from *Butterfield v. Forrester* there are *Dublin, etc. Rly. Co. v. Slattery* (see note 11); *Caswell v Worth,* (1856) 5 El. & Bl. 849; *Senior v. Ward* (1859) 1 El. & El. 385; *Dew v. United British S.S. Co.,* (1929) 98 L.J.K.B. 88; *Craze v. Meyer-Dumore Bottlers' Equipment Co.,* [1936] 2 All E.R. 1150; *Lewis v. Denye* [1940] A.C. 921; *Proctor v. Johnson,* [1943] 1 All E.R. 565; *Gibby v. East Grinstead Gas & Water Co.,* [1944] 1 All E.R. 358; and *Cork S.S. Co. v. Kiddle* (see note 10).

The pre-1945 Cases.

There are three separate case-lines to be examined, the *rationes* in each of them being, in theory, freely interapplicable.[13].

It seems natural that the Admiralty Court first should have adopted an apportionment rule, in view of the long tradition of distributing losses in maritime enterprise. This rule was settled in its final form in *Hay v. Le Neve*,[14] when it was established that damages should be shared equally only when the respective faults of either party were causally inextricable. Hence, it was a matter of moment to determine whether the defendant or the plaintiff alone could be said, in law, to have caused the damage at issue. The rule of law originating in *Butterfield v. Forrester* and polished in *Davies v. Mann* and *Tuff v. Warman* was taken over entirely by the House of Lords in maritime cases as the test-principle to decide the pertinent question of legal causation. This was done, before 1911, in a seemingly unshakeable pair of decisions of the supreme tribunal, *viz.*, *Spaight v. Tedcastle*[15] and *Cayzer, Irvine & Co. v. Carron Co.*[15a] The Court of Appeal decision in *The Margaret*[16] suggests that there might have been a slight tendency in maritime cases to find inextricable negligence where this would not otherwise have been found; but the tendency was no more than slight, since in cases of unequal damage and unequal fault, equal apportionment might wreak almost as great an injustice as no apportionment at all.

The Maritime Conventions Act 1911[16a] provided the necessary incentive to adopt a broader interpretation of the facts in bilateral fault situations. There was, however, a time-lag in this instance before the courts were prepared to exploit the potentialities of the Act in the teeth of the fact that, technically, the vital words, "caused to" in sec. 1, were underpinned by the rule in *Davies v. Mann*. Thus, in *Cork S.S. Co. v. Kiddle*, the House of Lords followed its legal statements in the *Spaight* and *Cayzer* cases. But, two years later, the first breach was made in the *Davies v. Mann* rule by the judgment of Viscount Birkenhead in *The Volute*.[17] The real obstacle presented by the rule to an enlightened use of the 1911 Act lay in the inexorable clarity of the rule. Wherever a sufficient interval of time, place, and circumstances existed, the rule permitted little or no

[13] If support for this statement be necessary, one may refer, for example to *Cayzer, Irvine & Co. v. Carron Co.*, (1883-4) L.R. 9 A.C. 873, at 882 (per Lord Blackburn).

[14] (1824) 2 Shaw's Sc. App. 395. The reason given by Lord Gifford for rejecting the proportionate apportionment rule has been amusingly overtaken by time: *viz.*, "It might be extremely difficult to regulate the quantum of neglect on the one side and the other, and to apportion the damages by any other rule" (at 404-5). The reason subsequently advanced by Lord Blackburn is simply perplexing: *The Khedive*, (1882) L.R. 7 A.C. 795, at 819.

[15] (1881) L.R. 6 A.C. 217.

[15a] See note 13.

[16] (1881) 6 P.D. 76.

[16a] 1 & 2 Geo. 5, c. 57.

[17] [1922] 1 A.C. 129.

discretion to the courts in the interpretation of the facts. Did the party fail through lack of reasonable care to avoid (or take the last opportunity of avoiding) the consequences of the other's negligence? These are clear questions easily answered. On the other hand, if the rule were re-stated in a more blurred phraseology, a full interpretative discretion might be vested in the courts, with the result that by shifting their thought from the plane of legal causation to that of natural causation, the courts might, in all cases, be in a position to find that the carelessness of both parties caused the injury.

The seminal passage in the Lord Chancellor's judgment runs as follows: "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 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."[18] "Subsequent negligence" is plain, but what is meant by "severable negligence"? The words might be given the artificial meaning contained in the *Davies v. Mann* rule. But the Lord Chancellor did not say as much. The learned and noble lord left the words as they stood. Certainly, if the words be given their normal meaning, then a moment's reflection will demonstrate that, in a bilateral fault situation, the carelessness of either party can never be said, in a natural or scientific sense, to be causally severable. However, two years later, a differently constituted House assumed that the "subsequent and severable negligence" test was synonymous with the *Davies v. Mann* principle.[19]

The semantic line of attack sketched out above was, in my respectful opinion, re-opened by Greer, L.J., in *The Eurymedon*.[20] The relevant passage is rather long but merits reproduction in full: "I think the law arising out of what is usually called the *Davies v. Mann* principle may be stated as follows:—

(i) If, as I think was the case in *Davies v. Mann,* one of the parties in a common law action actually knows from observation the negligence of the other party, he is solely responsible if he fails to exercise reasonable care towards the negligent plaintiff.

(ii) Rule No. (i) also applies where one party is not in fact aware of the other party's negligence if he could by reasonable care have become aware of it, and could by exercising reasonable care have avoided causing damage to the other negligent party.

(iii) The above rules apply in Admiralty with regard to collisions between two ships as they apply where the question arises in a common law action.

[18] *ibid.*, at 136.
[19] *Anglo-Newfoundland Development Co. Ltd. v. Pacific Steam Navigation Co.*, [1924] A.C. 406, at 419-20.
[20] [1938] P. 41.

(iv) But if the negligence of both parties to the litigation continues right up to the moment of collision, whether on land or on sea, each party is to blame for the collision and for the damage which is the result of the continued negligence of both.

(v) If the negligent act of one party is such as to cause the other party to make a negligent mistake that he would not otherwise have made, then both are equally to blame."[21]

Propositions (i) and (ii) embody the *Davies v. Mann* rule in its pristine form. Proposition (iv), however, by its use of the "continuing negligence" phraseology, confers as wide an interpretative discretion on the courts as the "subsequent and severable negligence" in *The Volute*—provided, that is, the continuance of the party's negligence for causal purposes is judged by the criterion of natural and not legal causation. In this light, proposition (iv) stands in almost direct contradiction to (i) and (ii) and, if taken out of its context to the ignoring of (i) and (ii), might subsequently, just as much as Lord Chancellor Birkenhead's formula, open the door to legal reform.

The second line of contributory negligence cases to be analysed is that of the employment cases. The central question here was whether an act of contributory negligence was a defence to a breach of statutory duty and on what principle. In the earliest decision of *Caswell v. Worth*,[21a] the Court of King's Bench took over and applied the *Davies v. Mann* rule and, from that time, the rule was consistently acted on in this type of case.[22] As the courts grew to appreciate the realities of industrial work and relations, some of the harsh effects of the defence were mitigated in two ways, neither of which, however, impaired the main structure of the *Davies v. Mann* rule. In the first place, a distinction was taken between contributory negligence on the part of a workman on the one hand, and a mere "error of judgment"[23] or "some carelessness or inattention to his own safety . . . trivial in itself"[24] or some "mistake or inadvertence"[25] on the other hand. The facts of the workmen-cases go to show that, whatever verbalisms may have been employed, a workman deprived himself of his common law remedy where he failed to avoid the injurious consequences of a breach of statutory duty, not merely through his want of care but through conduct amounting to

[21] *ibid.*, 49-50. The judgment of Scott, L.J., is also of great importance, not only for the more than justified strictures he passed on the fifth proposition of Greer, L.J., (at 57) but also for the large approach based on policy which the learned judge suggests for the purpose of construing the 1911 Act (at 60-1).

[21a] (1856) 5 El. & Bl. 849.

[22] See, for example, the cases from *Caswell v. Worth* to *Gibby's Case* in note 12.

[23] Lord Wright, in *Flower v. Ebbw Vale Steel Co.*, [1936] A.C. 206.

[24] Lord Wright, in *Caswell v. Powell Duffryn Associated Collieries Ltd.*, [1940] A.C. 152, at 179.

[25] *Gallagher v. Dorman, Long & Co.* [1947] 2 All E.R. 42 (per curiam.)

a reckless or wilful disregard for his own safety.[26] The second mitigating factor has been that, in judging whether conduct amounted to contributory negligence by a workman, it was decided that the physical conditions surrounding the conduct, such as hours and place of work, probable fatigue and strain, must be carefully taken into account,[27] a rule which has never been applied, for example, to a motorist or even to a long-distance coach- or lorry-driver. It is in this way that the rules of contributory negligence in road accidents or collisions were, in Lord Atkin's words, "suitably adapted to deal with breaches by an employer of his statutory duty."[28]

Turning to the third category of cases other than employment or maritime cases, it was here, of course, that the *Davies v. Mann* rule was cradled; and it may briefly be said that, in these cases, the rule was cherished and fostered without any alienation of affection up till 1945, in all courts, including the House of Lords in *Radley v. L. & N.W.R., Dublin, Wicklow & Wexford Rly. v. Slattery, Swadling v. Cooper,*[29] and *M'Lean v. Bell.*[30].

If the foregoing survey be correct, the legal authorities before 1945 were lined up in massive weight on the side of the *Davies v. Mann* rule, treating the rule whether in its original form or later "last opportunity" form as a test of legal causation.[31]. On the other side were the suggestive judgments of Birkenhead, L.C., and Greer and Scott, L.JJ., in the maritime cases. In theory, the legal statements on contributory negligence in any of the three types of cases were freely interapplicable. In practice, however, the possibilities of the maritime decisions were not exploited in the employment and other non-maritime cases. In my submission, there can be slight doubt that, against the normal canons of statutory interpretation, the words "as the result of" in s. 1 of the 1945 Act were, like the corresponding phrase in the 1911 Act, underpinned by the *Davies v. Mann* rule. Therefore, the deeply interesting jurisprudential question to which the 1945 Act gave rise was, to my mind, whether the apportionment rule, with its great advantages, would be powerful enough to sweep away the outmoded and antagonistic rule in *Davies v. Mann* without further Parliamentary intervention and, in so doing, would exemplify what Holmes has called "the struggle for life among competing ideas, and . . . the ultimate victory and survival of the strongest."[32]

[26] See note 20, supra.
[27] See, for example, *Flower's Case at* 214.
[28] *Caswell v. Powell Duffryn Associated Collieries Ltd.,* [1940] A.C. 152, at 180.
[29] [1931] A.C. 1.
[30] There is just one deviating judgment, *viz.,* that of Walton, J., in *Reynolds v. Tilling Ltd.,* (1902-3) 19 T.L.R. 540. But it must be considered, with respect, relatively unimportant.
[31] See any of the pre-1945 standard works, like *Winfield, Salmond, Pollock. Clerk & Lindsell.*
[32] *Collected Legal Papers,* 220. It might also be viewed as exemplifying what Pound refers to as "the replacing of the purely contentious conception of litigation by one of adjustment of interests:" *Outlines of Jurisprudence* (5th edn.), 47.

The post-1945 Cases.

Five cases have so far been reported that are relevant. In all of them the loss has been apportioned, though for reasons which differ quite widely. Employing the same order of analysis as for the pre-1945 decisions, the maritime case of *Boy Andrew v. St. Rognvald*[33] is the first that falls for consideration.

The facts were that *St. Rognvald* made to pass *Boy Andrew* at a lateral distance of one hundred feet when five hundred feet was the interval demanded by careful seamanship. It was found that *Boy Andrew* would have been safely passed had she held her way; instead, she suddenly starboarded right across the course of *St. Rognvald* and the collision took place. Viscount Simon and Lords Porter and MacDermott delivered the leading judgments. The former produced an interesting mixture of legal and factual analysis. Quoting the Law Revision Committee, the learned lord asserted: "the question, as in all questions of liability for a tortious act, is, not who had the last opportunity for avoiding the mischief, but whose act caused the wrong."[34] But Viscount Simon went on to show that he understood *Davies v. Mann* to involve a principle of legal causation: "As by driving more carefully he could have avoided hitting the donkey, his negligence was the sole cause."[35] The vital problems, therefore, would appear to have been whether *Boy Andrew* might by navigating more carefully have avoided the collision, or whether an insufficient separation of time, place, and circumstance existed.[36] Viscount Simon dealt, it must be respectfully submitted, with neither problem. *St. Rognvald* "was able, if she chose, to starboard and to reduce her speed."[37] Whether such manoeuvrability enabled *St. Rognvald* to avoid or even to soften the collision was not pursued. Instead, the manoeuvrability was contrasted with the "static position"[38] in *Davies v. Mann* as a sufficient distinction between the one case and the other. *Boy Andrew* "would be entitled to expect . . . (*St. Rognvald*) to steer so as to give her a wider berth,"[39] but the precise bearing of this legitimate expectation was not examined. Instead, Viscount Simon approved Lord Justice Greer's analysis of *Davies v. Mann* in *The Eurymedon* and, selecting proposition (iv) alone of that analysis for citation, concluded that it applied to the instant case "exactly."[40]

Lord Porter made no reference to *Davies v. Mann* at all, but simply adopted the Birkenhead test of "subsequent and severable negligence," adding that "the problem should be approached broadly

[33] [1948] A.C. 140.
[34] *ibid.*, at 149. See also Lord du Parcq, *obiter*, in *Grant v. Sun Shipping Co.*, [1948] 2 All E.R. 238, at 245.
[35] *ibid.*, at 149.
[36] See *The Volute* [1921] 1 A.C. 129.
[37] [1948] A.C. 140, at 149.
[38] *ibid.*
[39] *ibid.*
[40] *ibid.*, 150.

avoiding those fine distinctions which were apt to be drawn when some slight act of negligence on the part of the plaintiff might defeat his claim altogether."[41] And as, in the present case, there was "no clear dividing line between the operation of one act of negligence and the other,"[42] both ships contributed to the accident.

Lord MacDermott dissented but on the basis of a special interpretation of the Birkenhead test, namely, by giving the word "severable" a clear fault content, and so rendering that test virtually synonymous with the rule in *Davies v. Mann*.[43]

Of the two employment cases, the more important is *Cakebread v. Hopping Bros. Ltd.*,[44] where the guard on a woodworking machine could not be adjusted as low as it ought, in contravention of the statutory regulations. The workman-plaintiff, who was an experienced man, would not work the machine with the guard fixed even as low as it would go. Seemingly in deference to the plaintiff's experience, the foreman compromised with the former's idiosyncrasy. While the guard was in its accustomed position, the plaintiff's hand was thrown against the saw. Now, it is extremely difficult to discern any substantial distinction between these facts and those in, for instance, *Lewis v. Denye*,[44a] where the workman was held to have been "the real and effective cause" of the accident.[45] In *Cakebread*, however, the Court of Appeal apportioned the damages fifty-fifty. Tucker, L.J., together with his learned brethren, ignored the *Davies v. Mann* rule and held simply that "there was a continuous breach on the part of the employers by reason of the fact that they supplied a machine which could not be properly adjusted . . . ;"[46] and that their continuing breach of duty concurred with the workman's negligence to produce the accident. Of additional interest were the learned Judge's remarks *obiter* on the "delegation of duty" cases. The *dicta* seem to suggest that, since the 1945 Act, the Courts will more easily find breach of statutory duty even though the fulfilment of that duty has been rightfully delegated to a negligent workman. "In (*Vincent v. Southern Rly. Co.*[46a]), of course, the House of Lords had not before it, any more than Goddard, L.J., in *Smith v. Baveystock & Co. Ltd.*,[46b] the question what the position would have been under this new Act of 1945 . . . I can quite conceive that, in a case of the type of *Smith v. Baveystock & Co. Ltd.*, where . . . a competent skilled man is left in charge of a properly constructed machine, there is proper delegation to him . . . and proper supervision in the factory—if in those circumstances the workman is

[41] *ibid.*, 155.
[42] *ibid.*
[43] *ibid.*, 160.
[44] [1947] K.B. 641.
[44a] [1940] A.C. 921.
[45] *ibid.* 929.
[46] [1947] K.B. 641, at 650.
[46a] [1927] A.C. 430.
[46b] [1945] 1 All E.R. 531.

injured, and assuming, without deciding, that the question of contribution would arise in such a case, I can quite conceive, and I say no more, that a Court might take the view that in those circumstances something like ninety per cent. of the blame might possibly fall on the workman."[47]

Lavender v. Diamints[48] concerned a window-cleaner who had contracted to clean certain factory windows that had to be approached over the factory roof. The roof was, in contravention of statutory regulations, unsafe to be walked over. The responsibility for laying out his work rested on the cleaner; this he did negligently, and fell through the roof. Denning, J., said, "I hold that he was guilty . . . of negligence which was the decisive cause of the accident,"[49] and apportioned one hundred--zero under the Act. By implication, therefore, the learned Judge decided that the 1945 Act applied even where the plaintiff alone had, in law, caused the damage. This bold, frontal approach to the construction of the Act was elaborated later on by the same learned Judge when sitting in the Court of Appeal.

Finally, there are two road accident cases: *Henley v. Cameron*[50] and *Davies v. Swan Motor Co. Ltd.*[51] It is a matter of profound perplexity to see on what grounds it can be denied that the facts in *Henley's Case* are on all fours with those in *Davies v. Mann*. The defendant's car ran out of petrol. It was—negligently—left for the night at the roadside, its front wheels turned out a foot into the middle of the road. During the night its batteries were exhausted and the lights went out. In the darkness of a December morning, the side-wheel of the motor cycle-combination on which the plaintiff's late husband was riding to work collided with the protruding front wheel of the stationary car. It was found that the deceased man was negligent in not keeping a proper look-out. Here, the situation was equally "static" as in *Davies v. Mann*, but the Court of Appeal held that both sides had caused the fatal accident and therefore apportioned damages one-third-two-thirds under the Act. Tucker, L.J., in the leading judgment, states as though it existed "the rule that the negligence of A. does not absolve B. from the duty to take reasonable care to avoid the consequences of A.'s negligence."[52] But the learned Judge rested his decision on the following ground: "In my view, it would not be adequate merely to give the directions in *Davies v. Mann* without adding to it words substantially to the effect of those used by Lord Birkenhead in *The Volute*. So directed, I believe that a jury in the present case would find that the accident was due partly to the fault of the deceased and partly to the fault

[47] [1947] K.B. 641, at 653.
[48] [1948] 2 All E.R. 249.
[49] *ibid.*, 251. In the Court of Appeal, where the decision of Denning, J., was reversed, this particular legal point was left untouched: [1949] 1 All E.R. 532.
[50] (1949) 65 T.L.R. 17.
[51] [1949] 1 All E.R. 620.
[52] (1949) 65 T.L.R. 17, at 19.

of the defendant, which continued right down to the moment of impact."[53] Singleton, L.J., concurring, relied on the observations of the Lords Justices in *The Eurymedon*, mentioning in particular the words of Scott, L.J.: "I confess to a feeling that much of the litigation which has taken place in the past upon this type of question has arisen through a tendency to substitute a too philosophical analysis of causation for a broad estimate of responsibility in the legal sense."[54] Finally, Asquith, L.J., delivered a purist dissent which, technically speaking, is very difficult to criticise; and, it seems, the learned Judge found that the motor-cyclist alone had, in law, caused the accident since he had had the last clear opportunity of avoiding it.

The situation in the last of the cases was, undoubtedly, one of inextricable negligence. But the Court of Appeal delivered important judgments on the relation between the rule in *Davies v. Mann* and *the 1945 Act*. Bucknill, L.J., reiterated that the Act had not altered the law which had been laid down as to the legal doctrine of causation,[55] but decided the case "in the light of the ordinary, plain commonsense of this matter,"[56] in the manner of Lord Chancellor Birkenhead. Evershed, L.J. (now Master of the Rolls), was more explicit; he said that "such a rule as that which applied in *Davies v. Mann* would not be, and is not, affected by the Act of 1945."[57] The rule in *Davies v. Mann*, however, had to be distinguished from the "last opportunity rule."[58] Even with the explanation tendered by Evershed, L.J., this distinction is, in my very respectful opinion, obscure to the point of mystery and is, indeed, contradicted by the whole trend of preceding case-law, not to speak of the writings of authoritative jurists. However, the type of verbal differentiation employed is indicative of an inclination to whittle away the central rule. Finally, Denning, L.J., delivered, as already foreshadowed, a judgment that engaged in a firm, frontal assault on the *Davies v. Mann* rule. His central assertion is that the *Davies v. Mann* rule "as a doctrine of law . . . was dead before the Act, though it remained in use by some as a practical test."[59] The supporting propositions are as follows:

(i) The *Davies v. Mann* rule "was not a principle of law, but a test of causation."[60] But if "test of causation" means what it must mean, *viz.*, test of legal causation, such test must be regarded as a principle of law.

[53] *ibid.*
[54] *ibid.*, 21.
[55] [1949] 1 All E.R. 620, at 625.
[56] *ibid.*, 626.
[57] *ibid.*, 628.
[58] *ibid. Contra*, Denning, L.J.; *ibid.*, 631. The "last opportunity" form is used in a sense synonymous with the rule in *Davies v. Mann* in *The Eurymedon*, [1938] P. 41 at 52 per Slesser, L.J., in *M'Lean v Bell* (supra) by Lord Wright, and generally by the text-book writers.
[59] *ibid.*, 629.
[60] *ibid.*

(ii) "It was a fallacious test, because the efficiency of the causes do not depend on their proximity in point of time."[61] As a test of *legal* causation, it certainly was not, with great respect, fallacious. The *Davies v. Mann* rule only became fallacious if judged (though unjustly) against the criterion of natural causation, but not for the reason given.

(iii) "It held sway for many years because it enabled the Courts to mitigate the harshness of the doctrine of contributory negligence."[62] This point has already been dealt with.

(iv) "After the decision . . . in *The Volute* and *Swadling v. Cooper* the doctrine of 'last opportunity' fell into disrepute and was superseded by the simple test, What was the cause, or what were the causes, of the damage? . . . Since the recent speeches of Lord Simon . . . and of Lord du Parcq . . . the doctrine has no place even as a test of causation."[63] And later: "I venture to think that, if the doctrine of 'last opportunity' is discredited, so is the rule in *Davies v. Mann,* for, as I have always understood it, they are one and the same doctrine."[64] Technically, there is much to be quarrelled with in these views; but they do, by and large, give a good description of the solvent process at work on the *Davies v. Mann* rule. The learned Judge's final syllogism goes far beyond the opinion of the members of the Law Reform Committee[65] upon which the Act is based, but I respectfully think that they are justly impaled upon it.

Apart from these comments, the judgment of Denning, L.J., has the eminent virtue of being strikingly straightforward in its attempt to re-mould the law to attain the ends of justice. It is possible that it presages a future when the subtler, more circuitous, more diplomatic techniques of legal change will be abandoned in favour of a frank appraisal and reform by the judiciary of any difficult legal position; but, for the present, all this is mere speculation. The Judges are constrained to work the stubborn material of the common law under the straightened conditions that existing institutions[66] allow. In the contributory negligence cases since 1945, the shifts in emphasis to be found in the judgments are slowly resulting in a clear reformative tendency. What the Judges have done possesses perhaps more significance than what they have said. For, notwithstanding the repeated affirmation by the majority that the *Davies v. Mann* rule continues to exist, the same majority are, by making use of the

[61] *ibid.*
[62] *ibid.*
[63] *ibid.*, 629-630.
[64] *ibid.*, 631.
[65] Eighth Report, Cmd. 4032.
[66] Future legal institutions might, for example, include a procedure by which hypothetical cases could go forward to the House of Lords; or even a procedure enabling, say, a two-thirds majority of the Judges of the superior courts to send a statute back to Parliament for immediate reconsideration on account of a technical flaw.

broad commonsense approach and looser phraseology in *The Volute* and *The Eurymedon* gradually replacing the artificial doctrine of legal causation in bilateral fault situations by an apportionment rule founded upon causation in its ordinary, natural meaning.

This principle of apportionment appears to me, indeed, to be so plainly an instrument of justice that repercussions of its wholehearted acceptance might be felt in other spheres of bilateral fault in the law of tort; especially, for example, in self-frustrating cases of *volenti non fit iniuria,* like *Dann v. Hamilton,*[67] or in the invitor-invitee relationship.[68]

Howsoever this may be, if the tendency of the cases be truly construed above, then plainly the time-lag before the appearance of reformative trends after the 1911 Act has not recurred on this occasion, a fact that is due partly to the post-1911 experiences but partly also, it must be, to the quickened tempo of legal change which we are experiencing today as a reflection of the enormous acceleration that has taken place in the movement of social change. And, as precedent piles on precedent to the final submerging of the *Davies v. Mann* rule, the cases on contributory negligence since 1945 will, in my opinion, be seen to merit a place beside such classics as *Nordenfelt v. Maxim-Nordenfelt Gun & Ammunition Co.*[69] as an example of a progressive and statesmanlike exercise of the creative function of the judiciary.

C. GRUNFELD.

[67] [1939] 1 K.B. 509.

[68] Mention is here made of the invitor-invitee relationship because apportionment for contributory negligence seems to be an ideal way out of what I consider to be the unjustifiably restricted scope of an invitor's duty: cf. recently, *Horton v. London Graving Dock,* [1949] 2 All E.R. 169 (Lynskey, J.), and *Jennings v. Cole* [1949] 2 All E.R. 191 (Lynskey, J.)

[69] [1894] A.C. 535, where the common law of restraint of trade was in effect amended.