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## "The harshness and injustice of the common law rule... has frequently been commented upon": Debating Contributory Negligence in Canada, 1914-1949

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R. Blake Brown\* and  
Noelle Yhard\*\*

“The harshness and injustice of the  
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Negligence in Canada, 1914–1949

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*In the early twentieth century, many legal professionals damned the law of contributory negligence as complicated and unfair to plaintiffs barred from recovery, while business people often complained that judges and juries refused to find sympathetic plaintiffs contributorily negligent. Elite Canadian lawyers, through their work in the Canadian Bar Association and the Commission on Uniformity of Legislation in Canada, proposed model contributory negligence legislation that a number of provinces subsequently adopted. Reviews of these statutes were mixed however. The large body of existing case law, despite its complications, encouraged some lawyers and judges to fall back on older jurisprudence in interpreting the new acts. Legislators and law reformers responded by increasing the length and complexity of the negligence statutes, thus undermining the goal of simplifying the law.*

*Au début du vingtième siècle, les spécialistes du droit ont été nombreux à condamner la règle relative à la négligence de la victime comme étant compliquée et injuste pour les demandeurs privés d'un recours alors que les gens d'affaires se plaignaient souvent du fait que juges et jurys refusaient de déclarer que des demandeurs sympathiques étaient eux-mêmes responsables de négligence. Des avocats canadiens de renom, dans leurs travaux au sein de l'Association du Barreau canadien et de la Conférence sur l'uniformisation des lois au Canada, ont proposé un modèle de loi en cette matière qui a par la suite été adopté par bon nombre de provinces. Les opinions sur ces lois étaient toutefois partagées. La jurisprudence considérable, malgré ses complications, a encouragé certains avocats et certains juges à s'appuyer sur des précédents anciens pour interpréter les nouvelles lois. Les législateurs et les réformateurs du droit ont alors réagi en allongeant les lois sur la négligence et en les rendant plus complexes, ce qui a miné l'objectif qui était de simplifier le droit.*

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*Introduction*

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II. *The critique of contributory negligence*

III. *Provincial legislation*

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*Introduction*

This article explores the debates over, and the legislation concerning, the tort law doctrine of contributory negligence in Canada from the Great War to the abolition of new appeals from Canada to the Judicial Committee of the Privy Council in 1949. Canadian legal historians have given scant attention to tort law for the period after 1915. The lack of interest in tort law is both understandable and lamentable. The focus on the period before 1915 stems in part from the tendency of Canadian scholars to follow American academic trends in this area. Morton Horwitz's 1977 work *The Transformation of American Law, 1780–1860* proved especially influential. He argued that American judges reshaped the common law in the nineteenth century to encourage capitalist development. Using an "instrumentalist" approach, the judiciary deviated from American and British precedents in several areas of the law, including tort, to ensure that a disproportionate share of the wealth produced by the industrial economy remained with the upper echelons of American society. "During the eighty years after the American Revolution," Horwitz concluded, "a major transformation of the legal system took place." The result was that "emergent entrepreneurial and commercial groups" won "a disproportionate share of wealth and power in American society."<sup>1</sup>

Horwitz's thesis spurred imitators and critics. Critics included Gary T. Schwartz and Peter Karsten. Schwartz counters the argument that American courts assisted business interests in tort cases, suggesting that "the nineteenth-century negligence system was applied with impressive

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1. Morton J Horwitz, *The Transformation of American Law, 1780–1860* (Cambridge: Harvard University Press, 1977) at xvi.

sternness to major industries” and that “tort law exhibited a keen concern for victim welfare.”<sup>2</sup> Karsten similarly suggests that the judiciary did not conort decisions to support the propertied and powerful.<sup>3</sup>

Legal historians investigating developments in Canadian tort law have taken sides in this debate. James Muir concludes that the law of injuries in mid-nineteenth-century Nova Scotia suggests that the province’s judges “demonstrated a willingness to think instrumentally about the law and in favour of private industrial interests.”<sup>4</sup> In his study of occupational health and safety regulation in Ontario from 1850 to the creation of a provincial workers’ compensation board in 1914, Eric Tucker argues that in the late nineteenth century “the common law embraced a system of market regulation of occupational health and safety.”<sup>5</sup> On the other hand, Jennifer Nedelsky diverges from the Horwitzian thesis in examining Canadian nuisance law between 1880 and 1930. She concludes that nuisance cases “show that the Canadian courts were considerably less willing to abridge the common law rights of occupiers in response to the pressures of industrialization than their American counterparts or their English mentors,” and that courts proved “generally unwilling to deny traditional remedies in order to foster development or minimize its costs.”<sup>6</sup> Peter Karsten uses his examination of almost 600 appellate level negligence decisions handed down in Canada, Australia, and New Zealand to reveal “a proplaintiff bias” among many jurists, despite the existence of common law defences, including contributory negligence.<sup>7</sup> The work of Karsten and Nedelsky thus suggests, in opposition to the work of Muir and Tucker, that the law treated parties fairly.

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2. Gary T Schwartz, “Tort Law and the Economy in Nineteenth-Century America: A Reinterpretation” (1981) 90 Yale LJ 1720. See also Gary T Schwartz, “The Character of Early American Tort Law” (1989) 36 UCLA L Rev 641.

3. Peter Karsten, *Heart Versus Head: Judge-Made Law in Nineteenth-Century America* (Chapel Hill, NC: University of North Carolina Press, 1997) at 79-127.

4. James Muir, “Instrumentalism and the Law of Injuries in Nineteenth-Century Nova Scotia” in Philip Girard, Jim Phillips & Barry Cahill, eds, *The Supreme Court of Nova Scotia, 1754–2004: From Imperial Bastion to Provincial Oracle* (Toronto: University of Toronto Press and the Osgoode Society for Legal History, 2004) 361 at 364.

5. Eric Tucker, *Administering Danger in the Workplace: The Law and Politics of Occupational Health and Safety Regulation in Ontario, 1850–1914* (Toronto: University of Toronto Press, 1990).

6. Jennifer Nedelsky, “Judicial Conservatism in an Age of Innovation: Comparative Perspectives on Canadian Nuisance Law, 1880–1930” in David H Flaherty, ed, *Essays in the History of Canadian Law, Volume 1* (Toronto: University of Toronto Press and the Osgoode Society for Legal History, 1981) 281 at 286, 287.

7. Peter Karsten, *Between Law and Custom: “High” and “Low” Legal Cultures in the Lands of the British Diaspora—The United States, Canada, Australia, and New Zealand, 1600–1900* (Cambridge: Cambridge University Press, 2002) at 450.

The development of contributory negligence law in Canada fails to fit neatly within either polarized academic position. Legal scholars and the judiciary damned the law of contributory negligence as complicated, confused, and unfair to plaintiffs barred from recovery. A desire to assist plaintiffs thus motivated some advocates of reforming contributory negligence. Business, however, *also* supported altering the doctrine. In the early twentieth century, courts often found against corporations (especially railroads and streetcar companies) in negligence cases, despite businesses raising the defense of contributory negligence. The business community thus proved willing to accept, and even advocate for, a statutory change that, on its face, appeared to benefit injured plaintiffs. When business interests looked for an instrument to amend the law, they found a willing partner: the elite Canadian corporate lawyer. By the early twentieth century, the leadership of the bar increasingly came from the ranks of corporate lawyers, many of whom became dependent on pleasing a handful of powerful and wealthy clients. Corporate lawyers filled the ranks of the Canadian Bar Association (formed in 1914) and the Commission on Uniformity of Legislation in Canada (formed in 1918). These national bodies preached the value of law reform to assist business, proposing reforms for provincial governments to adopt, including a model contributory negligence bill. The act, when and where it was adopted, helped businesses avoid full liability for accidents. In the interwar period, therefore, elite lawyers (not just the judiciary as Horwitz and Muir, among others, emphasize) became vital to the instrumental reshaping of the law.

In demonstrating these claims, this article first considers the state of contributory negligence before the Great War. It then takes stock of the critiques of the contributory negligence doctrine, including that it was unjust, uncertain, and hampered business. The article's next section details the efforts to have provinces pass legislation to alter the common law rule. The judicial interpretation of these acts is analyzed prior to a final discussion of subsequent proposals and legislative reforms up to 1949.

### I. *Contributory negligence before the Great War*

Nineteenth-century courts developed the basic doctrines concerning negligence law. Failure to exercise reasonable care to avoid harming another person gave the injured party a right to sue for damages. Courts also developed guidelines to ensure that a reasonably close connection between the act and the injury existed—that is, there had to be “proximate

cause” to “avoid a limitless chain of liability.”<sup>8</sup> Contributory negligence constituted another potential bar to recovery—in fact, it offered an absolute defence if successfully invoked. Several nineteenth-century English cases became key signposts for the contributory negligence doctrine. Late-nineteenth- and early-twentieth-century courts pointed to the 1809 case of *Butterfield v Forrester* as announcing the rule of contributory negligence in English law.<sup>9</sup> As railway law expert Angus MacMurchy summarized in the *Canadian Bar Review* in 1923, negligence on the part of the plaintiff, “however slight, as amounts to want of ordinary care and prudence” would prevent recovery “if such negligence contributes directly to produce the injury.”<sup>10</sup> The time sequence of accidents emerged as important in contributory negligence cases. By the 1840s a consensus had emerged that if both parties had been concurrently negligent, the plaintiff’s negligence prevented him or her from receiving compensation. However, when the defendant’s negligence followed the plaintiff’s, courts sometimes allowed recovery, as demonstrated in the famous case of *Davies v Mann*.<sup>11</sup> In this case, the plaintiff tethered a donkey in the road and the defendant ran into it. Despite the plaintiff’s negligence, the court held the defendant liable because of what became known as the “last clear chance” doctrine. That is, the defendant was liable because he had the last opportunity to avoid the accident—he was, as other judges concluded, “ultimately” negligent or “directly” responsible. The last clear chance doctrine could work against plaintiffs however. If the plaintiff could have avoided the consequence of the defendant’s negligence, s/he failed to recover.<sup>12</sup>

Critics who believed that contributory negligence barred recovery unfairly damned the rule as one of the “unholy trinity” of defences that also included voluntary assumption of risk (barring recovery to plaintiffs who knowingly placed themselves in danger) and the fellow servant rule (preventing employees from suing employers for injuries caused by fellow employees). The 1867 case of *Plant v The Grand Trunk Railway Company* provides a classic illustration of the challenges the rule could impose on

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8. Barbara Young Welke, *Recasting American Liberty: Gender, Race, Law, and the Railroad Revolution, 1865–1920* (Cambridge: Cambridge University Press, 2001) at 82.

9. *Butterfield v Forrester* (1809), 103 ER 926 (KB); Harry Abbott, *A Treatise on the Railway Law of Canada* (Montreal: C Theoret, 1896) at 368.

10. Angus MacMurchy, “Contributory Negligence—Should the Rule in Admiralty and the Civil Law be Adopted?” (1923) 1 Can Bar Rev 844 at 852; Angus MacMurchy & John D Spence, *The Canadian Railway Act, 1919*, 3d ed (Toronto: Canada Law Book, 1922).

11. *Davies v Mann* (1842), 152 ER 588 (Exch).

12. WR Cornish & G de N Clark, *Law and Society in England, 1750–1950* (London: Sweet & Maxwell, 1989) at 494–496; Wex S Malone, “The Formative Era of Contributory Negligence” (1946) 41 Illinois L Rev 151.

working people. William Plant, a Grand Trunk employee, was helping clear away snow on a railway track near Georgetown, Ontario. When a freight car approached, the foreman ordered the employees to clear the line. However, Plant “lost his presence of mind” and ran along the track in front of the train. The train’s crew acted negligently in tending the brakes, such that the train overtook Plant, killing him. His widow sued the railway and won at trial. The railway appealed and the appellate court allowed the appeal, dismissing the widow’s suit. Chief Justice William Draper invoked the employee’s voluntary assumption of risk and declared that the court could “scarcely imagine a clearer case of contributory negligence.” While the “loss and misfortune to the plaintiff and her children is doubtless very serious and sad,” the court “must not be drawn out of our path of duty, even by our feelings for the widow and orphans.”<sup>13</sup> As Draper noted, the contributory negligence doctrine “forced” courts to pay no heed to the suffering of the plaintiff and his family.

Reported cases, however, suggest that contributory negligence did not always shield businesses, especially when average people sought compensation when struck by railways or streetcars. Railways and streetcars killed or injured many Canadians in the early twentieth century, with the result that injured parties (or the relatives of deceased men and women) often sued in negligence. As the *Canada Law Journal* thus noted in 1911, the “subject of negligence” is “prominent in these days of rapid transit and reckless disregard of life.”<sup>14</sup> Often, accidents occurred when trains failed to warn of their approach at crossings by using lights, bells, and whistles. Trams ran down many men and women who crossed streets without first checking for traffic. Passengers also suffered injuries in “alighting” incidents—that is, when they boarded or exited moving trains or trams. While contributory negligence prevented many injured parties from receiving compensation, in many other instances plaintiffs succeeded. According to Karsten, English law required that plaintiffs use “due care” in crossings, but “this was a highly subjective standard,” such that “some jurists (and few jurors)” expected “much of pedestrians and wagon drivers,” while “other jurists (and most jurors)” expected “much less,” and thus refused to non-suit plaintiffs.<sup>15</sup>

13. *Plant v The Grand Trunk Railway Company* (1867), 27 UCQB 78 at 86.

14. “Humanity and the Law” (1911) 47 Can LJ 719 at 719. The frequency of accidents led to plenty of legal commentary on the issue of railway and streetcar accidents. For examples, see WE Raney, “The Pedestrian and the Street Car” (1914) 50 Can LJ 121-139; “Duty of Traveller on Highway when Approaching Railroad Crossings” (1914) 50 Can LJ 407-412. On the negligence litigation caused by the development of railways in England see RW Kostal, *Law and English Railway Capitalism, 1825-1875* (Oxford: Clarendon, 1994) at 254-321.

15. Karsten, *supra* note 7 at 405.

Various examples illustrate the willingness of some courts to refuse to find against plaintiffs in cases involving railroads and streetcars, even when plaintiffs had clearly contributed to the accident. For example, in *Halifax Electric Tramway Co v Inglis*, a cab driver attempted to cross the track of an electric tram without watching out for the streetcar. The tram operator tried to stop with his brakes and then reversed power. In finding for the plaintiff, the jury found that the tram driver was going too fast on a downgrade and should have been keeping a better lookout. The Supreme Court of Nova Scotia upheld the trial decision, as did the Supreme Court of Canada on the ground that the tram operator had the last chance to avoid the accident.<sup>16</sup> In *McKay v Grand Trunk Railway Company*, a train struck the plaintiff at a busy crossing in Sarnia not protected by a gate or watchman. The jury found for the plaintiff, determining that the train was moving too fast without sufficient protection at the crossing. At the Ontario Court of Appeal, Justice James Thompson Garrow asserted that “there was evidence, I am inclined to think strong evidence, of contributory negligence on the plaintiff’s part,” but he refused to interfere.<sup>17</sup> In *British Columbia Electric Railway v Dunphy*, a passenger in an automobile warned the inattentive driver of an approaching streetcar. The jury found for the plaintiff on the ground that the streetcar driver had been insufficiently cautious in approaching the crossing. The Supreme Court of Canada affirmed the trial judgment on the ground that the driver had not been contributorily negligent.<sup>18</sup> In *Long v Toronto Railway Co*, the Supreme Court of Canada held a railway liable after a pedestrian crossed the road with his head down, oblivious to his surroundings. The Court concluded that the electric tram’s driver should have realized that the pedestrian might attempt to cross the tracks, and believed that the motorman had the last chance to avoid the accident.<sup>19</sup> In *Keith v Ottawa and New York Railway*, a passenger got off a train in motion when the train began to leave the station without stopping a sufficient amount of time. The passenger fell and suffered an injury. The jury did not hold the passenger contributorily

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16. *Halifax Electric Tramway Co v Inglis* (1900) 36 Can LJ 303; *Halifax Electric Tramway Co v Inglis* (1899), 32 NSR 117; *Halifax Electric Tramway Co v Inglis* (1900), 30 SCR 256.

17. *McKay v Grand Trunk RW Co* (1903), 5 OLR 313; *McKay v Grant Trunk Rw Co* (1903) 39 Can LJ 247.

18. *British Columbia Electric Railway Co v Dunphy* (1919), 59 SCR 263; *BC Electric Rly Co v Dunphy* (1919) 39 Can LT 716.

19. *Long v Toronto Railway Co* (1914), 50 SCR 224.



negligent, and the appeal courts agreed.<sup>20</sup> While other examples exist of plaintiffs unsuccessfully suing railroads and streetcar companies because of findings of contributory negligence, the cases mentioned illustrate that the law did not preclude successful negligence lawsuits against business.

## II. *The critique of contributory negligence*

Despite the willingness of some courts to find for plaintiffs in accidents involving streetcars and railways even when evidence existed of contributory negligence, the perceived harshness of the doctrine contributed to efforts to create workers' compensation schemes in the early twentieth century. Common law defences, including contributory negligence, proved especially effective when employers sought to protect themselves from claims stemming from workplace injuries or deaths. As a result, the public called for action. The *Manitoba Free Press* claimed in 1909 that contributory negligence "always operated unjustly toward the workingman" and was the "most one-sided law that had ever been enacted."<sup>21</sup> In 1914, Ontario created a workers' compensation board. The legislature eliminated contributory negligence on the part of a worker as a bar to recovery of damages and dictated that damages be awarded in proportion to the degree to which the employer and employee were at fault.<sup>22</sup> Lawyer George Kingston celebrated the workers' compensation legislation in the *Canadian Law Times*, damning contributory negligence (along with the fellow servant rule and assumption of risk doctrine) as operating "to relieve the employer from all liability in a very large number of cases," such that "their manifest unfairness" had begun to "impress itself on the minds of right thinking people."<sup>23</sup>

Leading Canadian lawyers began to criticize the contributory negligence doctrine in situations other than workplace accidents. At times,

20. *Keith v Ottawa and New York RW* (1903) 39 Can LJ 200; *Keith v Ottawa and New York Railway Co* (1902), 5 OLR 116. Also see *Bell v Winnipeg Street Ry Co* (1905) 41 Can LJ 617; *Bell v Winnipeg Electric Street Ry Co* (1905) 15 Man R 338; *Sims v Grand Jury Trunk Ry Co* (1905) 41 Can LJ 755; *Sims v Grand Trunk RW Co* (1905), 10 OLR 330; *Preston v Toronto Ry Co* (1906) 42 Can LJ 38; *Preston v Toronto RW Co* (1905), 11 OLR 56; *Wallman v Canadian Pacific Ry Co* (1906) 42 Can LJ 519; *Wallman v Canadian Pacific RW Co* (1906), 16 Man LR 82; *Wright v Grand Trunk RW Co* (1906) 42 Can LJ 511; *Wright v Grand Trunk RW Co* (1906), 12 OLR 114. For examples of cases in which contributory negligence prevented plaintiffs from receiving compensation in accidents involving railways and streetcars, see *O'Hearn v Town of Port Arthur* (1902) 38 Can LJ 465; *O'Hearn v Town of Port Arthur* (1902), 4 OLR 209; *London Street Railway Co v Brown* (1902) 38 Can LJ 153; *London Street Railway Co v Brown* (1901), 31 SCR 642.

21. "Contributory Negligence," *Manitoba Free Press* (2 March 1909) 1. A delegation asking for law reforms that would benefit workers in Manitoba in 1917 included an appeal to eliminate the contributory negligence rule: "Want Workers' Legislation," *Manitoba Free Press* (17 January 1917) 5.

22. *Ontario Workmen's Compensation Act*, SO 1914, c 25.

23. George A Kingston, "The Workmens Compensation Act, 1914" (1915) 35 Can LT at 302. See also WGC Howland, "Workmen's Compensation—Domestic Servant" (1936) 1 UTLJ 387.

lawyers simply argued that the common law doctrine unfairly barred plaintiffs from securing compensation for their injuries. In 1915, Alberta Justice William Walsh in *Black v City of Calgary* unhappily dismissed an action after a passenger was hurt boarding a moving streetcar: “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,” Walsh J. lamented, “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.”<sup>24</sup> M.J. Gorman, an Ottawa lawyer, complained in the *Canadian Law Times* in 1917 that recent contributory negligence cases failed to meet “the requirements of equity and justice in all cases.” He thus pondered the possibility of getting “rid of all the refinements of legal ingenuity.”<sup>25</sup>

Gorman also offered another typical argument:—that the law of contributory negligence was too uncertain and that “there is nothing worse than ambiguity or uncertainty.”<sup>26</sup> In a paper delivered to the annual meeting of the Ontario Bar Association, lawyer Angus MacMurphy also condemned contributory negligence’s growing complexity, which meant that “a clear enunciation of the principle has been for many years a matter of considerable difficulty to Judges and its application a matter of perplexity and doubt to juries.”<sup>27</sup> This was a powerful critique given the dominant mode of legal analysis in the early twentieth century. As R.C.B. Risk and others have shown, most Canadian legal professionals generally held a formalistic approach to the law. They saw law as an apolitical system that could, or at least should, offer clear rules applicable to any situation. The complexity and seeming uncertainty of contributory negligence in practice made the doctrine an embarrassment.<sup>28</sup>

The doctrine also became a target of lawyers seeking to make provincial statutory provisions more business friendly. In the early twentieth century, the leadership of the Canadian legal profession came increasingly from the ranks of elite corporate lawyers. In the past, leading barristers had risen to the top of the profession, but the rise of corporate Canada allowed for a relatively small group of solicitors to become wealthy and prominent,

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24. *Black v Calgary (City)* (1915), 24 DLR 55 [*Black*].

25. MJ Gorman, “Negligence—Contributory, ‘Ultimate’ and ‘Comparative’, with a Suggested Statutory Amendment” (1917) 37 Can LT 23 at 31.

26. MJ Gorman, “Contributory Negligence” (1922) 42 Can LT 425 at 425. See also “Ultimate Negligence” (1918) 54 Can LJ 274.

27. MacMurphy, *supra* note 10 at 845.

28. RCB Risk, *A History of Canadian Legal Thought: Collected Essays*, ed by G Blaine Baker & Jim Phillips (Toronto: University of Toronto Press and the Osgoode Society for Legal History, 2006).

though in the process some became reliant on the patronage of one or two large businesses. In appealing for law reform, corporate lawyers often reflected the interests of their clients.<sup>29</sup>

Making provincial legislation more uniform became one business-friendly goal of lawyers. This proved especially pressing in the early twentieth century, a time of substantial corporate consolidation in Canada. Large companies sought to operate from east to west. They complained that the fragmentation of legislation caused by the decentralized interpretation of the *British North America Act* propounded by the Supreme Court of Canada and the Judicial Committee of the Privy Council in the late nineteenth and early twentieth centuries had resulted in great diversity in provincial legislation that related to business. There had been in the past periodic calls by lawyers for more uniformity of legislation, but those calls had failed to achieve results. The Privy Council's decision in *Bonanza Creek* in 1916 sparked new appeals for action. In *Bonanza Creek*, the Privy Council held that the provinces had the legislative jurisdiction to create corporations with the capacity to carry on any kind of operation across Canada, rather than for businesses that fell just within the boundaries of the province of incorporation as previously assumed.<sup>30</sup>

Eugene Lafleur, one of Canada's leading lawyers at the time, became an early proponent of uniformity. Lafleur taught civil law at McGill while keeping up an active practice, appearing regularly before the Supreme Court of Canada and the Judicial Committee of the Privy Council. He took cases covering the whole spectrum of law but achieved a national reputation as a constitutional lawyer and as a lawyer engaged in freight rate litigation. Lafleur made a substantial income—in fact, he refused to accept the position as Chief Justice of Canada in part because he could make more money in private practice. When he spoke about law reform, he emphasized the need for legislative uniformity to assist business. For example, in 1912 Lafleur told the Canada Club of Ottawa that there was “no field in which uniformity is so desirable as in commercial law,” for it was “impossible now to limit the activities of commercial partnerships and corporations to a particular province.” He also sought uniformity in dealing

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29. Carol Wilton, “Introduction: Beyond the Law—Lawyers and Business in Canada, 1830–1930,” in Carol Wilton, ed, *Essays in the History of Canadian Law, Volume IV—Beyond the Law: Lawyers and Business in Canada, 1830 to 1930* (Toronto: University of Toronto Press and the Osgoode Society for Legal History, 1990) at 14-20; Philip Girard, “The Maritime Provinces, 1850–1939: Lawyers and Legal Institutions” (1996) 23 *Man LJ* 394; Christopher Moore, *The Law Society of Upper Canada and Ontario's Lawyers, 1797–1997* (Toronto: University of Toronto Press, 1997) at 152-156.

30. *Bonanza Creek Gold Mining Co v The King*, [1916] 1 AC 566; Allison Dunham, “A History of the National Conference of Commissioners on Uniform State Laws” (1965) 30 *Law & Contemp Probs* 233.

with workplace injuries “no matter where the accident takes place.” “From the employer’s point of view,” he reasoned, it was “manifestly desirable that there should be one law governing his relations with his working men.”<sup>31</sup>

Law reform that achieved greater provincial uniformity also became a goal of the Canadian Bar Association, which formed in 1914. James Aikins served as the association’s first president, and, importantly, he was a vocal advocate of legislative uniformity. Although born in Ontario, Aikins practised in Winnipeg for most of his career. In 1881, he became counsel for the Western division of the Canadian Pacific Railway, a role he retained until 1911. He developed a large and lucrative law practice and made substantial sums through his investments, especially in real estate in Winnipeg and elsewhere in Manitoba. He acted as solicitor for many companies, including the Westbourne and Northwestern Railway Company, the Northern Electric Light Company, the Great-West Life Assurance Company, the Imperial Bank of Canada, the Bank of Ottawa, and the Scottish American Investment Company. He also served as a director of the Northern Trusts Company, the Canadian Fire Insurance Company, and the Canadian Indemnity Company. He was a millionaire by 1910.<sup>32</sup>

This experience in practice shaped the work Aikins undertook as president of the Canadian Bar Association (a position he held from 1915 until 1927). In an address to a business organization in late 1914, Aikins proposed a joint effort by Canadian lawyers and business leaders to secure more uniform laws since businessmen demanded that the interference “caused by divergent, conflicting or inconsistent statutory provisions should end or at least be mitigated.”<sup>33</sup> At the first annual meeting of the Canadian Bar Association, Aikins again emphasized the need to pass uniform laws in common law Canada on the ground that the “law of a country is the responsive expression of its social and business life and it must expand with it, or hamper it.”<sup>34</sup> Such arguments helped shape the constitution of

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31. Eugene Lafleur, “Uniformity of Laws in Canada” in *Addresses Delivered before the Canadian Club of Ottawa, 1912-1913* (Ottawa: Mortimer Press, 1913) 52 at 55, 57; LR MacTavish, “Uniformity of Legislation in Canada—An Outline” (1947) 25 *Can Bar Rev* 36 at 41-42; David Ricardo Williams, *Just Lawyers: Seven Portraits* (Toronto: University of Toronto Press for the Osgoode Society, 1995) at 18-55.

32. Lee Gibson, “Aikins, Sir James Albert Manning,” online: *Dictionary of Canadian Biography* <<http://www.biographi.ca>>; BM Greene, ed, *Who's Who in Canada, 1930-31* (Toronto: International Press, 1932) at 54, 270, 1049.

33. James Aikins, *Uniformity in Provincial Legislation* (Winnipeg: Canadian Credit Men’s Trust Association, 1914) at 12 [Aikins, *Uniformity*].

34. James Aikins, “The Advancement of the Science of Jurisprudence in Canada,” *Report of the Canadian Bar Association, 1915* at 18.

the association. Article 1 listed the association's goals, including upholding the honour of the profession and encouraging cordial intercourse among members of the bar. Article 1 also urged the association to "advance the science of jurisprudence, promote the administration of justice and uniformity of legislation throughout Canada so far as consistent with the preservation of the basic systems of law in the respective provinces."<sup>35</sup>

Aikins and Lafleur repeatedly appealed for law reform to assist business. In his 1916 address to the Canadian Bar Association, Aikins argued that businessmen who wanted to expand their operations "do not care to risk the uncertainties of the laws of the different legal jurisdictions," for they "desire to know definitely their legal rights and remedies." Business could only secure statutory uniformity with "the assistance of the lawyers of Canada."<sup>36</sup> Lafleur made similar arguments in an address to the Canadian Bar Association in 1916. "Every Province," he complained, "has an insurance law of its own." While these laws were "not differentiated by any fundamental principles they abound in minor diversities calculated to produce conflict and uncertainty." This annoyed business, such as "a great trans-continental railway," which was "unable to get a uniform cover on its rolling stock throughout Canada" and instead had to "submit to a modification of its contract every time it crosses a provincial border line."<sup>37</sup>

Not surprisingly, the association's desire to assist business through legislative reform received the support of corporate Canada. Officers and council members of the Canadian Bar Association met with the Credit Men's Association, boards of trade, manufacturers, and insurance managers. These business interests offered financial assistance to the association's legislative reform efforts, and several publicly stated their support, including the Credit Men's Association and the Federation of the Chambers of Commerce of the Province of Quebec.<sup>38</sup>

The Canadian Bar Association sought to achieve law reform by establishing committees that would identify opportunities to achieve uniformity in several areas of law. The topics selected indicated the lawyers' emphasis on assisting business. Committees examined company law, insurance, conditional sales and succession duties, sale of goods,

35. "Constitution," *Report of the Canadian Bar Association, 1915*, art 1.

36. James Aikins, "Address of the President," *Proceedings of the Canadian Bar Association, 1916* at 80-81, 82 [Aikins, "Address"].

37. Eugene Lafleur, "Uniformity of Laws in Canada," *Report of the Canadian Bar Association, 1915* at 25.

38. Aikins, *Uniformity*, *supra* note 33 at 14; Aikins "Address," *supra* note 36 at 82-84.

chattel mortgages, insolvency, bulk sales, and the enforcement of extra-provincial judgments.<sup>39</sup>

The formation of the Conference of Commissioners on Uniformity of Legislation in Canada (hereinafter the Conference) in 1918 represented a further effort by Canada's leading lawyers to achieve reforms for the benefit of business. The group had an American model to copy, the National Conference of Commissioners on Uniformity of State Law, which reported to the American Bar Association.<sup>40</sup> The Canadian organization consisted of a large number of leading lawyers, as well as a smattering of legal academics and government representatives. Aikins became the first president of the Conference. Other members included lawyers with corporate law experience. Frank Ford of Ontario had been a partner in McCarthy, Osler, Hoskin & Harcourt. Travers Sweatman's firm acted as a solicitor for a number of leading corporate clients, and he served as president of the Winnipeg Board of Trade in the 1920s. James Layton Ralston of Nova Scotia served as a director of Maritime Life Assurance and the Starr Manufacturing Company. Isaac Pitblado, a leading Winnipeg lawyer, represented Manitoba. Pitblado had expertise in freight rates and, by 1930, served as a director of the Canadian Bank of Commerce, Toronto General Trusts Corporation, Lake of the Woods Milling Company, and Mutual Life Assurance Company, among other companies. He delivered speeches such as "Why the Business Tax Should be Abolished," and, like many of Winnipeg's wealthy residents, he opposed the Winnipeg General Strike, serving on the Citizens' Committee of 1000. In 1923, Pitblado became president of the Conference of Commissioners on Uniformity of Legislation, a role he retained until 1930.<sup>41</sup>

The leadership of the Conference openly stated a desire to assist business. In his 1920 presidential address, Aikins asserted that "Canada takes no second place in endeavouring to facilitate trade and business by uniformity of laws relating to them within the nation."<sup>42</sup> In 1923, another president of the Conference, Mariner G. Teed of Saint John, bluntly stated that the organization sought to assist business. The lawyers of Canada, "wishing to co-operate with business men and others interested

39. RW Shannon, "Uniformity of Legislation" (1930) 8 Can Bar Rev 28 at 29-30.

40. Dunham, *supra* note 30 at 233-249; Walter P Armstrong, *A Century of Service: A Centennial History of the National Conference of Commissioners on Uniform State Laws* (St Paul, MN: West Publishing, 1991).

41. Greene, *supra* note 32 at 194, 919, 1186, 1705-1706; Williams, *supra* note 31 at 124-154; Isaac Pitblado, *Why the Business Tax Should be Abolished* (Winnipeg: Winnipeg Branch of the Retail Merchants' Association of Canada, 1915).

42. James Aikins, "Presidential Address," *Proceedings of the Annual Meeting of the Conference of Commissioners on Uniformity of Legislation in Canada, 1920* at 15.

in interprovincial matters,” hoped to have provinces adopt uniform legislation, “particularly relating to business and commercial transactions in which the people of the several provinces are concerned.”<sup>43</sup>

The usual practice of the Conference was to identify a certain number of topics suitable for amendment. The Conference then produced a draft model bill, debated the draft, and undertook additional revisions. When approved, the Conference recommended the model bill for adoption by provincial legislatures. By 1930, the Conference produced twelve model acts, most of which sought to ease the operation of commerce in a federal nation. Bills dealt with warehousemen’s liens, conditional sales, life insurance, fire insurance, reciprocal enforcement of judgments, bills of sale, and assignment of book debts.<sup>44</sup> The Conference also tackled contributory negligence. At first blush, this is surprising. The doctrine has long been accused of serving business interests, but, as noted earlier, case law suggests that courts had found ways to provide compensation for plaintiffs, especially when people suffered injuries caused by railroads and streetcar companies. In addition, businesses likely chafed at the uncertainty of the law in this area, which made litigation expensive and uncertain. For example, Irving Fairty, general counsel for the Toronto Transportation Commission, consistently proposed altering the law of contributory negligence because of the confusing nature of the existing law.<sup>45</sup>

Abandoning or altering the contributory negligence doctrine represented a fairly radical change. England did not pass legislation permitting apportionment of damages in cases of contributory negligence until 1945, while Australia, New Zealand, and South Africa waited until after the Second World War. In 1908, the United States enacted the *Federal Employers’ Liability Act* that abolished the doctrine of contributory negligence for railroad workers, and by 1941 nine states also adopted a

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43. Mariner G Teed, “Presidential Address,” *Proceedings of the Annual Meeting of the Conference of Commissioners on Uniformity of Legislation in Canada*, 1923 at 30.

44. Shannon, *supra* note 39 at 30.

45. Fairty stated that his desire to see changes in Ontario stemmed from his personal experience, not because the Toronto Transportation Commission wanted legislative action, see Irving S Fairty to Attorney General of Ontario (5 May 1926), AO, RG4-32, file 1961: Attorney General Registry Criminal and Civil Files; Fairty to Attorney General of Ontario (26 January 1927), AO, RG4-32, file 720: AGO Legislation—1927 Contributory Negligence Act; Fairty to Attorney General of Ontario (25 August 1927), RG4-32, file 679: Toronto Transportation Commission: Re contributory negligence. This is not to say that all business interests supported a change to the contributory negligence doctrine. The managing secretary of the Hamilton Chamber of Commerce expressed concern in 1924 that proposed reforms might lead some people to put themselves deliberately in the way of an accident see, FP Healey to WF Nickle (24 March 1924), AO, RG4-32, file 688: AGO Legislation—Amendment of the law as to contributory negligence.

“comparative negligence” approach, although they remained the minority position into the 1960s.<sup>46</sup>

Two models proved more influential in Canada. In admiralty law, the British *Maritime Conventions Act* of 1911 imposed apportionment of damages according to the degrees of fault of each vessel involved in an accident at sea.<sup>47</sup> Canada adopted the British statute in 1914 (although it did not apply it to the Great Lakes or the St. Lawrence as far east as the lower exit of the Lachine Canal and the Victoria Bridge at Montreal).<sup>48</sup> The civil law doctrine of *faute commune* used in Quebec served as a second important model for critics of the contributory negligence rule. Chief Justice Charles Fitzpatrick summarized the *faute commune* doctrine: “where the party who claims compensation for an injury caused by the fault of another has been also guilty of fault, which contributed to the accident, he must share responsibility, and in that case, the damages are not divided equally as is the rule in the English Admiralty Courts.”<sup>49</sup>

Critics of the contributory negligence law frequently noted these two examples in arguing that the apportionment of damages approach could work in some cases traditionally embroiled in the contributory negligence doctrine. In 1915, for instance, Walsh J. in *Black v City of Calgary* noted that, in Quebec, “the much more equitable principle prevails of apportioning the damage between the parties.”<sup>50</sup> Gorman also pointed to the admiralty and civil law rules in appealing for change in the *Canadian Law Times* in 1923.<sup>51</sup> Importantly, justices of the Supreme Court of Canada also made this case. In a blunt address to the Canadian Bar Association, Justice Francis Anglin (as he then was) critiqued the law of contributory

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46. *Law Reform (Contributory Negligence) Act, 1945* (UK), 8 & 9 Geo VI, c 28; Glanville L Williams, “The Law Reform (Contributory Negligence) Act, 1945” (1946) 9 Mod L Rev 105; *Contributory Negligence Act* (NZ), 11 Geo VI, no 3; Michael Spisto & Less Arthur, “Contributory Negligence: A Comparison between the South African, Australian and New Zealand Legal Systems” (2000) 19 U Tasm L Rev 311; KO Shatwell, “Contributory Negligence and Apportionment Statutes” (1948-1950) 1 UWA Annual L Rev 145; Cecil A Wright, “The Law of Torts: 1923-1947” (1948) 26 Can Bar Rev 46 at 70; John Fabian Witt, *The Accidental Republic: Crippled Workingmen, Destitute Widows, and the Remaking of American Law* (Cambridge, MA: Harvard University Press, 2004) at 67; Lawrence M Friedman, “The Litigation Revolution” in Michael Grossberg & Christopher Tomlins, eds, *The Cambridge History of Law in America, Volume 3: The Twentieth Century and After (1920-)* (Cambridge, MA: Cambridge University Press, 2008) at 185; G Edward White, *Tort Law in America: An Intellectual History* (New York: Oxford University Press, 1985) at 165; Kermit L Hall, *The Magic Mirror: Law in American History* (New York: Oxford University Press, 1989) at 297.

47. *Maritime Conventions Act, 1911* (UK), 1 & 2 Geo V, c 57.

48. *Maritime Conventions Act, 1914*, SC 1914, c 13.

49. *Nichols Chemical Company of Canada v Lefebvre* (1909), 42 SCR 402 at 404.

50. *Black*, *supra* note 24 at para 11.

51. Gorman, *supra* note 26. See also Lester McTaggart, “The Contributory Negligence Act” (1937) 2:2 Sask Bar Rev & L Soc Gaz 39.



negligence, comparing it unfavourably with the *faute commune* doctrine and the rule in admiralty law:

The English law excluding all relief where the plaintiff has been guilty of contributory negligence, however slight, has always seemed to me much less equitable than the provision of the civil law that where there is *faute commune* there should be an apportionment of damages according to the degree of blame attributable to each party. This feature of the civil law has been adopted by the English Courts of Admiralty.<sup>52</sup>

Anglin J.'s public critique of a long accepted doctrine empowered proponents of reform.

Justice Anglin also expressed his reservations about contributory negligence in *Grand Trunk Pacific Railway Co. v Earl* in 1923.<sup>53</sup> The case, like many others involving contributory negligence in this period, stemmed from an injury involving a railway. The accident occurred in Edmonton at a location where six rail lines crossed a busy street. To prevent accidents, the Board of Railway Commissioners ordered the company to carry out its switching movements over the crossing between the hours of 1:00 and 2:30 in the afternoon and between 9:00 p.m. and 6:00 a.m. The Board also ordered the company to keep a watchman on duty to protect the crossing during switching operations. The railway clearly violated these orders. The plaintiff, Earl, a stenographer and bookkeeper, suffered his injury at 6:30 p.m. The company also failed to station a watchman at the site. Earl, who was on a bicycle, saw the train but erred in anticipating which track it would take. He ran into some mud and became distracted. The train, with its bell ringing, struck him while shunting. The trial court awarded Earl \$3,850 in damages, a decision the Alberta Court of Appeal upheld. However, in a four to one decision, the Supreme Court determined that the railway company was not liable because of the plaintiff's contributory negligence.

Three of the judges in the majority uttered frustration with the unfairness of the contributory negligence doctrine. Justice Anglin expressed the most displeasure. He complained that the case "illustrates the harshness of the rule by which, where there is common fault contributing to cause injury to a plaintiff, he is deprived of all redress and the defendant entirely relieved, although the culpability of the former may be comparatively slight and that of the latter distinctly gross." In his view, the "doctrine of the civil law that in such circumstances the damages should be divided in proportion to

52. Honourable Justice Francis Anglin, "Some Differences between the Law of Quebec and the Law as Administered in the Other Provinces of Canada" (1923) 1:1 Can Bar Rev 48-49.

53. *Grand Trunk Pacific Railway Co v Earl*, [1923] SCR 397.

the degree of culpability commends itself to my judgment as much more equitable.”<sup>54</sup>

Justices Lyman Duff and Pierre-Basile Mignault also critiqued the result and the existing law. Duff J. wrote that the case was “one of those cases that sometimes cause one to turn a rather wistful eye to jurisdictions in which where injury results from the combined negligence or misconduct of the plaintiff and the defendant, the burden of the loss can be equitably distributed.” “But where the English doctrine of contributory negligence reigns,” Duff J. continued, “a tribunal assessing damages in such circumstances must find the defendant responsible for the whole of the loss or for none.” Justice Duff also complained that the law of contributory negligence had become too complex for there had “been a tendency of over-refinement in the application of the law which has led to a good deal of confusion and uncertainty.” The desire to find for the plaintiff could lead the court only to complicate the law further, with the result that the court would “be approaching perilously near to frittering away the substance of the doctrine which it is the duty of the Court to apply.”<sup>55</sup> Justice Mignault complained, like Duff J., about the complexity of the existing jurisprudence: “Questions involving the application of the rule of contributory negligence are of much nicety and considerable difficulty and it is not easy to frame a satisfactory formula which can be applied in the almost infinite variety of circumstances where the rule is invoked.” He also preferred the civil law rule: “If I may say so, the doctrine of the civil law, in force in the province of Quebec and also adopted in admiralty matters, is much more equitable.” Mignault J., however, noted that the legislature would have to change the law.<sup>56</sup> The judicial criticism of any common law doctrine was unusual in this period, a time when Canadian appellate court judges tended to write with a passionless style, sought only to apply existing case law and avoided raising policy considerations. In this case, however, the justices of the Supreme Court of Canada voiced a critique of the traditional tort law doctrine, much like some contemporary American judges who, according to William E. Nelson, recognized that “classical doctrine no longer provided easy answers in every case,” such that judges “began to recognize that issues of liability and causation involved policy choices.”<sup>57</sup> The tone of the judgments in *Earl* quickly drew attention and served as another source of ammunition for critics of contributory

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54. *Ibid* at 406.

55. *Ibid* at 398-399, 400.

56. *Ibid* at 408.

57. William E Nelson, *The Legalist Reformation: Law, Politics, and Ideology in New York, 1920–1980* (Chapel Hill, NC: University of North Carolina Press, 2001) at 97.

negligence. The *Canadian Bar Review* immediately noted the criticisms of Duff, Anglin, and Mignault JJ., and suggested that legislatures could “remedy any evil pointed out by the judges in the existing law.”<sup>58</sup>

The legal profession thus led the effort to ameliorate the contributory negligence doctrine. In comparison, the effort to secure workers’ compensation schemes had garnered substantial public support. Workers feared becoming destitute if they suffered an injury at work. Contemporary newspapers, however, provide little evidence that average Canadians wanted to amend the law of contributory negligence. Statutory change was thus an effort by lawyers, and reflected the concerns of the small cadre of elite legal professionals who led the law reform effort. Reform sought to make the law more business friendly, more easily applicable, and more consistent. As will be shown in the next section, these proved difficult goals to attain.

### III. *Provincial legislation*

The first effort to move away from the rule that contributory negligence was an absolute bar to recovery occurred in Ontario. In 1923, lawyer H.P. Hill, a Conservative member of the Ontario provincial assembly, introduced a private member’s bill to alter the contributory negligence doctrine. His bill provided that the judge in a negligence case would determine the extent to which each party was at fault and then apportion damages. If the evidence prevented a determination as to the relative degrees of fault between plaintiff and defendant, then the court would find the defendant liable for one-half the damages.<sup>59</sup>

Anglin J. wrote the attorney general of Ontario, W.F. Nickle, to express his support for the principle of the bill, but Hill’s proposal also spurred calls for caution. The Ontario Bar Association debated the measure, and the association’s Committee on Resolutions asked that the government delay acting until the legal profession could discuss the idea fully. The

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58. RWS, “Contributory Negligence—‘Unjust Enrichment’—Civil Law Doctrines” (1923) 1 *Can Bar Rev* 521. See also, Francis King to WF Nickle (21 February 1924), AO, RG4-32, file 688: AGO Legislation—Amendment of the law as to contributory negligence. Critics of the contributory negligence also noted the harsh critiques of the doctrine in other parts of the Empire. For example, Sir John Salmond, a justice of the Supreme Court of New Zealand and author of a treatise on torts commented on the contributory negligence rule: “No more baffling and elusive problem exists in the law of Torts.” Salmond instead encouraged reform based on Admiralty law (Gorman, *supra* note 26 at 432). See also John W Salmond to MJ Gorman (28 August 1922) and John W Salmond to MJ Gorman (21 July 1924), AO, RG4-32, file 688: AGO Legislation—Amendment of the law as to contributory negligence.

59. “Bills Introduced Would Alter Laws,” *Globe and Mail* (31 January 1923) 9; MacMurchy, *supra* note 10 at 844; MJ Gorman to WF Nickle (16 February 1924), AO, RG4-32, file 688: AGO Legislation—Amendment of the law as to contributory negligence.

Chief Justice of Ontario, William Meredith, (who had earlier expressed reservations about altering the contributory negligence rule) also suggested to the attorney general that the bench and bar should consider the proposal in more detail, and the bill was withdrawn. The attorney general then obtained the opinions of the justices of the Supreme Court of Canada. With the exception of Justice John Idington, who expressed no opinion, all supported legislation that would apportion damages.<sup>60</sup>

In 1924, Attorney General Nickle introduced a government bill to amend the contributory negligence doctrine.<sup>61</sup> While Nickle privately called the proposed change a “revolutionary measure in relation to our jurisprudence,” the bill received a tepid reception in the assembly.<sup>62</sup> Lawyer W.E. Raney approved the measure, though he called the approach a “mathematic distribution” and wondered if the results for parties would improve.<sup>63</sup> Liberal leader and lawyer W.E.N. Sinclair said that if anything could be done to simplify negligence actions, then he would welcome the bill. He feared, however, that it might induce “a little gambling in negligence legislation.”<sup>64</sup> The act provided that the jury, or judge, if the action was tried without a jury, had to find first the entire amount of damages to which the plaintiff would have been entitled if there was no contributory negligence, and then the degree to which each party was at fault, with the result that the plaintiff could receive only that proportion of the damages. If the judge or jury could not determine the respective degree of damages, then liability for one-half of the damages fell on the defendant.<sup>65</sup>

The Ontario bill generally received a warm reception in the legal community. The *Fortnightly Law Journal* offered a minority critical view, suggesting that the government effort to make the law more equitable might result in further unfairness to particular plaintiffs.<sup>66</sup> Justice Thibaudeau Rinfret of the Supreme Court of Canada, on the other hand, remarked that Anglin J.’s “truly remarkable” appeal for reform to the contributory negligence doctrine was “beginning to be heard,” and he hoped that

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60. “Sir William Wants New Act Restricted,” *Edmonton Bulletin* (12 January 1913) 5; Arthur A Macdonald, “Ontario Bar Association” (1923) 1:4 *Can Bar Rev* 351 at 351-352; MacMurchy, *supra* note 10 at 862; Anglin J to RL Brackin (10 March 1923), AO, RG4-32, file 688: AGO Legislation—Amendment of the law as to contributory negligence.

61. “Canadian Bar Review” (1924) 2 *Can Bar Rev* 203 at 206.

62. WF Nickle to MJ Gorman (18 February 1924), AO, RG4-32, file 688: AGO Legislation—Amendment of the law as to contributory negligence.

63. Raney, “Iron Ore Industry to be Encouraged,” *Globe* (26 February 1924) 10.

64. *Ibid.*

65. *The Contributory Negligence Act*, SO 1924, c 32.

66. “Apportionment of Contributory Negligence Damages” (1932) 2 *Fort LJ* 18; “Contributory Negligence Complicating the Situation” (1934) 3 *Fort LJ* 242.

other provinces would soon follow Ontario's example.<sup>67</sup> Judge E.C. Huyeke, president of the Ontario Judges Association, called the new act "satisfactory and an improvement on the old system" for it was "certainly less confusing to the minds of the laity and those of the bench and bar as well."<sup>68</sup> The *Canadian Bar Review* welcomed the legislation, noting that the "harshness and injustice of the common law rule" had "frequently been commented upon and a preference for the more equitable rule of the civil law expressed." The journal did, however, wonder how the courts would apply the act. In particular, it "might be anticipated that difficulty would be found in measuring the respective degrees of fault," but, the journal believed, it "should prove quite as practicable in common law as in admiralty courts or in jurisdictions where the civil law prevails."<sup>69</sup> The *Canadian Bar Review's* assessment would prove overly optimistic.

The Conference of Commissioners on Uniformity of Legislation in Canada independently considered a contributory negligence act at the same time that Ontario debated and passed a statute. In 1923, the Conference first began work on model legislation after the Canadian Bar Association recommended that the group tackle the subject. The Conference appointed the Ontario commissioners to prepare a draft bill: Francis King, John Falconbridge, and John C. Elliott, as well as Winnipeg corporate lawyer James Aikins. These members brought relevant expertise and an awareness of the desires of business. Elliott had sat in the Ontario legislature and would eventually join Prime Minister Mackenzie King's cabinet. Falconbridge served as Dean of Osgoode Hall Law School, but both his experience in practice and his academic interests were in business law. He worked as a partner in the law firm Cassels, Brock, Kelley & Falconbridge from 1905 to 1917. While practising, he published books on the law of banking and bills of exchange, mortgages, sale of goods, and negotiable instruments. Francis King, from Kingston, Ontario, specialized in admiralty law. He acted as counsel and spokesperson for Canadian ship owners on the Great Lakes and upper St. Lawrence River and worked as general counsel for the Dominion Marine Association. He had broad experience in admiralty questions in Canadian, American, and British courts and acted as arbitrator in many shipping cases. This was, therefore,

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67. Honourable Justice Thibaudeau Rinfret, "Reciprocal Influences of the French and English Laws" (1926) 4 Can Bar Rev 69 at 81.

68. "Judge Criticizes Acts Ontario Parole Board," *Toronto Daily Star* (21 May 1926) 1.

69. "Noteworthy Changes in Statute Law" (1925) 3 Can Bar Rev 57 at 67, 68.

a group well-suited to drawing from admiralty law and crafting a bill amenable to business.<sup>70</sup>

These commissioners expressed displeasure with the existing law. King, for instance, openly criticized the contributory negligence rule. King served as the president of the Ontario Bar Association, and, in a 1923 speech, he complained about the unfairness of the common law rule and the complex questions asked of jurors. He also noted the labyrinthine jurisprudence courts had developed in interpreting contributory negligence. Like other advocates of reform, he pointed to the civil law of Quebec and admiralty law as examples that could be drawn from in reforming the common law by statute. He sought to counter preemptively two potential criticisms of legislation altering the law of contributory negligence. He noted that some lawyers might object to “abandoning a good old common law doctrine which has been the subject of a tremendous amount of study and labour” and that “the jurisprudence on the subject would have to be scrapped.” Neither argument bothered King: “The first objection is so ultra conservative in its nature that it is not likely at present to invite popular acceptance; and the second, on a moment’s consideration, becomes an argument in favour of the change.”<sup>71</sup> King was thus ready for action.

In 1924, the Conference received the report of the Ontario members, debated and amended the proposed bill, and then recommended that provincial legislatures adopt the model statute.<sup>72</sup> The wording of the Conference’s bill differed somewhat from the Ontario legislation but sought the same ends.<sup>73</sup> The short (six-section) model act provided that, where two or more persons were involved in an incident, the loss assigned “shall be in proportion to the degree in which each person was at fault.” If, “having regard to all the circumstances of the case,” it was impossible to establish different degrees of fault, then damages would be divided evenly. The costs of an action would be divided in the same proportion as the liability for the loss or damage. Finally, the model act was to be

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70. *Proceedings of the Canadian Bar Association, 1923* at 427-428; *Proceedings of the Annual Meeting of the Conference of Commissioners on Uniformity of Legislation in Canada, 1923* at 17-18; Gibson, *supra* note 32; Greene, *supra* note 32 at 54, 270, 1049.

71. Francis King, “A Proposal for the Division of Loss in Contributory Negligence Cases,” in *Proceedings of the Annual Meeting of the Conference of Commissioners on Uniformity of Legislation in Canada, 1924* at 46. In 1923, King introduced a resolution at the Canadian Bar Association calling for the reform of contributory negligence: see, Francis King to WF Nickle (21 February 1924), AO, RG4-32, file 688: AGO Legislation—Amendment of the law as to contributory negligence.

72. *Proceedings of the Annual Meeting of the Conference of Commissioners on Uniformity of Legislation in Canada, 1924* at 11.

73. The committee explained that it preferred to follow closely the broad terms of the *Maritime Conventions Act*, since it had “been interpreted without difficulty and applied satisfactorily in admiralty actions ever since its enactment”: *ibid* at 34.

“so interpreted and construed as to effect its general purpose of making uniform the law of those provinces which enact it.”<sup>74</sup>

By 1926, three provinces adopted the model bill. British Columbia and New Brunswick enacted legislation in 1925 based on the Conference’s work. Nova Scotia first passed legislation modeled on the Ontario act in 1925 but repealed it the following year in favour of the model legislation of the Conference.<sup>75</sup> The other common law provinces, however, waited, and chose not to pass such legislation during the 1920s.

#### IV. *Judicial interpretation*

Legal scholars soon debated the scope of these acts, while courts did the same in applying them. A key issue became whether the acts applied in cases in which courts deemed the defendant (or plaintiff) to have been “ultimately” negligent—that is, where it was found that the plaintiff or defendant should be held liable because they had the last clear chance to avoid the accident.

An advocate of the legislation, M.J. Gorman, had suggested that legislation would “effect a revolution in our law,” but court decisions quickly limited the potential impact of the statutes.<sup>76</sup> In Ontario, this trend began with cases like *Walker v Forbes* in 1925.<sup>77</sup> In *Walker*, a streetcar stopped to discharge a passenger. The defendant truck driver drove over the passenger’s foot as he moved across a lane of traffic to reach the sidewalk. At trial, the Court asked the jury the traditional questions posed in contributory negligence cases designed to determine if there was contributory negligence on the part of the plaintiff that barred his recovery. The jury found each party fifty per cent at fault, so the plaintiff received half of his damages from the defendant. Justice William Renwick Riddell agreed that the case was an example of contributory negligence, but noted that the new statute would “not apply where there is ultimate negligence found in such a way as that before the statute the plaintiff would succeed.”<sup>78</sup>

74. “The Contributory Negligence Act,” *Proceedings of the Annual Meeting of the Conference of Commissioners on Uniformity of Legislation in Canada*, 1924 at 36.

75. *Contributory Negligence Act*, SBC 1925, c 8 [BC *Contributory Negligence Act*]; *The Contributory Negligence Act*, SNB 1925, c 41; *Contributory Negligence Act, 1925*, SNS 1925, c 5; *Contributory Negligence Act, 1926*, SNS 1926, c 3. The unwillingness of all provinces to adopt a model act was not unusual: see EE Palmer, “Federalism and Uniformity of Laws: The Canadian Experience” (1965) 30 *Law & Contemp Probs* 250.

76. MJ Gorman to FW Nickle (19 February 1924), AO, RG4-32, file 688: AGO Legislation—Amendment of the law as to contributory negligence.

77. *Walker v Forbes*, [1925] 2 DLR 725.

78. *Ibid* at 727; “Gets \$500 Award,” *Toronto Daily Star* (3 February 1925) 5; “Given \$500 Damages,” *Globe* (4 February 1925) 13. Riddell J came to the same conclusion in *Farber v Toronto Transportation Commission*, [1925] 2 DLR 729. See also *Mondor v Luchini*, [1925] 2 DLR 746.

Riddell J. thus suggested the continued existence of ultimate negligence out of his assumption that the legislature sought to ensure that plaintiffs could secure full judgments.

The Supreme Court of Canada tackled whether the doctrine of last clear chance survived the contributory negligence acts in *McLaughlin Estate v Long* in 1927, a case that originated in New Brunswick. The ten-year-old plaintiff rode on the running board of the defendant's bread delivery truck. The jury held the defendant liable after the plaintiff suffered an injury when the truck ran off the road, but also found the boy negligent for riding on the running board despite being asked by the defendant to get off. The New Brunswick Court of Appeal apportioned the damages, allowing 75 percent recovery. The Supreme Court of Canada, however, reversed the Court of Appeal's decision on the ground that the last clear chance doctrine had been insufficiently considered. In the Supreme Court's view, the defendant was ultimately negligent. There was "no evidence" on which the jury "could find that fault of the infant plaintiff was in the legal sense a cause of his injury."<sup>79</sup> It thus followed that the New Brunswick *Contributory Negligence Act* had no application to the case, and the Court awarded the plaintiff 100 percent of his damages. The Court was perhaps motivated by a desire to assist the family of an injured boy, but in doing so, the Court limited the applicability of the contributory negligence statutes in cases in which one party could be deemed ultimately negligent. There was some irony in the result, as law professor Malcolm MacIntyre concluded some years later: the *McLaughlin* decision "delivered by the same court which had assisted in inspiring the legislatures to enact the statutes" had, "ironically enough, deprived them of much of their usefulness."<sup>80</sup>

Contemporary commentators reached the same conclusion. Dean Falconbridge argued that the Court had re-imposed the old common law principle of last clear chance and thus limited the impact of the statutes. He asked whether it was "not desirable that the search for ultimate negligence or the last clear chance to avoid the accident should be, as far as possible, rendered unnecessary?" "Unless some such result is achieved," he

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79. *McLaughlin Estate v Long*, [1927] SCR 303 at 311.

80. MM MacIntyre, "Last Clear Chance after Thirty Years Under the Apportionment Statutes" (1955) 33 Can Bar Rev 257 at 263.



concluded, “we do not seem to be much better off than before.”<sup>81</sup> “This result seems unfortunate,” concluded John J. Robinette of Osgoode Hall Law School, since situations that previously fell under the ambit of ultimate negligence “demand an apportionment of the degrees of fault just as much as the situations where the negligence of the plaintiff and defendant is concurrent.” This was especially true in automobile accidents, for which “the attempt to establish against the parties and categorize negligence, contributory negligence and ultimate negligence seems artificial and destructive of the real purpose of the investigation as to who caused the accident.”<sup>82</sup>

In a 1935 address to the Canadian Bar Association, Vincent MacDonald of Dalhousie Law School also critiqued the judicial application of the contributory negligence legislation, and he proposed a solution as well. MacDonald was a key member of a small group of Canadian legal realist scholars, including Bora Laskin, Cecil Wright, and W.P.M. Kennedy, who in the 1930s sought to make the law meet the needs of modern society. Heavily influenced by American legal scholarship, these academics are best known for their work on Canadian constitutional and administrative law.<sup>83</sup> However, many also wrote and spoke extensively about the need

81. John D Falconbridge, “Desirable Changes in the Common Law” (1927) 5 Can Bar Rev 581 at 583. Falconbridge appealed directly to the Ontario attorney general for amendments to the Ontario *Negligence Act*: John D Falconbridge to attorney general of Ontario (21 January 1927), AO, RG4-32, file 720: AGO Legislation 1927—Contributory Negligence Act. See also Robert I Towers, “Contributory and Ultimate Negligence,” *Proceedings of the Canadian Bar Association, 1926* at 5; AC Heighington, “Negligence—Contributory and Ultimate—Contributory Negligence Act” (193) 8 Can Bar Rev 466.

82. John J Robinette, “Delictual Responsibility in the Common Law Provinces of Canada” (1933) 11 Can Bar Rev 88 at 91. Irving S Fairty advocated legislation granting courts “a larger latitude than at present in determining whether, where both parties have been negligent, natural equity demands that responsibility for the damages should be shared by the litigants.” Leaving cases to the courts to dispose of “on a common sense basis” could not “possibly work more injustice than does the present system, and it at least would eliminate the semi-farcical spectacle of the bench and bar attempting to guide a jury through the mazes of the law of ultimate negligence”: IS Fairty, “Negligence—Contributory Negligence Act—Appointment of Damages” (1931) 9 Can Bar Rev 52 at 54, 55 [Fairty, “Negligence”]. Fairty contacted the Ontario government directly to appeal for a legislative amendment, see Irving S Fairty to attorney general of Ontario (5 May 1926), AO, RG4-32, file 1961: Attorney General Registry Criminal and Civil Files. Also see JA Weir, “Davies v Mann and Contributory Negligence Statutes” (1931) 9 Can Bar Rev 470. In his book devoted entirely to the judicial interpretation of the contributory negligence acts, British Columbia lawyer Cyril Francis Davie concluded in 1936 that the legislation had “not brought about that simplification of the law of contributory negligence which had been anticipated, and that we find unmistakable evidence of great confusion in uniformly administering the altered law”: Cyril Francis Davie, *Common Law and Statutory Amendment in Relation to Contributory Negligence in Canada* (Toronto: Carswell, 1936) at 1.

83. Richard Risk, “Canadian Law Teachers in the 1930s: ‘When the World was Turned Upside Down’” (2004) 27 Dal LJ 1; RCB Risk, “The Many Minds of WPM Kennedy” (1998) 48 UTLJ 353; R Blake Brown, “The Canadian Legal Realists and Administrative Law Scholarship, 1930–1941” (2000) 9 Dal J Leg Stud 36.

to improve Canadian private law. In considering negligence, MacDonald told the association that the “basic concepts of the law” had “originated at times when the social and economic conditions which gave them birth were vastly different.” In his view, the law must “adapt for the common good.” The judicial interpretation of provincial contributory negligence legislation troubled MacDonald. He believed that the acts had worked within the restricted areas to which they had been confined—by allowing the plaintiff some recovery, the acts “have justified themselves.” He noted the existence of calls to abolish contributory negligence but urged caution. In his view, courts should retain the common law rule barring recovery in cases of ultimate negligence. He defended the last clear chance rule on the ground of policy. In his view, the doctrine of ultimate negligence was “intrinsicly just and convenient in its results, for it merely means that he who *caused* the injury should pay for or bear it.” However, he hoped that the courts would adopt a less technical approach, and, in doing so, apply the acts to more cases. He damned courts for detailing events in such detail that “*in practice* many cases in which the negligent acts were substantially contemporaneous were treated as if they were cases of ultimate negligence.”<sup>84</sup> MacDonald thus encouraged courts to extend the benefits of contributory negligence acts to more litigants by abandoning efforts to find evidence of ultimate negligence in all cases. Doing so would avoid tossing out common law principles *and* allow for a more accurate application of statute law.

Other Canadian scholars disagreed with MacDonald’s solutions. In 1938, tort law expert Cecil Wright argued that the doctrine of ultimate negligence and last clear chance should be abolished: “Ultimate negligence served its purpose of allowing a rough comparison of blame at a time when the common law denied the existence of apportionment. We profoundly wish that, like other wholesome but obsolete fictions, it may rest in peace,—but we feel quite sure that it will do no such thing.”<sup>85</sup> The comment was typical Wright, who revelled in bombast but provided

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84. Vincent C MacDonald, “The Negligence Action and the Legislature” (1935) 13 Can Bar Rev 535 at 535, 536, 559, 561 (emphases in original). Also see Vincent C MacDonald, “Review of Cyril Francis Davie, *Common Law and Statutory Amendment in Relation to Contributory Negligence in Canada*” (1936) 14 Can Bar Rev 368; Vincent C MacDonald, “Review of Charles O Gregory, *Legislative Loss Distribution in Negligence Actions. A Study in Administrative Aspects of Comparative Negligence and Contribution in Tort Litigation*” (1936) 14 Can Bar Rev 780.

85. CAW, “Negligence—Causation—Ultimate Negligence” (1938) 16 Can Bar Rev 137 at 143. Wright consistently critiqued the judicial use of last clear chance. See CAW, “Negligence—Children’s Contributory Negligence—Foreseeability by Dependant—Duty of Care or Apportionment” (1945) 23 Can Bar Rev 162.

few solutions to thorny legal issues.<sup>86</sup> Nevertheless, the idea of getting rid of contributory negligence continued to have proponents. Malcolm MacIntyre of the University of Alberta complained in 1940 that “decisions superimposing last clear chance upon these statutes” added “injustice as well as complexity to an already confused *corpus juris*,” “[e]very vestige of last clear chance must be swept away in favour of apportionment.”<sup>87</sup>

#### V. *Statutory amendments*

In the efforts to reform the law further, the more conservative approach of Vincent Macdonald proved more persuasive. The judicial interpretation of the original contributory negligence legislation led the Canadian Bar Association and the Conference of Commissioners on Uniformity of Legislation to call for amendments to the model statute. In 1928, the Committee on Contributory Negligence of the Conference considered whether its model act should be amended to make the principle applicable to more situations. The committee consisted of the same representatives that had drafted the first model bill: King, Aikins, Falconbridge, and Elliott, as well as Arthur W. Rogers, a young lawyer who worked as a solicitor in the office of the attorney general of Ontario.<sup>88</sup> The key question became whether “the legislation could or should take a form which would effectively render unnecessary the search for ultimate negligence.” The committee, however, concluded with regret that new legislation would prove ineffective. It was “not reasonably possible to define in terms of general application the point at which negligence prior to the accident passes from the category of extraneous and irrelevant events into the list of things which may fairly be considered to have contributed to the result so as to entail a share of liability.” The committee felt that the “retention of these safeguards against liability would seem to be in accord with abstract justice as well as with the whole trend of the law of negligence.”<sup>89</sup> The Committee members thus failed to craft a solution.

The commissioners soon considered the contributory negligence act again. In 1929, the attorney general of Ontario introduced the 1924 model act in the provincial legislature to replace the Ontario legislation. Members of the Ontario Bar, however, suggested amendments. Since only three

86. R Blake Brown, “Cecil A Wright and the Foundations of Canadian Tort Law Scholarship” (2001) 64 Sask L Rev 169.

87. Malcolm M MacIntyre, “The Rationale of Last Clear Chance” (1940) 18 Can Bar Rev 665 at 689, 690.

88. Greene, *supra* note 32 at 1678.

89. Francis King, “Report of the Committee on the Contributory Negligence Act,” *Proceedings of the Annual Meeting of the Conference of Commissioners on Uniformity of Legislation in Canada, 1928* at 90, 92. Also see Fairty, “Negligence,” *supra* note 82 at 54.

provinces had adopted the model act, the commissioners decided to revisit the topic in light of the various proposed Ontario amendments. Ontario, however, acted before the commissioners completed their work, passing a new *Negligence Act* in 1930. The revised act allowed for a person not already a party to an action who might have been responsible to be added as a defendant. It also dictated that, where two or more persons were liable to another person suffering loss or damage, they would be jointly and severally liable to the plaintiff.<sup>90</sup>

Debate on more substantial changes to the contributory negligence rule continued. In 1931, the Conference of Commissioners on Uniformity of Legislation asked the Committee of the Canadian Bar Association on Comparative Legislation and Law Reform to consider the contributory negligence issue.<sup>91</sup> In a 1932 report, the Canadian Bar Association committee proposed legislative language to discourage courts from employing the ultimate negligence doctrine to bar the use of the statutes. It offered for discussion a proposal that, when a party was found at fault, s/he “shall contribute to the payment of the damages, even if some other party or parties was or were guilty of ultimate negligence or had the last clear chance to avoid the act causing the loss or damage.”<sup>92</sup> After discussion and consultation, the committee expressed the opinion that there should be protection against a finding of sole liability based on ultimate negligence. The committee nevertheless believed that ultimate negligence and the contributory negligence legislation could co-exist. In 1933, the committee produced a model statute apportioning damages in actions arising out of motor vehicle accidents; it provided that “the finding that one or more of the parties in an action might, by the exercise of care, have avoided the consequences of the negligence of another party, or of other parties, shall... be material only in fixing the respective contributions of the persons found negligent.”<sup>93</sup>

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90. *Proceedings of the Annual Meeting of the Conference of Commissioners on Uniformity of Legislation in Canada, 1929* at 21; *Proceedings of the Annual Meeting of the Conference of Commissioners on Uniformity of Legislation in Canada, 1930* at 17-18; *The Negligence Act, 1930*, SO 1930, c 27; “Changes in Canadian Statute Law” (1930) 8 *Can Bar Rev* 652 at 657-658. Also see *The Negligence Act, 1931*, SO 1931, c 26. The attorney general of Ontario later invited Riddell J to draft a bill that would abrogate the last clear chance doctrine, although the government never introduced the bill into the provincial assembly: *Falsetto v Brown*, [1933] OR 645; MacIntyre, *supra* note 80 at 274.

91. “Topics of the Month” (1931) 9 *Can Bar Rev* 366 at 366-367.

92. “Report of the Committee on Comparative Provincial Legislation and Law Reform,” *Minutes of Proceedings of the Annual Meeting of the Canadian Bar Association, 1932* (Toronto: Carswell, 1933) at 155.

93. “The Contributory Negligence Act,” *Proceedings of the Annual Meeting of the Conference of Commissioners on Uniformity of Legislation in Canada, 1933* at 32. Also see “Comparative Provincial Legislation and Law Reform” (1933) 11 *Can Bar Rev* 549 at 551.

The work of the Canadian Bar Association committee prompted the Conference to consider the issue again. The Conference tasked the Nova Scotia commissioners with evaluating the bar association's 1933 proposals.<sup>94</sup> Nova Scotia had two representatives: Frederick Mathers, the province's deputy attorney general, and, most importantly, Vincent MacDonald. The report reflected many of MacDonald's views. In discussing the Canadian Bar Association committee's draft report, MacDonald noted that the judicial limitation of the acts only to situations of "*concurrent negligence*" represented "a serious curtailment in their scope." MacDonald, however, continued to hope that altering the legislation slightly would lead to a broader application of the contribution system. Unlike the bar association committee, which suggested making ultimate negligence only relevant in fixing the respective contributions of the persons found negligent, MacDonald opposed abolishing the doctrine of ultimate negligence. Instead, he cited the House of Lords' decision in the 1922 *Volute* case for the principle that "contributory negligence must be dealt with broadly and upon *common-sense principles*." He criticized Canadian courts for lacking common sense when they spent excessive energy finding evidence of ultimate negligence. The solution was to write the *Volute* approach into the statute such that "many cases of so-called ultimate negligence will hereafter be deemed substantially contemporaneous, and thereby the scope of the Act enlarged so as to afford relief to many more plaintiffs."<sup>95</sup> The Nova Scotia commissioners thus proposed two versions of an amendment, each of which would largely accomplish the same goal. The provisions dictated that judges should not submit questions of ultimate negligence to juries unless the judge believed the jury could reasonably find that the act or omission was perceptibly subsequent to the other act or omission. The Conference decided that if the representatives of at least two provinces objected to the draft bill then the commissioners would not recommend the adoption of this proposal. British Columbia and Ontario objected. The commissioners compromised in 1935 by resolving that one section of the model statute (s 5) be printed with an explanatory note indicating that the Conference believed the section enunciated the law in *Volute*. Provinces

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94. *Proceedings of the Annual Meeting of the Conference of Commissioners on Uniformity of Legislation in Canada, 1932* at 19; *Proceedings of the Annual Meeting of the Conference of Commissioners on Uniformity of Legislation in Canada, 1934* at 17.

95. *Proceedings of the Annual Meeting of the Conference of Commissioners on Uniformity of Legislation in Canada, 1934* at 53, 54, 57, 59 (emphases in original); *Admiralty Commissioners v SS Volute*, [1922] 1 AC 129.

could consider the advisability of including that section in their act.<sup>96</sup> The Conference thus hoped to encourage courts to expand the purview of the contributory negligence acts.

Several more provinces subsequently adopted contributory negligence legislation. After some debate, Alberta passed a copy of the revised model act in 1937, as did Prince Edward Island in 1938 and Manitoba in 1939.<sup>97</sup> Saskatchewan eventually followed suit as well; the provincial legislature delayed passing an act after members of the legal profession asked the government to wait and see how successfully the legislation worked in other provinces. In 1943, the province's bar association passed a resolution calling for an act, and Saskatchewan adopted a contributory negligence statute based on the Ontario legislation the following year.<sup>98</sup>

Some Canadian courts began to extend the reach of the contributory negligence statutes. For example, in 1941 the Ontario Court of Appeal in *Gives v CNR* decided against putting the question of ultimate negligence to juries. In this case, a train in London struck a car, killing a man and his son. They were passengers in a vehicle owned and driven by the man's brother,

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96. *Proceedings of the Annual Meeting of the Conference of Commissioners on Uniformity of Legislation in Canada, 1934* at 19; *Proceedings of the Annual Meeting of the Conference of Commissioners on Uniformity of Legislation in Canada, 1935* at 14-15. The final proposed section provided that:

The Judge shall not submit to the jury any question as to whether notwithstanding the fault of one party, the other could have avoided the consequences thereof unless in his opinion there is evidence upon which the jury could reasonably find that the act or omission of the latter was clearly subsequent to and severable from the act or omission of the former so as not to be substantially contemporaneous with it (*ibid* at 31).

97. *The Contributory Negligence Act, SA 1937*, c 18; *The Contributory Negligence Act, SPEI 1938*, c 5; *The Tortfeasors and Contributory Negligence Act, SM 1939*, c 75; Sydney Wood, "Tendencies in Tort" (1934-1936) 1 *Alta LQ* 133 at 133-134; R Andrew Smith, "The Change in the Common Law Effected by the Contributory Negligence Act of Alberta" (1938-1939) 3 *Alta LQ* 189; MM MacIntyre, "Report to the Canadian Bar Association of the Committee on Noteworthy Changes in Statute Law, Presented September 1, 1944" (1943-1945) 57 *Alta LQ* 210.

98. "Synopsis of Proceedings" (1936) 1 *Sask Bar Rev & L Soc Gaz* 66 at 68-69; "Annual Convention—Resolutions" (1943) 8 *Sask Bar Rev & L Soc Gaz* 69 at 72; *The Contributory Negligence Act, 1944*, SS 1944, c 23. Newfoundland had a contributory negligence statute after joining Canada in 1949: *The Contributory Negligence Act, 1951*, SN 1951, c 48. Other provinces amended their contributory negligence laws. British Columbia, for example, more clearly laid out how damages should be awarded. Whereas the 1925 British Columbia act simply provided that a jury would determine degrees of fault, the new act created a step by step process, entailing (1) the determination of damage sustained by each party in dollar terms, and (2) the degree to which each person was at fault expressed in percentage terms: *Contributory Negligence Act, SBC 1936*, c 12, s 3. Ontario would again act on its own in 1935, dictating that passengers injured in motor vehicle accidents could not get damages from the driver or owner of the motor vehicle, although the portion of the loss caused by the owner or driver should be determined so that the other driver would only be required to compensate the injured passenger for their portion of the damages. Ontario also prevented spouses of negligent persons from recovering the portion of the damages caused by the negligence of their spouse: *The Negligence Amendment Act, 1935*, SO 1935, c 46; "The Passenger Hazard," *Toronto Daily Star* (3 April 1935) 7.

who was uninjured. The jury found the train company twenty percent at fault and the car's owner eighty percent responsible. The trial judge asked the jury if either party could have avoided the accident, thus raising the issue of ultimate negligence. Chief Justice Robert Robertson upheld the verdict but held that "no purpose can be served" by "submitting any further question as to 'ultimate' negligence." Justice Cornelius Arthur Masten also dismissed the appeal and asserted that he was "unable to appreciate that the doctrine of ultimate negligence has survived the provisions of The Negligence Act."<sup>99</sup> The decision pleased Cecil Wright. "After a long struggle," he wrote, "Ontario has, for all practical purposes, decided that an issue of ultimate negligence is not required to be put before a jury who find that the negligence of both plaintiff and defendant contributed to the damage and assess degrees of fault."<sup>100</sup>

While Wright deemed this jurisprudential trend as positive, other scholars lacked his certainty and began to question the effect of the apportionment legislation. Some wondered whether the legislation had in fact benefitted defendants as much, or more, than plaintiffs. As noted earlier, some critics of the contributory negligence doctrine had suggested that it prevented plaintiffs from receiving compensation. However, the new laws could also limit the potential liability of defendants, especially big businesses. The 1930 *Morgan v The British Columbia Electric Railway Co.* case exemplified this tendency. In *Morgan*, the plaintiff, in breach of a municipal by-law, parked his truck on a street railway line on a dark night to make it easier to unload his vehicle. A streetcar operator, not keeping an adequate lookout, subsequently struck the truck. The trial court concluded that the motorman could have avoided the accident if he had kept a good lookout. The trial judge found both parties negligent and awarded the plaintiff four-fifths of his damages using the British Columbia *Contributory Negligence Act*.<sup>101</sup> The last clear chance doctrine traditionally would have allowed the courts to obviate the contributory negligence rule and find the street railway wholly responsible. The British Columbia Court of Appeal reversed the relative responsibility for the damages (making the plaintiff eighty per cent and the defendant twenty percent respectively responsible), and Justice Archer Martin expressed his wish that the truck owner be wholly responsible for the accident. He

99. *Gives v Canadian National Railway*, [1941] 4 DLR 625.

100. Cecil A Wright, "The Law of Torts: 1923-1947" (1948) 26 Can Bar Rev 46 at 71. But on the other hand, see *Towne v British Columbia Electric Railway*, [1943] 3 DLR 572, where the British Columbia Court of Appeal used the older approach. See "Negligence—Ultimate Negligence and Apportionment Statutes" (1943) 21 Can Bar Rev 663.

101. BC *Contributory Negligence Act*, *supra* note 75.

couched this preference in policy terms: “The street railway company must keep to its schedule or the people will not be able to keep their appointments or get to their work.”<sup>102</sup> The result befuddled an author in the *Alberta Law Quarterly*, who noted that the contributory negligence acts had helped the company at the expense of the plaintiff, even though it “would appear that the plaintiff ought to have recovered all the damages he suffered, however reprehensible and inconsiderate we may consider his conduct to have been.”<sup>103</sup> The *Canadian Bar Review* later noted that courts had begun to apportion losses in instances of strict liability and intentional wrongdoing, such that “apportionment legislation will be of benefit not only to a negligent plaintiff but also to a defendant.”<sup>104</sup> By 1954, Cecil Wright, in the first edition of his *Cases on the Law of Torts*, commented that apportionment statutes, by spreading out responsibility for motor vehicle accidents, may have reduced the total sum of liabilities payable by insurance companies.<sup>105</sup> If these commentators were correct, the advocates of reforming contributory negligence to assist business had achieved their desired goal.

### *Conclusion*

The contributory negligence doctrine made no one happy in the early twentieth century. Practising lawyers and judges found it uncertain and complicated. Many legal academics damned it as outdated and out of step with modern society. Business felt it failed to protect them from lawsuits by careless plaintiffs. The injured, on the other hand, felt threatened that the law would completely bar recovery for their losses. Advocates of change found no easy solutions. The large body of existing case law, despite its complications, encouraged some lawyers and judges to fall back on older jurisprudence when interpreting the new acts. Legislators

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102. *Morgan v The British Columbia Electric Railway*, [1930] 4 DLR 300. Christopher Moore notes that Martin JA had a tendency to consider the efficient functioning of vital industries: Christopher Moore, *The British Columbia Court of Appeal: The First Hundred Years, 1910–2010* (Vancouver: UBC Press for the Osgoode Society, 2010) at 35. For other examples see “Claim Damages Excessive,” *Toronto Daily Star* (10 November 1926) 3.

103. JA Weir, “Davies v Mann and Contributory Negligence Statutes” (1943–1945) 5 *Alta LQ* 43 at 47.

104. RR Jordon, “Torts—Apportionment Acts—‘Fault’” (1945) 23 *Can Bar Rev* 519.

105. Cecil A Wright, *Cases on the Law of Torts* (Toronto: Butterworth, 1954) at 429.



and law reformers responded by increasing the length and complexity of the negligence acts, thus undermining the goal of simplifying the law.<sup>106</sup>

Thirty years after Ontario passed the first piece of contributory negligence legislation, law professor Malcolm MacIntyre argued that the acts had failed to achieve their aim. “Unfortunately,” he concluded, the legislation “was done quickly,” and “nobody had made any clear analysis of the whole problem; and nobody wondered whether or not the last-chance doctrine should be abolished.” As a result, the “courts have spent the intervening years making an unbelievably confused and contradictory mess out of the words of the statute.”<sup>107</sup> By the mid-1950s, Cecil Wright also abandoned his earlier optimism. He critiqued “the tenacity with which older concepts have survived modern legislation, and the seeming inability of courts to bring order out of chaos.” In thinking about what to do next, Wright noted that the changing social context might require a more innovative system. In 1914, accidents involving railways and streetcars remained front and centre in tort law and scholarship. By the Second World War, however, the automobile accident became the “typical” topic of analysis. This shift had consequences. While railway cases often saw average men and women in conflict with large corporations, automobile accidents usually involved people of more modest means meeting in court. The issues of economic development and the inequality between parties disappeared. Instead, the question became how to fairly and quickly provide compensation for the many people injured in automobile accidents each year. Wright thus pondered “whether the time has not come for replacing our whole elaborate structure of compensation for victims of automobile accidents by an insurance scheme apart from fault, contributory or otherwise.”<sup>108</sup>

While legal scholars downplayed the concrete effect of the contributory negligence legislation, the debate over legislative change is historically significant for three reasons. First, law reform advocates proved remarkably weak at analyzing the potential impacts of their proposals. While members of the legal profession sensed inequitable results, they lacked the social science tools to analyze the actual problem or to gauge how their proposed solutions would affect cases on the ground. Law reform advocates, for

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106. Despite legislation removing contributory negligence as a bar to recovery, contributory negligence remained operative in some specific situations. In 1997, the Supreme Court of Canada decided that the last vestiges of contributory negligence should be removed from maritime law. Chief Justice Beverley McLachlin noted that tort law “no longer accepts the traditional theory underpinning the contributory negligence bar,” and that the “contributory negligence bar results in manifest unfairness”: *Bow Valley Husky (Bermuda) Ltd v Saint John Shipbuilding Ltd*, [1997] 3 SCR 1210 at para 94.

107. MacIntyre, *supra* note 80 at 260.

108. Wright, *supra* note 105 at 428, 429.

example, seemed surprised that the courts would continue to find ultimate negligence. Canadian lawyers in the first half of the twentieth century were only capable of considering doctrine, yet they somehow felt confident in their ability to propose law amendments that would positively affect many Canadians.

Second, the willingness of several leading Canadian common law lawyers and judges to draw inspiration for legislative change from the *faute commune* doctrine of Quebec civil law is surprising. The interwar period was generally a time of heightened “solitudes” in Canada, such that lawyers and judges in English and French Canada saw little value in sampling the ideas of each other’s legal traditions.<sup>109</sup> However, the efforts of several prominent judges and lawyers to use French civil law to buttress their case against the continued use of an unreformed contributory negligence doctrine evidences the need for a mild correction to the traditional account.

Third, the work of the early Canadian Bar Association and the Conference of Commissioners on Uniformity of Legislation in Canada demonstrates the very close connections between the business community and the legal elite of Canada in the early twentieth century. Corporate lawyers sought to protect and promote the interests of their clients. For business, lawyers’ attempts at securing uniformity had obvious benefits. To most Canadians, lawyers appeared as impartial advocates of useful statutory reform. Corporate interests could thus seek change without creating the appearance of lobbying. Too often, Canadian business historians have ignored the role of law in furthering enterprise. The attempts to secure uniformity, including standardized changes to the contributory negligence doctrine, however, highlight the role of business in shaping Canadian law for its own benefit.

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109. David Howes, “From Polyjurality to Monojurality: The Transformation of Quebec Law, 1875–1929” (1987) 32 McGill LJ 523; J-G Castel, “Le juge Mignault défenseur de l’intégrité du droit civil québécois” (1975) 53 Can Bar Rev 544 at 544; James G Snell & Frederick Vaughan, *The Supreme Court of Canada: History of the Institution* (Toronto: The Osgoode Society, 1985) at 131-132.

