

## The Fatal Accidents Act 1846

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This chapter is a historical analysis of the Fatal Accidents Act 1846, which for the first time gave the relatives of a person who had been wrongfully killed a right to compensation from the wrongdoer. I argue that criticisms of the 1846 Act are largely groundless, and that giving the relatives of the deceased claims in tort was a pragmatic and rational response to the problem of wrongful death in the mid-nineteenth century. Furthermore, I argue that from the standpoint of legal analysis, the formula for recovery employed in the legislation was appropriate and effective, and that the legislation was a progressive measure, which had beneficial social effects. It is shown that the immediate catalyst for the legislation was the desire to protect the interests of the families of those who perished in mining accidents, and more generally it is argued that the passage of the Act was motivated by the humanitarian desire to reduce the incidence of fatal accidents and to make provision for those affected by them when they did occur. I conclude that the advent of the wrongful death action was an important and welcome development in the law of tort, which was appropriately brought about through legislative intervention.

**Keywords:** tort law; English legal history; wrongful death; occupational death; Fatal Accidents Act 1846; legislative reform

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### [131] I. INTRODUCTION

As Wex Malone observed in his classic article on wrongful death in American law, ‘The effect to be given the death of a person connected with a tort rests almost entirely upon statutory foundations’.<sup>1</sup> This statement holds as true in the English context as in the American, and no survey of the relationship between tort law and the legislature would be complete without an analysis of the most important of those statutory foundations, the Fatal Accidents Act 1846, which for the first time gave the relatives of a person wrongfully killed a right to compensation from the wrongdoer.

For an apparently enlightened piece of legislation, the core elements of which have survived into the modern era, the 1846 Act has had a surprisingly bad press in recent times. In his survey of the history of the Act, for example, Richard Kidner described it as lacking principle, and ‘the product of muddle and archaic common law defects’.<sup>2</sup> The proposals were ‘not fully thought through at the time’, the ‘complexities of compensation for fatal accidents were not properly understood’, and the proposers of the legislation were ‘confused in their objectives’.<sup>3</sup> Many of the difficulties surrounding compensation for wrongful death today were attributable, he claimed, to this ‘lack of

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<sup>1</sup> W Malone, ‘The Genesis of Wrongful Death’ (1965) 17 *Stanford Law Review* 1043, 1044.

<sup>2</sup> R Kidner, ‘A History of the Fatal Accidents Acts’ (1999) 50 *Northern Ireland Legal Quarterly* 318, 334.

<sup>3</sup> *ibid*, 318.

underlying principle'.<sup>4</sup> Nor is Kidner alone in criticising the legislation. Stephen Waddams has argued that it is preferable for wrongful death claims to lie, not with the survivors of the deceased, but with the estate, and hence that the regime of survivor recovery established by the 1846 Act has 'outlived its usefulness'.<sup>5</sup>

Even the assumption that the Act was a progressive measure has come under challenge from legal historians who have argued that the combined effect of the Fatal Accidents Act and the Act which was passed in tandem with it abolishing deodands (fines imposed by coroners' juries on the owners of chattels which had caused death) was to set back the interests of many of the relatives of fatal accident victims. According to Harry Smith, the Fatal Accidents Act 'promised much but often gave nothing',<sup>6</sup> and Elisabeth Cawthon has argued that the Act allowed suits [132] for wrongful death 'on grounds so narrow as to preclude most working-class victims',<sup>7</sup> and that the combined effect of the 1846 legislation was harmful to the interests of most occupational accident victims<sup>8</sup> and contributed to a process whereby the 'English state' abrogated responsibility for employees' accident compensation.<sup>9</sup> At best, she concludes, the two Acts were 'legalistic in form and narrow in application':

At worst, they were an ill-disguised attempt to placate railway interests in Parliament and to kick the teeth out of the one type of legal forum which had shown any sustained sympathy for the victims of occupational accidents—the coroner's inquest.<sup>10</sup>

Both Smith and Cawthon go as far as to imply that the two pieces of legislation were pushed by the 'railway interest', Cawthon claiming that its influence was 'quite apparent' in the passage of the Deodands Abolition Act<sup>11</sup> and that the two Acts 'made the financing of enterprises involving steam power a much more predictable (and profitable) proposition',<sup>12</sup> and Smith that there is little doubt that the abolition of deodands 'came as a result of fear that really heavy losses would be sustained by the railway companies if the system continued'.<sup>13</sup>

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<sup>4</sup> *ibid*, 334.

<sup>5</sup> SM Waddams, 'Damages for Wrongful Death: Has Lord Campbell's Act Outlived its Usefulness?' (1984) 47 *MLR* 437.

<sup>6</sup> H Smith, 'From Deodand to Dependency' (1967) 11 *The American Journal of Legal History* 389, 401.

<sup>7</sup> E Cawthon, 'Thomas Wakley and the Medical Coronership: Occupational Death and the Judicial Process' (1986) 30 *Medical History* 191, 201. See also E Cawthon, 'New Life for the Deodand: Coroners' Inquests and Occupational Deaths in England, 1830-46' (1989) 33 *The American Journal of Legal History* 137, 147fn ('extremely narrow grounds'); EA Cawthon, *Job Accidents and the Law in England's Early Railway Age: Origins of Employer Liability and Workmen's Compensation* (Lewiston, The Edwin Mellen Press, 1997) 149 (the 'narrowest possible grounds'). It is not clear why Cawthon considers the grounds to be narrow.

<sup>8</sup> Cawthon, *Job Accidents and the Law* (above n 7) 151.

<sup>9</sup> *ibid*, 4.

<sup>10</sup> *ibid*, 153.

<sup>11</sup> Cawthon, 'New Life for the Deodand' (above n 7) 147.

<sup>12</sup> Cawthon, 'Thomas Wakley' (above n 7) 202.

<sup>13</sup> Smith (above n 6) 396.

The criticisms levelled at the legislation by PWJ Bartrip and SB Burman in their study of nineteenth-century workers' compensation law and policy are more measured, but still hard-hitting.<sup>14</sup> While they accept, for example, that the Fatal Accidents Act was 'the first important step in the story of the legislative amendments to the common law that benefited injured workers and their dependants', they claim that this was not the motivation of the Act,<sup>15</sup> which they describe as 'relatively ineffective'<sup>16</sup> and as of 'little use to the bulk of the working population'.<sup>17</sup>

I hope to show that these criticisms of the 1846 Act are largely groundless, and that giving the relatives of the deceased claims in tort was a pragmatic and rational response to the problem of wrongful death in the mid-nineteenth century. Furthermore, I will argue that from the standpoint of legal analysis, the formula for recovery employed in the legislation was appropriate and effective, and that the legislation was a progressive measure, which had beneficial social effects. Ironically, in the light of the criticism directed at the Act by legal historians concerned with the plight of occupational accident victims, it will be shown that the immediate catalyst for the legislation was the desire to protect the interests of the families of those who perished in mining accidents, and more generally it will be argued that the passage of the Act was motivated by the humanitarian desire to reduce the incidence of [133] fatal accidents and to make provision for those affected by them when they did occur. It will be concluded that the advent of the wrongful death action was an important and welcome development in the law of torts which was appropriately brought about through legislative intervention.

## II. THE LEGAL BACKGROUND

Any analysis of the 1846 Act must begin with the general legal background to the legislation. As this is ground which has been raked over many times before, the treatment will be fairly brief. The common law position on wrongful death was (and still is) encapsulated in two rules. The first was that in general tort actions did not survive the death of either party, so that in a case of wrongful death no action could be brought by the estate of the deceased. And the second was that the death of a person did not give rise to a claim by or on behalf of those detrimentally affected by the death. The former principle, often expressed by means of the maxim *actio personalis moritur cum persona*, has 'roots deep in the early history of English law',<sup>18</sup> but the latter was formally acknowledged only in *Baker v Bolton*, a case heard at nisi prius in 1808, and reported by a young barrister called John Campbell, who as Lord Campbell was to lay the Fatal

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<sup>14</sup> PWJ Bartrip and SB Burman, *The Wounded Soldiers of Industry: Industrial Compensation Policy 1833-1897* (Oxford, Clarendon Press, 1983).

<sup>15</sup> *ibid*, 97.

<sup>16</sup> *ibid*, 103.

<sup>17</sup> *ibid*, 116.

<sup>18</sup> Malone (above n 1) 1044.

Accidents Bill before Parliament thirty-eight years later.<sup>19</sup> Faced with a claim by a publican for loss of services arising out of the death of his wife following a stagecoach accident, Lord Ellenborough responded tersely that in a civil court ‘the death of a human being could not be complained of as an injury’.<sup>20</sup>

The origins of the two rules have been extensively explored elsewhere,<sup>21</sup> but it is perhaps worth highlighting the most important apparent historical underpinning of the rule in *Baker v Bolton*, which is that in the old common law all homicides were treated as felonies. According to Holdsworth, the rule in *Baker v Bolton* arose out of a misunderstanding of the principle that where a wrongful act amounted to a felony, the right of action in tort was suspended until the felony had been prosecuted.<sup>22</sup> And the fact that homicide was a felony may also explain why it took so long for the issue of civil liability for wrongful death to come before the courts. For it meant that on a practical level there would often have been little point in bringing a civil action in wrongful death cases, since the property of a felon was forfeited to the Crown,<sup>23</sup> although it seems that the practice of forfeiture was not consistent in the case of accidental death, and may have been avoided by directing a not guilty verdict or not bringing an arraignment in the first place.<sup>24</sup> Furthermore, in wrongful death [134] cases the family of the deceased may have been able to extract a money payment from the accused as the price of not instituting an appeal of felony, a procedure (aptly described as ‘a formalised relic of the feud’<sup>25</sup>) which co-existed with the process of criminal indictment, and which was not foreclosed by trial and even acquittal of the accused, nor by a pardon.<sup>26</sup> The appeal of homicide was only abolished in 1819,<sup>27</sup> although it seems to have fallen into general disuse well before then, and it had probably passed its peak as a means of obtaining compensation by the late sixteenth century.<sup>28</sup>

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<sup>19</sup> *Baker v Bolton* (1808) 1 Camp 493, 170 ER 1033.

<sup>20</sup> *ibid*, 493, 1033. See also *Higgins v Butcher* (1607) Yelv 89, 80 ER 61, where it was held that a husband could not recover for loss of services after his wife died following an assault. It is noteworthy that in both the US and England all the reported early wrongful death suits were for loss of services: JF Witt, ‘From Loss of Services to Loss of Support: The Wrongful Death Statutes, the Origins of Modern Tort Law, and the Making of the Nineteenth-Century Family’ (2000) 25 *Law and Social Inquiry* 717, 732.

<sup>21</sup> See *The Amerika* [1917] AC 38 (HL); WS Holdsworth, ‘The Origin of the Rule in *Baker v Bolton*’ (1916) 32 LQR 431; PH Winfield, ‘Death as Affecting Liability in Tort’ (1929) 29 *Columbia Law Review* 239; TA Smedley, ‘Wrongful Death: Bases of the Common Law Rules’ (1960) 13 *Vanderbilt Law Review* 605; Malone (above n 1).

<sup>22</sup> Holdsworth (above n 21). See also Smedley (above n 21) 611-13.

<sup>23</sup> See 4 Bl Comm 6 (‘as the public crime is not otherwise avenged than by forfeiture of life and property, it is impossible afterwards to make any reparation for the private wrong’). See also *McKendrick v Sinclair* [1972] SLT 110 (HL) 115 (Lord Simon).

<sup>24</sup> JH Baker, *An Introduction to English Legal History*, 4th edn (London, Butterworths LexisNexis, 2002) 529.

<sup>25</sup> SFC Milsom, *Historical Foundations of the Common Law* (London, Butterworths, 1969) 356.

<sup>26</sup> See *The Amerika* [1917] AC 38 (HL) 58-60 (Lord Sumner) (‘long a form of legalized blackmail’); Holdsworth (above n 21) 435; Malone (above n 1) 1055-56.

<sup>27</sup> An Act to Abolish Appeals of Murder (59 Geo 3, c 46).

<sup>28</sup> See Baker (above n 24) 504; DR Ernst, ‘The Moribund Appeal of Death: Compensating Survivors and Controlling Jurors in Early Modern England’ (1984) 28 *American Journal of Legal History* 164, 169-77.

The position in some other jurisdictions should also be noted, as reference was made to it in the debates on the 1846 Act.<sup>29</sup> In Scots law, it was a long-established rule that the close relatives of a person who was wrongfully killed could obtain money from the wrongdoer under the doctrine of assythment.<sup>30</sup> This doctrine was limited to cases of criminal homicide,<sup>31</sup> however, and the payment of money was designed not only to compensate the relatives for the loss occasioned by the death, but also to buy off their vengeance (the word ‘assythment’ being connected to the verb ‘assuage’), so that it might vary according to the status of the deceased and the means of the killer.<sup>32</sup> By the late eighteenth century, the assythment doctrine began to look anachronistic, and it was gradually replaced by (or metamorphosed into) an action which gave reparation where the cause of death was merely culpable and not also criminal.<sup>33</sup> Importantly, both assythment and its successor encompassed not only the relatives’ pecuniary losses, but also an element of solatium for their grief and suffering. In the United States, some state courts had by the early nineteenth century recognised an action at common law for wrongful death;<sup>34</sup> legislative intervention predating the English statute was however limited to isolated penal provisions which exacted fines for the benefit of dependants on highway authorities, common carriers and the victors in duels.<sup>35</sup> Finally, although Roman law had resisted actions for the wrongful death of a freeman on the grounds that the value of his life could not be measured in money,<sup>36</sup> civilian systems came to allow such claims, although in German law a narrow approach was taken, which limited standing to those legally entitled to financial support from the deceased.<sup>37</sup>

### [135] III. THE SOCIETAL BACKGROUND

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<sup>29</sup> See, eg, HL Deb 24 April 1846, vol 85, col 968 (Lord Campbell); *ibid*, col 969 (Lord Brougham).

<sup>30</sup> See KM Norrie, ‘The Intentional Delicts’ in K Reid and R Zimmermann (eds), *A History of Private Law in Scotland* (Oxford, OUP, 2000) 484-88.

<sup>31</sup> See *Greenborn v Addie* (1855) 17 D 860, 866 (Lord Ivory).

<sup>32</sup> *McKendrick v Sinclair* [1972] SLT 110 (HL) 111 (Lord Reid)

<sup>33</sup> On this action for ‘death caused negligently’, see DM Walker, *The Law of Delict in Scotland*, 2nd edn (Edinburgh, W Green & Son, 1981) 718-26.

<sup>34</sup> See Malone (above n 1) 1066-67.

<sup>35</sup> See, eg, 1786-87 Mass Acts, ch 81, § 7, 250 (highway authorities); 1840 Mass Acts, ch 80, 224 (common carriers); 1838-39 Ky Acts, ch 1214, 166 (victors in duels). In the case of the Massachusetts enactments, the proceedings were criminal, and the penalties assessed by reference to the degree of the defendant’s fault. See further, WS Malone, ‘American Fatal Accident Statutes—Part I: The Legislative Birth Pains’ [1965] *Duke Law Journal* 673.

<sup>36</sup> R Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (Oxford, Clarendon Press, 1996) 1015. In the Parliamentary debates on the Fatal Accidents Bill, a similar rationale was given for the *Baker v Bolton* rule, namely that ‘the life of a man was so valuable that [the courts] could not put any estimate upon it’: HL Deb 24 April 1846, vol 85, col 968 (Lord Campbell). See also HL Deb 24 April 1846, vol 85, col 969 (Lord Brougham).

<sup>37</sup> *Bürgerliches Gesetzbuch*, §§ 844 II and 845.

The main drivers behind the birth of the statutory wrongful death action were social rather than legal. By the turn of the nineteenth century, accidental death had become 'a much more fertile source of dispute' than the 'violence and vendettas' which characterised earlier times.<sup>38</sup> The records of coroners' inquests in Westminster indicate that even allowing for population increases there was a nearly threefold increase in the frequency of accidental death between 1800 and 1840,<sup>39</sup> with the most common cause of these deaths being falls or injuries from falling objects, and the second most common cause traffic accidents.<sup>40</sup> The increasing incidence of accidental death in this period was of course accelerated by the advent of steam power, and it was steam which propelled the issue into the public consciousness, for from the late 1830s onwards fatal accidents on the railways and steamships attracted a level of press coverage and public concern apparently disproportionate to the number of passenger fatalities involved (on average just over 20 a year between 1843 and 1850<sup>41</sup>). A number of factors doubtless contributed to this phenomenon. One was the fact that multiple fatalities were more likely to result from a single incident on a railway or a steamship than had previously been the case with stagecoach accidents and the like. And a second was the relatively high mortality rate associated with accidents involving steam power—according to data on patients admitted to Guy's Hospital in London between 1854 and 1861, for example, nearly one-third of railway accident victims subsequently died, compared to just over seven per cent of accident victims as a whole.<sup>42</sup> (It should also be borne in mind that more generally the relatively poor standard of medical care in the early nineteenth century meant that a far higher proportion of accidents resulted in death than is the case today,<sup>43</sup> with many of the fatalities attributable to complications of simple fractures and minor wounds.<sup>44</sup>) A third factor, emphasised by RW Kostal, was that railway accidents 'befell members of all social and occupational classes':

Derailments, collisions, and explosions on railway trains killed and maimed enginemen and brakemen, pitmen and parliamentarians, barrel-makers and barristers, mill-workers and magnates, without discrimination. The classlessness of railway accidents lent them a special and grim fascination.<sup>45</sup>

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<sup>38</sup> Norrie (above n 30) 487.

<sup>39</sup> MW Greenwald and GI Greenwald, 'Coroners' Inquests: A Source of Vital Statistics—Westminster, 1761-1866' (1983) 4 *Journal of Legal Medicine* 51, 70 (number of accidental deaths per million persons per annum increased from 223 in 1800-03 to 609 in 1835-38) .

<sup>40</sup> *ibid*, 71-73.

<sup>41</sup> RW Kostal, *Law and English Railway Capitalism 1825-1875* (Oxford, Clarendon Press, 1994) 281. Kostal says that it is arguable that 'with respect to actual fatalities among paying customers the railways were a comparatively safe means of overland transportation throughout the nineteenth century' (*ibid*, 279-80).

<sup>42</sup> JC Steele, 'Numerical Analysis of the Patients Treated in Guy's Hospital for the Last Seven Years, from 1854 to 1861' (1861) 24 *Journal of the Statistical Society of London* 374, 398.

<sup>43</sup> See Witt (above n 20) 731.

<sup>44</sup> Greenwald and Greenwald (above n 39) 84-85 ('An accidental death might result nearly as easily from trivial as from massive injuries').

<sup>45</sup> Kostal (above n 41) 280.

This may have been more perception than reality (according to *The Preston Guardian*, as late as 1845 not one railway accident had proved fatal to a passenger travelling in a first-class carriage<sup>46</sup>), but it was the perception that mattered. Finally, Kostal also makes the important point that railway accidents were generally considered to be avoidable—‘the [136] predictable consequence of reckless operational and managerial procedures’.<sup>47</sup> As we shall see, the perception that railway companies were deliberately endangering life and limb through their unwillingness to take obvious safety precautions was a persistent theme in both the contemporary press coverage of railway accidents and the Parliamentary debates on the fatal accidents legislation. Coupled with the social psychology of railway accidents, and the absence of stringent regulation of railway safety,<sup>48</sup> this perception ‘encouraged the idea that personal injury litigation might be an effective deterrent of corporate negligence’.<sup>49</sup>

Although deaths on the railways are an important element of the background to the 1846 legislation, other factors would also have contributed to the push for a legislative response to the issue of fatal accidents. John Fabian Witt has argued, for example, that the development of liability for personal injury and death in the nineteenth century reflected the shift from an economy centred around domestic household labour towards one based on wage labour, in which the worker supported ‘an independent domestic sphere of his own’.<sup>50</sup> In the old household economy, there had been little scope for personal injury litigation unless the injury resulted from the collision of one household with another, in which case the action for loss of services generally defended the household’s interests, but the new wage economy created the conditions for tort actions of a more modern hue where the disablement or death of an independent labourer robbed his household of its means of support—the ‘emerging wage system and the new structure of domestic life were at the heart of this new form of tort litigation’.<sup>51</sup> As PWJ Bartrip points out, this shift also created the conditions for personal injury claims by employees against employers where previously it was likely that the ‘prevention, treatment and compensation’ of [work] accidents would have occurred ‘on a personal level without recourse to the courts’.<sup>52</sup> Mention should also be made of the new poor law, which came into force following the passage of the Poor Law Amendment Act in 1834. Up until then, if an accident caused the death of a male breadwinner, and reduced his widow and children to penury, then under the old poor law provision would be

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<sup>46</sup> ‘Railway Intelligence’ *The Preston Guardian*, 1 February 1845.

<sup>47</sup> Kostal (above n 41) 280.

<sup>48</sup> The two Acts passed in the early 1840s regulating the railways had little bite. The Regulation of Railways Act 1840 imposed various reporting obligations on the railways, authorised the Board of Trade to carry out inspections, and made provision for the punishment of railway company employees found drunk or endangering passengers. The Regulation of Railways Act 1842 also gave the Board of Trade the power to order the postponement of the opening of a new railway if it considered that there was a danger to the public, and required railway companies to erect gates at level crossings and to maintain adequate fences (though there was no enforcement provision for these obligations).

<sup>49</sup> Kostal (above n 41) 282.

<sup>50</sup> Witt (above n 20) 731.

<sup>51</sup> *ibid.*

<sup>52</sup> PWJ Bartrip, *Workmen’s Compensation in Twentieth Century Britain* (Aldershot, Gower Publishing, 1987) 2.

made for them by the parish, which would cover the cost of the burial if they were unable to do so, and then provide assistance.<sup>53</sup> However, the provision made under the new poor law was much more restricted, with the result that increasingly tort law became ‘a candidate for the job of replacing the older mechanism of support’ in the case of both personal injury and wrongful death.<sup>54</sup>

Furthermore, in the push to drive down the cost of poor relief, attention came to be focused on accidents as a cause of poverty, and increasingly financial responsibility of some kind came to be seen as a way of reducing the frequency of accidents by incentivising [137] potential defendants to take more care.<sup>55</sup> The chief proponent of this idea was Edwin Chadwick, who argued that industrialists, railway companies and the like should be strictly liable for the costs of accidents which arose out of their undertakings. The clearest expression of his ideas is to be found in a paper delivered to the Manchester Statistical Society in January 1846, in which he argued that as a general principle ‘those who erect machines, or conduct large and dangerous works, or undertake public conveyance, should be pecuniarily responsible for all their unavoidable, as well as for their avoidable consequences’.<sup>56</sup> This principle of pecuniary responsibility was to be preferred to a priori regulation and inspection, he went on, because ‘it reaches where they could not reach, and renders arbitrary and troublesome interferences unnecessary’.<sup>57</sup> Also in 1846, a House of Commons Select Committee on Railway Labourers adopted Chadwick’s proposal that strict liability should be imposed on railway companies for any deaths and personal injuries caused during railway construction works,<sup>58</sup> a recommendation which if enacted would itself have carved out a legislative exception to the rule in *Baker v Bolton*. Whatever the veracity of Chadwick’s later claim that he had persuaded his friend Lord Campbell to take up the cause of fatal accidents,<sup>59</sup> the powerful arguments which he made for his principle of pecuniary responsibility must surely have helped to create a favourable atmosphere for legislative intervention in that same year, even if the result fell short of the strict liability he advocated.

#### IV. INQUESTS AND DEODANDS

Civil actions arising out of accidental death differ from other tort claims in that such deaths are routinely the subject of a quite separate set of legal proceedings, namely an inquest conducted by a coroner. Although apparently of little import nowadays, this

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<sup>53</sup> AWB Simpson, ‘A Case of First Impression: *Priestley v Fowler* (1837)’ in *Leading Cases in the Common Law* (Oxford, OUP, 1995) 118.

<sup>54</sup> *ibid*, 127.

<sup>55</sup> *ibid*, 129-32.

<sup>56</sup> *Papers Read before the Statistical Society of Manchester*, The Chadwick Papers (UCL) 18 (cited by RA Lewis, ‘Edwin Chadwick and the Railway Labourers’ (1950) 3 *The Economic History Review* 107, 112).

<sup>57</sup> *ibid*, 27.

<sup>58</sup> *Report from the Select Committee on Railway Labourers* PP 1846 (530) XIII, 411.

<sup>59</sup> Bartrip and Burman (above n 14) 103.

overlap was of great significance to the genesis of the statutory wrongful death action. In the years leading up to 1846, the absence of a civil remedy meant that growing public concern over fatal accidents manifested itself through the inquest system, with a number of activist coroners using the ancient institution of the deodand to exact large fines on railway companies and others judged to blame for accidental deaths. As Kostal has written, the perceived ineffectiveness of other legal mechanisms of regulation and compensation meant that coroners' juries 'deliberately conscripted the deodand to the cause of punishing and deterring railway company negligence'.<sup>60</sup> The obvious deficiencies of this mode of legal response in turn created the conditions for legislative action to put the law on a more rational footing.

Although the story of the revival of the deodand in the 1830s has been told before,<sup>61</sup> it will be helpful to highlight those aspects of the phenomenon of most relevance to the advent of the 1846 legislation. The original idea of the deodand was the confiscation of a chattel which caused the accidental death of a person, although relatively early on the [138] giving up of the thing itself was replaced by a money payment supposedly representing its value, which went either to the Crown or to the holder of a royal franchise (typically the lord of the manor, but also latterly some local corporations). Since the deodand was based on the primitive idea that blame could attach to things themselves,<sup>62</sup> the fault of the chattel's owner was irrelevant. Nevertheless, there was a logic of sorts to the strict liability which the deodand entailed. In particular, a crude conception of causation was reflected in the distinction between things that 'moved to the death' and things which caused death while stationary,<sup>63</sup> in the former case, the whole of the chattel was deodand, but in the latter the forfeiture applied only to that part of the item directly connected to the death.

It would seem that from the mid-eighteenth century onwards, deodands tended to be nominal, or at least for relatively small amounts. Since coroners' juries were tasked both with deciding whether the whole or only part of the chattel had occasioned the death, and with valuing the object in question, they had considerable discretion as to the amount of any deodand, and since the forfeitures were unpopular, they generally exercised that discretion so as to minimise their impact;<sup>64</sup> furthermore, it seems that any

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<sup>60</sup> Kostal (above n 41) 289.

<sup>61</sup> See Smith (above n 6); Cawthon, 'New Life for the Deodand' (above n 7); T Sutton, 'The Deodand and Responsibility for Death' (1997) 18 *Legal History* 44.

<sup>62</sup> 'One of the firmest convictions of primitive man is, that every harm which he suffers is due to malevolent agency; and the earliest form of legal remedy is the gratification of that desire for revenge which harm, malevolently inflicted, still (it is to be feared) arouses, even in the civilized breast. So keen is the desire for revenge that, as is well known, early stages of law allow it to be wreaked on animals, and even on inanimate objects' (E Jenks, 'On Negligence and Deceit in the Law of Torts' (1910) 26 *LQR* 159, 160).

<sup>63</sup> 1 *Bl Comm* 291; 'The Law of Deodands' (1841) 10 *Monthly Law Magazine* 15, 17; Sutton (above n 61) 45.

<sup>64</sup> Smith (above n 6) 394. See also 'On the Law of Deodands' (1845) 29 *The Legal Observer* 337, 337 ('the finding a deodand has in most cases degenerated into a mere form').

legal challenges to these determinations fell on deaf ears.<sup>65</sup> As a result, *The Times* claimed in 1840 that 'it had become a matter of course to assess the deodand at a totally inadequate value',<sup>66</sup> and the following year the *Monthly Law Magazine* claimed that 'for some centuries' deodands had 'scarcely exceeded the amount of a few shillings'.<sup>67</sup> In truth, however, there were considerable local variations throughout the history of the deodand,<sup>68</sup> and Teresa Sutton points to examples of rural areas which appear to have continued to apply more orthodox principles of valuation, such as Holderness in Yorkshire, where substantial deodands of £20 and £40 were imposed as late as the 1770s.<sup>69</sup> Although there is no evidence in these instances that the amount of the deodand was linked to the fault of the chattel's owner, Sutton also suggests that the deodand may always have 'had some tenuous associations with fault',<sup>70</sup> and that by the late eighteenth century, at any rate, the valuation of the chattel in some localities was probably connected to the ascription of blame for the accident.<sup>71</sup> The revival of the deodand in the late 1830s and early 1840s may not therefore have represented a complete break from the past.

The mid-nineteenth century revival itself is associated with a series of high-profile cases in which very large deodands were levied on railway engines or steamships where there was evidence of negligence on the part of the owners. Perhaps the most famous such case arose out of the Sonning railway disaster of December 1841, when a Great Western train hit a [139] landslip near Reading, causing multiple fatalities. The inquest jury returned a verdict of accidental death in all cases, and imposed a deodand of £1,000 on the train. Other instances of such awards include a deodand of £2,000 imposed on the London and Birmingham railway company by a Harrow jury when two passengers died after a collision; a deodand of £800 levied on a steamship which struck another vessel on the River Thames, killing a man;<sup>72</sup> and a deodand of £1500 on a steam engine after the boiler on a steamship exploded, killing a fireman.<sup>73</sup> Even though in theory it was not appropriate for the amount of the deodand to be linked to the culpability of the thing's owner, the juries in these headline inquests made it quite clear that that was precisely what they were doing. In the case of the disaster at Sonning, for example, the jury expressed the view that since landslips were an obvious danger, the company's employees should have kept a closer eye on the cutting, and that passengers should not

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<sup>65</sup> 'The Law of Deodands' *The Times* 30 October 1840 ('the Court of King's Bench ... has invariably refused all attempts ... to compel the juries to rectify the verdict'). See also *The Standard* 1 January 1842.

<sup>66</sup> 'Editorial' *The Times* 4 December 1840. See also 'The Law of Deodands' *The Times* 30 October 1840 ('generally trifling and sometimes nominal').

<sup>67</sup> 'The Law of Deodands' (1841) 10 *Monthly Law Magazine* 15, 15.

<sup>68</sup> Sutton (above n 61) 48.

<sup>69</sup> *ibid*, 48-49.

<sup>70</sup> *ibid*, 47.

<sup>71</sup> *ibid*, 49-51.

<sup>72</sup> Quashed in *R v Polwart* (1841) 1 QB 818, 113 ER 1345.

<sup>73</sup> Also later quashed: *R v Brownlow* (1839) 11 Ad & E 119, 113 ER 358.

have been travelling so close to the engine.<sup>74</sup> Other forms of carelessness which attracted censure included operating more than one engine on each track at the same time, failing to provide proper safety training for employees, and encouraging workers to overfill boilers in order to test their capacity.<sup>75</sup> Conversely, where a jury found no evidence of culpable neglect in the case of an accident on the Eastern Counties railway in 1845, it imposed a nominal deodand of one shilling.<sup>76</sup> Nor was this overt focus on fault confined to cases involving steam power; by the early 1830s, it seems that at least in some areas juries took a similar approach at inquests into deaths on the roads and in the workplace,<sup>77</sup> and in 1840 *The Times* cited a case of a deodand of £500 imposed when the roof of a theatre collapsed, allegedly because of the ‘precipitous haste’ with which the building had been constructed.<sup>78</sup>

As a result of this emphasis on culpability, in cases involving relatively complex technologies such as steam power coroners were increasingly dependent on expert witnesses, such as inventors and engineers, who testified as to the likely causes of mechanical failures, explosions and the like, and the ways in which they might have been guarded against.<sup>79</sup> All in all, it seems clear that by the early 1840s inquests in some areas had come to take on many of the functions of a trial court in a civil action, with the important qualification that the deodand was tailored to the value of the chattel coupled with the degree of fault rather than to the loss caused, and did not go (directly at least) to the victims of the defendant’s negligence.

Although it has been suggested by some commentators that the replacement of the deodand by a statutory wrongful death action may have been a retrogressive step,<sup>80</sup> the truth is [140] that even after its nineteenth-century revival, the deodand remained a hopelessly inadequate mechanism for dealing with the problem of wrongful death. For a start, it would seem that the punitive use of deodands was not widespread.<sup>81</sup> Cawthon

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<sup>74</sup> Sutton (above n 61) 46. Similarly, *The Times* attributed the collision which was the subject of the Harrow inquest to an ‘accumulation of guilty negligence’ (‘Editorial’ *The Times* 4 December 1840) and the coroner in the case said later that the jury had imposed the deodand because ‘one of the men to whose carelessness the accident was attributable, had previously been guilty of very gross offences, but still he had been retained in the service of the company’ (HC Deb 22 July 1846, vol 87, col 1372 (Mr Wakley)).

<sup>75</sup> See Cawthon, ‘New Life for the Deodand’ (above n 7) 145.

<sup>76</sup> ‘Editorial’ *The Times* 13 August 1845.

<sup>77</sup> Regarding accidents on the roads, see Cawthon, ‘New Life for the Deodand’ (above n 7) 141-42; Greenwald and Greenwald (above n 39) 68. Regarding accidents at work, see Cawthon, ‘New Life for the Deodand’ (above n 7) 138; Cawthon, *Job Accidents and the Law* (above n 7) 137.

<sup>78</sup> ‘The Law of Deodands’ *The Times* 30 October 1840 (though the deodand was later set aside by the Court of King’s Bench on ‘grounds merely technical’).

<sup>79</sup> Cawthon, ‘Thomas Wakley’ (above n 7) 195.

<sup>80</sup> This is clearly the view of Cawthon, *Job Accidents and the Law* (above n 7). See also Smith (above n 6) 397, 403; J Hostettler, *Thomas Wakley: An Improbable Radical* (Chichester, Barry Rose Law Publishers, 1993) 138.

<sup>81</sup> See Smith (above n 6) 389 (‘incredibly haphazard’); Cawthon, ‘New Life for the Deodand’ (above n 7) 147 (‘far from the norm throughout most of England’); Cawthon, *Job Accidents and the Law* (above n 7) 130-31 (‘very rare’ for substantial deodands to be imposed in rural areas).

points out for example that juries in industrial and mining areas were reluctant to use deodands in cases where workers were killed,<sup>82</sup> and that most large deodands seem to have been imposed by London juries in cases involving railways or steamships. Furthermore, she notes that even in London some coroners' courts never imposed substantial deodands, and suggests that the differences in practice reflected the differing attitudes of coroners, some of whom were far more activist in this regard than others.<sup>83</sup>

Another weakness of the deodand system was that even when a jury did impose a substantial deodand, it was 'almost invariably'<sup>84</sup> quashed by the Court of Queen's Bench, which had the power to review coroners' inquisitions and looked 'with coldness on deodands'.<sup>85</sup> As an editorial in *The Times* in 1840 put it:

As a matter of fact, it is true that [deodands] are peculiarly liable to be set aside, that the pettifogging quibbles and technical objections which of late year have been discountenanced in almost all other matters, are received with favour by our judges when advanced to relieve overgrown commercial monopolists from the pecuniary penalties of a fatal neglect.<sup>86</sup>

A substantive reason given for striking down a deodand was that the jury had returned a verdict of manslaughter, and that deodands were not appropriate in cases of felonious killings but only where death was by misadventure,<sup>87</sup> a rule of dubious authority<sup>88</sup> which had the unfortunate effect of barring a sanction in precisely those instances where the culpability was greatest. Usually, however, the court fixed upon more technical matters like want of jurisdiction<sup>89</sup> or some minor flaw in the wording of the inquisition, such as the fact that the fatal event or the subject of the deodand was not described with sufficient precision; in the case of the deodand of £1500 imposed after a fireman was killed in an explosion on a steamboat, for example, the inquisition was quashed because

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<sup>82</sup> Cawthon, 'New Life for the Deodand' (above n 7) 139-40. See also Cawthon, *Job Accidents and the Law* (above n 7, 109-10) for examples of coroners and juries apparently unsympathetic to the victims of mining accidents. Later on, in the 1860s, there were also reports 'of the unseemly partisan attitude adopted by juries at some mining disaster inquests' (RL Howells, '*Priestley v Fowler* and the Factory Acts' (1963) 26 MLR 367, 376).

<sup>83</sup> 'New Life for the Deodand' (above n 7) 140-41.

<sup>84</sup> HL Deb 24 February 1845, vol 77, cols 1029-30 (Lord Campbell). See also HC Deb 11 August 1846, vol 88, col 625 (Sir G Grey) ('in almost every case'); 'On the Law of Deodands' (1845) 29 *The Legal Observer* 337, 337-38 ('almost always quashed').

<sup>85</sup> 'Railway Accidents' *The Bradford Observer* 3 December 1840.

<sup>86</sup> *The Times* 12 January 1842.

<sup>87</sup> *R v Polwart* (1841) 1 QB 818, 113 ER 1345 (deodand of £800 on steamboat).

<sup>88</sup> See 'Railway Accidents' *The Northern Star and Leeds General Advertiser* 19 December 1840.

<sup>89</sup> *R v Great Western Rly Co* (1842) 2 Gale & D 773; *R v The Coroner of the Liberty of the Honor of Pomfret* (1845) 8 *The Jurist* 910.

the word ‘instantly’ was too vague a description of the time of death.<sup>90</sup> Since coroners were not generally lawyers, it would have been difficult for them to make their inquisitions watertight, but in truth it seems that the aversion of the common law courts to deodands was so strong that it made little difference; the coroner who had drafted the inquisition in the steamboat boiler case [141] was a lawyer,<sup>91</sup> and according to the activist West Middlesex coroner and MP Thomas Wakley, even after he had taken the precaution of consulting a raft of eminent lawyers on the wording of an inquisition, it was ‘at once declared to be utterly worthless’ when challenged in the Court of Queen’s Bench, and ‘treated as almost worse than waste paper’.<sup>92</sup>

Despite the implication of the *Times* editorial otherwise, it is by no means clear that the courts’ antipathy to punitive deodands was rooted in a desire to protect corporate enterprise, and even judges who sat in these cases (such as Lord Denman CJ) supported the Fatal Accidents Bills during their passage through Parliament.<sup>93</sup> A more plausible explanation is concern that inquests were distorting the law and usurping some of the functions of the civil process, and that the resultant sanctions were arbitrary and potentially unfair; when he introduced the first Deodands Abolition Bill, for example, Lord Campbell accused coroners’ juries of perverting the law, and described them as ‘a very unfit tribunal to punish an offender’, since inquests were an entirely *ex parte* proceeding.<sup>94</sup> In any case, the combined effect of the rarity of large deodands and the propensity of the courts to strike them down was that even in the supposed heyday of the deodand, the mechanism was little more than an ‘expensive irritant’ for railway companies and the like, who could be reasonably confident that they would never actually have to pay the fine,<sup>95</sup> but were still obliged to send lawyers to inquests to try to forestall such awards, and then to litigate to overturn them if made.<sup>96</sup>

Even if we set aside the fact that for these reasons deodands were of limited practical significance in the 1830s and 1840s, their inherent drawbacks were readily apparent. Contemporary accounts are scathing in their criticism of what was seen as an absurd relic of a barbarous age.<sup>97</sup> An article reproduced in the *Caledonian Mercury* in April 1842,

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<sup>90</sup> *R v Brownlow* (1839) 11 Ad & E 119, 113 ER 358. See also *R v Directors of the Stockdale and Darlington Rly* (1840) 8 Dowl PC 516 (insufficient description of the cause of death), and *R v West* (1841) 1 QB 826, 113 ER 1348 (chattel not proven to be property of parties named in the inquisition).

<sup>91</sup> Cawthon, *Job Accidents and the Law* (above n 7) 106.

<sup>92</sup> HC Deb 22 July 1846, vol 87, cols 1372-73.

<sup>93</sup> HC Deb 23 July 1845, vol 82, col 970 (Mr Bouverie); HL Deb 7 May 1846, vol 86, col 173 (Lord Campbell). See also the supportive intervention of Lord Denman himself: HL Deb 7 May 1846, vol 86, col 174.

<sup>94</sup> HL Deb 24 February 1845, vol 77, col 1029 (Lord Campbell).

<sup>95</sup> ‘However flagrant the case, it is notorious that a deodand of any amount is seldom paid’ (‘Law of Deodand—Superiority of the Scotch Law’ *Caledonian Mercury* 4 April 1842).

<sup>96</sup> Kostal (above n 41) 289.

<sup>97</sup> See, eg, *The London Dispatch* 16 December 1838 (‘extremely barbarous’, ‘this absurd law’); *The Standard* 8 January 1842 (‘The law of deodand has long been out of favour with all classes of men, learned and unlearned’).

for example, argued for the superiority of Scots law over ‘the complicated, and generally ineffectual, mode by which the English law professes to provide for the security of human life’, and instanced a Scottish case in which the family of a woman who had fallen into the defendant’s unfenced coal pit had recovered damages, pointing out that in England no deodand could be levied in such a case, as there was nothing which had ‘moved toward’ the deceased.<sup>98</sup> Three months earlier, *The Standard* said that:

Nothing indeed can be imagined more unreasonable than the law of deodand. It is a law founded upon a fiction, and with the exploded fiction on which it rests it ought to have long since taken its departure.<sup>99</sup>

That similar views were held by lawyers is suggested by the fact that the legal press were equally critical, with *The Jurist* describing the law of deodands as ‘a rank absurdity’ and [142] ‘quite unfit for its purpose’<sup>100</sup> and *The Legal Observer* as ‘undoubtedly in an anomalous and absurd state’,<sup>101</sup> criticisms echoed in the Parliamentary debates on the Bills abolishing deodands in 1845 and 1846.<sup>102</sup>

If we step back from this avalanche of contemporary contempt, we can identify a number of fundamental weaknesses of the deodand mechanism as a legal response to accidental death. One was that it was not set up as a punishment for fault, but instead reflected pre-modern notions of strict causal responsibility.<sup>103</sup> This ‘strange peculiarity’<sup>104</sup> meant that the penalty attached to the thing, rather than the person in control of it at the time of the accident, with the result that if A borrowed B’s carriage and negligently ran over and killed C, B would end up being punished, and not A.<sup>105</sup> And where the owner did have possession of the item at the relevant time, it meant that the law had to be twisted (and jurors had to perjure themselves) if the imposition of the sanction was to be tied to culpability. Furthermore, even where the owner was at fault, there was no necessary correlation between the size of the sanction and the degree of culpability,

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<sup>98</sup> ‘Law of Deodand—Superiority of the Scotch Law’ *Caledonian Mercury* 4 April 1842.

<sup>99</sup> *The Standard*, 8 January 1842. An article reproduced in *The Times* two days later was particularly scornful of the fact that the fines often went to the lord of the manor, commenting that ‘we shall presently see manors put up for sale with recommendations to purchasers that such and such a railway passes through them, and that their value is considerably enhanced by the probability of deodands from the railway company’ (‘Railway Accidents’ *The Times* 10 January 1842).

<sup>100</sup> (1845) 9 *The Jurist* 49, 49, 50.

<sup>101</sup> (1845) 29 *The Legal Observer* 337, 337. See also (1846) 7 *Law Times* 94 (an ‘antiquated absurdity’).

<sup>102</sup> HL Deb 24 February 1845, vol 77, col 1027 (Lord Campbell)(‘extremely absurd and inconvenient’); *ibid*, col 1032 (The Lord Chancellor)(‘pregnant with absurdity’); HL Deb 7 May 1846, vol 86, col 174 (Lord Denman)(‘barbarous and absurd’); HC Deb 11 August 1846, vol 88, col 626 (Mr Wakley)(‘most unsatisfactory’).

<sup>103</sup> ‘Whatever may have been the origin of deodands, we can find no reason for believing that they were regarded in the light of fines imposed on a person guilty of some misconduct’ (*R v Polwart* (1841) 1 QB 818, 824; 113 ER 1345, 1347 (Lord Denman CJ)).

<sup>104</sup> *Blake v Midland Rly Co* (1852) 18 QB 93, 99; 118 ER 35, 38 (Lord Campbell CJ).

<sup>105</sup> See, eg, the case cited by Greenwald and Greenwald (above n 39, 68-69) of a fifty-pound deodand being exacted on the owner of a rented carriage which had been involved in a fatal traffic accident.

since the amount of the deodand was supposed to be based on the value of the chattel.<sup>106</sup> The difficulties to which this principle gave rise can readily be imagined, and these were compounded by the complexity surrounding the question of which part or parts of the thing were deodand in a given case,<sup>107</sup> an issue inevitably much debated in the railway context,<sup>108</sup> but one that also gave rise to difficulties in other cases; where factory machinery was concerned, for example, the fact that often only a small part of the machine was in motion made it harder for juries to impose substantial deodands.<sup>109</sup> Other weaknesses included the rule that no deodand could be imposed in cases of murder or manslaughter,<sup>110</sup> the absurdity of attaching significance to whether or not the thing had ‘moved to the death’, the rule (seemingly not always observed<sup>111</sup>) that a deodand could attach to a fixture only if it was severed prior to the accident,<sup>112</sup> the rule that a vessel could not be deodand if the accident happened at sea,<sup>113</sup> and so on.

Finally, even if despite these flaws the deodand mechanism operated in its final phase as a crude deterrent to negligent conduct, it did little if anything to compensate those who suffered loss as a result of wrongful death. Some of the modern apologists for the deodand [143] have assumed that the relatives of the deceased stood to benefit from the fines, but any such benefit was at best ad hoc and haphazard,<sup>114</sup> and there is little evidence to support the claims of Smith<sup>115</sup> and Kidner<sup>116</sup> that the deceased’s relatives were often given the awards.<sup>117</sup> Although isolated instances of such transfers can be identified,<sup>118</sup> it seems unlikely that the beneficiaries of deodands routinely took this

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<sup>106</sup> (1845) 9 *The Jurist* 49, 50.

<sup>107</sup> For example, it was said that if a person died under the wheels of a stagecoach, ‘the horses and the coach, and everything in the coach, including the luggage of the passengers, would all be forfeited’ (HL Deb 24 February 1845, vol 77, col 1028 (Lord Campbell)).

<sup>108</sup> Elements of the press were adamant that in the case of a moving train, every part of the train was deodand: see, eg, ‘The Law of Deodands’ *The Times* 30 October 1840; ‘Railway Accidents’ *The Northern Star and Leeds General Advertiser* 19 December 1840.

<sup>109</sup> Smith (above n 6) 395.

<sup>110</sup> See above, text to n 87.

<sup>111</sup> See the example of the collapsing theatre roof, discussed above (text to n 78).

<sup>112</sup> Sutton (above n 61).

<sup>113</sup> ‘The Law of Deodands’ (1841) 10 *Monthly Law Magazine* 15, 18. The origin of this rule was jurisdictional.

<sup>114</sup> See also Bartrip and Burman (above n 14) 97 (‘a fortuitous and sporadic result of an essentially punitive process’).

<sup>115</sup> Smith (above n 6) 398.

<sup>116</sup> Kidner (above n 2) 321. See also WR Cornish and G de N Clark, *Law and Society in England 1750-1950* (London, Sweet & Maxwell, 1989) 502.

<sup>117</sup> See also Bartrip and Burman (above n 14) 98 (‘on balance it appears that compensation was not often paid’).

<sup>118</sup> For example, Smith (above n 6, 390) cites a couple of cases from 1825 in which the City of London surrendered the deodands to widows who had asked for them, and also (ibid, 392-93) an instance in which the King’s Remembrancer agreed to hand over a parachute forfeited as deodand to a fund established to provide for the widow of the deceased.

course, and in the Parliamentary debates on the Deodands Abolition Bills, it was argued that the Crown gained considerable revenue from the awards<sup>119</sup> and that any change to the law of deodands should take into consideration the rights of franchise-holders.<sup>120</sup> Petitions were also received from the boroughs of Liverpool and Reading opposing the Bills,<sup>121</sup> presumably because they stood to lose a source of income if deodands were abolished. The fact that deodands merely swelled the assets 'of those who could easily dispense with the addition'<sup>122</sup> aroused the particular ire of the press.<sup>123</sup> It was argued that the law should be changed so that the whole of the deodand,<sup>124</sup> or at least a part of it,<sup>125</sup> could be appropriated to the dependants of the deceased, and in the case of the deodand of £1000 imposed after the Sonning railway disaster *The Times* welcomed reports that it was the intention of the lord of the manor to divide the entire sum among the relatives of the victims<sup>126</sup> (even though it seems that the lord of the manor in question, Robert Palmer MP, had already poured cold water on the suggestion<sup>127</sup>). Finally, we should note that there is evidence that occasionally juries wielded the threat of a large deodand to force employers to compensate the families of employees killed by their negligence, and that similar machinations may have occurred in other types of case as well.<sup>128</sup> This was perhaps the ultimate twist in the tale of the transformation of the deodand from the 'God-gift' of the Middle Ages into a nineteenth-century substitute for a damages action, but the degree of contortion required for the transformation was clearly too great, and the substitute manifestly inadequate. By 1846 its replacement by a dependency claim was long overdue.

#### [144] V. THE PASSAGE OF THE ACT

It will already be apparent that there was considerable disquiet expressed in the press about accidental death and the legal response to it during the late 1830s and early 1840s.

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<sup>119</sup> HC Deb 11 August 1846, vol 88, col 624 (Lord Granville Somerset)(£700 or £800 a year paid into the privy purse). This claim was contested, it being asserted that deodands were of 'trifling pecuniary value' to the Crown, but only on the grounds that lately almost all substantial deodands had been quashed by the courts (ibid, cols 624-25 (Sir G Grey)).

<sup>120</sup> HL Deb 24 February 1845, vol 77, cols 1032-33 (The Lord Chancellor); HC Deb 22 July 1846, vol 87, col 1375 (Lord Granville Somerset).

<sup>121</sup> *House of Commons Journal* vol 100, cols 718 (10 July 1845) and 774 (22 July 1845). For two further petitions from Liverpool to the same effect, see *House of Commons Journal* vol 101.2, cols 814 (6 June 1846) and 1077 (22 July 1846).

<sup>122</sup> 'The Law of Deodands' (1841) 10 *Monthly Law Magazine* 15, 23.

<sup>123</sup> 'The application of the forfeiture is villanous [sic]' ('Railway Accidents' *The Northern Star and Leeds General Advertiser* 19 December 1840).

<sup>124</sup> *The Standard* 24 August 1838; 'Editorial' *The Times* 31 October 1840.

<sup>125</sup> 'The Law of Deodands' (1841) 10 *Monthly Law Magazine* 15, 24.

<sup>126</sup> 'Editorial' *The Times* 12 January 1842.

<sup>127</sup> Sutton (above n 61) 47.

<sup>128</sup> Cawthon, 'New Life for the Deodand' (above n 7) 146-47; Cawthon, *Job Accidents and the Law* (above n 7) 137-38.

A number of themes emerge from the press coverage. First, there was a general concern about fatal accidents, particularly on the railways. Articles on the subject appeared regularly throughout this period,<sup>129</sup> and the fact that the concern was shared by members of the public is suggested by the letters column of *The Times* on 31 October 1840, which featured a number of letters on railway safety in response to an article on the matter the day before;<sup>130</sup> an editorial in the same paper referred to ‘the great number of such letters which we continually receive’.<sup>131</sup> Another feature of the press coverage (replicated in the Parliamentary debates in 1845 and 1846) was the conviction that the accidents which were taking place were preventable. *The Standard* complained, for example, that steamboat fatalities were ‘almost always the result of a sordid economy’ which sacrificed safety to profit,<sup>132</sup> and a *Times* editorial in 1840 claimed that when fatal railway accidents occurred, there was ‘an almost infallible presumption of something defective in the general arrangements’.<sup>133</sup> It was a central theme of this and other *Times* editorials that the priority was therefore to deter negligence in order to reduce the toll of injury and death,<sup>134</sup> and the paper was not alone in this view; according to *The Northern Star and Leeds General Advertiser*, juries should award the value of the whole train as deodand following a fatality until they ‘touched the pockets’ of directors and companies (these being much more sensitive than their hearts).<sup>135</sup> In addition to large deodands, other measures that received support from the press included statutory regulation of railway and steamboat safety,<sup>136</sup> and even a law making negligence causing death manslaughter, and punishable by imprisonment of at least six or twelve months, ‘with or without hard labour’.<sup>137</sup>

The interests of the dependants of fatal accident victims were less central to the press coverage of the issue than the need to prevent such accidents from happening in the

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<sup>129</sup> See, eg, ‘Protection Against Steam Casualties’ *Preston Chronicle* 21 July 1838; ‘Railway Accidents’ *The Standard* 20 October 1840; ‘Railway Accidents’ *The Aberdeen Journal* 2 December 1840; ‘Railway Accidents’ *The Bradford Observer* 3 December 1840; ‘Railway Accidents’ *The Northern Star and Leeds General Advertiser* 19 December 1840; ‘Railway Accidents’ *The Times* 10 January 1842; ‘Editorial’ *The Times* 12 January 1842; ‘Railroad Slaughter’ *Glasgow Herald* 9 December 1844.

<sup>130</sup> ‘Letters to the Editor’ *The Times* 31 October 1840.

<sup>131</sup> ‘Editorial’ *The Times* 31 October 1840.

<sup>132</sup> *The Standard* 24 August 1838.

<sup>133</sup> ‘Editorial’ *The Times* 31 October 1840. See also ‘Editorial’ *The Times* 13 August 1845 (questioning the conclusion of an inquest jury that no-one was to blame for a fatal railway accident, expressing the view that ‘it was not such an accident as it was impossible to guard against’ and suggesting that the train in question was probably travelling too fast).

<sup>134</sup> See, eg, ‘Editorial’ *The Times* 4 December 1840 (requirement of ‘some strong and efficient check’ upon culpable negligence or misconduct on the part of railway companies); ‘Editorial’ *The Times* 12 January 1842 (the need for a ‘check upon neglect, which generally springs from a small and niggardly economy’).

<sup>135</sup> ‘Railway Accidents’ *The Northern Star and Leeds General Advertiser* 19 December 1840.

<sup>136</sup> ‘Protection Against Steam Casualties’ *Preston Chronicle* 21 July 1838; ‘Railway Accidents’ *The Bradford Observer* 3 December 1840.

<sup>137</sup> ‘Railway Accidents’ *The Times* 10 January 1842. An editorial two days later endorsed the proposal: ‘Editorial’ *The Times* 12 January 1842.

first place through appropriate mechanisms of deterrence.<sup>138</sup> However, as early as 1838 it was suggested that railway and steamboat companies should be made to support the families of such victims,<sup>139</sup> a view which was echoed by a correspondent to *The Times* two years [145] later,<sup>140</sup> and as the 1840s wore on it is possible to discern increasing concern for those left destitute by accidental death. In its early stages, this concern tended to manifest itself in the suggestion that deodands should be paid over to the relatives of the deceased,<sup>141</sup> but later on it led to calls for the deodand to be abolished, and replaced with a civil action for the relatives' benefit; according to an article in *The Spectator* at the end of 1844, this was 'the check to which every consideration points—the public instinct, the theory of corporate sensitiveness, and the spirit of just reparation'.<sup>142</sup> It was also of course the solution at which the legislature eventually arrived.

The clamour for a legislative response to the problem of fatal accidents was finally answered on 18 February 1845, when a Bill was introduced in the House of Lords by Lord Lyttelton giving the families of wrongful death victims a claim for damages against the wrongdoer.<sup>143</sup> According to evidence given to the Select Committee on the Law of Compensation for Railway Accidents in 1870, the immediate catalyst for the Bill was not railway accidents, but rather mining accidents, which were also a cause for great concern in the mid-nineteenth century.<sup>144</sup> The relevant evidence was provided by a County Court judge, Charles Shapland Whitmore QC, who said:

In the year 1845, I was applied to by a client of mine, who was a solicitor at Stourbridge, to assist him in framing a Bill to be introduced to Parliament for the protection, as he stated, of his neighbours, who were concerned in the mines in that part of the country, Staffordshire and Worcestershire, amongst whom there was a general wish that there should be some measure ... compensating families for the death of somebody concerned in the working of the mines. He said that he was moving in it at their instance, and that Lord Lyttelton, their neighbour, who lives at Hagley, would be good enough to introduce the measure in the House of Lords, if I would assist him in framing it. I was at that moment acting as counsel in a committee room in the House of Commons, and I went out with him into the corridor, and I

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<sup>138</sup> For a rare example of an article focusing primarily on the interests of the dependants, see the *Caledonian Mercury* 17 January 1842, though even here the need for effective deterrence was also emphasised.

<sup>139</sup> *The London Dispatch* 16 December 1838.

<sup>140</sup> 'Letters to the Editor' *The Times* 31 October 1840 (from 'S') (Parliament should give a right of action to 'widows and orphans, when wantonly deprived of husbands and parents').

<sup>141</sup> See, eg, *The Standard* 24 August 1838; 'The Law of Deodands' *The Times* 30 October 1840; 'Editorial' *The Times* 31 October 1840; 'Railway Accidents' *The Northern Star and Leeds General Advertiser* 19 December 1840; 'The Law of Deodands' (1841) 10 *Monthly Law Magazine* 15, 23-24.

<sup>142</sup> 'Railroad Slaughter' *Glasgow Herald* 9 December 1844. See also *The Standard* 8 January 1842; 'Editorial' *The Times* 12 January 1842; 'Law of Deodand—Superiority of the Scotch Law' *Caledonian Mercury* 4 April 1842.

<sup>143</sup> Compensation to Families of Persons Killed by Accidents Bill, HL Deb 18 February 1845, vol 77, col 637.

<sup>144</sup> Howells (above n 82) 374.

drew up two or three clauses which, the same evening, I think, were introduced in the House of Lords by Lord Lyttelton.<sup>145</sup>

In response to the suggestion from the chairman of the select committee that ‘it was with regard to mining accidents’ that Lord Campbell’s Act was originally suggested, Whitmore replied: ‘Entirely. No thought of railway accidents entered into the matter at that time’.<sup>146</sup>

It is difficult to see any reason why Whitmore would have misled the select committee on the provenance of the Bill, and Lord Lyttelton’s willingness to intervene on behalf of the families of deceased miners is consistent with his reputation as an enlightened aristocrat with an interest in education, who promoted night schools and working men’s institutes.<sup>147</sup> Whitmore’s evidence is also consistent with the fact that the only substantive opposition to the Bill when it was re-introduced the following year seems to have come not from the [146] railway companies but from mine owners.<sup>148</sup> As it turned out, developments in the common law relating to employers’ liability meant that the Fatal Accidents Act did not greatly assist the families of workers killed in the mines and factories of the Victorian era,<sup>149</sup> but in 1845 these developments had either not yet occurred, or if they had, their importance had not yet been grasped. In particular, the doctrine of common employment was only at an embryonic stage,<sup>150</sup> and Parliament seems to have been unaware of its potential significance.<sup>151</sup> Parliamentary reports and legislation from the period show, for example, that it was assumed that an employer was liable at common law for injuries caused by dangerous plant and machinery,<sup>152</sup> and the intervention of one MP in the debates on the Fatal Accidents Bill was based on the assumption that a mine owner would be liable for fatalities in a colliery attributable to the ‘neglect and inattention of some ignorant and comparatively ill-paid’ employee,<sup>153</sup> an assumption which also underlay the objections of the mine owners themselves to the legislation.<sup>154</sup>

The essence of the original Fatal Accidents Bill was that in cases of wrongful death, liability should be imposed on a person who would have been liable to the deceased if death had not ensued, and that the action should be brought by the executor or

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<sup>145</sup> *Report of the Select Committee on the Law of Compensation for Railway Accidents*, PP 1870 (341) X, Minutes of Evidence, para 2002 (Mr Charles Shapland Whitmore QC).

<sup>146</sup> *ibid*, para 2003.

<sup>147</sup> P Gordon, ‘Lyttelton, George William, fourth Baron Lyttelton and fourth Baron Westcote (1817-1876)’ *Oxford Dictionary of National Biography* (Oxford, OUP, 2004).

<sup>148</sup> See below, text to n 186.

<sup>149</sup> See below, text following n 211.

<sup>150</sup> See below, text to n 212.

<sup>151</sup> Howells (above n 82) 382.

<sup>152</sup> *ibid*, 372-74.

<sup>153</sup> HC Deb 22 July 1846, vol 87, col 1370 (Sir J Graham).

<sup>154</sup> Bartrip and Burman (above n 14) 103.

administrator for the ‘sole benefit of such person or persons as are entitled to the personal effects of the deceased’, with the jury awarding such damages as they ‘may think apportioned to the injury’ suffered by such parties as a result of the death. There was no debate at the Bill’s first reading, and six days later, another brief measure abolishing deodands was introduced by Lord Campbell, a former law officer and future Lord Chief Justice and Lord Chancellor.<sup>155</sup> When presenting his Bill, Campbell said that the ‘wonder to him was that a law so extremely absurd and inconvenient should have remained in force down to the middle of the nineteenth century’.<sup>156</sup> The only benefit of the law of deodands was that it tended to induce care on the part of ‘stage coach proprietors and the directors of railroads’, but this could be better achieved by requiring those whose default resulted in death to compensate persons who suffered loss as a result, which was the law in Scotland, France and ‘most of the Continental countries’.<sup>157</sup> He had intended to make that part of his Bill, but he hoped that Lord Lyttelton’s Bill would answer the purpose, and the two Bills might go on together *pari passu* or be joined together, because,

objectionable as the system of deodands was, he would not abolish it, having regard to the public safety, unless the right of action was given, in order to make railroad directors and stage coach proprietors cautious of the lives and limbs of Her Majesty’s subjects.<sup>158</sup>

No objections were raised to this second Bill in the House, and there was no substantive discussion of the measure when the House went into committee on it on 17 March, but merely a spat between Lord Ellenborough and Campbell over the drafting, with Ellenborough suggesting that the already very short Bill could be made yet more concise, [147] and Campbell responding with some uncomplimentary remarks about the prolixity of certain of Ellenborough’s proclamations when Governor-General of India.<sup>159</sup>

The debate on the second reading of the Fatal Accidents Bill in the Lords on 21 April was also brief, with Lord Lyttelton pointing out that as things stood a person injured by another’s negligence might obtain compensation if he recovered from his injury, but that if he died the right of action died with him, and that his Bill would rectify this anomaly.<sup>160</sup> The Bill was welcomed by Lord Campbell as a ‘signal amendment of the law’. It had been suggested that coroners could be given the power to levy a fine on those at fault, but he did not think that inquests were ‘the proper tribunal which would

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<sup>155</sup> Deodands Abolition Bill, HL Deb 24 February 1845, vol 1025, cols 1027-34.

<sup>156</sup> HL Deb 24 February 1845, vol 77, col 1027 (Lord Campbell).

<sup>157</sup> *ibid*, col 1030.

<sup>158</sup> *ibid*, col 1031.

<sup>159</sup> The argument culminated in Ellenborough telling Campbell that ‘the next time he meant nothing he had better say nothing’ (HL Deb 17 March 1845, vol 78, col 949 (Earl of Ellenborough)).

<sup>160</sup> HL Deb 21 April 1845, vol 79, col 1053.

mete out equal justice between the parties'.<sup>161</sup> No opposition was expressed to the proposal, and both Bills passed the House of Lords on 17 June.<sup>162</sup>

It remains unclear why the Fatal Accidents Bill failed in the Commons. The only discussion of the two Bills recorded in *Hansard* was when they were considered by a committee of the whole House on 23 July, which made some amendments to both.<sup>163</sup> The absence of the law officers at the committee stage was commented upon,<sup>164</sup> and when the Bills came back before the House on 25 July, it was the Attorney-General who opposed the motion that the report of the committee on the Fatal Accidents Bill be brought up. The motion was defeated by 39 votes to 7, and the Bill was accordingly lost.<sup>165</sup> There is no *Hansard* record of the fate of the other Bill, which we can assume was then withdrawn. The defeat of the Fatal Accidents Bill in 1845 is surprising because both measures went through the House of Lords unopposed, clearly met with the approval of both the legal and the popular press,<sup>166</sup> and apparently had the 'sympathy of the public'.<sup>167</sup> Indeed, the only recorded opposition to the proposals came from two municipalities petitioning against the Deodands Abolition Bill,<sup>168</sup> presumably because of the loss of income this would entail for them as recipients of the fines.

It has been suggested that the Bills may have been lost because of opposition by 'a coalition of railway and mining interests' in the Commons,<sup>169</sup> but this seems unlikely.<sup>170</sup> It is true that when he reintroduced the proposals in the Lords in 1846, Lord Campbell said that he had been told that resistance to the Fatal Accidents Bill in the Commons would be increased by the influence of railway companies there, 'and that this influence was so great that one railway company alone could muster no less than eighty votes'.<sup>171</sup> In fact, however only 13 MPs returned to the Commons in the general election of 1841 were aligned with the [148] railway interest,<sup>172</sup> and although this number increased to 80 in the election of 1847,<sup>173</sup> the leading modern authority on the railway interest argues

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<sup>161</sup> *ibid.*

<sup>162</sup> HL Deb 17 June 1845, vol 81, col 632.

<sup>163</sup> *House of Commons Journal* vol 100, col 783 (23 July 1845).

<sup>164</sup> HC Deb 23 July 1845, vol 82, col 970 (Mr Bernal).

<sup>165</sup> HC Deb 25 July 1845, vol 82, cols 1088, 1130.

<sup>166</sup> See, eg, 'On the Law of Deodands' (1845) 29 *The Legal Observer* 337; 'Death by Accidents Compensation Bill' (1845) 9 *Justice of the Peace* 209; 'Editorial' *The Times* 23 April 1845.

<sup>167</sup> 'Death by Accidents Compensation Bill' (1845) 9 *Justice of the Peace* 209.

<sup>168</sup> See above, text to n 121.

<sup>169</sup> Bartrip and Burman (above n 14) 100.

<sup>170</sup> See also Kidner (above n 2) 324 ('no real evidence' that the railway interest was responsible).

<sup>171</sup> HL Deb 24 April 1846, vol 85, col 969. The following week, the *Law Times* asserted that 'some of the great railway interests' were about to employ their influence in the Commons to defeat the Fatal Accidents Bill, 'as they succeeded in doing last year' (*Law Times* 2 May 1846) but it is possible that the publication simply assumed that Lord Campbell's suggestion to this effect was correct.

<sup>172</sup> G Alderman, *The Railway Interest* (Leicester, Leicester University Press, 1973) 25.

<sup>173</sup> *ibid.*

that before 1868 its unity and strength was ‘more apparent than real’,<sup>174</sup> and Kostal characterises the railway industry in the mid-1840s as ‘comparatively young, disunited, politically inept, and almost wholly preoccupied with the greatest of its three early promotion manias’; very few of its proponents, he says, ‘were paying close attention to the details of proposed legislation’.<sup>175</sup> Two further pieces of evidence point against the railway interest being responsible. One is that the author of an editorial in *The Times* shortly after the loss of the Bills was ‘quite at a loss’ to explain why the measures had not become law, and hypothesised that ‘like some other Bills of the session, it was abandoned by its parents’ and then ‘left to perish’.<sup>176</sup> Had the railway companies been in any way implicated, then that would surely have been highlighted, since the paper’s antipathy towards them is obvious from its coverage of the railway accident issue. The other piece of evidence is the voting figures. The low numbers of MPs voting suggests that there was little interest in the two measures, and the fact that the same proposals received such overwhelming support (51 votes to 6) when revised versions of the Bills came back before the Commons in 1846 is difficult to square with the suggestion that they had been defeated so comprehensively by powerful vested interests in the same House the year before. The volte-face has been put down to the railway companies having realised that they would have to accept the Fatal Accidents Bill if ‘the hated deodands were to be abolished’,<sup>177</sup> but the interdependence of the two measures should have been equally obvious to them the year before.

A more plausible explanation for the failure of the first Fatal Accidents Bill in the Commons was provided by Charles Whitmore QC in his evidence to the select committee of 1870, according to whom ‘it was defeated by the veto of the Attorney General’ because

It seemed to the lawyers of that day to offend against first principles, especially against the well-known legal maxim, ‘*Actio personalis moritur cum persona*’; and some of the great pillars of our profession stood up resolutely against it, and it was thrown out.<sup>178</sup>

This explanation is consistent with Lord Lyttelton’s remark in the House of Lords in 1846 that the objections had been ‘rather of a technical nature than of any other kind’,<sup>179</sup> and also with the fact that when a second version of the Bill was debated in the Commons that year the Attorney-General prefaced his remarks by saying that he ‘entertained considerable difficulty with reference to this measure, which would introduce a new principle into the law of England’.<sup>180</sup> Furthermore, Lord Campbell

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<sup>174</sup> *ibid.*, 224.

<sup>175</sup> Kostal (above n 41) 164.

<sup>176</sup> ‘Editorial’ *The Times* 13 August 1845.

<sup>177</sup> Bartrip and Burman (above n 14) 101.

<sup>178</sup> *Report of the Select Committee on the Law of Compensation for Railway Accidents*, PP 1870 (341) X, Minutes of Evidence, para 2002 (Mr Charles Shapland Whitmore QC).

<sup>179</sup> HL Deb 24 April 1846, vol 85, col 969. See also *ibid.*, col 970 (The Lord Chancellor).

<sup>180</sup> HC Deb 22 July 1846, vol 87, col 1368 (Sir J Jervis).

referred in the 1846 Lords debate only to the railway interest *increasing* the resistance to the measure in the House of Commons, and this comment was preceded by his lamenting the fact that ‘some disposition appeared to exist among hon. and learned Gentlemen elsewhere [ie lawyer MPs] to oppose this measure’ and the observation that some of his ‘learned Friends thought ... that the law of England was absolute perfection, and that any attempt to infringe upon it should be [149] resisted’,<sup>181</sup> remarks entirely consistent with Whitmore’s claim that it was opposition from lawyers in the Commons which had scuppered the reform the year before.

In any case, fresh versions of the two Bills were introduced by Lord Campbell in the House of Lords in April 1846, and this time the House took them together. Some changes had been made to the wording of the Fatal Accidents Bill, so that for example the action was now said to be for the sole benefit ‘of such person or persons as would be entitled as next of kin’ to the deceased’s estate if he had died intestate. There was a fairly full debate of the Bills at their second and third readings in the House of Lords, with two central arguments being put forward in their favour. The first was that deodands were absurd and unfit for purpose, but that they could not be abolished without a replacement, as otherwise there would be no security ‘against death being caused by reckless conduct’.<sup>182</sup> And the second was that it was irrational that as the law stood a wrongdoer had to pay damages if he maimed someone, but that if ‘the negligence were still grosser’, and a life destroyed, ‘there was no remedy whatever’.<sup>183</sup> References were also made to the fact that remedies were available to the deceased’s relatives in Scotland and in continental countries.<sup>184</sup> On 7 May, both Bills were passed by the House unopposed.

Later that month, the Fatal Accidents Bill received its first reading in the House of Commons, and on 16 July the Deodands Abolition Bill received its first and second readings, alongside the second reading of the other Bill. A few days later, the Fatal Accidents Bill went before a committee of the whole House, and for the first time there is a record of detailed discussion of the measure in the Commons. Although it is clear from an intervention by the MP for Dorchester<sup>185</sup> and other evidence<sup>186</sup> that the substance of the Bill was opposed by mine owners, most of the objections which were raised at this point were of a technical nature. There seems to have been a general sense that the Bill needed considerable redrafting; according to the rather harsh assessment of the coroner and member for Finsbury, Thomas Wakley, it ‘was an extremely crude measure’ which ‘must have been drawn by some legal gentleman who was practising as

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<sup>181</sup> HL Deb 24 April 1846, vol 85, col 968.

<sup>182</sup> HL Deb 7 May 1846, vol 86, col 174 (Lord Denman).

<sup>183</sup> HL Deb 24 April 1846, vol 85, col 968 (Lord Campbell). This point was also emphasised at the committee stage of the Fatal Accidents Bill in the Commons: see HC Deb 22 July 1846, vol 87, col 1374 (Sir G Grey) (‘a gross anomaly’).

<sup>184</sup> See above n 29.

<sup>185</sup> HC Deb 22 July 1846, vol 87, cols 1369-70 (Sir J Graham).

<sup>186</sup> See Bartrip and Burman (above n 14) 103.

an amateur'.<sup>187</sup> Wakley suggested that the Bill be referred to a select committee for revision, and this was indeed the course taken by the House. There is apparently no record of the committee's deliberations, but when the Bill emerged from the committee stage, a number of important amendments had been made.<sup>188</sup> One was that the Bill now stipulated that the compensation was to be payable not to the next of kin of the deceased, but to an identified class of close relatives, namely the husband or wife, children, parents, step-parents, grandparents, stepchildren and grandchildren. A second change was the removal of a provision stipulating that the parties likely to benefit from an action could initiate proceedings in their own names if no executor or administrator had been appointed, or if he refused to act. This change proved problematic, particularly for those who could not afford to obtain letters of administration, and was reversed by [150] Parliament in 1864.<sup>189</sup> Finally, the committee had spotted a possible loophole in the original wording, which referred to an action being brought against the person who had caused the death, and which could therefore have been interpreted to exclude the possibility of vicarious liability. This was resolved by making the action lie against 'the person who would have been liable if death had not ensued'. In the light of this change, and the extensive list of protected parties, it is odd that Bartrip and Burman should claim that all the amendments made in the select committee which were not 'technical' were beneficial to defendants,<sup>190</sup> and their implication that the committee 'emasculated' the Bill is completely unwarranted,<sup>191</sup> even though (as they emphasise) the removal of the possibility of proceedings being initiated by the dependants was undoubtedly a setback to the interests of the families of working-class accident victims.

James Stuart-Wortley, a lawyer who seems to have been unhappy with the amendments made in committee, made a last-ditch attempt to block the two Bills at their third reading on 11 August, arguing that 'it was by means of deodands only that cheap and ready compensation was made to the poor',<sup>192</sup> but the House voted 51 to 6 in favour of passing the Bills as amended. When the Fatal Accidents Bill made its final appearance in the Lords ten days later, right at the end of the Parliamentary session, Lord Campbell moved that the House agree to the Commons' amendments, which it did without objection. On 26 August 1846, eight days after the Deodands Abolition Act, the Fatal Accidents Act received the Royal Assent.

## VI. THE AFTERMATH OF THE ACT

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<sup>187</sup> HC Deb 22 July 1846, vol 87, col 1372.

<sup>188</sup> In addition to the changes described in the text, the select committee also made it clearer that it was the jury which would apportion the damages between the dependants (s 2) and added a twelve-month limitation period (s 3).

<sup>189</sup> Fatal Accidents Amendment Act 1864 (27 & 28 Vict c 95). On the background to this enactment, see J Morgan, 'Technological Change and the Development of Liability for Fault in England and Wales' in M Martin-Casals (ed), *The Development of Liability in Relation to Technological Change* (Cambridge, CUP, 2010) 59.

<sup>190</sup> Bartrip and Burman (above n 14) 100.

<sup>191</sup> *ibid*, 103.

<sup>192</sup> HC Deb 11 August 1846, vol 88, col 625.

That the 1846 Act represented a desirable and long overdue development of the law is attested to by the speed with which many other common law jurisdictions enacted similar measures. In 1847, the legislature of New York passed a virtually identical Act<sup>193</sup> (the most significant difference being that the action was to be for the benefit only of the 'widow and next of kin' of the deceased) and by 1869, 29 of the 37 states of the Union had enacted wrongful death statutes of some kind.<sup>194</sup> Lord Campbell's Act was also swiftly re-enacted in British colonial territories such as India<sup>195</sup> and Western Australia.<sup>196</sup> The 1846 Act did not apply to Scotland,<sup>197</sup> where the action for reparation which had emerged out of the old law of assythment continued to provide protection to the relatives of the deceased in wrongful [151] death cases.<sup>198</sup> (Assythment was formally abolished by the Damages (Scotland) Act 1976, which put the Scots law of wrongful death on a statutory footing and made a number of reforms of the common law action for reparation. Although some of those reforms resulted in a degree of assimilation with the statutory position as it had developed south of the border, important differences remain, such as the claim the deceased's immediate family have for damages at large for loss of society.<sup>199</sup>)

Turning to the aftermath of the 1846 Act in England, what are we to make of the claims that the legislation 'only marginally helped' the victims of fatal accidents,<sup>200</sup> and was of 'little use to the bulk of the working population',<sup>201</sup> or the assertion by J Hostettler that the passage of the two Acts was actually advantageous to the railway companies, since the Fatal Accidents Act 'provided quite inadequate compensation in most cases and meant that, after the abolition of deodands, the relatives of victims of railway accidents were left with few rights' against them?<sup>202</sup> Setting aside the fact that the law of deodands did not actually give any 'rights' to the families of fatal accident victims, was Lord Campbell's Act really such a damp squib? To answer this question, consideration must be given to three matters: the interpretation of the Act itself; developments elsewhere in the law of tort which affected the scope of the Act's operation; and other evidence bearing on the Act's impact in the half century or so following its enactment.

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<sup>193</sup> 1847 NY Laws c 450, §1, 575.

<sup>194</sup> Witt (above n 20) 736, citing T Shearman and A Redfield, *A Treatise on the Law of Negligence* (New York, Baker, Voorhis & Co, 1869), who stated (at 333) that Lord Campbell's Act 'has been in substance incorporated into the legislation of most states of the American Union'.

<sup>195</sup> Fatal Accidents Act 1855 (India).

<sup>196</sup> Ordinance 12 Vict no 21 (1849) (WA). See also Ordinance 11 Vict no 32 (1848) (NSW); Ordinance 16 Vict no 11 (1853) (Tas); Common Law Practice Act 1867, ss 12-15 (Qld).

<sup>197</sup> Fatal Accidents Act 1846, s 6.

<sup>198</sup> See, eg, *Eisten v North British Rly Co* (1870) 8 M 980, where it was held that siblings of the deceased had no standing to sue for either solatium or patrimonial loss.

<sup>199</sup> Damages (Scotland) Act 1976, s 4. For other differences, see Walker (above n 33) 724.

<sup>200</sup> Cawthon, 'Thomas Wakley' (above n 7) 201.

<sup>201</sup> Bartrip and Burman (above n 14) 116.

<sup>202</sup> Hostettler, *Thomas Wakley* (above n 80) 137.

The two principal issues that arose on the interpretation of the Act were whether a dependant required a legal right to support from the deceased in order to benefit, and whether claims under the Act were limited to financial loss, or could include an element of solatium. Although the former restriction did apply to the Scottish claim for reparation,<sup>203</sup> there was nothing in the wording of the Act to support such a limit, and it was rejected in *Franklin v South Eastern Railway*,<sup>204</sup> where an elderly porter at St Thomas's hospital sought to recover substantial damages under the Act because the death of his son in a railway accident deprived him of income he received for the carrying of coals to the wards of the hospital, a task the deceased had taken on for his father after he had become too infirm to continue doing it himself. The Court of Exchequer allowed the claim, holding that the damages under the Act should be calculated by reference to a reasonable expectation of pecuniary benefit from the deceased, whether by right or otherwise.

The question of recovery for non-pecuniary loss was more involved. Section 2 of the Act said only that the jury should award 'such damages as they may think proportioned to the injury resulting from such death to the parties respectively', and the intentions of the sponsors of the legislation are not clear, although they did heap praise on the Scots law in the Parliamentary debates,<sup>205</sup> and as we have seen, in Scotland an element of solatium was recoverable. The issue first came before the courts in *Gillard v Lancashire and Yorkshire Railway*,<sup>206</sup> where Sir Frederick Thesiger (who had contributed to the debates in the House [152] of Commons<sup>207</sup>) pointed out that if recovery were limited to pecuniary loss then a parent would have no claim under the Act for the death of a young child, which had not been the intention of the framers of the Bill. However, Pollock CB held that no claim for solatium could be brought:

It is a pure question of pecuniary compensation, and nothing more, which is contemplated by the Act. I think it is utterly impossible for a jury to estimate any sum as a compensation for the injured feelings of the survivors ... The framers of the Act never could have meant to give compensation to the parent for the mere deprivation of his son, or the widow for that of her husband.<sup>208</sup>

The limitation of recovery to pecuniary loss was confirmed by the Court of Queen's Bench in 1852 in *Blake v Midland Railway*,<sup>209</sup> a case in which Lord Campbell (by now

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<sup>203</sup> Cf now Damages (Scotland) Act 1976, s 1(6).

<sup>204</sup> (1858) 3 H & N 211, 157 ER 448.

<sup>205</sup> HL Deb 24 February 1845, vol 77, col 1030 (Lord Campbell); HL Deb 24 April 1846, vol 85, col 968 (Lord Campbell).

<sup>206</sup> (1849) 12 LT 356.

<sup>207</sup> HC Deb 22 July 1846, vol 87, cols 1365-69.

<sup>208</sup> (1849) 12 LT 356, 356.

<sup>209</sup> (1852) 18 QB 93, 118 ER 35.

Lord Chief Justice) was himself a member of the bench.<sup>210</sup> The judgment of the court was given by Coleridge J, who again referred to the difficulty of calculating and apportioning a solatium, and said that if Parliament had intended to provide compensation for wounded feelings then it would have used more explicit language (an argument which, however, cut both ways, since—as counsel for the plaintiff pointed out—if it had been intended to limit recovery to financial loss then this could have been achieved by simply adding the word ‘pecuniary’ before ‘injury’ in section 2). It was not until 1982 that Parliament mitigated the effect of *Blake* by giving the spouse or (in the case of a minor) the parents of the deceased a conventional sum as damages for bereavement.<sup>211</sup>

The exclusion of non-pecuniary loss had the unfortunate effect of barring recovery under the Act in cases where a child or spouse was wrongfully killed but no financial dependency could be established. Nevertheless, the most significant limitations on the impact of the legislation were attributable not to the Act itself (or to its interpretation by the courts) but to developments elsewhere in the law of tort, by far the most important of which was the rule that an employee could not sue his employer for the negligence of a fellow employee. Although this ‘doctrine of common employment’ can be traced back to *Priestley v Fowler* in 1837, it has persuasively been argued<sup>212</sup> that the rule was only properly established four years after the passage of the 1846 Act, by the decision of the Court of Exchequer in *Hutchinson v York, Newcastle and Bernick Railway*.<sup>213</sup> This would explain why mining interests opposed the Act, even though the common employment rule largely shielded them from its consequences, and why in one of the earliest cases applying the legislation the family of a railway labourer who had been killed in an accident caused by the carelessness of his fellow employees recovered damages from the railway company for which he had worked.<sup>214</sup> Along with the defences of contributory negligence and voluntary assumption of risk, the doctrine of common employment meant that in the end the families of those killed in accidents at work were generally deprived of the assistance which the Fatal Accidents [153] Act could otherwise have provided, but the responsibility for that lies not (as has been implied) with any ‘defects’ in the legislation,<sup>215</sup> but with the judges who went out of their way to use common law techniques to exclude employees from the protection of nineteenth-century personal injury law.

Furthermore, outside the employment context there is considerable evidence that the 1846 Act was far from ineffectual, and that on the contrary it played a significant role in the growth of personal injury litigation in the second half of the nineteenth century,

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<sup>210</sup> According to the report in the *Queen’s Bench Reports*, Lord Campbell was not in court when the judgment was handed down (see (1852) 18 QB 93, 108; 118 ER 35, 41) but the report also makes clear that he played an active role during the course of argument.

<sup>211</sup> Fatal Accidents Act 1976, s 1A (inserted by the Administration of Justice Act 1982, s 3).

<sup>212</sup> Kostal (above n 41) 259ff. See also Bartrip and Burman (above n 14) 103-06.

<sup>213</sup> (1850) 5 Ex 343.

<sup>214</sup> *Armsworth v South Eastern Rly* (1848) 11 *The Jurist* 758.

<sup>215</sup> Bartrip and Burman (above n 14) 103.

much of which was directed against the railway companies. The extensive use made of the legislation by the relatives of railway accident victims is documented by Kostal,<sup>216</sup> who shows how the broad discretion given to juries when fixing damages in wrongful death actions resulted in the quantum of the awards sky-rocketing, citing as an example *Pym v Great Northern Railway*, where the jury awarded the widow and eight of the children of a 'gentleman of fortune' who died in a derailment on the Great Northern line the then enormous sum of £13,000 (an award reduced to £9,000 on appeal<sup>217</sup>). Awards such as this provoked a fierce reaction from the railway press, and the railway companies which had hitherto played little attention to the risk of litigation were spurred into action, forming a standing committee of lawyers and managers in 1861 to gather information and lobby Parliament. High on their list of demands was the reform of Lord Campbell's Act.<sup>218</sup> However, although their lobbying resulted in a number of parliamentary inquiries and even recommendations for reforms—such as maximum liabilities according to the class of fare and a new juryless railway court<sup>219</sup>—none of these proposals were implemented. Tellingly, Kostal attributes the industry's failure to persuade Parliament to enact proposals of this kind to MPs sharing the popular perception that railway accidents were preventable, and that the threat of litigation operated as an effective deterrent to negligence,<sup>220</sup> precisely the assumptions which had driven Parliament to enact the 1846 Act in the first place. These same assumptions were shared by both the Royal Commission on Railways of 1867 and the Royal Commission on Railway Accidents of 1877, the latter stating that 'the law of liability for negligence' was the 'greatest safeguard of the public against railway accidents' and that it was generally considered that Lord Campbell's Act had 'done more than all other legislation to strengthen the influences which operate in favour of the public safety'.<sup>221</sup> Whatever else might be said about the 1846 Act, then, it was certainly not an irrelevance.

## [154] VII. EVALUATING THE ACT WITH HINDSIGHT

Notwithstanding the criticisms that modern commentators have directed at the 1846 Act, with the benefit of hindsight it can be defended as a rationalising and progressive measure, the central tenets of which have stood the test of time. Despite the nostalgia

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<sup>216</sup> Kostal (above n 41) ch 7.

<sup>217</sup> See (1861) 2 B & S 759, 121 ER 1254 (QB). A further appeal by the defendant on quantum failed: (1863) 4 B & S 396, 122 ER 508 (Ex Ch). See further, Kostal (above n 41) 295-97.

<sup>218</sup> Kostal (above n 41) 296.

<sup>219</sup> Maximum liabilities were for example recommended both by the 1867 Royal Commission on Railways (PP 1867 (3844) XXXVIII, Final Report, para 159) and by a Select Committee on the Law of Compensation for Railway Accidents, PP 1870 (341) X, which also recommended a special juryless court.

<sup>220</sup> Kostal (above n 41) 310-11. See, eg, *Report on Railway Accidents During the Year 1857*, PP 1857-58 (2338) LI, 183, pp 20-21 (law of compensation 'the present safeguard against accidents' and the only practicable mode of reducing railway accidents would be to 'obtain a more sure and just action of the law by which compensation is awarded'); *Report of the Select Committee on Railway Accidents*, PP 1857-58 (362) XI, Minutes of Evidence, para 841 (Rt Hon R Lowe MP) ('I regard Lord Campbell's Act myself as the only security which the public have against railway accidents').

<sup>221</sup> PP 1877 (1637) XLVIII, Final Report, para 100.

with which some legal historians seem to view them, the mid-nineteenth century dismissal of deodands as an irrational hangover from more primitive times was wholly justified. Although the advent of steam power led to a brief revival of the deodand, and its partial transformation into a sanction for negligently causing death, 'it was a concept which was modified until further adaptation was no longer possible'.<sup>222</sup> Ultimately, it was simply too much of a stretch to convert a doctrine based on pre-modern conceptions of responsibility into an effective legal mechanism for responding to the problem of accidental death in the railway age, and in hindsight abolition of the deodand and its replacement with a civil action for wrongful death was the only rational option.

It would however be unfair on the proponents of the 1846 legislation to characterise it as no more than the tidying up of a technical difficulty, for while on its own the abolition of deodands could certainly have been viewed in that way, giving the close relatives of persons who were wrongfully killed a claim for damages against the wrongdoer was a progressive measure motivated by humanitarian concerns. The progressive nature of the 1846 reforms is borne out not only by the fact that the original Fatal Accidents Bill was designed to further the interests of the families of mining accident victims, but also by the backgrounds of two of the foremost proponents of the reforms, Lord Campbell and the MP Thomas Wakley. Campbell has been described as a 'committed but conservative whig' with a 'profound interest in law reform',<sup>223</sup> and, although certainly no radical, the fact that he was a progressive force is obvious from the list of reform measures with which he had been associated prior to 1846, including the Prisoners' Counsel Act of 1837, which improved the rights of those accused of felonies, and a failed attempt to abolish imprisonment for non-payment of ordinary debts.<sup>224</sup> Wakley, on the other hand, was a radical figure, and the fact that he lent his support to both the 1846 Acts is highly significant, not least because as the coroner for West Middlesex he had aroused the ire of officialdom by insisting on investigating accidental or violent deaths in workhouses,<sup>225</sup> campaigned for the more extensive use of deodands in occupational death cases, and encouraged juries to impose large deodands where there was clear evidence of corporate negligence<sup>226</sup>—he had, for example, presided with what *The Times* called 'praiseworthy zeal'<sup>227</sup> over the inquest at which a Harrow jury imposed a deodand of £2,000 on the London and Birmingham Railway. More generally, Wakley has been described as 'an ardent social reformer and champion of the neglected poor',<sup>228</sup> whose 'keen onslaughts on injustice' and 'unfailing humanity' won him praise

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<sup>222</sup> Sutton (above n 61) 53.

<sup>223</sup> GH Jones and V Jones, 'Campbell, John, first Baron Campbell of St Andrews (1779-1861)' *Oxford Dictionary of National Biography* (Oxford, OUP, 2004).

<sup>224</sup> *ibid.*

<sup>225</sup> WF Bynum, 'Wakley, Thomas (1795-1862)', *Oxford Dictionary of National Biography* (Oxford, OUP, 2004).

<sup>226</sup> Hostettler, *Thomas Wakley* (above n 80) 135; Cawthon, 'New Life for the Deodand' (above n 7) 141 (when Wakley took over the coronership of West Middlesex in 1838, 'the number and amount of deodands increased markedly').

<sup>227</sup> 'Editorial' *The Times* 4 December 1840.

<sup>228</sup> J Hostettler, 'Thomas Wakley: An Enemy of Injustice' (1984) 5 *Journal of Legal History* 60, 73.

from [155] contemporaries such as Charles Dickens.<sup>229</sup> He used his position as the independent radical MP for Finsbury to campaign (among other things) against the new poor law and military floggings—which were so savage many proved fatal—and in favour of the extension of the franchise, remission of the sentences of the Tolpuddle martyrs, better provision of health services and a system of workmen’s compensation. Nor was there anything half-hearted about Wakley’s support for the 1846 legislation. Although he directed some barbs at the original drafting of the Fatal Accidents Bill<sup>230</sup>—which perhaps reflected his passionate loathing of lawyers<sup>231</sup>—in his contribution to the debate in the Commons he fully endorsed the substance of the two measures, saying that it was ‘quite obvious ... that the law of deodands ought not to remain in its present state’ and that with appropriate amendments the Fatal Accidents Bill would be ‘a very useful and practical measure’.<sup>232</sup> Furthermore, in both 1845 and 1846, Lord Campbell referred in the House of Lords debates to the view of Wakley (a ‘most active servant of the public’<sup>233</sup>) that the law of deodands ‘could do no good’ and that ‘no benefit whatever’ arose from it.<sup>234</sup>

The progressive nature of the 1846 reforms is attested to by three other considerations. The first is that some of the assumptions underlying the criticism that the Fatal Accidents Act did little to help the working classes are questionable. For example, we have seen that the ineffectiveness of the Act in the case of occupational accidents was not attributable to any defects in the legislation itself, but to developments in the common law of tort. Similarly, while it is often assumed that tort law was largely irrelevant to the working class in the Victorian era because the costs of litigation were prohibitive, in reality the picture may have been more complex. There is certainly evidence that it was difficult for victims of occupational accidents and their relatives to fund legal actions against employers,<sup>235</sup> but on the other hand there are also a number of reported cases from the late 1840s and 1850s in which the widows of deceased workers brought fatal accidents actions and were represented by counsel.<sup>236</sup> Furthermore, it seems that, at least in the context of railway accidents, de facto contingency fee arrangements allowed lawyers to take on cases for poor clients with good causes of action in the second half of the nineteenth century.<sup>237</sup> According to evidence given to

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<sup>229</sup> *ibid*, 60. See also Bynum (above n 225) (Wakley ‘was ever indignant at social or political injustice, and he never lost his concern for the plight of the ordinary individual’).

<sup>230</sup> See above, text to n 187.

<sup>231</sup> On which, see J Hostettler, ‘Thomas Wakley: An Enemy of Injustice’ (1984) 5 *Journal of Legal History* 60, 72-73.

<sup>232</sup> HC Deb 22 July 1846, vol 87, col 1372. See also HC Deb 11 August 1846, vol 88, cols 626-27.

<sup>233</sup> HL Deb 24 February 1845, vol 77, col 1030.

<sup>234</sup> *ibid*; HL Deb 24 April 1846, vol 85, col 968.

<sup>235</sup> See, eg, Bartrip and Burman (above n 14) 110-11, 116. Bartrip and Burman also highlight ‘the social obstacles to bringing of an action of this sort’ (*ibid*, 116).

<sup>236</sup> See, eg, *Armsworth v South Eastern Rly* (1848) 11 *The Jurist* 758 (railway labourer); *Wiggett v Fox* (1856) 11 Ex 832, 156 ER 1069 (construction worker); *Degg v The Midland Rly Co* (1857) 1 H & N 773, 156 ER 1413 (labourer); *Vose v Lancs and Yorks Rly Co* (1858) 27 LJ Ex 249 (railway worker).

<sup>237</sup> Kostal (above n 41) 261.

the Select Committee on the Law of Compensation for Railway Accidents in 1870, in railway cases such arrangements meant that poorer persons had ‘no difficulty in getting attorneys’,<sup>238</sup> and reported cases such as *Franklin v South Eastern Railway*<sup>239</sup> show that plaintiffs of apparently very limited means were able to recover damages from railway companies. Secondly, it is noteworthy that Lord Campbell’s Act allowed claims to be brought for the benefit of both wives and husbands, with the result that it provided equal [156] protection to families in which the earnings of a deceased woman were an important source of income. This gender symmetry can be contrasted with the majority of wrongful death statutes enacted in American jurisdictions after 1846, which excised the word ‘husband’ and so deprived widowers of the right to bring an action.<sup>240</sup> Finally, the humanitarian credentials of the 1846 legislation are not undermined by the fact that it was justified primarily in terms of deterrence rather than compensation.<sup>241</sup> As we have seen, in the Victorian era it was commonly assumed that most of the fatal accidents which were taking place on the railways and elsewhere were preventable,<sup>242</sup> and in those circumstances the priority would rightly have been reducing their incidence, rather than simply compensating those who lost out when they occurred.<sup>243</sup> Overall, the aim was to ‘reduce suffering by deterrence and by securing compensation where it failed’.<sup>244</sup> Furthermore, the unwillingness of Parliament to impose stringent safety regulation meant that tort law was seen as the most effective available mechanism for deterring corporate negligence.<sup>245</sup>

The legislation can also be defended as a matter of purely legal analysis, despite the criticisms of commentators such as Kidner<sup>246</sup> and Waddams.<sup>247</sup> The 1846 Act was brief and tightly drafted<sup>248</sup> and the channelling of the claims via the executor or administrator

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<sup>238</sup> See *Report of the Select Committee on the Law of Compensation for Railway Accidents*, PP 1870 (341) X, Minutes of Evidence, paras 145-54 (Mr James Blenkinsop). See also paras 692-96 (Mr James Allport).

<sup>239</sup> (1858) 3 H & N 211, 157 ER 448.

<sup>240</sup> This feature of many of the American wrongful death statutes is explored by Witt (above n 20), who attributes it to a nineteenth-century conception of the family in which women were confined to relatively narrow domestic roles and wholly dependent on their husbands for financial support. Needless to say, this same conception of the family also underlay much of the discussion of the fatal accidents issue in England, but nevertheless it was not reflected in the legislation.

<sup>241</sup> See, eg, HL Deb 21 August 1846, vol 88, col 926 (Lord Campbell).

<sup>242</sup> It was several decades before it was generally recognised that ‘a certain number of accidents were unavoidable and not attributable to anyone’s fault’ (Bartrip and Burman (above n 14) 102-03). See also Kostal (above n 41) 282.

<sup>243</sup> See also Bartrip and Burman (above n 14) 103.

<sup>244</sup> Simpson (above n 53) 129 (referring to pressure for tort protection for injured workers).

<sup>245</sup> See Kostal (above n 41) 282, 319-20. See also Howells (above n 82) 371-72.

<sup>246</sup> Kidner (above n 2).

<sup>247</sup> Waddams (above n 5).

<sup>248</sup> Frederick Pollock described the Act as ‘extremely characteristic of English legislation’ (F Pollock, *The Law of Torts* (London, Stevens and Sons, 1887) 58), which presumably was intended as a compliment. See also W Holdsworth, *A History of English Law* (AL Goodhart and HG Hanbury eds, London, Sweet &

was neater than giving each dependant their own separate action (as was the case in Scotland). Furthermore, the basic idea of a derivative or 'parasitic' claim was sophisticated and appropriate; it meant, for example, that any defences which would have been available against the deceased himself could also be pleaded against the dependants, and although this had the unfortunate consequence that claims in respect of occupational fatalities could often be defeated by pleas of volenti or contributory negligence, or by the doctrine of common employment, it would surely have been anomalous if the legislation had put the dependants in a better position than the deceased himself would have been in had he survived.

Although inevitably the subsequent Fatal Accidents Acts of 1864, 1959 and 1976 (along with other amending legislation) have considerably altered the statutory wrongful death regime as it stands today, the central conceptual structure of the original legislation has survived into the modern law. In particular, the argument<sup>249</sup> that the dependency claim should be replaced with a claim by and on behalf of the deceased's estate was rejected by nearly 90 per cent of those who responded to a Law Commission consultation paper on [157] wrongful death,<sup>250</sup> and then by the Commission itself in its final report.<sup>251</sup> Even though giving the claim to the estate would admittedly simplify the law,<sup>252</sup> the dependency claim can be defended on the grounds that tort damages are awarded as a 'next best' to the wrong not having been committed in the first place, and that 'giving the claim to the third party dependants results in a closer approximation to the wrong not having been committed ... than would be the case if the award accrued to the estate', since if the deceased had lived, his dependants would have received support, and his heirs (if different) would have received nothing.<sup>253</sup>

## VIII. CONCLUSION

One final point can be made by way of a conclusion, which is that there were clear advantages to a *legislative* solution to the wrongful death question. Statutory intervention resulted in a comprehensive scheme for the recovery by dependants of their losses, which would have been difficult to achieve through common law development. Furthermore, the courts were obviously not in a position to strike the compromise which lay at the heart of the 1846 reforms, namely the simultaneous abolition of the deodand and its replacement by a right of action on behalf of the relatives of the deceased. In striking that compromise, Parliament took wrongful death out of the hands of coroners' juries and put it into the hands of the civil courts. By so doing, the

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Maxwell, 1965) vol XV, 220, where the framing of the the 1846 Act is compared favourably with that of the Law Reform (Miscellaneous Provisions) Act 1934.

<sup>249</sup> See Waddams (above n 5).

<sup>250</sup> Law Commission, *Claims for Wrongful Death* (Law Com CP No 148, 1997).

<sup>251</sup> Law Commission, *Claims for Wrongful Death* (Law Com No 263, 1999) paras 3.1-3.4.

<sup>252</sup> Waddams (above n 5) 445.

<sup>253</sup> R Stevens, *Torts and Rights* (Oxford, OUP, 2007) 176.

legislature ‘ushered in a recognizably modern approach to personal injury litigation’<sup>254</sup> which heralded the coming of age of personal injury law.

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<sup>254</sup> Witt (above n 20) 720.