

## THE ROLE OF CONTRIBUTORY NEGLIGENCE IN CLAIMS FOR ASSAULT AND BATTERY

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This article examines the role of contributory negligence in claims for assault and battery in the light of several cases which have considered the issue, including, in particular, a recent decision of the English Court of Appeal. It considers the injustice to which the current English law might give rise, and suggests alternative approaches to assault and battery cases in which claimants are partly responsible for the harm they suffer.

### I. INTRODUCTION

Although the partial defence<sup>1</sup> of contributory negligence is primarily associated with actions in negligence, its scope is not confined to that tort. Under both the U.K. *Law Reform (Contributory Negligence) Act* (“the *U.K. Act*”)<sup>2</sup> and the Singapore *Contributory Negligence and Personal Injuries Act* (“the *Singapore Act*”)<sup>3</sup> contributory negligence may be pleaded where a claimant suffers harm partly as a result of his own fault and partly as a result of the defendant’s fault. Since the ‘fault’ required is defined in both Acts as “negligence, breach of statutory duty or other act or omission which gives rise to a liability in tort or would, apart from this Act, give rise to the defence of contributory negligence”,<sup>4</sup> the defence is potentially applicable to a range of actions where lack of care on the part of the claimant can be shown to have contributed to the

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<sup>1</sup> Contributory negligence was a full defence at common law. In order to mitigate the harshness which resulted when claimants lost all compensation as a result of minor acts of carelessness (see *e.g.*, *Butterfield v. Forrester* (1809) 11 East 60; 103 E.R. 926), the courts introduced the ‘last opportunity rule’, under which the party who had the last chance to avoid the accident bore sole responsibility for its consequences (see *e.g.*, *Davies v. Mann* (1842) 10 M. & W. 456; 152 E.R. 588). This was succeeded by the ‘constructive last opportunity’ rule, under which responsibility lay with the party who would have had the last chance of avoiding the accident had he not been negligent (see *e.g.*, *British Columbia Electric Railway v. Loach* [1916] 1 A.C. 719 (P.C.)). However, rather than bringing greater fairness to the defence, these devices merely served to complicate it. In order to answer the many criticisms and anomalies to which contributory negligence as a full defence gave rise, legislation was introduced in the U.K. in 1945 and in Singapore in 1953 (by Ordinance 37 of 1953) to make it a partial defence, thus allowing damages to be apportioned between the parties to reflect their respective responsibilities for the claimant’s damage.

<sup>2</sup> 1945 (U.K.), 8 & 9 Geo. VI, c. 28.

<sup>3</sup> Cap. 54, 2002 Rev. Ed. Sing.

<sup>4</sup> Section 4 of the *U.K. Act* and s. 2 of the *Singapore Act*.

damage he sustained. Contributory negligence is, for example, well-established as a defence to actions for breach of statutory duty,<sup>5</sup> and has also been applied in cases of private nuisance.<sup>6</sup> However, it is widely accepted that the defence cannot be pleaded in relation to torts which involve intentional wrongdoing by defendants. Until the recent decision of the English Court of Appeal in *Pritchard v. Co-operative Group Ltd.*,<sup>7</sup> the only exception to this general rule related to actions for assault and battery,<sup>8</sup> with respect to which judicial attitudes were somewhat unsettled. Although the decision in *Pritchard* appears to have resolved the uncertainty by concluding that the *U.K. Act* does *not* allow for contributory negligence to be pleaded in such actions, it is a conclusion which—even if supportable as an exercise in statutory interpretation—is likely to lead to unjust results. This article will examine the historical role of contributory negligence in cases of assault and battery, evaluate the current law, and suggest alternative approaches under which a claimant’s responsibility for the events which cause him damage might appropriately be taken into account.

## II. BACKGROUND

At common law, it was accepted that contributory negligence could not, in general, be pleaded with respect to the intentional torts. The reason for this was encapsulated in Lord Lindley’s dictum in the early 20<sup>th</sup> century case of *Quinn v. Leatham* that “the intention to injure the plaintiff negatives all excuses”.<sup>9</sup> However, cases in which the issue of contributory negligence or its historical equivalent arose in the context of assault and battery were few and far between, and—as will be discussed below—their conclusions were somewhat opaque.<sup>10</sup>

In the fifty years or so following the introduction of the *U.K. Act* in 1945, a number of cases involving the application of contributory negligence to actions for assault and battery fell to be decided, but rather than clarifying matters, these cases made the position cloudier—due primarily to the judgments of Lord Denning in the Court of Appeal in the cases of *Lane v. Holloway*<sup>11</sup> and *Murphy v. Culhane*.<sup>12</sup>

*Lane v. Holloway* involved a claim by a man in his sixties who insulted the defendant’s wife and threw a punch at the defendant. The defendant, who was a much younger man, then hit the claimant very hard, severely injuring his eye. In considering whether the claimant’s provocation of the defendant could result in a reduction of the claimant’s damages, Lord Denning, without making specific reference to the *U.K. Act*, relied on the Australian decision in *Fontin v. Katapodis*<sup>13</sup> in holding that,

<sup>5</sup> See e.g., *Caswell v. Powell Duffryn Collieries Ltd.* [1940] A.C. 921 (H.L.).

<sup>6</sup> See e.g., *Trevett v. Lee* [1955] 1 W.L.R. 113 (C.A.).

<sup>7</sup> [2011] EWCA Civ 329, [2011] 3 W.L.R. 1272 (C.A.) [*Pritchard*].

<sup>8</sup> Historically, the defendant’s state of mind was not relevant in actions for trespass to the person. Intention only became a prerequisite following the widely adopted dictum of Lord Denning in *Letang v. Cooper* [1965] Q.B. 232, in which the Master of the Rolls opined that, given the major role which negligence now played in offering remedies for unintentional wrongs, only intentional acts should all henceforth give rise to actions for trespass.

<sup>9</sup> [1901] A.C. 495 (H.L.). *Quinn v. Leatham* involved the economic tort of conspiracy to injure.

<sup>10</sup> See text accompanying note 54 *et seq.*

<sup>11</sup> [1968] 1 Q.B. 379.

<sup>12</sup> [1977] 1 Q.B. 94.

<sup>13</sup> [1962] 108 C.L.R. 177 (H.C.A.).

while provocation by a claimant could prevent the award of exemplary or aggravated damages, it could not be used to reduce what he referred to as “the real damages”.<sup>14</sup>

Some ten years later, Lord Denning reached a different conclusion in *Murphy v. Culhane*, an interlocutory appeal arising from an incident in which the claimant’s husband was killed when the defendant hit him on the head with a plank while the claimant and others were allegedly attacking him. In that case, Lord Denning distinguished *Lane v. Holloway* on the basis that it had involved only a “trivial” act by the claimant in comparison with the “savage” response of the defendant.<sup>15</sup> In an action for assault and battery where an injured person’s conduct was sufficiently serious for it fairly to be regarded as partly responsible for the damage suffered, he preferred the view which he had expressed in another Court of Appeal decision, *Gray v. Barr*, that the court “can take into account not only circumstances which go to aggravate damages, but also those which go to mitigate them”.<sup>16</sup> In this respect Lord Denning concluded that, while in *Lane v. Holloway* the claimant’s conduct had not been sufficient to amount to ‘fault’ within s. 4 of the *U.K. Act*, the conduct of the claimant’s husband in *Murphy v. Culhane* “may well have been such as to make him liable in tort”.<sup>17</sup>

Lord Denning’s definition of ‘fault’ in *Murphy v. Culhane*, and his consequent conclusion that contributory negligence could be pleaded in actions for assault and battery, was accepted and applied—whether explicitly or implicitly—in a number of subsequent cases. In *Barnes v. Nayer*,<sup>18</sup> where the defendant assaulted and

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<sup>14</sup> *Lane v. Holloway*, *supra* note 11 at 388. Salmon L.J. also rejected the idea that compensatory damages should be reduced, stating that it was “... impossible to hold that what this old man did, however rude or silly or cantankerous, amounted to contributory negligence” (at 392, 393), and Winn L.J. simply said that there was nothing on the facts which could be considered fault on the part of the claimant. Brian Childs, in his article “Pause for Thought: Contributory Negligence and Intentional Trespass to the Person” (1993) 44 Northern Ireland Legal Quarterly 334 [Childs] at 337, n. 20, observes: “Unfortunately, the language used by both Salmon L.J. and Winn L.J. was directed to the non-availability of the defence on the facts. Neither questioned its availability as a matter of law...”.

<sup>15</sup> *Murphy v. Culhane*, *supra* note 12 at 98.

<sup>16</sup> *Gray v. Barr* [1971] 2 Q.B. 554 at 569. In *Gray v. Barr*, Mr. Barr shot Mr. Gray, his wife’s lover, after going to Mr. Gray’s home to look for his wife. The jury in the criminal trial found that the death occurred by accident, when Mr. Barr’s gun went off during a struggle between the two men. Mr. Barr accepted that he was liable to compensate Mr. Gray’s widow and children under the legislation governing fatal accidents, but sought to recover the cost of this compensation from his ‘hearth and home’ insurance policy, which covered injuries caused by accident. The Court of Appeal held that the policy did not cover accidents of this kind, and that it would, anyway, be against public policy to allow Mr. Barr to recover the cost of compensating Mr. Gray’s family. During the course of his judgment, Lord Denning considered (*obiter*) whether, had he lived, Mr. Gray would have had an action against Mr. Barr. Concluding that he would have done, the Master of the Rolls went on, somewhat ambiguously, to observe:

Whenever two men have a fight and one is injured, the action is for assault, not for negligence. If both are injured, there are cross-actions for assault. The idea of negligence—and contributory negligence—is quite foreign to men grappling in a struggle. In an action for assault, in awarding damages, the judge or jury can take into account, not only circumstances which go to aggravate damages, but also those which go to mitigate them. They could take into account in this case the provocation to Mr. Barr and his distraught and anxious state.

<sup>17</sup> *Murphy v. Culhane*, *supra* note 12 at 98, 99. Childs, *supra* note 14 at 337, observes that Lord Denning’s conclusion in *Murphy v. Culhane* was “in the nature of a throwaway remark” and that it “hardly constituted a compelling authority for the reversal of the accepted position.”

<sup>18</sup> *The Times*, 19 December 1986.

killed a neighbour whom he alleged had abused him and his family for years, May L.J. observed in the Court of Appeal: “I can see no reason why... given the facts, a defendant to a claim for damages for assault cannot rely on the [U.K.] Act”,<sup>19</sup> and in *Wasson v. Chief Constable of the Royal Ulster Constabulary*<sup>20</sup> and *Tumelty v. Ministry of Defence*,<sup>21</sup> both of which involved injuries to rioters by plastic baton rounds during the Northern Ireland troubles, Hutton J. reduced the damages payable, holding that “as a matter of principle contributory negligence can be pleaded as a defence to an action for intentional trespass to the person”.<sup>22</sup> A similar approach was taken in *Ward v. Chief Constable of the Royal Ulster Constabulary*,<sup>23</sup> and in *Malcolm v. Walsh*,<sup>24</sup> where the defendant put out the claimant’s eye with a golf club, counsel for the claimant conceded that “... given appropriate circumstances contributory negligence can be a partial defence to an action for battery”.<sup>25</sup> And based on an assumption that contributory negligence could apply in assault and battery cases, the parties in *Parmer v. Big Security Company Limited and others*,<sup>26</sup> where the claimant was injured by the doorman of a pub from which he was being ejected after a brawl, agreed to apportion damages to reflect the claimant’s responsibility for his injuries.

However, in *Standard Chartered Bank v. Pakistan Shipping Corporation*,<sup>27</sup> a case which involved an action for deceit, Lord Hoffmann in the House of Lords arrived at an entirely different definition of ‘fault’ for the purposes of the U.K. Act. His Lordship concluded that a claimant could not be at ‘fault’ within s. 4 of the Act<sup>28</sup> unless his conduct would have given rise to contributory negligence at common law, since the purpose of the legislation, as indicated in s. 1(1),<sup>29</sup> was to relieve claimants whose actions would otherwise have failed, *not* to reduce the damages which would previously have been payable by defendants.<sup>30</sup>

### III. THE DECISION IN *PRITCHARD*

It was against this backdrop that the Court of Appeal was called on to decide *Pritchard*. In that case, the claimant and her sister got into an altercation with Mr. Wilkinson, the manager of the Co-op store in which she worked, when he refused

<sup>19</sup> *Ibid.*

<sup>20</sup> [1987] 8 N.U.B. 34 [*Wasson*].

<sup>21</sup> [1988] 3 N.U.B. 51.

<sup>22</sup> *Wasson*, *supra* note 20 at 49.

<sup>23</sup> [2000] N.I. 543.

<sup>24</sup> [1997] EWCA Civ 1679.

<sup>25</sup> *Ibid.* On the facts, the claimant’s damages were not reduced.

<sup>26</sup> [2008] EWHC 1414 (Q.B.).

<sup>27</sup> [2003] 1 A.C. 959 (H.L.) [*Standard Chartered*].

<sup>28</sup> Section 2 of the *Singapore Act* contains an identical definition of ‘fault’. See text accompanying note 4.

<sup>29</sup> Section 1(1) of the U.K. Act, *supra* note 2, reads:

Where any person suffers damage as a result partly of his own fault and partly of the fault of any other person or persons, a claim in respect that damage shall not be defeated by reason of the fault of the person suffering that damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant’s share in the responsibility for the damage.

An identical provision is to be found in s. 3(1) of the *Singapore Act*, *supra* note 3.

<sup>30</sup> *Pritchard*, *supra* note 7 at para. 31, quoting Lord Hoffmann in *Standard Chartered*, *supra* note 27, at para. 12.

her request for an additional day off work following a period of sick leave. During the altercation, the claimant shouted foul and abusive language at Mr. Wilkinson, who swore back, and told her that she must leave the premises. When she would not do so, he took a firm hold of her arms and held them in front of her, as if to lead her out. A struggle ensued, during which she bit him. She sued the Co-op (on the basis of vicarious liability for Mr. Wilkinson's acts) for assault and battery and false imprisonment, as well as for harassment and bullying during the period before the incident.<sup>31</sup> The trial judge, Bromilow J., rejected the claims for false imprisonment, harassment and bullying. However, he held that Mr. Wilkinson had committed assault and battery, since at the time he took hold of the claimant's arms she had posed no imminent threat of violence. Bromilow J. further concluded that, even though the claimant's abusive attitude amounted to a "degree of provocation", he was nevertheless bound by *Lane v. Holloway* to reject the defence of contributory negligence on the facts of the case.

In the Court of Appeal, the defendant appealed on the issue of contributory negligence.<sup>32</sup> The judgments were delivered by Aikens L.J. (with whose reasons Sir Anthony May P. agreed) and Smith L.J. Aikens L.J. took as his starting point Lord Hoffmann's conclusion in *Standard Chartered* that contributory negligence could be pleaded under the *U.K. Act* only in circumstances where it had been available at common law. In this respect, he referred to the fact that, while counsel for the defendant had been unable to cite any decisions before the introduction of the *U.K. Act* in which the defence of contributory negligence had been applied to actions for assault and battery, counsel for the claimant had found three cases—*Gibbons v. Pepper*,<sup>33</sup> *Bridgman v. Skinner*<sup>34</sup> and *Watson v. Christie*<sup>35</sup>—in which the courts had "expressly or inferentially"<sup>36</sup> refused to apply it to such actions. Moreover, in the Australian case of *Horkin v. North Melbourne Football Club Social Club*,<sup>37</sup> Brooking J., after a thorough examination of old and modern Australian, English and New Zealand law, had reached a similar finding with respect to the application of the defence to common law cases of battery.<sup>38</sup> In addition, the dicta of Lord Hoffmann and Lord Rodger of Earlsferry in *Standard Chartered*,<sup>39</sup> and Mummery L.J. in *Alliance &*

<sup>31</sup> The claimant did not return to work, either at the Co-op or elsewhere, and claimed that the incident had led to near psychiatric breakdown, depression and agoraphobia.

<sup>32</sup> The defendant also appealed on a causation issue relating to the fact that, having specifically indicated that he preferred the expert evidence of the consultant psychiatrist who testified for the defendant to that of the consultant psychiatrist who testified for the claimant, Bromilow J. then apparently accepted the evidence of the claimant's expert witness that the incident had led the claimant to suffer from agoraphobia. All three judges agreed that Bromilow J. should not have found as he did on this point without offering a cogent reason, in the absence of which it must be assumed that he had misinterpreted the evidence. They held that damages awarded at trial should therefore be reduced to take account of the sum wrongly attributed to the agoraphobia. *Pritchard*, *supra* note 7 at paras. 72, 73, 77 and 86.

<sup>33</sup> (1695) 1 Raym. Ld. 38.

<sup>34</sup> (1734) 2 Barn. K.B. 418.

<sup>35</sup> (1800) 2 Bos. & Pul. 224.

<sup>36</sup> *Pritchard*, *supra* note 7, at para. 34.

<sup>37</sup> [1983] V.R. 153 [*Horkin*], referred to in *Pritchard*, *supra* note 7 at para. 39.

<sup>38</sup> Aikens L.J. also referred to the lack of precedents in *Bullen & Leake's Precedents of Pleadings*, 3rd ed. (London: Stevens & Sons, 1868) and to the fact that a survey of textbooks and essays also led to same conclusion that the defence was not available with respect to assault and battery at common law. *Pritchard*, *supra* note 7 at paras. 36, 37.

<sup>39</sup> *Supra* note 27, at paras. 18, 42.

*Leicester Building Society v. Edgestop Ltd.*,<sup>40</sup> supported the view that there had been no common law defence of contributory negligence in the tort of deceit.<sup>41</sup>

Turning to the law after the introduction of the *U.K. Act*, Aikens L.J. considered Lord Denning's approach in *Murphy v. Culhane* to be "problematical".<sup>42</sup> He concluded that, since this approach was based purely on the extent to which the claimant was responsible for his own damage, and not on the question of whether the defence of contributory negligence would have been available to reduce his damages at common law, it could not stand with the subsequent statement of principle by Lord Hoffmann in the House of Lords in *Standard Chartered*<sup>43</sup> (which had drawn on the judgment of Lord Hope of Craighead in *Reeves v. Commissioner of Police of the Metropolis*<sup>44</sup> and the views of Professor Glanville Williams<sup>45</sup>). For this reason, *Murphy v. Culhane* and the cases applying its reasoning should not "... be regarded as authority for the proposition that, as a matter of law... compensatory damages for the tort of assault can be reduced by the application of the [*U.K. Act*]"<sup>46</sup> And even if he were wrong on this point, Aikens L.J. concluded that the claimant's conduct in this case had not, anyway, been sufficient to amount to contributory negligence for the purposes of apportionment of damages. Since the trial judge had found that she had posed no immediate threat of violence to the defendant, it was "difficult to see how any words or actions on her part could be an effective cause of the ensuing injury to her".<sup>47</sup>

<sup>40</sup> [1993] 1 W.L.R. 1462 [*Alliance & Leicester*].

<sup>41</sup> *Pritchard*, *supra* note 7 at para. 35.

<sup>42</sup> *Ibid.* at para. 48.

<sup>43</sup> *Supra* note 27.

<sup>44</sup> [2000] 1 A.C. 360 (H.L.) [*Reeves*]. In *Reeves*, their Lordships held that while contributory negligence could *not* be applied to reduce damages under the *U.K. Act* in respect to an intentional act by the defendant of the kind which would have precluded the application of the defence at common law, it *could* be applied to reduce damages under the Act where the claimant, rather than the defendant, acted intentionally. (In *Reeves*, the police were held to have breached their duty of care in negligence to prevent a detainee from committing suicide. However, the damages awarded were reduced by 50% to reflect the detainee's intentional act in taking his own life.)

<sup>45</sup> Glanville Williams, *Joint Torts and Contributory Negligence* (London: Stephens & Sons, 1951) at 318.

<sup>46</sup> *Pritchard*, *supra* note 7 at para. 49. In reaching his conclusion, Aikens L.J. also referred (at para. 32) to the "exhaustive discussion" of the issue by Childs, *supra* note 14. In addition, (at paras. 57, 58) he considered the New Zealand cases of *Hoebergen v. Koppens* [1974] 2 N.Z.L.R. 567, in which Moller J. in the Supreme Court in Hamilton had reduced damages in an assault case under s. 3(1) of the New Zealand *Contributory Negligence Act*, and *Dellabarca v. Northern Storemen and Packers Union* [1989] N.Z.L.R. 734, in which Smellie J. in the High Court of New Zealand at Auckland had held that contributory negligence was *not* a defence to intentional torts, and that he could not, therefore, follow the decision in *Hoebergen v. Koppens*. Aikens L.J. distinguished (at para. 56) the case of *Millward v. Oxfordshire County Council* [2004] EWHC 445 (Fam.), in which a teacher's damages had been reduced to take account of her conduct prior to an assault by a youth in a remedial school, on the basis that the relevant action had been brought not in trespass against the perpetrator, but rather in negligence against the local authority. While acknowledging that a number of textbooks appeared cautiously to recognize the possibility of contributory negligence applying to cases of assault and battery under the *U.K. Act*, he went on to note (at para. 59) that this recognition was based on an assumption that the decision in *Murphy v. Culhane* was defensible, and should be interpreted accordingly.

<sup>47</sup> *Pritchard*, *supra* note 7 at para. 65. With respect, this reasoning appears more pertinent to the full defence of self-defence than to the partial one of contributory negligence. For although an imminent threat to oneself or others *is* required when pleading self-defence (which also requires a response which is proportionate to the threat), contributory negligence requires only that a claimant, by his 'fault'—which may include negligent failure to take care of his own safety—contributes to the harm he suffers.

Smith L.J. agreed with Aikens L.J.'s analysis that under the *U.K. Act*, "contributory negligence... is not available as a partial defence to an intentional tort such as battery".<sup>48</sup> While the colloquial meaning of 'fault' might seem to encompass the conduct of a person who provoked another to violence by words or acts, this would ignore the definition of fault in the Act, and its construction by the House of Lords in *Standard Chartered* and *Reeves*. Decisions which suggested otherwise were based on the 'germ' of an idea in *Murphy v. Culhane*, which had thereafter been followed with little analysis.<sup>49</sup> Now that the true meaning of 'fault' had been explained by their Lordships, it must be assumed that *Murphy v. Culhane* and the cases applying it were wrong,<sup>50</sup> and, in the absence of parliamentary intervention to amend the legislation, there was therefore no possibility of a defendant pleading contributory negligence in an action for assault and battery.<sup>51</sup> However, her Ladyship observed (emphasis added):<sup>52</sup>

I reach this conclusion with regret because I think that apportionment *ought* to be available to a defendant who has committed the tort of battery where the claimant has, by his misconduct, contributed to the happening of the incident, for example by provocative speech or behaviour. I think that there *ought* to be some apportionment in the present case. I think that Miss Pritchard's conduct was provocative, verging on the intimidatory. I entirely accept that Mr. Wilkinson's conduct was unlawful; it went beyond what he was entitled to do. But I do not think that he intended to harm Miss Pritchard, only to remove her. In all the circumstances, I think it would be just and equitable if her damages were to be reduced by one third. However, I do not think that the law permits me so to hold.

#### IV. DISCUSSION

##### A. *Pritchard and the Significance of the Old Common Law Assault and Battery Cases*

When, in *Murphy v. Culhane*, Lord Denning failed to ask whether the claimant's conduct would have given rise to the defence of contributory negligence at common law, he undeniably glossed over the proper definition of 'fault' in s. 4 of the *U.K. Act*, and his analysis—as the judgments in *Standard Chartered* and *Pritchard* make clear—was for this reason legally flawed. In purely common sense terms, however, it has much to commend it. Indeed, it is probable that if Lord Denning's approach, based on the seriousness of the claimant's conduct and thus his responsibility for the events which resulted in his damage, were to be applied to the facts of *Pritchard* in the absence of the s. 4 definition of 'fault', most commentators would agree with Smith L.J. that the claimant's conduct *should* have led to a reduction in her damages.<sup>53</sup>

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<sup>48</sup> *Ibid.* at para. 78.

<sup>49</sup> *Ibid.* at paras. 80-84.

<sup>50</sup> *Ibid.* at para. 85.

<sup>51</sup> *Ibid.*

<sup>52</sup> *Ibid.* at para. 82.

<sup>53</sup> Note that not all commentators recognize the justice of reducing a claimant's damages to reflect his provocative behaviour. Childs, *supra* note 14, after a detailed examination of the law following Lord Denning's judgment in *Murphy v. Culhane*, argues (at 350 *et seq.*) that the critical role which actions

For while the Court of Appeal's application in *Pritchard* of Lord Hoffmann's judgment in *Standard Chartered* cannot be faulted in terms either of *stare decisis* or logic, the Court's conclusion that the combined effect of ss. 1(1) and 4 of the *U.K. Act* was to preclude a defendant from pleading contributory negligence in cases of assault and battery if such a plea would not have been available to him at common law is, as the outcome of *Pritchard* itself demonstrates, rather unfortunate. Given the age and scarcity of the relevant common law decisions, the effect is to freeze at the date of a few extremely old cases the circumstances in which defendants may nowadays plead the defence. Moreover, even if one accepts—as one must surely do in the light of *Standard Chartered* and *Pritchard*—that the old common law position is indeed critical to the determination of the current law, the three cases to which the Court of Appeal alluded (without either discussion or analysis) in *Pritchard* are by no means determinative. An examination of these cases, all of which were decided in the days before the concept of contributory negligence as we now know it came to exist, reveals not only that they do not 'expressly' conclude that contributory negligence or its historical equivalent was historically unavailable in actions for assault and battery, but that it is even something of a stretch to say that they reach this conclusion 'inferentially'.

In the first case, *Gibbons v. Pepper*,<sup>54</sup> reported in 1695, the claimant was injured when the defendant lost control of the horse he was riding. In response the claimant's action for assault and battery, the defendant argued that he had called out to the claimant to get out of the way, but that the claimant had not done so. The claimant's action succeeded, notwithstanding the argument that he had failed to take sufficient care of his own safety. However, the very short report contains no indication that, in reaching its decision, the court even addressed the issue of whether or not the claimant had actually taken insufficient care. At best, therefore, the case offers a somewhat tenuous basis for concluding that a court which has recognized a claimant to be at fault must nevertheless ignore that fault when deciding a case involving assault and battery.

The second case, *Bridgman v. Skinner*,<sup>55</sup> reported in 1735, concerned a claimant and a defendant who got into a fight over a fork, which the defendant tried to take

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for trespass to the person play in the vindication of the right to bodily integrity makes it inappropriate to allow a claimant's damages in a trespass case to be reduced to take account of his contributory negligence. In terms of a claimant's threatening or provocative conduct, Childs confines the proper operation of the law to situations where that conduct leads the defendant to apprehend physical contact. In this respect, he asks (at 347, 348):

What role is there for the operation of the defence of contributory negligence in such a context? If the apprehension of the defendant is found to have been reasonable, then he was the victim of an assault and accordingly had the right, or perhaps it would be better to say the privilege, of self-defence... If the apprehension was unreasonable, then there was no assault and no lawful justification for his actions at all, at least as regards a plea of self-defence. How can there be introduced into this situation, without doing considerable violence to the structure of the law, considerations pertaining to the conduct of the plaintiff which go partially to excuse, but not to remove *in toto*, the defendant's liability?

<sup>54</sup> *Supra* note 33. This case did not involve an intentional act by the defendant. However, at that stage in the development of the law, the defendant's state of mind was not relevant in actions for assault and battery. See *supra* note 8.

<sup>55</sup> *Supra* note 34.



from the claimant. The claimant struck out at the defendant, in response to which the defendant hit the claimant with such violence that he sustained a serious injury to his eye. This case also resulted in an award of damages for assault and battery when the Chief Justice rejected the defendant's argument that he was justified in the ferocious attack on the claimant. However, rather than supporting the conclusion that a claimant's contributory negligence cannot be taken into account in cases of this kind, the report clearly states that the jury—in what appears to be a historical equivalent to the modern day notion of apportionment—awarded the claimant only 12d. of the two guineas which it cost to treat his injury “because they thought him to blame as well as the defendant”.<sup>56</sup>

The final case is *Watson v. Christie*,<sup>57</sup> reported in 1800. In that case, the defendant was the captain of a ship and the claimant was one of his crew, whom he beat severely. The defendant argued that the beating was in response to the claimant's bad behaviour on board the ship, but Lord Eldon C.J. advised the jury that the only questions were whether the defendant had carried out the beating, and what damage the claimant had sustained as a result. Since the defendant had not “put on record, in the shape of special justification”, in the pleadings his assertion that the beating was necessary to maintain discipline on board the ship, he had no defence to the action. The report goes on to state that “the jury should give damages to the extent of the evil suffered; without lessening them on account of the circumstances under which it was inflicted”—which comes close to suggesting that, even assuming the claimant had been at fault, his conduct must be disregarded—but it is by no means clear that this does not relate back to the fact that the circumstances had not been specifically pleaded. Thus, while this case also resulted in a full award of damages for assault and battery, the primary basis for the decision appears to have been the defendant's failure to explain in the pleadings the grounds on which he wished to defend the claim. It hardly offers incontrovertible support for the proposition that, even if pleaded and established, a claimant's fault cannot be taken into account in actions for assault and battery.

Admittedly, other old English common law cases not referred to in *Pritchard*—such as *Weaver v. Ward*, reported in 1617, where it was stated that “no man shall be excused of a trespass... except it be adjudged utterly without his fault”<sup>58</sup>—seem to suggest that contributory negligence, or rather its historical equivalent, might not have been available at common law in actions for assault and battery.<sup>59</sup> And since this view accords with the interpretation favoured in Australia, New Zealand and elsewhere,<sup>60</sup> it is improbable that, in the unlikely event of a suitable case being presented, the English courts would wish to revisit their conclusion in this respect. However, in view of their age and the brevity of their reporting, it can certainly be argued that none of the old common law cases lays down a clear and unequivocal

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<sup>56</sup> *Ibid.*

<sup>57</sup> *Supra* note 35.

<sup>58</sup> (1616) Hob. 134, 80 E.R. 284, cited by Brooking J. in *Horkin*, *supra* note 37 at 164.

<sup>59</sup> As do the old precedents for pleadings and the vast majority of textbooks, for discussion of which see *Bullen & Leake's Precedents of Pleadings*, *supra* note 38.

<sup>60</sup> For the Australian and New Zealand positions, see text accompanying notes 37 and 46. For reference to the fact that this position is also favoured in Canada and the United States, see the judgment of Brooking J. in *Horkin*, *supra* note 37 at 161.

rule. So even though the provisions of the *Singapore Act* are *in pari materia* with those of the *U.K. Act*—which means that the Singapore courts would almost certainly interpret ss. 3(1) and 2 of the *Singapore Act* in the same way as the English courts have interpreted ss. 1(1) and 4 of the *U.K. Act*—and even though the old common law decisions certainly form part of Singapore law (having been imported under the *Second Charter of Justice*),<sup>61</sup> the courts in this jurisdiction would not necessarily have to conclude, as the courts elsewhere have done, that the old common law unambiguously prohibited the application of contributory negligence in assault and battery cases. Although the possibility of the courts in this jurisdiction choosing an interpretation of the common law cases which is different from that espoused elsewhere is clearly a remote one, it should not be discounted entirely, particularly given the implicit exhortation in the *Application of English Law Act*<sup>62</sup> for the courts to develop Singapore law in an autochthonous manner.<sup>63</sup>

#### B. *The Argument that the Act of the Defendant Dwarfs that of the Claimant*

One of the most widely favoured explanations for the refusal to reduce a claimant's damages in actions involving intentional torts is that in such cases the defendant's wrong dwarfs that of the claimant. This view, famously expressed by Sir Frederick Pollock in his landmark study of tort law,<sup>64</sup> has proved influential in a number of cases, including most recently, *Bici v. Ministry of Defence*.<sup>65</sup> *Bici* involved claims by two men shot by British peacekeeping soldiers in Kosovo. It was argued on behalf of the defendant that, even assuming the shooting was deliberate and without justification (which the judge, Elias J., held it was), the claimants had been contributorily negligent in recklessly travelling in a vehicle with a person who was firing a gun in a provocative manner. However, Elias J. held that it could not “sensibly be said that the claimants by their conduct shared in the responsibility for their injuries. Any imprudence on their part was dwarfed by the acts of the soldiers”.<sup>66</sup> He went on to say that, for this reason, “it would in my view be a very rare case where damages should be reduced in circumstances where the defendant's conduct is intentional and unjustified and the claimant's is merely negligent”.<sup>67</sup>

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<sup>61</sup> 27 November 1826.

<sup>62</sup> Cap. 7A, 1994 Rev. Ed. Sing.

<sup>63</sup> Although there are few reported Singapore decisions involving actions for assault and battery, one such case was decided recently. *Simon Suppiah Sunmugam v. Chua Geok Teck and another* [2012] SGHC 73 involved a claim for damages for assault and battery and wrongful arrest. The claimant, a private investigator, who was conducting surveillance of an apartment near the Israeli embassy, was questioned first by an embassy security officer and then by the first defendant, an auxiliary police officer stationed at the embassy, about his reasons for loitering so close to the embassy. When the claimant refused to explain his reasons for being there, the first defendant arrested him. An altercation ensued, during which the claimant alleged he was injured as a result of the first defendant's use of excessive force. However, the judge, Tay Yong Kwang J., held that the arrest was a lawful response to the claimant's suspicious behaviour, and that “the force used by the first defendant was reasonable and justifiable on account of the [claimant's] resistance and struggle” (at para. 84). The action therefore failed.

<sup>64</sup> Frederick Pollock, *Law of Torts, A Treatise on the Principles and Obligations arising for Civil Wrongs in the Common Law* (London: Stevens & Sons, 1895).

<sup>65</sup> [2004] EWHC 786 (Q.B.) [*Bici*].

<sup>66</sup> *Ibid.* at para. 109.

<sup>67</sup> *Ibid.* at para. 111.

There is certainly a strong case to be made for ignoring the carelessness, or even the recklessness, of a claimant who is the victim of an extremely serious act such as a deliberate shooting. However, there can surely be no blanket assumption that, simply because a defendant commits an intentionally wrong act, that act must necessarily, and in all circumstances, dwarf the fault of the claimant—particularly where, as in *Pritchard*, the claimant has provoked the defendant into acting as he does. In cases where the relative wrongs of the claimant and the defendant are close in terms both of severity and blameworthiness, the argument that one act dwarfs the other falls away, making it hard to disagree with Smith L.J.’s observation that it is neither just nor equitable to exclude the possibility of apportionment.<sup>68</sup>

*C. The Difference Between Contributory Negligence as a Defence  
to Actions for Deceit and Contributory Negligence as a Defence  
to Actions for Assault and Battery*

*Standard Chartered*, in which Lord Hoffmann set out what is now accepted to be the correct interpretation of the *U.K. Act*, involved an action for deceit with respect to falsely antedated bills of lading issued by a seller and a shipping company in relation to a shipment of goods. The issue of contributory negligence arose because the claimant bank authorized payments with respect to the shipment on the basis of quality certificates received after the expiry date of the credit, a fact about which it attempted to mislead the issuing bank when it sought reimbursement, wrongly assuming that this would not affect its claim.<sup>69</sup> After a detailed examination of the common law on deceit,<sup>70</sup> Lord Hoffmann cited the 19<sup>th</sup> century case of *Edgington v. Fitzmaurice*<sup>71</sup> as having established that.<sup>72</sup>

If a fraudulent representation is relied upon, in the sense that the claimant would not have parted with his money if he had not known it was false, it does not matter that he also held some other negligent or irrational belief about another matter and, but for that belief, would not have parted with his money either.

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<sup>68</sup> *Pritchard*, *supra* note 7 at para. 82. For the judgment of Smith L.J. see *supra* note 52.

<sup>69</sup> In *Standard Chartered*, *supra* note 27, the seller’s managing director and the shipper agreed to issue falsely antedated bills of lading. The claimant bank was unaware of this, but voluntarily accepted late receipt of quality certificates and authorized payment to the seller by discounting its bills. The claimant then sought reimbursement from the issuing bank, falsely indicating that it had received the quality certificates on time, and believing that this would not affect its claim. When the issuing bank refused to reimburse the claimant bank, the claimant bank sued the seller’s managing director and the shippers for deceit and conspiracy. The defendants argued that the claimant bank’s damages should be reduced to take account of its contributory negligence in assuming that it would obtain reimbursement from the issuing bank on the basis of the late certificates.

<sup>70</sup> This included a lengthy consideration of the judgment of Sir George Jessel M.R. in *Redgrave v. Hurd* (1881) 20 Ch. D. 1. Although decided in the context of the equitable remedies of specific performance and rescission, the judgment contained the famous statement (at 13, 14): “Nothing can be plainer... on the authorities in equity than that the effect of false representation is not got rid of on the ground that the person to whom it was made has been guilty of negligence.”

<sup>71</sup> (1885) 29 Ch. D. 1.

<sup>72</sup> *Standard Chartered*, *supra* note 27 at para. 15. In *Standard Chartered*, this was the negligent or irrational belief by the claimant bank that it could obtain reimbursement from the issuing bank.

Referring with approval to the dictum of Mummery J. in *Alliance and Leicester*,<sup>73</sup> his Lordship concluded that “[i]n the case of fraudulent misrepresentation... there is no common law defence of contributory negligence”.<sup>74</sup> As a consequence, no apportionment would be possible under the *U.K. Act*.<sup>75</sup>

It appears from Lord Hoffmann’s historical survey in *Standard Chartered* that, at common law, contributory negligence was almost certainly *not* available in cases of deceit, and that—based on his Lordship’s interpretation of the meaning of ‘fault’ in the *U.K. Act*—it is thus not available under the legislation either. Moreover, in *Standard Chartered* Lord Rodger of Earlsferry went even further, specifically doubting whether there was any place for contributory negligence in the intentional torts as a whole.<sup>76</sup> Referring in particular to actions for assault and battery, he suggested that Lord Denning’s judgment in *Murphy v. Culhane*<sup>77</sup> “would appear to conflict with the view that contributory negligence had never been open to a defendant who had intended to [cause] harm”.<sup>78</sup> Given the strength of the views expressed by both Lord Hoffmann and Lord Rodger in *Standard Chartered*, it is understandable that the court in *Pritchard* drew such a close parallel between the non-availability of contributory negligence in cases of deceit and its non-availability in cases of assault and battery. There are, however, good reasons for not automatically equating the two.

Where a defendant sets out to inflict economic harm on a claimant by intentionally misleading him into parting with his money, it is easy to see why the law should not reduce the claimant’s damages to take account of his own fault—however foolish or misguided he may have been. It would, as a matter of policy, be both distasteful and inappropriate to reduce the liability of a defendant who has perpetrated a planned and deliberate fraud on a claimant, particularly since that claimant’s fault will relate only to the damage he suffers, and will have no causal connection with the actual commission of the tort. Assault and battery cases, on the other hand, frequently arise in the context of spontaneous disagreements where events escalate quickly as a result of the heightened emotions of both parties. In many such cases, the defendant does not set out to cause the claimant harm, but does so only as a consequence of the way in which the situation develops. In addition, since, as the precedents demonstrate, the claimant in an assault and battery case may well actually initiate, or at least fuel, the altercation in which he is injured, his fault will often be causally linked not only to the damage he suffers but also to the very commission of the tort.

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<sup>73</sup> *Supra* note 40. Mummery J. concluded (at 1474):

There is no decision on the point whether contributory negligence could be a defence to a claim for deceit. In principle, however, the position before and apart from the [*U.K.*] *Act*... is clear. The contributory negligence of a [claimant] suing in deceit could not be pleaded as a defence.

<sup>74</sup> *Standard Chartered*, *supra* note 27 at para. 18. His Lordship accepted (at para. 17) that the decision in *Gran Gelato Ltd. v. Richcliff (Group) Ltd.* [1992] Ch. 560 “left open the possibility that, in a case of innocent representation, some other kind of negligent causative conduct might be taken into account”.

<sup>75</sup> *Ibid.*

<sup>76</sup> *Ibid.* at paras. 42–45.

<sup>77</sup> *Supra* note 12.

<sup>78</sup> *Standard Chartered*, *supra* note 27 at para. 45. His Lordship also referred in support of this conclusion to Sir Frederick Pollock’s *Law of Torts* (*supra* note 64), which argued that contributory negligence would not apply in the case of intentional harm.

In such circumstances, it is much less easy to understand the reason for there being an absolute rule that a claimant's role in the events leading to his damage can never be taken into account, even when he has seriously provoked the defendant.<sup>79</sup>

In the wake of *Pritchard*, and for reasons connected with those discussed above,<sup>80</sup> it is now extremely unlikely that the English courts will choose to distinguish the role of contributory negligence in actions for assault and battery from its role in actions such as deceit, but it is a distinction which would—at least in theory—be open to the Singapore courts to make should they choose *not* to interpret the old assault and battery decisions as having irrefutably established a defendant's inability to plead contributory negligence at common law.

#### D. *The Possibility of Developing a Common Law Defence (or Excuse) of Provocation for Cases of Assault and Battery*

On the assumption that it is, in practice, too late now to persuade the courts—whether in Singapore or elsewhere—that contributory negligence is available as a defence to actions for assault and battery under the applicable legislation, an alternative solution might lie in the creation of a partial common law defence or excuse of provocation, drawing on the concept of provocation in criminal law.

In most jurisdictions provocation, or its equivalent,<sup>81</sup> is available only in relation to murder, in which respect it operates as a mitigatory defence, converting the offence either to voluntary manslaughter or, as in Singapore, culpable homicide.<sup>82</sup> It is based on the notion that if a person who is “deprived of the power of self-control by a grave and sudden provocation cause[s] the death of the person who gave the provocation”<sup>83</sup> this fact ought to be taken into account in reducing the seriousness of the crime which the person is deemed to have committed.<sup>84</sup> However, in some jurisdictions, of which Singapore is one, provocation may also be pleaded with respect to a prosecution for criminal assault. In Singapore, s. 352 of the *Penal Code* (in a definition which mirrors that applying to cases of homicide) refers to an assault

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<sup>79</sup> Mummery J. in *Alliance & Leicester*, *supra* note 40 at 1476, alluded to the differences between pleading contributory negligence in cases of deceit and cases of trespass. Referring to the decision of the Court of Appeal in *Murphy v. Culhane*, *supra* note 12 (which, at the time, was still regarded as good law), he observed:

The case is not on all fours with the present case for two reasons. First, it is not a case of deceit, to which different considerations applied before the Act and may well continue to apply. Secondly, the conduct of the [claimant] against whom contributory negligence was pleaded might have made him liable in tort and, therefore, liable to a counterclaim or action for damages.

<sup>80</sup> See text accompanying note 58 *et seq.*

<sup>81</sup> In English law, provocation under s. 3 of the *Homicide Act*, 1957 (U.K.), 5 & 6 Eliz. II, c. 11, was abolished by s. 56(1) of the *Coroners and Justice Act* 2009, c. 25, and replaced with the very similar defence of ‘loss of control’.

<sup>82</sup> In Singapore, under s. 300 of the *Penal Code* (Cap. 224, 2007 Rev. Ed. Sing.), a person who is charged with murder but who successfully pleads provocation, as one of the exceptions to murder, will be convicted of culpable homicide not amounting to murder. See *infra* notes 83, 84.

<sup>83</sup> *Penal Code*, *ibid.*, Exception 1 to s. 300.

<sup>84</sup> In Singapore, a person who is convicted of culpable homicide not amounting to murder as a result of pleading provocation will escape the mandatory death penalty under s. 302 and will instead be sentenced to life imprisonment under s. 304.

taking place on ‘grave and sudden provocation’.<sup>85</sup> Although other jurisdictions adopt more detailed definitions,<sup>86</sup> the common feature of provocation in such circumstances is that the incendiary conduct of the person on whom the assault is committed should be taken into account—whether as a ground for removing criminal responsibility for the assault<sup>87</sup> or, as in Singapore, as a mitigating factor to reduce the penalty to be imposed.<sup>88</sup>

In no jurisdiction is provocation taken into account to reduce compensatory damages in actions for assault and battery—as opposed to preventing the award of exemplary or aggravated damages in such cases—and its use in this respect would clearly be a major development. And quite apart from the difficulties inherent in transposing a criminal law concept into the civil law arena, there would be the difficulty of distinguishing it sufficiently from other tort defences, and, in particular,

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<sup>85</sup> Under s. 352 of the *Penal Code*, *supra* note 82:

Whoever assaults or uses criminal force to any person otherwise than on grave and sudden provocation given by that person shall be punished with imprisonment for a term which may extend to three months or a fine which may extend to \$1,500 or with both.

Under s. 358 of the *Penal Code*:

Whoever assaults or uses criminal force to any person on grave and sudden provocation given by that person, shall be punished with imprisonment for a term which may extend to one month, or with a fine which may extend to \$1,000 or with both.

The explanation to both sections state, *inter alia*, that “[g]rave and sudden provocation will not mitigate the punishment... if the provocation is sought or voluntarily provoked... as an excuse for the offence.” (Note that ss. 334 and 335 deal with the more serious offences of causing hurt or grievous hurt on provocation). There are a number of differences between provocation as a defence to murder and as a defence to non-fatal offences, including the fact that, with respect to the latter, no specific reference is made to loss of self-control (although this has been read into the requirement that the provocation must be ‘grave and sudden’). For further discussion of these differences, see Stanley Yeo, Neil Morgan and Chan Wing Cheong, *Criminal Law in Malaysia and Singapore*, 2nd ed. (Singapore: LexisNexis, 2012) [Yeo, Morgan and Chan] at para. 12.15.

<sup>86</sup> See *e.g.*, s. 268(1) of the Queensland *Criminal Code*, which provides:

The term provocation, used with reference to an offence of which assault is an element, means and includes... any wrongful act or insult of such nature as to be likely, when done to an ordinary person... to deprive the person of the power of self-control, and to induce the person to assault the person by whom the act or insult is done or offered.

Section 245 of the Western Australia *Criminal Code* contains an identical provision.

<sup>87</sup> Section 269 (1) of the Queensland *Criminal Code*, *ibid.*, provides:

A person is not criminally responsible for an assault committed upon a person who gives the person provocation for the assault, if the person is in fact deprived by the provocation of the power of self-control, and acts upon it on the sudden and before there is time for the person’s passion to cool, and if the force used is not disproportionate to the provocation and is not intended, and is not such as is likely, to cause death or grievous bodily harm.

Section 246 of the Western Australia *Criminal Code* contains an almost identical provision.

<sup>88</sup> Since there is no *minimum* penalty under s. 352 of the *Penal Code*, *supra* note 85, for cases in which there is *no* provocation—the maximum penalty being imprisonment for three months and/or a fine of \$1,500—the fact that the *maximum* penalty under s. 358 of the *Penal Code* for cases in which there *is* provocation is lower—imprisonment for up to one month or a fine of up to \$1,000—will not necessarily affect the penalty imposed. In practice, therefore, any reduction in either the prison term or the fine (or both) to take account of provocation will effectively be the result of an informal evaluation by the sentencing judge. See Yeo, Morgan and Chan, *supra* note 85, at para. 12.16.

self-defence.<sup>89</sup> However, this ought not to prove an insuperable obstacle—first, because the courts already deal (both in criminal and civil law) with a number of parallel defences, and second, because in tort law self-defence, as a full defence, requires an imminent physical threat before it can be pleaded, whereas provocation, which would only reduce damages, would be based on inflammatory, but not necessarily immediately threatening, conduct.<sup>90</sup> Moreover, since, unlike most jurisdictions, Singapore's *Penal Code* already allows for provocation to be taken into account to reduce the consequences of a charge of criminal assault,<sup>91</sup> there is at least a tenable argument for its use in this jurisdiction to reduce the damages payable in civil claims.

In practice, though, it is doubtful whether the courts in any jurisdiction will go to the trouble of recognizing the availability of provocation to reduce compensatory damages in actions for assault and battery. The possibility was not even considered in *Pritchard* by Smith L.J. (the only judge overtly to regret the outcome of the case), and the limited circumstances in which it would be required mean that it is almost certainly too much to expect. There is also an argument that while provocation might be necessary as an excuse to mitigate the penalty in criminal law, there is no similar need in civil law, where the consequences of liability are less severe. There being no overwhelming argument in its favour, it is therefore unlikely that this is an idea which will attract judicial support.

## V. CONCLUSION

In the aftermath of *Pritchard*, defendants who come before the English courts wishing to plead contributory negligence in actions for assault and battery will find themselves blocked by the common law as it apparently stood before the introduction of the *U.K. Act*, unable to look to the Act itself for assistance, but unable either to argue for a change in the common law. The peculiarity of this situation is compounded by the fact that the most recent of the common law cases referred to in *Pritchard* as supporting the view that contributory negligence cannot be pleaded in relation to assault and battery was decided over two hundred years ago, and that none of the cases unequivocally supports the conclusion that contributory negligence was historically unavailable in such circumstances. To add insult to injury, the assumption that contributory negligence cannot be pleaded in actions for assault and battery draws much of its strength from the assumption that it cannot be pleaded in relation to the intentional torts as a whole. This assumption is, in turn, based largely on the law

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<sup>89</sup> Childs, *supra* note 14, argues that the only defence which has a proper role in cases of assault and battery is self-defence, under which a defendant's conduct is justified if it is a direct and proportionate response to an imminent physical threat posed by the claimant. He takes the view that, in the absence of an imminent threat, there can be no reason for excusing a defendant's conduct at all, and that, for this reason, contributory negligence can have no proper role in assault and battery actions. For analogous reasons, he would no doubt consider it inappropriate to offer a partial defence of provocation. (For a more detailed discussion of this point, see *supra* note 53.)

<sup>90</sup> For discussion of the fact that Aikens L.J. arguably blurred of the lines between self-defence and contributory negligence in *Pritchard*, see *supra* note 47.

<sup>91</sup> See *supra* note 85. The argument that there should be a partial defence of provocation for civil claims is even stronger in jurisdictions—such as Queensland and Western Australia (*supra* note 87)—where provocation can extinguish criminal responsibility altogether.

relating to deceit,<sup>92</sup> which involves very different practical and policy considerations from those which pertain to cases of assault and battery. Although the position could, in theory, be remedied by amending legislation, there is little serious prospect of parliamentary intervention, particularly given the fact that the English position is consistent with that in other jurisdictions in which the matter has been considered.

Singapore, as a jurisdiction in which the matter has not yet been considered, *could* take a different approach, but the lack of divergence elsewhere makes this unlikely. And while one solution to the potential injustice associated with the inability to plead contributory negligence in cases of assault and battery might lie in the creation of a partial defence or excuse of provocation to reduce the compensatory damages payable, there is no reason to expect this to happen. So for the foreseeable future, defendants who are unable to display superhuman sangfroid in resisting claimants' provocative behaviour must simply accept that, at least for the purposes of assessing damages in tort law, no account will be taken of the circumstances in which they lose their cool. As Smith L.J. intimated in *Pritchard*, unfortunately justice and the law do not always coincide.

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<sup>92</sup> And possibly other economic torts, such as the economic tort of conspiracy to injure in *Quinn v. Leatham*, *supra* note 9.