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LORD CAMPBELL AND THE FATAL ACCIDENTS ACT

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At one time, the families of persons killed due to the negligence of another could get no compensation. The common law position was succinctly expressed in Lord Ellenborough’s ruling in *Baker v Bolton*¹ in 1808: ‘In a civil Court, the death of a human being could not be complained of as an injury’. There was a parallel rule that when a person with a cause of action died, their right to compensation died also: the action did not survive for the benefit of the estate of a deceased plaintiff, or against the estate of a deceased defendant, a rule expressed in the Latin maxim *actio personalis moritur cum persona*.² But from the early 19th century onwards, there was growing pressure for reform due to the increase in accidents, notably transport accidents, and this pressure was greatly intensified by the advent of railways: a man who was merely injured due to the negligence of the railway could recover damages, but if he died his family got nothing.³ Eventually, in 1846, Parliament passed ‘An Act for compensating the Families of Persons killed by Accidents’, a statute which became known as the Fatal Accidents Act.⁴ This Act was speedily copied in many other common law jurisdictions, not only those which were part of the British Empire, such as Canada, Australia and New Zealand,⁵ but also in the United States.⁶ However, the Act gave no guidance as to the extent of the injuries for which damages could be obtained - it said only: ‘and in every such Action the Jury may give such Damages as they may think proportioned to the Injury resulting from such Death to the Parties respectively for whom and for whose Benefit such Action shall be brought’.⁷ It was left to the Court of Queen’s Bench in *Blake v Midland Railway Co*⁸ in 1852 to settle this issue by deciding that compensation under the Act was limited to pecuniary losses.

Much has changed in this area since the mid 19th century.⁹ The Fatal Accidents Act has been refined and re-enacted;¹⁰ the list of those who can claim compensation has been enlarged; new problems have been encountered, such as whether to take account of remarriage or repartnering prospects;¹¹ and some jurisdictions have amended their statutes to

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¹ (1808) 1 Camp. 493; 170 E.R. 1033.
² See below, text to n.59 ff.
³ There is a probably apocryphal story that on some American railways fire-axes were kept in the coaches to deliver the coup de grace to injured passengers: W.L. Prosser, *Torts* (4th ed., St. Paul, Minnesota, West, 1971), p.902 n.43.
⁴ In the Parliamentary Debates the Bill was referred to as the Death by Accidents Compensation Bill, but short titles were not universal at this time. The short title ‘Fatal Accidents Act’ was officially conferred by the Short Titles Act 1896.
⁷ Fatal Accidents Act 1846 s.2.
⁸ (1852) 18 Q.B. 93; 118 E.R. 35.
¹⁰ The Fatal Accidents Act 1846 was subsequently amended by the Fatal Accidents Act 1864, the Fatal Accidents (Damages) Act 1908, the Law Reform (Limitation of Actions etc.) Act 1954, the Fatal Accidents Act 1959 (which repealed the 1908 Act) and various Statute Law Revision Acts. All the legislation still in force was repealed and replaced by the Fatal Accidents Act 1976.
¹¹ In assessing the damages payable to a widow, no account is to be taken of her remarriage or prospects of remarriage: Law Reform (Miscellaneous Provisions) Act 1971. Widowers have been left in a less advantageous position. See K.A.Clarke and A.I.Ogus, ‘What is a Wife Worth?’ (1978) 5 B.J.L.S. 1. The Australian High Court.
permit claims for non-pecuniary loss. In the 1930s, further pressure for reform due to the increasing number of road accidents led to the passing of legislation allowing a cause of action to survive against deceased defendants: unlike the railways, which survived collisions in perfect health, careless car drivers often perished along with their victims. This legislation also allowed the survival of a cause of action in favour of the estates of deceased plaintiffs, which created a new problem because of the potential overlap between the claims of relatives under the Fatal Accidents Act and the claim of the estate (usually inherited by the same relatives). It has even provoked suggestions that the Fatal Accidents Act has outlived its usefulness and should be abolished, so that all claims would be made by the estate and who gets what would be determined by the laws of succession on death. But none of this should be allowed to obscure the significance of the original Fatal Accidents Act as an important and distinctive piece of law reform - virtually the only statutory interference with the common law of negligence that happened during the 19th century.

Through the whole sequence of events described in the first paragraph - from Baker v Bolton, through the passing of the Fatal Accidents Act, to the decision in Blake v Midland Railway Co - one figure stands out, that of Lord John Campbell. As a young barrister, Campbell reported nisi prius cases, and Baker v Bolton was included in the first volume of his reports - so he was the means by which this decision came to be known. As Attorney General, he appeared for the Crown in several actions dealing with deodands (the pre-1846 way of penalising fatal accidents). He was clearly aware that in Scottish law compensation for fatal accidents (including ‘solatium’ for injured feelings) was well established, because in 1839 he had to argue an appeal for the defendant against the award of such compensation - though he would probably have preferred to have been on the other side. Raised to the peerage as the result of a brief appointment as Lord Chancellor of Ireland in 1841, as a member of the House of Lords he played a leading part in ensuring the passage through Parliament of the Death by Accidents Compensation Bill (still generally known as Lord Campbell’s Act) and a companion piece of legislation, the Deodands Abolition Bill. Finally, as Chief Justice of the Queen’s Bench, he presided over the court that decided Blake v Midland Railway Co.

has held that there should ordinarily be no deduction for the contingency that the surviving spouse will remarry or enter into a new relationship, though the position would be different if there is evidence of actual remarriage or entry into a new relationship from which the survivor derives substantial pecuniary advantage: De Sales v Ingrilli (2002) 212 C.L.R. 238. See J.Sippe, ‘Discounting Damages in an Action for Wrongful Death Brought by a Surviving Spouse’ (2004) 12 Tort L. Rev. 98.


13 Eg Law Reform (Miscellaneous Provisions) Act 1934, which like the Fatal Accidents Act has equivalents in Australia, Canada, New Zealand and other jurisdictions: see Handford, above n.5, p.160.


16 Eg R v Polwart (1841) 1 Q.B. 818; 113 E.R. 1345 (below, n.129).

17 Duncan v Findlater (1839) 6 Cl. & Fin. 894; 7 E.R. 934 (below, n.198).
The object of this article is to examine these events and Lord Campbell’s part in them. It will therefore first briefly review his life and career, and then look in more detail at the old law, its replacement by the new law contained in the Fatal Accidents Act, and the extent of the reform.

I. Lord Campbell’s career

John Campbell was born at Cupar in Fifeshire in 1779, the younger son of a Scottish Presbyterian minister. He studied at St. Andrew’s University, entering at the remarkably early age of 11 and graduating four years later. He then studied theology for three years because it was intended that he would follow his father into the Presbyterian ministry, but what was intended to be a short period as a tutor to a London family changed the course of his life. Instead, he decided that he wanted to be called to the bar and rise to the top of the legal profession. He forecast his future career with remarkable accuracy in a letter to his sister in 1800:

In about six years after I am called to the bar I expect to have distinguished myself so much as to be in possession of a silk gown and a seat in Parliament. I shall not have been long in the House of Commons before I interest the Minister in my favour and am made Solicitor-General. The steps then, though high, are easy, and after being a short time Attorney-General and Master of the Rolls, I shall get the seals with the title of Earl Auld-Kirk-Yard.

Campbell achieved his aim by his own dedication, without connections or much in the way of financial assistance. He supported himself while qualifying for the bar by reporting Parliamentary debates and acting as theatre critic for the Morning Chronicle. Like most intending barristers at that time, he learnt the law by himself with very little in the way of formal instruction, by sitting in court and making notes. However, he did spend some time as a pupil of William Tidd, the foremost special pleader of his day, and unlike some of his contemporaries, evidently took his work very seriously, eventually acting as Tidd’s assistant. By this means he acquired a thorough grounding in the English common law.

He was called to the bar in 1806, but work was slow in coming in for some years, and so he took an opportunity which presented itself to report cases decided at nisi prius. His reports first appeared in 1808 and continued to be published until 1816. By this time his career at the bar was beginning to blossom, and he took silk in 1827 and entered Parliament as a member of the Whig (later the Liberal) party in 1830. Only two years later, he became Solicitor General in Earl Grey’s government, and two years after that, Attorney General under

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18 The primary source for his career is his Life, compiled by his daughter and published after his death in 1881: Hon. Mrs. Mary Scarlett Hardcastle, Life of John, Lord Campbell, Lord High Chancellor of Great Britain, consisting of a selection from his Autobiography, Diary, and Letters (London, John Murray, 1881). It consists of extracts from his unpublished autobiography, commenced in 1842 and completed in 1847, a journal covering the later years of his life, and letters to his father and brother. However, the earliest published sources are ‘Lord Campbell: His Professional and Parliamentary Career’ (1853) 50 Law Magazine 1; ‘The Professional and Parliamentary Life of Lord Campbell’ (1861) 11 Law Magazine & Review 347 (the earlier article republished and brought up to date following Lord Campbell’s death). For more modern sources see L.Stephen and S.Lee (eds.), Dictionary of National Biography (Oxford University Press, 1917 onwards), iii, p.831 (G.P.M.); H.C.G.Mathew and B.Harrison (eds.), Oxford Dictionary of National Biography (Oxford University Press, 2004), i, p.825 (G.H.Jones and V.Jones); A.W.B.Simpson, Biographical Dictionary of the Common Law (London, Butterworths, 1984), p.99 (G.H.Jones).

19 Life, above n.18, i, p.53.

20 At least until 1821, nearly fifteen years after he had been called to the bar, when he married Mary Scarlett, eldest daughter of James Scarlett Q.C., the future Lord Abinger (Chief Baron of the Exchequer 1834-1844).
Viscount Melbourne. These appointments did not prevent him from pursuing his career at the bar: apart from government work (which included appearing in the second action in *Stockdale v Hansard*\(^2\) in 1839), one of the highlights of his career was his successful defence of Melbourne against a charge of criminal conversation with Lady Caroline Norton in 1836.\(^2\)

Campbell was unsuccessful in pressing his claim to be appointed Master of the Rolls in 1834 and again in 1836 (so in this one respect failing to realise the ambitions he set out for himself in his letter to his sister). In 1841 he was appointed Lord Chancellor of Ireland and raised to the peerage as Baron Campbell of St. Andrews, but he was in office for only six weeks before Melbourne’s government fell and was replaced by Sir Robert Peel’s Conservative administration. For the next few years, he combined acting as a member of the opposition front bench in the House of Lords with sitting as a judge in the House of Lords in its judicial capacity. However, these activities still left him enough time to write his autobiography and then the works of judicial biography for which he is often remembered, *Lives of the Lord Chancellors* (published in three volumes between 1845 and 1847) and *Lives of the Chief Justices* (two volumes published by 1849 and a third in 1857).

Though by 1846, the year of the passing of the Fatal Accidents Act, he was 65, there were still a number of important steps ahead of him. In July 1846, Peel’s government fell and Campbell became Chancellor of the Duchy of Lancaster in Lord Russell’s Liberal government, with a seat in the Cabinet. Though by 1850 he had not been involved in the everyday business of the common law for some years, he was appointed Chief Justice of the Queen’s Bench and performed that role with reasonable success for the next nine years. In 1859, Viscount Palmerston’s Liberal government, faced with a number of competing claims, chose Campbell as Lord Chancellor. He died 18 months later, in 1861, in his 80th year - one of the few Lord Chancellors to die in office.\(^2\)

Posterity has not always judged him kindly. On his death in 1861 the *Law Magazine & Review* said that though it was his ambition to be considered an orator, a scholar and a wit, he was none of these: ‘His was the triumph of mediocrity. … It seems to us that hardly any public man, though even of less eminence than Lord Campbell, and who has been removed by death in the midst of the activity of public life, has been so little lamented.’\(^2\) Later biographers refer to “[h]is selfishness, desperate eagerness to push to the front and perpetual air of calculation”\(^2\) and ‘his overbearing, often boorish, conduct on the bench’.\(^2\) His writings have contributed to this reputation. It was said that his biographies ‘added a new terror to death’\(^2\) because of the severe judgments that he passed on his contemporaries: this applied particularly to his account of the lives of Lords Lyndhurst and Lord Brougham, published posthumously.\(^2\) Moreover, his standards of scholarship were suspect, and there were allegations of plagiarism: the *Law Magazine* said ‘we had reason to complain of unacknowledged pillage’.\(^2\) However, another source suggests that among the negatives, there

\(^{21}\) (1839) 9 Ad. & El. 1; 112 E.R. 1112.
\(^{22}\) The case which was the inspiration for much of the fictitious trial of *Bardell v Pickwick* in Charles Dickens’ *The Pickwick Papers* (London, Chapman and Hall, 1837).
\(^{23}\) Campbell’s researches revealed that, up to the time he became Lord Chancellor, only 13 Lord Chancellors had died in office: *Life*, above n.18, ii, p.377. He became the 14th (and the oldest).
\(^{24}\) ‘The Professional and Parliamentary Life of Lord Campbell’ (1861) 11 Law Magazine & Review 347 at 394.
\(^{27}\) Lord Campbell attributed this remark to a contemporary, Sir Charles Wetherell: *Life*, above n.18, ii, p.219.
\(^{28}\) Lord St. Leonards wrote a pamphlet objecting to inaccurate statements about him in this work: *Misrepresentations in Campbell’s Lives of Lyndhurst and Brougham corrected by St. Leonards* (London, John Murray, 1869).
\(^{29}\) ‘Lord Campbell: His Professional and Parliamentary Career’ (1853) 50 Law Magazine 1 at 35 n.3.
were some positives: ‘thin-skinned and insensitive, he quarrelled with many of his contemporaries, … and having quarrelled, he rarely forgave. His aggressive self-confidence and unconcealed ambition were unattractive. Always determined to reach the top of his profession, Campbell quite shamelessly pressed his claims to office … Campbell’s warts are all too evident. But they cannot detract from his great service as a law officer, chief justice and lord chancellor, legislator and law reformer.’

It is as a law reformer that Lord Campbell deserves above all to be remembered. In 1828, as a newly appointed silk, he was made the head of the Real Property Commission which was appointed shortly after Lord Brougham’s famous speech which initiated the 19th century law reform movement. Campbell himself wrote the Commission’s report on limitation of actions and played a major part in its other work over the next few years. He became a lifelong advocate of a system of registration of title, destined not to be adopted for another hundred years, but he succeeded in many other areas. In addition to the Fatal Accidents Act and the other Acts referred to as ‘Lord Campbell’s Act’ (the Libel Act 1843 and the Obscene Publications Act 1857), Lord Campbell played a major part in reform legislation on wills, copyright, civil procedure, criminal procedure, local government and much more. In the last few years of his life he presided over the committee which recommended the new form of divorce introduced by the Matrimonial Causes Act 1857 and was working on legislation to consolidate the criminal law which was enacted after his death. In the words of Holdsworth, Campbell was one of the greatest common lawyers of the age of reform.

II. The common law: the rule in Baker v Bolton

(a) Baker v Bolton

The case of *Baker v Bolton* which first pinpointed the problem of fatal accidents was heard by Lord Ellenborough C.J. and a jury at Westminster on 8 December 1808. According to the law report, the action was brought against the defendants as proprietors of the Portsmouth to London stage coach. The plaintiff and his wife were passengers riding on the top of the coach when it was overturned. The plaintiff was much bruised, but his wife was so severely hurt that she died a month later in hospital. The plaintiff’s declaration stated that ‘the plaintiff had wholly lost, and been deprived of the comfort, fellowship, and assistance of his said wife, and had from thence hitherto suffered and undergone great grief, vexation, and anguish of mind’. Apart from his personal attachment to her, the plaintiff’s wife had helped him in his business as a publican. However, Lord Ellenborough told the jury that they could only take into consideration the bruises which the plaintiff had himself sustained, and the loss of his wife’s society, and the distressed of mind he had suffered on her account, from the time of the accident until the moment of her death. In a civil court, the death of a human being could not be complained of as an injury. The jury found a verdict for the plaintiff with £100 damages.

32 (1808) 1 Camp. 493; 170 E.R. 1033.
33 Campbell adds the editorial comment: ‘If the wife be killed on the spot, is this to be considered *damnum absque injuria*?’ The case is one of the earliest authorities for the proposition that a husband can recover damages for *loss of consortium* occasioned by negligence. It is interesting that Lord Ellenborough suggests that the damages include ‘distress of mind’: see Bramwell B.’s critical comments in his dissenting judgment in *Osborn v Gillett* (1873) L.R. 8 Ex. 88 at 96.
A few additional facts can be gleaned from The Times, which reported that one of the Portsmouth coaches had suffered an accident near Kingston, in Surrey, on 20 May 1808.35

Last Friday morning, a very melancholy accident occurred, by the upsetting of one of the Portsmouth Coaches, near Kingston, through which, we are sorry to state, no less than three of the inside passengers lost their lives on the spot, and three or four of the outside had their limbs broken, some of whom are at present in so deplorable a situation, that little hopes are entertained of their recovery.

In the case of Mrs. Baker, these fears proved justified.

The case is often belittled by saying that it was merely a nisi prius case, with the implication that it is of low status. Winfield, for example, says that ‘The case was at nisi prius, the report is extremely brief, and not a single authority is cited.’36 However, it is suggested that such views go too far in denigrating the decision, and that it should be granted at least a tolerable degree of respect.

‘Nisi prius’ was the name which became used to denote the civil side of the assize jurisdiction. For centuries the judges of the common law courts had been spending some part of the legal year ‘going circuit’, travelling from town to town and city to city around one or other of the six circuits trying criminal and civil cases.37 The problem was that originally pleading was done orally, and had to take place before one of the three common law courts at Westminster. However, the common law had developed a system under which issues of fact were tried before a jury from the county where the facts took place. The solution was to develop a three-stage process. Once the pleading process had produced an issue to be tried, it was ordered that a jury was to be summoned to Westminster to give their verdict unless before (nisi prius) the nominated date, the assize judges visited on circuit, in which case the trial on the facts would be heard locally. Ultimately, judgment was given in London on the basis of the jury verdict.38

However, what was happening in Baker v Bolton was a little different. The case was heard not in the country, but at Westminster, at the Westminster Guildhall courthouse.39 Though the trial took place before a judge and a jury, it appears to have been a one-stage affair (only one date is given in the report). According to Blackstone, writing in the 18th century, courts of nisi prius were also held ‘in London and Middlesex, where courts of nisi

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35 The Times, 25 May 1808, p.7 col c.
36 P.H.Winfield, ‘Death as affecting Liability in Tort’ (1929) 29 Col. L. Rev. 239 at 250. Note also T.A.Smedley, ‘Wrongful Death - Bases of the Common Law Rules’ (1960) 13 Vand. L. Rev. 605 at 614: ‘It must be remembered that Baker v Bolton was a nisi prius case, tried in the local court before a single judge rather than en banc in the superior court at Westminster. The case involved only a small amount of money and was not extensively argued. Ellenborough’s reported opinion is very brief, and the controversial rule of law was laid down without either sustaining reasoning or supporting authority. Under the circumstances it is understandable how the judge could have stated his ruling incautiously so that it declared absolutely that no action for damages could arise from the death of a person.’
38 For a detailed description of the sequence of events when a case was tried at nisi prius, see Ex parte Jose Luis Fernandez (1861) 10 C.B.(N.S.) 3; 142 E.R. 349, at 42-45 per Willes J.
39 This was a new building, completed in 1807, which stood on the site now occupied by the Middlesex Guildhall building, which since 2009 has been the home of the new Supreme Court which has inherited the judicial functions of the House of Lords. The present building, the third courthouse to be built on this site, was completed in 1913. The second, constructed in 1892, quickly became too small and was replaced. After many years as an assize and then a Crown Court, the present building was refurbished to make it suitable for its new function: The Supreme Court Building: A Brief Guide; The Middlesex Connection with The Supreme Court Building: A Brief Guide, pamphlets available at the Supreme Court.
nisi prius are holden in and after every term, before the chief or other judge of the several superior courts’. 40 The four-judge Court of Queen’s Bench, over which Lord Ellenborough presided as Chief Justice, sat during the Law Terms. Lord Ellenborough then sat at Westminster for a few days out of term, sitting alone, together with a jury. 41 In Campbell’s Reports, the cases decided in the same week as Baker v Bolton are preceded by the following note: ‘In the Court of King’s Bench, at the sittings after Michaelmas Term, in the 49th Year of George III. 1808, Adjourned sittings at Westminster, Thursday, Dec. 1, 1808’. 42 By this time, many of the proceedings which took place before the full Court of Queen’s Bench were in effect appeals, including motions in arrest of judgment or motions for a new trial, which enabled points of law arising at nisi prius to be re-argued. Looking at Baker v Bolton with modern eyes, we can say that it resembles the sort of case that would today be decided by a judge of the Queen’s Bench Division sitting at first instance, and in the absence of higher authority it is unquestioned that such cases can be important precedents. The status of Baker v Bolton can perhaps be underlined by noting that the case was heard by the Chief Justice, and that Sir Vicary Gibbs K.C., who appeared for the defendants, and James Alan Park K.C., who appeared for the plaintiff (together with his junior, Marryat), were among the leading advocates of the day. Gibbs was the Attorney General: at this time, the Attorney General was still able to maintain a private practice in addition to his government duties. Gibbs eventually became Chief Justice of the Court of Common Pleas, and Park a judge in the same court. 43

Whatever its status, this decision, one that would otherwise have perhaps been entirely forgotten, was saved from obscurity and brought to prominence because it was reported by Campbell. Until the 19th century, nisi prius decisions, whether given in the country or at Westminster, were not reported. The first nisi prius reporter was Isaac Espinasse, but he did not enjoy a high reputation: Pollock C.B. said of him that he heard only half of what went on in court and reported the other half, 44 and Maule J. when referred to a case in Espinasse’s Reports said that he did not care for ‘Espinasse or any other ass’. 45 Campbell, early in his career at the bar, at a time when he was not getting much work, secured a contract with Joseph Butterworth, the law publisher, to report nisi prius cases. He saw that he could take on Espinasse and beat him, 46 and indeed Campbell’s reports are of high quality and introduced

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41 Campbell noted that when he became Chief Justice in 1850, ‘after term I sat six days at Nisi Prius in Westminster’: Life, above n.18, ii, p.277.
42 (1808) 1 Camp. 477; 170 E.R. 1027. According to Campbell’s Reports, Baker v Bolton was one of two cases decided on 8 December 1808, and the last of seven cases dealt with by Lord Ellenborough between 1 and 8 December. J. Oldham, ‘Law-making at Nisi Prius in the Early 1800s’ (2004) 25 J. L. H. 221 at 227 says that Lord Ellenborough at his peak in 1812 decided 11 jury trials per day, and suggests that only between 8 and 15% of cases decided were reported (at 233). He compares the speed of decision of Lord Ellenborough at nisi prius with Langbein’s work on the speed of criminal trials at the Old Bailey in the 18th century: J. H. Langbein, ‘The Criminal Trial before the Lawyers’ (1978) 45 U. Chi. L. Rev. 263 at 277-284. Oldham quotes one barrister of the time describing Lord Ellenborough’s penchant for ‘rushing through the list like a rhinoceros going through a sugar plantation’: Serjeant Talfourd in Vacation Rambles, quoted in W. C. Townsend, The Lives of Twelve Eminent Judges of the Last and of the Present Century (London: Longman, Brown, Green and Longmans, 1846), i, p.386: Oldham at 235.
43 Campbell recounts anecdotes about Gibbs, Park and Marryat in Life, above n.18, i, pp.199, 205, 208, 219-221. Though Campbell confirms the status of Gibbs and Park, he is scathing about the abilities of Marryat, one of ‘the old wizened special pleaders, who knew the difference between case and trespass - and little more’: Life, above n.18, i, p.199. Park was apparently known as ‘St James Park’ to distinguish him from his contemporary, James Parke (later Lord Wensleydale), who was known as ‘Green Park’: Simpson, above n.18, p.401.
45 Williams, above n.44, p.44, citing Biron, Without Prejudice (1936).
46 Life, above n.18, i, pp.212-214. Campbell also notes the opportunity presented by the important issues of mercantile law that were being decided by Lord Ellenborough at nisi prius.
features such as the names of the attorneys and footnote comments by the reporter. The reports were a success and he continued to produce them until 1816.

So what of the substance of the decision in *Baker v Bolton*, preserved for posterity as a result of the work of a keen young law reporter?

(b) ‘In a civil Court, the death of a human being could not be complained of as an injury’

Lord Ellenborough’s statement as reported by Campbell could not be briefer. This one-sentence ruling stands alone, with no justification or elaboration. Over the years it has come in for much criticism from respected commentators. Pollock, for example, said it was a ‘barbarous’ rule, and Fleming criticised it as a misreading of legal history. American writers have been even more scathing, suggesting that it is one of the most criticised decisions in legal history, that it lacks both reasoning and historical support, that it has produced a ‘grotesque anomaly’, and that the path of English-speaking jurisprudence has been directed into a quagmire from which only recently has it begun to escape. Even Prosser, doyen of American torts scholars, dismissed Lord Ellenborough as a judge ‘whose forte was never common sense’.

Many of these criticisms seem unjustified, and some are clearly extreme. It is suggested that Winfield was nearer the mark when he said that Lord Ellenborough’s dictum was an accurate statement of the law as he knew it: no such action had been permitted. The fact that the decision was reported suggests that Campbell also thought that it was correct in principle. Various writers have attempted to fill in the blanks and supply reasons which would have supported the view expressed. Some have suggested that there are grounds of principle to justify it, such as repugnance to setting a price on human life. This was one of the suggestions made by W.H.Field in an article on the origins of the rule intriguingly entitled

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47 For a comparison of the two reporters, see P.Luther, ‘Campbell, Espinasse and the Sailors: Text and Context in the Common Law’ (1999) 19 Legal Studies 526 (contrasting the two reports of *Stilk v Myrick* (1809) 2 Camp. 317; 170 E.R. 1168 and 6 Esp. 129; 170 E.R. 851.
50 Speiser and Malawer, above n.12, at 5.
54 Prosser, above n.3, p.901.
56 Campbell exercised some discretion about which of Ellenborough’s cases to report. He records that ‘Lord Ellenborough ought to have been particularly grateful to me for suppressing his bad decisions … Before each number was sent to the press I carefully revised all the cases I had collected for it, and rejected such as were inconsistent with former decisions or recognised principles. When I arrived at the end of my fourth and last volume, I had a whole drawer full of “bad Ellenborough law”’: *Life*, i, p.215.
57 During the House of Lords debates on the Deodands Abolition Bill and the Death by Accidents Compensation Bill, Lord Brougham pointed to the limitations of this suggestion: ‘The argument … blew hot and cold, because it made life either infinitely valuable, or of no value whatsoever’: 85 H.L.Deb., 3rd ser., col.967 (24 April 1846). The argument is also doubted by Malone, above n.51, at 1053-1054, and J.J.Finkelstein, ‘The Goring Ox: Some Historical Perspectives on Deodands, Forfeitures, Wrongful Death and the Western Notion of Sovereignty’ (1973) 46 Temple L.Q. 169 at 175.
‘Thanatopsis’. Harking back to the medieval origins of tort law, Field also referred to Pollock’s suggestion that ‘a process which is still felt to be a substitute for private war may seem incapable of being continued on behalf of or against a dead man’s estate’.

However, it seems more likely that Lord Ellenborough’s statement is based not on principles such as this but on existing rules of law. Two principal candidates have been discussed in the literature: *actio personalis moritur cum persona* (a personal action dies with the person) and the felony-merger rule.

Under the *actio personalis* rule, the death of either the plaintiff or the defendant brought the action to an end. It made no difference whether the defendant died as a result of a tort in respect of which the action was brought, or through independent causes. The origins of the rule are unknown: it was not mentioned in early treatises such as Glanvill or Bracton (neither of which says much about personal actions) and though the rule is clearly of medieval origin it did not take final shape until the time of Coke and Blackstone. According to Blackstone, ‘in actions merely personal, arising *ex delicto*, for wrongs actually done or committed by the defendant, as trespass, battery, and slander, the rule is that *actio personalis moritur cum persona*; and it never shall be revived either by or against the executors or other representatives.’ The maxim did not apply to actions in contract (except contracts to marry), or to tort actions for the recovery of land or chattels.

However, as several writers have noted, this rule cannot be the origin of the rule in *Baker v Bolton*, though Holdsworth suggested that the development of the rule may have been fostered by confusion with *actio personalis*. The issue in *Baker v Bolton* was not the fate of the deceased wife’s cause of action for her own injuries: no action was brought on behalf of her estate. Instead, the husband was suing for his loss as occasioned first by her injuries, which meant that he was deprived of her consortium and her services during the month for which she survived after the accident, and then as the result of her death. In *Baker v Bolton*, both parties to the action - the husband and the negligent stage-coach proprietor - were still alive. Accordingly the *actio personalis* maxim cannot provide a basis for Lord Ellenborough’s rule.

When we turn to the felony-merger rule, we are on firmer ground. Where a tort-caused death amounted to a felony, it was not possible to bring a civil action, because the tort was regarded as having been converted into a felony. The rule is of considerable antiquity, but

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58 W.H.Field, ‘Thanatopsis’ (1912) 46 Am. L. Rev. 801 at 805. The title is borrowed from a poem by William Cullen Bryant (1794-1878). It combines two Greek words and may be translated as ‘Meditation upon death’.
59 Field, above n.59, at 804. The source of the Pollock quotation is not given.
61 Smedley, above n.36, at 606-607, for detailed history see Winfield, above n.36, at 233-249.
62 Blackstone, above n.40, iii, p.302.
63 Jackson v Watson & Sons [1909] 2 K.B. 193. So why did the husband in *Baker v Bolton* not sue for breach of the contract of carriage? It seems very likely that he would have purchased the tickets: Malone, above n.51, at 1061.
64 The scope of the rule was twice reduced by legislation: Executors’ Action for Trespass Act 1330 (4 Edw. III c.7) (giving executors the right to sue in trespass for chattels of the testator carried away in the testator’s lifetime); Civil Procedure Act 1833 s.2 (empowering personal representatives to sue in trespass or case for any injury to the deceased’s real estate for which the deceased might have brought an action): see H.B., ‘Law of Deodands’ (1845) 34 Law Magazine 188 at 200.
67 It seems to be generally accepted that this is the source of the rule in *Baker v Bolton*: see Holdsworth, above n.65, at 432; Smedley, above n.36, at 611; Malone, above n.51, at 1055; c.f. Finkelstein, above n.57, at 175-177.
its origins are obscure. Some writers attribute it to the *wergild* of Anglo-Saxon law, which was a payment exacted from the person responsible for killing another, payable to the deceased’s relatives, in order to prevent them wreaking vengeance on the killer and his family; acceptance of the wergild placed the relatives under an obligation not to take the law into their own hands.\(^{68}\) At a later point, killing was recognised as a crime and the tortious element faded into the background. As with other felonies, the perpetrator would be put to death and his assets forfeited to the Crown, so there was no one left to sue and no assets out of which to provide compensation.\(^{69}\) There was no express statement that a person could not sue in trespass for an act amounting to a felony until 1607,\(^{70}\) and nothing in any case after the 17th century. By this time it had been recognised that the felony did not completely rule out civil proceedings, but only postponed them until after the trial, but this made no practical difference as long as conviction entailed execution and forfeiture. By the 19th century it seems that this was regarded as established law, a fact confirmed, it is suggested, by the preamble and the reference to ‘felony’ in s.1 of the Fatal Accidents Act 1846.\(^{71}\) Though there is no indication that the wrong in *Baker v Bolton* amounted to a felony by the driver,\(^{72}\) more modern cases such as *Osborn v Gillett*,\(^{73}\) *Clark v London General Omnibus Co*\(^{74}\) and *Admiralty Commissioners v SS Amerika*\(^{75}\) have accepted the rule in *Baker v Bolton*\(^{76}\) and confirmed the theory that it was based on the felony-merger rule.\(^{77}\) These cases have generally been criticised for meek acceptance of an unsatisfactory rule - Winfield, for example, said that the House of Lords in *The Amerika* deliberately affirmed the rule in *Baker v Bolton* ‘after a historical investigation of it on their own account which had better be ignored. Worse, I am not sure that they used even such historical knowledge as was available’.\(^{78}\) By the 20th

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\(^{69}\) Holdsworth, above n.65, at 435, however suggests that the appeal of murder (a private criminal prosecution brought by the relatives) may have reduced the hardship caused by the felony-merger rule. This procedure was abolished in 1819 after it became clear that the accused could insist on the option of trial by battle: *Ashford v Thornton* (1818) 1 B. & Ald. 405; 106 E.R. 149.

\(^{70}\) *Higgins v Butcher* (1606) Yel. 89; 80 E.R. 61; see also *Smith v Sykes* (1677) 1 Freem. 224; 89 E.R. 160.

\(^{71}\) Malone, above n.51, at 1058. The preamble reads: ‘Whereas no Action at Law is now maintainable against a Person who by his wrongful Act, Neglect or Default may have caused the Death of another person, and it is oftentimes right and expedient that the Wrongdoer in such Case should be answerable in Damages for the Injury so caused by him’. However Holdsworth, above n.65, at 435 suggests that the preamble reveals confusion between the felony-merger rule and *actio personalis*.

\(^{72}\) Smedley, above n.36, at 615.

\(^{73}\) (1873) L.R. 8 Ex. 88 (Bramwell B dissenting).

\(^{74}\) [1906] 2 K.B. 648.

\(^{75}\) [1917] A.C. 38. See also *Barclay v Penberthy* (2012) 86 A.L.R. 1206 at [22]-[27], where the High Court of Australia confirmed that the rule in *Baker v Bolton* continued to be part of Australian common law.

\(^{76}\) *Clark* was a claim for burial expenses, not recoverable under the Fatal Accidents Act, and *The Amerika* was a claim for loss of services by employers and so did not involve any question of family relationship. *Osborn v Gillett* was a claim for the loss of services of a daughter, and Malone, above n.51, at 1059 says that there is no explanation why the action was not brought under Lord Campbell’s Act. The explanation may be that the daughter did not receive any actual earnings, but merely provided services.

\(^{77}\) In *Moragne v States Marine Lines Inc* (1970) 398 U.S. 375, the U.S. Supreme Court likewise confirmed that the felony-merger rule was the true basis for the rule in *Baker v Bolton*. However the court then held that the historical justification for the rule never existed in the United States, and it therefore overruled its own previous decision upholding the rule (*The Harrisburg* (1886) 119 US 199). In the 19th century, many American jurisdictions had followed *Baker v Bolton*: in the words of Davis, above n.68, at 328, it spread like dutch elm disease. However, some early decisions took a different view. See generally Smedley, above n.35, at 616-619; Malone, above n.51, at 1062-1076.

\(^{78}\) P.H. Winfield, ‘Law Reform’ (1928) 44 L.Q.R. 289 at 299. In another article Winfield said that ‘Upon what ground, except that of *vis inertia*, the judgments proceeded, it is not easy to see’: Winfield, above n.36, at 252. He clearly had in mind statements such as that of Lord Parker of Waddington, who said it was not ‘any part of the functions of this House to consider what rules ought to prevail in a logical and scientific system of jurisprudence’; [1917] A.C. 38 at 42-43.
century the status of the felony-merger rule was doubtful, and it became obsolete with the abolition of felonies and misdemeanours as categories of criminal offence in 1967.\(^{79}\)

(c) Deodands

The rule that death did not give rise to a civil action needs to be seen in the context of the ancient practice whereby articles which ‘moved to’ a person’s death were forfeited to the Crown as a deodand. A practice evolved that on the hearing of the inquest the coroner’s jury would assess the value of the deodand, and the owner of the thing in question would pay the sum assessed which would be paid over to the deceased’s dependants as compensation for their loss. By the 19th century it was said that the continued existence of this rule ‘had long been an insult to intelligence and an affront to ideas of justice’;\(^{80}\) however, it did provide a means whereby, even in cases where it might not be possible to prove fault, relatives might receive a small measure of compensation soon after the accident.\(^{81}\)

The practice was extremely ancient. According to Fitzherbert’s treatise on coroners (1538), a deodand ‘must arise from a death by misadventure, and is, when any moveable thing not fixed to the freehold, or instrument inanimate or beast animate, doth, upon land or in fresh water, by mischance cause the untimely death of man above the age of fourteen years, within the year and day’.\(^{82}\) There were a number of complex rules, such as the seemingly absurd distinction between things which were or were not in motion: according to Blackstone,

Where a thing, not in motion, is the occasion of a man’s death, that part only which is the immediate cause is forfeited: as if a man be climbing up a wheel, and is killed by falling from it, the wheel alone is a deodand: but, wherever the thing is in motion, not only that part which immediately gives the wound, (as the wheel, which runs over his body) but all things which move with it and help to make the wound more dangerous (as the cart and loading, which increase the pressure of the wheel) are forfeited.\(^{83}\)

There are many theories about the origin of deodands. Lord Campbell, when introducing the Deodands Abolition Bill, suggested that they originated in the need to provide funds to pay the church for saying masses for the soul of the deceased, to rescue them from the pains of purgatory.\(^{84}\) Coke grounded the practice on ‘the law of God’ as expounded in Exodus, which provides that when an ox gores a man or woman to death the ox shall be stoned, and its flesh not eaten, but the owner of the ox shall be liable.\(^{85}\) Pollock and Maitland argued that in early times deodands were not intended to provide compensation, but were objects on which vengeance could be taken before the deceased could rest in peace,\(^{86}\) and

\(^{79}\) Criminal Law Act 1967 s.1.

\(^{80}\) Field, above n.58, at 802.


\(^{83}\) Blackstone, above n.40, i, p.291.

\(^{84}\) 77 H.L.Deb., 3rd ser., col.1029 (24 February 1845). Others have doubted this explanation, eg H.B., above n.64, at 198.

\(^{85}\) Exodus 21:28. Field, above n.58, at 823 provides the reference to Coke but does not give a detailed citation. The reference to Exodus explains the title of Finkelstein’s article, above n.57: Finkelstein canvasses a number of theories, and points out the connection between ancient laws such as the deodand and modern statutes which authorise the forfeiture of possessions of persons who have committed a criminal offence.

Field has also referred to various ancient laws sanctioning vengeance on the offending thing, such as the Twelve Tables of ancient Rome, and literary sources such as the bond in Shakespeare’s *The Merchant of Venice* which Shylock argued gave him his pound of flesh.  

By the 18th century, deodands were forfeited to the King and the Royal Almoner made a distribution of the value for charitable purposes, which included compensation to the victim’s family, but the amounts awarded were generally low and it seemed that deodands were in decline. A hundred years later, however, the coming of the railways brought about a brief revival, as we will see.

### III. Pressure for reform

Only 37 years elapsed between 1808, when Lord Ellenborough pronounced that in a civil court the death of a human being could not be complained of as an injury, and 1845, when the Death by Accidents Compensation Bill was introduced into Parliament. But these were years of rapid change, as a result of the industrial revolution and in particular the invention of a new method of transport - the railway. In consequence, there was a great increase in the number of accidents, fatal and otherwise. Thus by 1845, there was great pressure to reform the law. The deodand had been revived and acted as a kind of palliative, resulting in some relatives of fatal accident victims getting small amounts of compensation in certain cases, but this was not at all satisfactory.

(a) The industrial revolution and the increase in accidents

The industrial revolution can perhaps be traced back to the early years of the 18th century, when Thomas Newcomen invented the self-acting steam pumping engine, and Abraham Darby started to produce pig iron by smelting with coke, but its pace accelerated during the second half of the century with more new machines revolutionising mining and the growth of factories, for example creating the cotton industry in Lancashire and the iron trade in the Black Country. Mines and factories were each responsible for an increase in the number of accidents. But it was transport accidents in particular which presented the most high-profile problems, because railways and the like ‘blurred what had been a stable division between the physical space of industrial production and consumption’. Whereas it was employees who were at risk of accidents in the mines and factories, transport accidents caused injury to passengers and pedestrians. So the chief focus must be on road accidents, and how the coming of the railways intensified the problem.

The appalling condition of the roads in the early 18th century limited the ability to travel and probably kept down the number of accidents. However, all this changed during the middle years of the century. The upkeep of roads, formerly entrusted to the parish, which generally did very little, began to be assigned to turnpike trusts which were established under private Acts of Parliament - whereas there were 400 such Road Acts between 1700 and 1750, there were 1,600 over the next forty years. The new road building techniques pioneered by Thomas Telford and John McAdam produced better roads, and there were 22,000 miles of...
good turnpike roads by 1840. This is ‘Mr. Pickwick’s world, the world of the fast stage coaches’. Stage coach services increased both in number and frequency, and in the speed of service. For example, whereas there had been one coach service a week between London and Birmingham in 1740, there were 30 coaches a week in 1783, and 34 a day in 1829; the journey time between London and Edinburgh was reduced from ten days in 1754 to four days by ordinary stage coach or two days by mail coach in 1836.

Stage coach accidents were frequent. Campbell describes his first journey via the mail coach from his home in Fife to London, fearing ‘the perils of an overturn’. The accident that befell Mrs. Baker in 1808 was just one of very many. With four inside passengers and as many as 12 outside, there could be multiple victims. Though few statistics are available, some idea of the number of accidents can be gleaned from the cases reported in The Times. For the five-year period 1791-1795 the figure for coach accidents is 81. For the next four five-year periods it is lower, but it reaches 103 for 1816-1820, 126 for 1821-1825 and (after a dip) 131 for 1836-1840 and 115 for 1841-1845 before finally falling away: 32, 8 and 2 for the next three five-year periods.

But it was the revolution in transport, particularly passenger transport, brought about by the railways that presented the most compelling case for reform of the law relating to fatal accidents. Railways originated to answer a need to take coal from the pit to the port or the canal, and the early railways, such as the Stockton & Darlington Railway of 1825, in the main envisaged the use of horses or stationary steam engines pulling ropes, rather than locomotives. The first modern railway, and the one principally responsible for the transport revolution, was the Liverpool & Manchester Railway, opened on 15 September 1830. It was different because it was set up principally for passenger transport, and because the locomotive was the chosen method of propulsion. George Stephenson, builder of the Rocket and other early steam engines, and the engineer in charge of the railway’s construction, was of course the driving force in this decision. Dyos and Aldcroft sum up the importance of the Liverpool & Manchester Railway by saying:

Here, then, was a major railway between the two most important industrial and commercial cities in the provinces, solidly engineered despite great difficulties, completely mechanized, creating a demand that had not been thought to exist, working to full capacity with unparalleled efficiency, and distributing to its shareholders year after year with the same measured power that drove its engines a dividend of 9½ per cent.

The railway spelt the end of coach travel. Within three months of its opening, half of the coaches on the Liverpool-Manchester route had ceased running. The coach operators tried to maintain their market share by drastic fare reductions, but this had no effect and all the coach services bar one had ceased operating by 1832. As Christian Wolmar says in his history of railways, the Liverpool & Manchester Railway did more than just supplant the stage coach: it

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92 Trevelyan, above n.91, p.384; see also H.J.Dyos and D.H.Aldcroft, British Transport (Leicester University Press, 1971), pp.62-76, also pp.87-79 (biographical information on Telford and McAdam).

93 Trevelyan, above n.91, p.478.

94 Dyos and Aldcroft, above n.92, pp.73, 75. The examples in the text are just a few of many cited by these authors; for others see C.Hibbert, The English: A Social History 1066-1945 (London, Guild Publishing, 1987), pp.348-354.

95 Life, above n.18, i, p.29.

96 Palmer’s Index to The Times 1790-1805 (Palmer’s Full Text Online). Note that some accidents, especially the most major ones, may well be the subject of more than one report.

97 Dyos and Aldcroft, above n.92, p.118.
created a new market for travel. ‘The Liverpool & Manchester was to be the 1830s what the Easyjet phenomenon is today, fulfilling a latent demand to travel at affordable prices.’

The Liverpool & Manchester Railway was the first of many. The 250 miles of track open for traffic in 1838 had become 2,235 miles by 1844, the year of William Gladstone’s Railway Regulation Act, and the year in which J.M.W. Turner’s Rain, Steam and Speed, showing an oncoming train on Brunel’s bridge over the Thames at Maidenhead, was first exhibited at the Royal Academy. The 1840s saw more miles of track (4,600) added to the railway system than any decade before or after. By the 1850s there were about 6,000 miles of track in operation, and all the main arteries of the present British railway system had been completed. Though the railways were to continue to grow between this point and the Edwardian era, when they reached their peak at about 20,000 miles of track (to be followed by a gradual decline during the 20th century, and then the major cuts recommended by the Beeching Report in 1963), by the 1850s two-thirds of the lines which were to form British Rail’s Inter City network had been built. All this was the result of intense private enterprise activity. The 2,235 miles of track open in 1844 involved about a hundred different railway companies. In each case, the railway had to be authorised by a private Act of Parliament. Activity peaked in the years 1844-1847: there were 48 Acts in 1844 (as compared with only 50 from 1838 to 1843), 120 in 1845, 219 in 1846 and 112 in 1847. Over this four-year period, a total of 9,500 miles of track was authorised (90 per cent of today’s route mileage).

The years 1844-1847 were the period of the ‘railway mania’, a period of boom in railway shares reaching a peak in August 1845, followed by an abrupt collapse of the market in October 1845, a crash every bit as devastating as the South Sea Bubble of the 18th century or the Global Financial Crisis of the early 21st century. There had been earlier periods of boom and bust in railway shares, first in 1825 and again in 1835-1836, but these were dwarfed by the events of 1844-1845. The use of companies to establish railways became possible with the repeal of the Bubble Act in 1825, and from this point onwards an ever-increasing number of railway companies petitioned for incorporation. Though many were genuine and had impeccable financial backing (such as the Liverpool & Manchester Railway),

99 Campbell recorded that he first travelled by railway in 1833: Life, above n.18, i, pp.39-40. Returning from a visit to Ireland, he took the train at Liverpool and so presumably travelled on the Liverpool-Manchester route.
100 Wolmar, above n.98, pp.75, 97.
101 The original aim of the Act was to impose important government controls over the management and working of train services, but the Bill was much watered down during its passage through Parliament. One of the main surviving changes was a requirement that the train companies should guarantee at least one train a day on every line, stopping at every station and with a fare of not more than a penny a mile - the slow ‘Parliamentary trains’ on which ‘the idiot who in railway carriages scribbles on window panes’ was condemned to ride by the Mikado of Japan: W.S. Gilbert and A.Sullivan, The Mikado (1885), Act II.
102 Wolmar, above n.98, p.107.
104 Wolmar, above n.98, p.185.
105 Wolmar, above n.98, pp.282-284.
106 Wolmar, above n.98, p.108.
107 Wolmar, above n.98, p.97.
108 On railways and the private bill system, see Kostal, above n.90, ch.3.
109 Wolmar, above n.98, p.88.
110 Dyos and Aldcroft, above n.92, p.128.
111 Wolmar, above n.98, p.88
112 See generally Kostal, above n.90, ch.1, the principal source for the material in this paragraph. See also Dyos and Aldcroft, above n.92, pp.126-138.
many were schemes by unscrupulous promoters who induced investors to part with their money in return for scrip which ultimately proved worthless. After the 1836 collapse a House of Commons Select Committee chaired by Gladstone made recommendations which led to a new Joint Stock Companies Act in 1844 containing tighter provisions about company registration. However, railway companies were entitled to provisional registration, and so promoters could go on collecting deposit money and speculating in new scrip just as before. Companies often used misleading advertisements which induced the gullible to part with their money by using the names of the titled or well-to-do (often without authority) and claiming that the company had their backing. The end came when the market crashed in October 1845, and the economy began to deteriorate in late 1846. Though many of the railways that had been authorised were built over the next few years, the number of Railway Bills before Parliament declined, and many companies went bankrupt. This period of railway mania was followed by a period of railway litigation, as those who had lost money tried to recover it in the courts.  

No fall from grace was more spectacular that that of ‘Hudson the Railway King’: George Hudson, the Chairman of the North Midland Railway, at one time controlled all the railways in the east of England. But much of his empire was built on deceit and eventually he fled overseas to escape criminal charges and his creditors. The railway experience undoubtedly contributed to the further reforms of company law contained in the Joint Stock Companies Acts of 1856 and 1862.

Railway accidents presented a problem from day one. On 15 September 1830, at the opening of the Liverpool & Manchester Railway, William Huskisson, M.P. for Liverpool and a former Cabinet minister, was killed by the Rocket. He was a passenger on the train proceeding from Liverpool to Manchester as part of the opening ceremony, and had got out during a temporary stop to speak to the Duke of Wellington, the Prime Minister of the day. Relations with the Duke had been strained following Huskisson’s resignation from the Cabinet in 1828, and it is thought that Huskisson decided to take an opportunity to effect a reconciliation. Unfortunately, the Rocket appeared unexpectedly on the other line and in the scramble to get out of the way the door of the carriage threw him onto the rails in the path of the engine. This was a sad end for one who had been an enthusiastic supporter of the new railway; but he was simply the first of many. Accidents were frequent. Railway accidents reported in The Times rose from 31 for the five-year period 1831-1835 to 304 in 1836-1840,

113 Kostal, above n.90, ch.2.
114 Campbell recorded in his autobiography that he met ‘Hudson the Railway King’ in 1846: Life, above n.18, ii, pp.216-217. He anticipated his downfall: ‘There is nothing so disgraceful to the present age as the manner in which this vulgar dog is flattered by all ranks. His elevation has greatly contributed to the gambling mania from which we are now suffering, and nothing would so much tend to reconcile men to the sober pursuits of industry as if he were to appear in the “Gazette” as a bankrupt.’ Jack Simmons, a leading railway historian, suggests that history could have passed a very different judgment on Hudson: ‘His financial chicanery is indefensible, and that met its proper reward. Along with it went a true vision of the weaknesses of the railways of the time and his understanding of the means to repair them’; J.Simmons, The Railways of Britain (3rd ed., London, Macmillan, 1986) (quoted by Kostal, above n.90, p.103).
115 Limited liability had been introduced in 1855.
116 See S.Garfield, The Last Journey of William Huskisson (London, Faber & Faber, 2002). For newspaper accounts, see Liverpool Courier, 15 September 1830 (second edition), Liverpool Times 21 September 1830. In the Liverpool Times, coming events cast their shadows before them. On 7 September it reported that Huskisson, who had been ill, was due in Liverpool on 10 September for the opening of the railway; the next item, entitled ‘Fatal Accident on the Railway’, recorded the death of a railway employee called, interestingly, George Stevenson. On 14 September a paragraph about whether Huskisson was likely again to accept Cabinet office was preceded by a report headed ‘Fatal Accident’.
117 It is recorded that there were fifteen times as many fatal accidents on the railways in England as in Germany: Hibbert, above n.94, p.651. Hibbert says that ‘many of [the accidents were] the fault of the passengers themselves who were constantly attempting to board moving trains, jumping off to pick up their hats, sitting in the tops of the carriages and falling over the sides of the open, seatless truck which were the only form of accommodation at first provided for third-class travellers’.
561 in 1841-1845, 749 in 1846-1850 and 848 in 1851-1855. Charles Dickens’ evil Mr. Carker deservedly met his end under the wheels of a train in *Dombey and Son*, and Dickens himself was involved in a train accident on the London to Dover line in 1865. However, accidents to passengers, fatal and otherwise, were greatly outnumbered by those suffered by railway employees. At least 6,200 were killed, and an unknown number injured, between 1841 and 1875.

(b) The revival of deodands

Deodands enjoyed a brief revival in the 19th century. Coroners’ juries started to use them as a means of punishing the railways for accidents caused by their carelessness, and to provide compensation to the relatives of those who had been slain. The sums awarded were often substantial. The courts had to intervene to confine deodands within their proper bounds, and, perhaps less justifiably, they kept the practice of awarding deodands in check by invoking technical rules. This added to the pressure for law reform which eventually caused Lord Campbell and others to act.

By the 19th century there had been some subtle changes. The owner was now allowed to surrender cash, rather than the thing itself, and the Royal Almoner had lost his function as the holder of the money. Instead it was taken by local officials on behalf of the Crown, or sometimes by an individual or corporation to whom the right to deodands had been granted in respect of a particular local area. It probably seemed pointless for the Almoner to collect the money from the local source and then return it to the same place, so the practice grew up of allowing the coroner to collect directly. The coroner’s jury determined what part of the instrument had caused the death and placed a value on it. However, there was no legal obligation to pay the money to the relatives, and it seems that it was often not paid over. In 1833 there was an attempt to reorganise the administration of deodands to inject new vigour into the process.

Probably the first sign of the new approach in railway cases was an instance in 1839 where the coroner’s jury awarded a large sum, either £1,400 or £1,500, against a railway company. This was followed by awards of £500, £600 and £800 in 1840, and then a new record sum of £2,000 awarded against the London & Birmingham Railway in 1841. There was further controversy later that year following an accident on the Great Western Railway at

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118 Palmer’s Index to The Times 1790-1805 (Palmer’s Full Text Online).
119 C. Dickens, *Dombey and Son* (London, Bradbury and Evans, 1848), ch.55. A major theme of the novel is the effect of the building of the railway through Camden Town in north London. On this, see Wolmar, above n.98, p.117.
121 Kostal, above n.90, p.258.
122 Deodands seemed to be in decline in the 18th century: see above text to n.88.
123 (1839) 3 Jurist 969; (1845) 9 Jurist 49; Lord Campbell 77 H.L.Deb., 3rd ser., col.1029 (24 February 1845).
124 This earned a reference in Samuel Butler’s *Hudibras - The Lady’s Answer to the Knight* (in *The Poetical Works of Samuel Butler* (London, William Pickering, 1835)), 103, line 104:

For love shou’d, like a deodand,
Still fall to th’ owner of the land’.

126 (1839) 3 Jurist 969. Compare the sum of £20 awarded against a hit-and-run stage-coach driver in 1825, ‘excessive by the usual standards of the day’: Smith, above n.88, at 392.
127 Smith, above n.88, at 395; Hostettler, above n.86, at 70.
Sonning, where it was the lord of the manor as the holder of the right to deodands who seized the offending railway carriage - the railway was deemed guilty of ‘wilful murder’.  

This was when the Court of Queen’s Bench stepped in to keep the law on the rails. However, the key decision which placed a brake on the expansion of deodands was not a railway case. In *R v Polwart* in 1841, the Court of Queen’s Bench held that deodands could only be awarded in a case of death by misadventure, and not where the death amounted to a felony. Polwart, who was the master of a steamboat called the *Manchester*, was responsible for colliding with and sinking another vessel called the *Tyrian*. The deceased was thrown into the water and drowned. The coroner’s court decided that the *Manchester* had moved to the death of the deceased and that the sum of £800 was accordingly payable as a deodand. In support of the objections to this finding, Sir William Follett argued that deodands were only available in cases of death by misadventure and no blame was imputable to anyone. The Attorney General, none other than Sir John Campbell (he had been knighted on appointment to this position), responded by saying that the question had become one of great importance since the introduction of steam power, in consequence of the practice of levying large deodands in cases where accidents had occurred by misadventure or criminal neglect. Though in the old cases deodands appeared to have been levied only where the thing had innocently been the moving cause of the deceased’s death, it had been the practice of the coroner’s jury to find the value of the instrument in all cases, and there were no express authorities to show that deodands were only to be levied when the death was caused by misadventure. This valiant attempt to preserve the deodand as a potential source of compensation for the relatives of fatal accident victims was unsuccessful: Lord Denman C.J. held that there was no instance in which a deodand could be laid where a verdict of murder or manslaughter had been found, and so the relevant part of the inquisition should be quashed. There was no justification for extending the application, and deodands should be limited strictly to cases where they had been established by practice and law.

There had already been several cases where the Court had heard appeals against coroners’ verdicts and quashed the decision on technical points - as with *Polwart*, over and over again, these cases took the form of a duel between Campbell as Attorney General and Sir William Follett as counsel for the defendants. For example, in *R v Brownlow*, the deceased died as the result of a boiler explosion on board a boat. Follett, as counsel for the defendants, moved for a rule nisi on the ground that the times of the explosion and the death had not been stated in the declaration, and so some jurors had signed with their initials rather than their full names. Campbell showed cause, arguing that these technical reasons should not prevent the finding of the deodand, but Lord Denman C.J. accepted Campbell’s argument that this was no objection to the coroner’s verdict, and discharged the rule. In *R v West* (decided a few days after *Polwart*), where three men died in a railway accident, Follett argued that the chattel which was said to be moving to the death was not laid to be the property of any named

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129 (1841) 1 Q.B. 818; 113 E.R. 1345.

130 (1839) 11 Ad. & E. 119; 113 E.R. 358.

131 (1839) 11 Ad. & E. 128n.; 113 E.R. 362.

132 (1841) 1 Q.B. 826; 113 E.R. 1348.
individual, but Campbell maintained that it was sufficient to refer to ‘the Proprietors’ of the railways in question without naming them. Again the finding was held sufficient and the deodand properly levied.

Later cases continued to be dominated by technical rules. In *R v Coroner of Berwick on Tweed* 133 in 1843, the case involved a wreck in the open sea, and the coroner’s verdict awarding a deodand was quashed because it was not within his jurisdiction. In *Ex parte Blundell* 134 in 1844, the deceased, a child aged about 6, was killed by an exploding boiler. The jury proceeded to levy a deodand on its owner, but the Court of Queen’s Bench overturned the decision on the ground that a deodand could not be imposed in respect of the death of a child of that age, and also because the inquisition was defective because it failed to state that the jurors were summoned from within the coroner’s jurisdiction, or how the deceased had died.

Despite such hazards, deodands continued to be awarded, especially in railway cases, and eventually the case for some alteration in the law became too powerful to be ignored. As a result, two bills were introduced into the House of Lords in 1845 - one to abolish deodands and the other to provide a new means of compensating the families of fatal accident victims. Even while these bills were being debated, deodands continued to be laid - in *R v Eastern Counties Railway Co* 135 in May 1845, there were four railway fatalities and £125 was awarded in respect of each.

**IV. The Fatal Accidents Act 1846**

(a) Parliamentary history

In view of the fact that the Fatal Accidents Act 1846 has gone down in history as Lord Campbell’s Act, it may come as a surprise to find that the Bill (at this stage called the Death by Accidents Compensation Bill) was introduced into Parliament not by Lord Campbell but by Lord Lyttelton. 136 It was introduced and had its first reading on 18 February 1845. 137 With one important exception (to be discussed later) this first draft differed only in minor respects from the third draft, which was the version that ended up on the statute book. It provided:

[W]hensoever any person shall by his wrongful Act Neglect or Default have caused the Death of another Person and the Act Neglect or Default is such as would (if Death had not ensued) have entitled the Party injured to maintain an Action in any of Her Majesty’s Courts of Record at Westminster and Recover Damages in respect thereof then and in every such Case the Person causing such Death shall be liable to an Action for Damages resulting therefrom notwithstanding the Death of the Person injured ...

133 (1843) 7 J.P. 676.
134 (1844) 8 J.P. 773 (see also a brief report at 4 L.T. 138 and the comment at 8 J.P. 785).
135 (1845) 10 M. & W. 58; 152 E.R. 380.
136 George William Lyttelton, 4th Baron Lyttelton, 1817-1876, British aristocrat and Conservative politician, took his seat in the House of Lords in 1838 on his 21st birthday; he was Under-Secretary for War in Peel’s short-lived administration of 1846. His children included Alfred (Cabinet minister and England wicket-keeper), Edward (Headmaster of Eton and England footballer) and Lucy (wife of Lord Frederick Cavendish, whose association with the education of women was commemorated by the foundation of Lucy Cavendish College, Cambridge).
138 ‘1845. An Act for compensating the Families of Persons Killed by Accidents, 18 February 1845. Presented by the Lord Lyttelton, read 1st and to be printed’ (original handwritten draft in the UK Parliamentary Archives, HL/PO/JO/10/8/1495). This draft of the Bill was printed (with a few minor variations from the handwritten original) in (1845) 4 L.T. 494 (29 March 1845).
The next section listed the relatives for whose benefit the action could be brought, and provided that not more than one action could lie in respect of the same subject-matter of complaint. These provisions can all be found in the 1846 Act and its successors in England and elsewhere.

One week later, on 24 February, Lord Campbell introduced a companion reform, the Deodands Abolition Bill, which received its first reading on this day. Lord Campbell made a speech and debate followed - the sort of process which would today take place on second reading. Lord Campbell called attention to the almost weekly use of deodands, the anomaly that they were not available in the very kind of case where something was needed, namely cases of malice or culpable negligence, and some of the absurd rules. He then said that there was another defect in the law that needed to be cured, namely the fact that relatives had no rights to compensation in the case of a fatal accident, unlike the position in French or Scottish law, and that he would have made this part of his Bill had not Lord Lyttelton already introduced a Bill on this subject. It was clear that Lord Campbell had a personal commitment to this latter reform - as the Lord Chancellor (Lord Lyndhurst) pointed out, Campbell himself had been responsible for the reporting of the case of Baker v Bolton. It has also been suggested that Campbell had been persuaded to take up the cause by Edwin Chadwick, who was campaigning for better conditions for the workers who built the railways.

Each Bill proceeded through the second reading and committee stages - Lord Lyttelton moved the second reading of the Death by Accidents Compensation Bill, so it was still his Bill at this point. It was then sent to a Select Committee, where some attention was evidently devoted to perceived shortcomings in its drafting, and by the time the Committee reported to the whole House on 9 June a second draft had been prepared, which provided that the compensation should be considered part of the personal estate of the deceased and go to the next of kin, rather than have a list of eligible relatives, and went into much more detail about the way in which the action should be brought by the executor or administrator of the deceased, and what should happen if there were no executor or administrator. After third reading in the House of Lords, the Bills went to the Commons, and proceeded through to Report stage. At 1.45 am on 26 July, Mr. Pleydell Bouverie moved that the Report of the Death by Accidents Compensation Bill be brought up. This was defeated by 7 to 39, and the Bill was accordingly lost. It was probably a bad decision to bring the matter up at that late hour - the House had been sitting since midday, debating such matters as the

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139 77 H.L.Deb., 3rd ser., cols.1027-1034 (24 February 1845).
141 Including better protection for their dependants in fatal accident cases - cases of accidental injury and death were frequent. Chadwick wrote a paper which was read to the Manchester Statistical Society in January 1846 proposing that the railway companies should bear the cost of lost lives, and this proposal was adopted by the Select Committee on Railway Labourers in 1846. However, the Parliamentary Debates on the Death by Accidents Compensation Bill show little or no awareness of questions of compensation for workers and their families, or the anomalies and injustices being revealed by the Select Committee: see R.A.Lewis, ‘Edwin Chadwick and the Railway Labourers’ (1950) 3 Econ. Hist. Rev. 107; Bartrip and Burman, above n.125, pp.102-103; Cornish and Clark, above n.81, p.503.
142 79 H.L.Deb., 3rd ser., cols.1053-1054 (20 April 1845).
143 The membership of this 20-strong committee, preserved in a document in the Parliamentary archives, included a number of lawyers (Lords Lyndhurst, Campbell, Ellenborough, Denman, Cottenham and Langdale), Lord Lyttelton, and a distinguished cast of Dukes, Marquesses, Earls and Barons (UK Parliamentary Archives, HL/PO/JO/10/8/1504).
144 UK Parliamentary Archives, HL/PO/JO/10/8/1513. This is the draft that was later printed in (1846) 10 J.P. 278 (2 May 1846) and (1846) 7 L.T. 144 (16 May 1846).
Free Church of Scotland, the state of the currency, and problems in Ceylon, and may have been in no mood for anything else. However, Lord Campbell later pointed to the strength of railway and mining interests in the Commons, and it may be that a combination of these interests led to the downfall of the Bill.\footnote{On introducing the second reading of both Bills in 1846: 85 H.L.Deb., 3rd ser., col.969 (24 April 1846).}

The two Bills were reintroduced into the House of Lords by Lord Campbell in April 1846.\footnote{Bartrip and Burman, above n.125, p.100.} From this point onwards Lord Campbell assumed the chief responsibility for ensuring that they reached the statute book.\footnote{85 H.L.Deb., 3rd ser., col.651 (7 April 1846); second reading 85 H.L.Deb 3rd ser., cols.967-970 (24 April 1846); third reading 86 H.L.Deb., 3rd ser., cols.173-175 (7 May 1846).} Having passed through all stages in the Lords, the Bills were transmitted to the House of Commons.\footnote{His autobiography notes that in 1846 ‘I now succeeded in getting through both Houses my Bills for the abolition of deodands, and for giving a compensation by action to the families of those who are killed by the negligence of others’: Life, above n.18, i, p.199. Lord Campbell moved the second and third readings in the House of Lords, and the adoption of the Commons amendments.} Lord Campbell had been concerned that they might encounter the same difficulties as in the previous year, but it may well be that the railway interest had other things to think about following the October 1845 crash. All that happened was a somewhat acrimonious debate at the Committee stage, in which Sir Frederick Thesiger referred to ‘the careless and hasty way in which the Bill had been prepared’, and Mr. Thomas Wakley said that he had never seen a Bill more carelessly drawn, and it must have been drawn by some legal gentleman who was practising as an amateur.\footnote{87 H.C.Deb., 3rd ser., cols.1365-1375 (22 July 1846).} It was suggested that the Bill be referred to a Select Committee, and further debate was postponed. At this point it appeared that the road ahead might be rather rocky, but in fact it all went more smoothly than might have been expected. It appears that the Bill was considered by a committee, and that various alterations were accepted; what emerged from this process was the third and final draft, which was much closer to the original conception in that the action was to be for the benefit of a named list of relatives, rather than the next of kin, and most of the technical details about personal representatives disappeared (to reappear in the amending 1864 Act).\footnote{It is a legitimate criticism that the Act was short on some of the technical detail about the procedure for making claims and administering damages paid. For example, in one of the early cases, Barnes v Ward (1847) 2 Car. & Kir. 661; 175 E.R. 277, an attempt was made to settle the sum awarded to two infant children to their use until they became 21, but Coltman J. said there was no provision in the Act for settling any sum awarded on infants and so it could not be done. The problem was commented on in (1947) 11(2) Jurist 185. It is noteworthy that Barnes v Ward is almost certainly the first case brought in respect of a female deceased. The action was brought by the husband of a charwoman. She was walking along a street at night and died after falling into the unfenced and unlit basement area of a partially-built house. The £300 award was apportioned between the husband and three children.} Each Bill passed the Commons, and the House of Lords agreed to the Commons amendments.\footnote{88 H.L.Deb., 3rd ser., col.926 (21 August 1846).} The Deodands Abolition Bill received the Royal Assent on 18 August 1846, and the Death by Accidents Compensation Bill eight days later on 26 August 1846.

\textbf{(b) Effect of the Act}

As enacted, the Fatal Accidents Act was very simple. It provided that:

\begin{quote}
[W]hensoever the Death of a Person shall be caused by wrongful Act, Neglect, or Default, and the Act, Neglect, or Default is such as would (if Death had not ensued) have entitled the Party injured to maintain an Action and recover Damages in respect
\end{quote}
thereof, then and in every such Case the Person who would have been liable if Death had not ensued shall be liable to an Action for Damages, notwithstanding the Death of the Person injured, and although the Death shall have been caused under such Circumstances as amount in Law to Felony.\textsuperscript{154}

The action was for the benefit of the wife, husband, parent and child of the deceased, and was to be brought in the name of the executor or administrator; and it was provided that ‘in every such Action the Jury may give such Damages as they may think proportioned to the Injury resulting from such Death to the Parties respectively for whom and for whose Benefit such Actions shall be brought’.\textsuperscript{155} Not more than one action was to lie in respect of the same subject-matter of complaint, and it had to be commenced within twelve months of the death.\textsuperscript{156} The remaining sections set out procedural requirements\textsuperscript{157} and definitions.\textsuperscript{158}

Some have noted the carefully limited nature of the right of action thus conferred: it is said to have been ‘drawn with a degree of cunning’.\textsuperscript{159} It did not give the dependants their own right of action, as it would have done had the Scottish precedent been followed, but instead gave the personal representative a right of action in any case where the deceased could have sued had he survived; and yet the damages were to be assessed on the basis of the injuries suffered by the dependants, which emphasises the hybrid nature of the action.

The fact that any defence which would have been good against the deceased, had he survived to sue in person, meant that the action was of limited usefulness in cases involving fatally injured employees, because the doctrine of common employment gave the employer a defence in any claim by an employee based on the employer’s vicarious liability for the fault of another. The common employment rule is now generally traced back to Priestley v Fowler (1837),\textsuperscript{160} though the significance of that case, and in particular of statements made by Lord Abinger C.B.,\textsuperscript{161} does not seem to have been fully appreciated until the 1850s,\textsuperscript{162} which may be why the defence was not raised in Armsworth v South Eastern Railway Co,\textsuperscript{163} one of the earliest cases on the Fatal Accidents Act, in which the deceased was a railway employee riding on top of a pile of chalk in a wagon. He was thrown out when the engine suddenly jerked the wagon, run over by a truck and killed. The jury awarded £100 in damages, half to the widow and the rest divided between the two children. The defence of common employment, once established, ruled out practically all employee claims: many railways were large organisations and their employees performed many different functions, but the courts assumed without question that they were all in common employment. It was not until well into the 20th century that the common employment defence was abolished by legislation.\textsuperscript{164}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{154} Fatal Accidents Act 1846 s.1.
\item \textsuperscript{155} Fatal Accidents Act 1846 s.2.
\item \textsuperscript{156} Fatal Accidents Act 1846 s.3.
\item \textsuperscript{157} Fatal Accidents Act 1846 s.4.
\item \textsuperscript{158} Fatal Accidents Act 1846 s.5. Apart from provisions nowadays found in Interpretation Acts (the singular includes the plural, and words denoting the masculine gender include the feminine gender), ‘parent’ was defined to include grandparents and step-parents, and ‘child’ to include grandchildren and stepchildren.
\item \textsuperscript{159} Cornish and Clark, above n.81, p.503.
\item \textsuperscript{160} (1837) 3 M. & W. 1; 150 E.R. 1030. On the problems of this case, see A.W.B.Simpson, \textit{Leading Cases in the Common Law} (Oxford, Clarendon Press, 1995), pp.100-134; Kostal, above n.90, pp.257-279. Simpson has shown that it was probable that the employer had personal knowledge of the dangerous state of the van in which the employee was riding, whereas Lord Abinger’s acceptance of the proposition that the employee had no legal obligation to ride in a vehicle which he knew to be dangerously overloaded may have been based on the implied assumption that the employer had no special knowledge.
\item \textsuperscript{161} Lord Campbell’s father-in-law.
\item \textsuperscript{162} See Hutchinson v York, Newcastle & Berwick Railway Co (1850) 5 Ex. 343; 155 E.R. 150; Bartonhill Coal Co v Reid (1858) 3 Macq. 285.
\item \textsuperscript{163} (1847) 11 Jurist 758.
\item \textsuperscript{164} Law Reform (Personal Injuries) Act 1948 s.1(1).
\end{itemize}
\end{footnotesize}
In contrast, the Act made all the difference to the families of fatally injured passengers. It appears that personal injury actions were not common before the middle of the 19th century, but actions then began to multiply, and the courts began to work out the principles on which personal injury damages were to be assessed - expenses, loss of earnings, pain and suffering and so on. There is some evidence that juries were sympathetic to the victims of railway accidents and so were generous with damage awards in such cases. The railways argued that it was unfair that a comparatively small fare payment should entitle injured passengers to large sums by way of damages, but in the end they had to accept it.

In fatal accident cases the Act gave no guidance on the assessment of damages, but simply instructed the jury to give such damages as they might think proportioned to the injury suffered by the relatives resulting from the death. The early case of Gillard v Lancashire & Yorkshire Railway Co gave the seal of approval to damages based on lost income, and in subsequent cases new records for damages awards were constantly set, and then exceeded. In all these cases, the sums awarded were limited to pecuniary loss. However, the Act allowed the jury to award damages proportional to the injury resulting from the death: if juries were entitled to follow the Scottish example and add on sums for injured feelings and other non-pecuniary losses suffered by the relatives, such as loss of companionship and guidance, the railways would have been in an even worse position. The question whether juries were entitled to make awards for such losses was finally resolved in Blake v Midland Railway Co.

V. Ambit of the Act: the rule in Blake v Midland Railway Co

(a) Blake v Midland Railway Co

On the evening of 19 May 1851, a major railway accident occurred on the Midland Railway line, near Clay Cross Station in Derbyshire. It was a dark night and a storm was raging. A passenger train, which had started from London, broke down shortly after it left Derby. Ten minutes later, just as it had started to move again, a goods train crashed into the rear of the passenger train and shattered several carriages. One passenger, a Derby magistrate, died immediately, and another sixteen were injured, some seriously. One was Mr. John Blake, who had gone to Birmingham on business and was returning home to Sheffield. He suffered a spinal injury, and as a result lost the power of moving his legs and the lower part of his body. Help eventually arrived and he was put in a train to Chesterfield, but he died during the

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165 Only two lawsuits were reported before 1847: Kostal, above n.90, p.283. For an early discussion on the possibilities of actions for damages against the railways, see (1839) 3 Jurist 665. It has been suggested that the early 19th century saw a move from the head of the household claiming damages for the loss of services of a servant, wife or child to injured people making claims on their own behalf; J.F.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.

166 One of the earliest landmarks is Phillips v South Western Railway Co (1879) 5 Q.B. 78.

167 Kostal, above n.90, p.291.

168 Kostal, above n.90, pp.291-313.

169 (1848) 12 L.T. 356.

170 It is noteworthy, however, that under the Act insurance moneys received by dependants under insurance policies taken out by the deceased had to be brought into account in determining whether the dependant had suffered loss as a result of the death: Hicks v Newport Railway Co (1857) 4 B. & S. 403n.; 122 E.R. 510; Pym v Great Northern Railway Co (1863) 4 B. & S. 406; 122 E.R. 508 (both decisions of the Queen’s Bench under Lord Campbell CJ), whereas in personal injury cases the courts held that insurance benefits did not have to be brought into account: Bradburn v Great Western Railway Co (1874) L.R. 10 Ex. 1.

171 (1852) 18 Q.B. 93; 118 E.R. 35.

172 The facts are taken from the law report, (1852) 18 Q.B. 93; 118 E.R. 35, and from various newspaper accounts: The Times 21, 23, 24, 27 and 31 May, 29 July 1851; Derby Mercury 21, 28 May, 4 June 1851; Derbyshire Advertiser 23, 30 May, 6 June 1851.
journey. At the coroner’s inquest the railway claimed to have taken the usual precautions in the event of an engine ‘falling lame’, namely sending the guard back along the line to warn oncoming trains. The inquest noted that the passenger train had made unscheduled stops at a number of stations, which had slowed its progress; it criticised the practice of allowing a goods train to start five minutes after the passenger train without taking sufficient measures to ensure it kept its distance, and suggested there should be improvements in signalling practices; but held that the accident was caused by reckless speeding by the driver of the goods train.

John Blake was aged 34 at the time of the accident. His wife, Ellen, was aged 26. They had been married just over three years earlier. It is clear that they were fairly comfortably off: John was a partner in the file manufacturing firm of Blake & Parkin, which made about £850 per annum, and they lived in a villa in Upperthorpe, Sheffield, with two servants. Ellen was represented by a solicitor at the inquest. Two months later, at the Derbyshire Summer Assizes, Ellen brought an action against the railway under the Fatal Accidents Act, claiming £10,000 compensation. At the trial before Parke B. and a jury, the defendants admitted liability, and the only issue was the amount of damages. Counsel for the plaintiff argued that the sum awarded should not be confined to the monetary loss, but should also include the suffering and loss in other respects. Parke B. referred to previous decisions confining the right to recover to pecuniary loss, but his direction to the jury was somewhat ambiguous: he said that he thought there was great difficulty in fixing any measure except that of pecuniary injury, but if the jury considered the plaintiff was entitled to any compensation for her bereavement, beyond the pecuniary loss, they should make their estimate accordingly. Parke B. suggested a method of estimating the pecuniary loss, which produced a suggested sum of about £6,000, and the jury ultimately awarded £4,000, so it is possible that they accepted that the damages should be confined to pecuniary loss; however, the defendants moved for a new trial on the grounds that the damages, if calculated on the basis of pecuniary loss only, were excessive, and that the judge should have expressly directed the jury to take nothing except pecuniary loss into consideration, the statute not allowing compensation for any other loss, or for mental suffering. A rule nisi was granted and the case was heard by the full Court of Queen’s Bench (Lord Campbell C.J., Patteson, Coleridge and Wightman JJ.). Eleven days later the Court delivered its decision, ruling that damages under the Fatal Accidents Act were limited to pecuniary loss. Accordingly the rule for a new trial was made absolute.

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173 At this time signals such as those on modern railways did not exist. Trains were controlled on a time interval basis, and policemen were sited at key points along the line and were instructed to give a ‘stop’ signal if a train had passed within the last ten minutes. If a train broke down, the policeman was supposed to run back down the track to protect the train from oncoming traffic by giving a hand signal: Wolmar, above n.98, pp.49-50.

174 The driver, Samuel Stretton, was tried for manslaughter before Maule J and a jury at the Derbyshire Summer Assizes, and found not guilty. According to The Times, 29 July 1851, p.7 col.c, ‘The learned judge observed, that he could not commend the discretion of those who had selected for prosecution the man who seemed the least blameable of all the parties concerned. The prisoner appeared to have done very well in everything but driving too fast. He had obeyed every signal, and instead of jumping off the train when the collision took place did all he could to stop it.’

175 They were married on 6 January 1848 at Sheffield: marriage certificate provided by the General Register Office.

176 1851 Census (31 March 1851).

177 (1851) 18 Q.B. 93; 118 E.R. 35, at 96-97.

178 (1851) 18 Q.B. 93; 118 E.R. 35, at 97.

179 The decision of the court was delivered by Coleridge J., the only one of the four judges who had heard the case who was in court when the decision was given. Lord Campbell C.J. was hearing nisi prius business at the Middlesex Guildhall: see The Times, 23 February 1852, p.7 col.b. Patteson J. had retired (and had been replaced by Crompton J., who took his seat in court for the first time on this day: The Times, 23 February 1852, p.7, col.a). The whereabouts of Wightman J. are unknown.

180 There are no reports of the new trial in The Times. The action may have settled.
(b) Damages are limited to pecuniary loss

Like *Baker v Bolton*, the decision in *Blake v Midland Railway Co* has been much criticised, especially by American commentators who have not considered it in its historical perspective. The limitation to pecuniary loss has been characterised as ‘barbarous’,\(^{181}\) and as ‘nothing more than a gratuitous and muddleheaded inference drawn by some misguided nineteenth century judges’.\(^{182}\) Perhaps most glaring of all, the Court of Queen’s Bench has been charged with destroying the legislative intent behind Lord Campbell’s Act,\(^{183}\) which overlooks the fact that Lord Campbell himself was presiding over the court’s decision. Are any of these criticisms justified, or are there good reasons why the court held that damages should be limited to pecuniary loss? To answer these questions, it is necessary to look more closely at the arguments of the parties and the court’s reasoning.

On behalf of the plaintiff, the main argument was that the kind of remedy sought was familiar in Scots law, which did not limit damages to non-pecuniary loss, and that Parliament’s intention was to assimilate English law to the law of Scotland. This argument will be further discussed below. It was also argued that there were analogous cases in English law where such damages were given, such as actions for battery, seduction, enticement and a husband’s claim for loss of consortium; that the statute listed remoter relatives such as grandparents who were unlikely to suffer pecuniary loss; and that if the statute had wished to confine the remedy to pecuniary injury it could easily have done so by inserting the single word ‘pecuniary’.\(^{184}\) Though in *Gillard v Lancashire & Yorkshire Railway Co*\(^{185}\) Pollock C.B. had said that actions under the statute were confined to pecuniary loss, ‘the learned Judge entertains views which may perhaps be deemed peculiar on the subject of compensation for personal suffering’,\(^{186}\) against the general run of personal injury actions by living plaintiffs. Counsel for the defendants impressed on the court that the Act introduced a new principle and so should be guardedly construed. Any attempt to carry it beyond pecuniary loss introduced difficulties which showed that this could not have been intended: amounts awarded for mental suffering could not be apportioned, but rather every plaintiff would be entitled to the full amount. The context of the Act supported the limitation to pecuniary loss, because the relatives who were listed were those most likely to be financially dependent on the deceased. Any analogy with loss of consortium at common law was misguided because a wife could not recover such compensation even if her husband were still living.\(^{187}\)

Coleridge J., giving the judgment of the court, made three main points. He rejected the analogy with Scottish law, saying that it was clear that the statute had not introduced the Scottish law ‘in its full latitude’,\(^{188}\) otherwise, for example, compensation would be due to illegitimate as well as legitimate children. The only safe course was to look at the language of the statute. The long title made it clear that it was an Act for compensating the families of persons killed, not solacing their wounded feelings. Section 1 did not transfer the deceased’s right of action to the relatives, but gave them ‘a totally new right of action, on different principles’.\(^{189}\) Under s.2 the measure of damages was not the loss or suffering of the deceased.

\(^{181}\) Wycko v Gnodtke (1960 Mich.) 105 N.W. 2d 118 at 121.
\(^{182}\) Davis, above n.68, at 347.
\(^{183}\) Speiser and Malawer, above n.12, at 6-7.
\(^{184}\) In the words of the Lord Chancellor (who describes himself as ‘an old Equity draftsman’) in W.S.Gilbert and A.Sullivan’s *Iolanthe* (1882), Act II, ‘The insertion of a single word will do it’.
\(^{185}\) (1848) 12 L.T. 356.
\(^{186}\) (1851) 18 Q.B. 93; 118 E.R. 35, at 104 (Sir F.Thesiger, Mellor, Miller Serjt and Flood arguendo).
\(^{187}\) As confirmed by the House of Lords a century later: *Best v Samuel Fox & Co Ltd* [1952] A.C. 716.
\(^{188}\) (1851) 18 Q.B. 93; 118 E.R. 35 at 109.
\(^{189}\) (1851) 18 Q.B. 93; 118 E.R. 35 at 110.
but the injury to his family resulting from the death; and here Coleridge J. accepted the
defence point about the difficulty of apportioning damages for non-pecuniary loss. Finally,
there was the danger of damages being given to the ruin of defendants. ‘We must recollect
that the Act we are construing applies not only to great railway companies but to little
tradesmen who send out a cart and horse in the care of an apprentice.’

The strongest point in favour of a more extensive interpretation of the Act was that
Scottish law permitted the awarding of solatium (damages for grief and bereavement) in such
cases. At several points during the Parliamentary debates, reference was made to the fact that
Scottish law allowed bereaved relatives to recover damages, though these references only
point to the existence of a cause of action and do not in themselves suggest that Parliament
was intending that damages should extend beyond pecuniary loss. Nevertheless, it was
undoubted that Scottish law permitted the awarding of non-pecuniary damages. The ancient
remedy of assymenthich gave a civil remedy in cases of criminal homicide in order to
dissuade the relatives from taking the law into their own hands and wreaking vengeance upon
the slayer, had more or less died out by the beginning of the 19th century, but it had been
superseded by a civil action for negligently caused injury or death which misleadingly became
referred to as the ‘actio injuriarum’. After early cases involving living pursuers, Blacks v Cadell established that this cause of action was available to relatives in a fatal accident case, and Brown v Macgregor confirmed that damages could be awarded for the
grief and sorrow caused by bereavement as well as for patrimonial loss. It is clear that Lord
Campbell was aware of the position in Scottish law, because as Attorney General in 1839 he
had argued Duncan v Findlater, an appeal to the House of Lords from the Court of Session,
case referred to by Coleridge J. in Blake v Midland Railway Co. The respondent’s gig was
overturned as a result of a collision with a heap of stones carelessly left in the road by
workers, and the respondent’s son was killed. It was alleged that the appellants, the turnpike
trustees, were vicariously liable, but the trustees’ appeal to the House of Lords, argued by
Campbell as Attorney General, was successful. The Court of Session had awarded the
respondent £500 damages as solatium for the death of his son. In the course of argument
Campbell admitted that although English law as it then stood gave no cause of action to the
relatives of a fatal accident victim, ‘the Scotch law … says more sensibly, that in such a case
a solatium shall be granted to the person injured in his happiness and circumstances by the
death of his wife or child’.

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190 (1851) 18 Q.B. 93; 118 E.R. 35 at 111.
191 See 77 H.L.Deb., 3rd ser., col.1030 (24 February 1845) (Lord Campbell); 85 H.L.Deb., 3rd ser., col.968 (24
April 1846) (Lord Campbell); 87 H.C.Deb., 3rd ser., col.1368 (22 July 1846) (Attorney General (Sir John
Jervis)), col.1370 (Lord Advocate (Mr. Andrew Rutherford)), col.1373 (Mr. Thomas Wakley).
Scotland: Volume 2, Obligations (Oxford University Press, 2000), pp.484
193 This terminology was given the final seal of approval by Lord President Inglis in the leading case of Eisen v North British Railway Co (1870) 8 M. 980 and is now too well-established to be eradicated. The action was in
fact based on the other great principle of the civil law of delict, the action on the lex Aquilia, which lay for
intentional or negligent injuries to interests of substance. The actio injuriarum was an action for intentional
injuries to the feelings.
194 Gardner v Fergusons (1795) (unreported); Innes v Magistrates of Edinburgh (1798) Mor. 13189 and 13967.
195 (1812) 5 Pat. 567. The deceased and his horse drowned in a deep coal pit dug only four feet from the road
which had become full of water.
196 February 1813 (unreported). The deceased was travelling on top of a stage coach which collided with a
post-chaise ‘while both vehicles were apparently engaged in the early nineteenth century equivalent of a “drag
race”’. Black, above n.192, at 196.
197 (1839) 6 Cl. & Fin. 894; 7 E.R. 934.
198 (1839) 6 Cl. & Fin. 894; 7 E.R. 934 at 898-899.
Though it is tempting to accept the argument that the aim of the Fatal Accidents Act was to bring English law into line with the Scottish position, it has to be rejected for the reasons stated by Coleridge J. The Act did not introduce all the elements of the Scottish law. It gave the relatives a carefully limited right of action, a sort of hybrid: an action conditioned on the deceased having been able to sue had he not died, but one in which the dependents are to be compensated for the injuries they suffer as a result of the death. The action is a creature of statute, one that differs considerably from Scottish law, and so it cannot be assumed that it has the same ambit.

The Parliamentary debates also contain some references to the French law of the time permitting a cause of action at the suit of relatives of persons killed by negligence. However, there is considerable doubt whether in 1846 the French law would have permitted recovery for ‘dommage moral’, that is, non-patrimonial loss, in such a case. The first case in which the Cour de Cassation recognised the right of relatives to sue under art 1382 of the Civil Code 1804 for loss resulting from the death of another did not occur until 1863, and nothing was expressly said in this case about ‘dommage moral’, although the court did say that art 1382 ‘ne limite en rien ... la nature de fait dommageable’. It was not until 1923 that the right to recover for ‘dommage moral’ was expressly confirmed by the Cour de Cassation.

In terms of statutory interpretation, it is again hard to object to the approach of the court, which said that the only safe course was to look at the language used by the legislature, which was the dominant rule of statutory interpretation in the 19th and much of the 20th century. The judgment details this approach by referring to the long title and the main sections of the Act. At this time, and for long afterwards, there was a settled rule that a court could not take notice of what had been said in Parliament. Even if they had been able to do so, it is unlikely that anything said would have been of much assistance on the question of recovery for non-pecuniary loss. Lord Campbell in urging the case for the reform used the example of a father whose son had been thrown from a stage coach and killed due to the

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200 It is sometimes argued that Lord Campbell’s intention in introducing the Fatal Accidents Act must have been to assimilate English law to Scottish law, because he was a Scots lawyer, eg Speiser and Malawer, above n.12, at 6. However, this overstates the position. Campbell was a Scot, but he never studied or practised Scots law; instead he went to London and was trained in the English common law. 77 H.L.Deb., 3rd ser., col.1030 (24 February 1845) (Lord Campbell); 79 H.L.Deb., 3rd ser., col.1053 (20 April 1845) (Lord Lyttelton); 85 H.L.Deb., 3rd ser., col.968 (24 April 1846) (Lord Campbell).

201 See H. and L. Mazeaud and A. Tunc, Traité Théorique et Pratique de la Responsabilité Civile Délictuelle et Contractuelle (6th ed., Paris, Editions Montéchrestien, 1965), ii, para. [302]. It has been suggested that an 1833 decision (ch. réun.15 June 1833, S.1833.458) recognised that compensation for moral damage could be given under art 1382, but the decision deals with the unlawful practice of pharmacy and the only reference to relatives suffering grief at the death of a loved one appears in an analogy drawn in the speech of the Procureur-Général rather than in the court’s judgment. It may be that the pre-1804 French law permitted actions by relatives: see references in counsel’s argument in Hubgh v New Orleans & Carrollton Railroad Co (1851) 6 La. Ann. 495. 202 Crim. 20 February 1863, D.1864.1.99 (the editor’s note says the relatives’ right of action does not appear able to be seriously contested).

203 See eg Magnor and St Mellons RDC v Newport Corporation [1952] A.C. 189 at 191 per Viscount Simonds: ‘The duty of the court is to interpret the words that the legislature has used; these words may be ambiguous, but, even if they are, the power and duty of the court to travel outside them on a voyage of discovery are strictly limited.’ 204 See eg Vacher v London Society of Compositors [1913] A.C. 107 at 113 per Viscount Haldane LC: ‘In endeavouring to place the proper interpretation on the sections of the statute before this House sitting in its judicial capacity, I propose … to exclude consideration of everything excepting the state of the law as it was when the statute was passed.’ The rule was not relaxed until Pepper v Hart [1993] A.C. 593.
negligence of the driver - a case where it is hard to see that the father would have suffered any pecuniary loss - but nothing else in the debates really comes anywhere near addressing this issue.

There is one piece of evidence which makes it quite clear that the original intention of the drafters of the Act was that compensation should be limited to pecuniary loss - though again not something that courts could take account of. In the original handwritten draft of the Death by Accidents Compensation Bill in the Parliamentary Archives - the one introduced by Lord Lyttelton on 18 February 1845 - it is provided that ‘in every such Action the Jury may give such Damages as they may think proportioned to the pecuniary injury resulting from such Death to the Parties respectively’. The word ‘pecuniary’ was omitted from the second draft by the Select Committee appointed in April 1845 and was not reinstated in the third draft (which returned to something much closer to the first draft) in July 1846. It could of course be argued that by omitting the word ‘pecuniary’ the Select Committee were expressing an intention to allow compensation on a wider scale, but it is much more likely that they simply saw the word as unnecessary.

More generally, the argument that compensation under the Fatal Accidents Act was intended to be limited to pecuniary loss is supported by the generally understood limits of compensation for personal harm in the mid-19th century. According to Roscoe Pound, the interest in the physical person was traditionally limited to immunity of the body from direct or indirect injury, the preservation and furtherance of bodily health, and immunity of the will from coercion. It is only with the progress of civilisation that more sophisticated interests, such as immunity of the mind and the nervous system from direct or indirect injury, and the preservation and furtherance of mental health, become more important. In 1846 the law was not yet ready to provide compensation for grief and other mental suffering. According to Lord Wensleydale in 1861, ‘Mental pain and anxiety the law cannot value, and does not pretend to redress, when the unlawful act complained of causes that alone’. It was not until the later years of the 19th century that courts began to open the door to claims for mental harm, whether intentionally or negligently inflicted.

VI. Conclusion

The Fatal Accidents Act was a very important reform, and Lord Campbell deserves praise for his lifelong commitment to it. The need for change first implanted in his mind by the case of Baker v Bolton when he was a young man was reinforced by later events such as the increasing problems of railway accidents, and eventually, nearly forty years later, when he was in a position to do something about it, he acted. The legislation gave a remedy to the relatives in cases where previously there was none (except for medieval survivals like the deodand which did not really meet contemporary needs and was rightly abolished). Though it

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207 See 77 H.L.Deb., 3rd ser., col.1030 (24 February 1845).
208 See above, n.206.
209 Emphasis added.
211 Lynch v Knight (1861) 9 H.L.Cas. 598; 11 E.R. 854, at 598. It is true that Lord Wensleydale went on to say ‘though when material damage occurs, and is connected with it, it is impossible a jury, in estimating it, should altogether overlook the feelings of the party interested’. However, in the case of the Fatal Accidents Act, Blake v Midland Railway Co places a limitation on this process.
212 See the analysis in P.R.Handford, 'Intentional Infliction of Mental Distress: Analysis of the Growth of a Tort’ (1980) 8 Anglo-Am. L.R. 1 at 1-13. Key cases include Wilkinson v Downton [1897] 2 Q.B. 57; Hickey v Welch (1901) 91 Mo. App. 4 (wilful harm); Hill v Kimball (1890 Tex.) 13 S.W. 59; Bell v Great Northern Railway Co of Ireland (1890) 26 L.R. Ir. 428; Dulieu v White & Son [1901] K.B. 669 (negligence). Note also Allsop v Allsop (1860) 5 H. & N. 534; 157 E.R. 1292 and Terwilliger v Wands (1858) 17 N.Y. 54 holding that mental distress did not amount to actionable damage in slander.
is possible to criticise the rather general drafting of the Act, and some unanswered problems had to be dealt with by later amendments, this should not be allowed to detract from Lord Campbell’s achievement.

More generally, this study shows that authors writing from 20th century perspectives can be too hasty in criticising 19th century judges for what they see as outmoded ideas. In the light of history, the idea that in a civil court the death of another cannot be complained of as an injury can be defended as having some rational basis, even if that basis had disappeared by the 19th century; and criticism of the decision in *Blake v Midland Railway Co* for providing incomplete protection to the interests of the relatives, and specifically their intangible interests, is again unjustified in light of the surrounding law as it was at the time. The historical dimension can add much to our understanding of present-day law.