Contributory Negligence and Intentional Trespass to the Person:
Rethinking Pritchard & the Section 4 Definition of Fault

Joshua Pike*

I. INTRODUCTION

Where once there were tentative suggestions in the textbooks that the Law Reform (Contributory Negligence) Act 1945 (the ‘1945 Act’) permitted the apportionment of damages for contributory negligence in cases of intentional trespass to the person,1 such tentative suggestions have now given way to conclusive statements to the contrary.2 This change in position has been brought about by the Court of Appeal decision in Pritchard v Co-Operative Group Ltd.3 The purpose of this article is to attempt to challenge both the legal and normative validity of this new position that now appears to have become relatively unchallenged orthodoxy.

The attempt will comprise three parts. First, it will be shown that as a matter of pure statutory construction there is nothing in the 1945 Act that prevents its application to cases of intentional trespass to the person. It will be shown that this remains the case despite the judicial gloss placed on the section 4 definition of fault by the House of Lords in Reeves v Commissioner of Police of the Metropolis.4 This judicial gloss (the ‘dual limb’ approach) splits the section 4 definition in two, restricting each half to the actions of the defendant and the claimant respectively. It will be suggested that section 4 in the light of Reeves entails nothing more than importing the common law test for contributory negligence into the statute. Emphasis is placed on it solely importing the common law test, namely whether the claimant took reasonable care for his or her own safety,5 rather than also restricting the section’s scope to cases where the common law outcome of the defence would have previously applied, i.e. where it absolved the defendant of all liability as a complete defence. Maintaining this distinction between the substantive legal test that relates to the actions of the claimant and the actual impact of the defence on the claim for damages is crucial.

Second, it will be argued that the Court of Appeal in Pritchard, in purporting to apply the same dual limb approach to the section 4 definition of fault as adopted in Reeves, fundamentally misunderstood this approach when it held that the new statutory doctrine of contributory negligence only applied in cases where the prior common law defence operated to absolve the defendant of all liability, thereby refusing to apply it in cases of intentional trespass to the person. It will be shown that this approach is irreconcilable with the facts of Reeves because it fails to maintain this crucial distinction between the test at common law and the outcome at common law. Only the incorporation of the former into section 4, and not the latter, is compatible with Reeves. It will be argued that this approach is not necessarily contrary to Parliament’s intention in enacting the 1945 Act.

Third, it will be argued that the apportionment of damages in section 1(1) of the 1945 Act, regardless of Parliament’s intention, has fundamentally altered the substance of contributory negligence as part of a wider trend in the law of tort towards shared responsibility. The approach of Pritchard, in its arbitrary adherence to pre-1945 case law, fails to take account of this fundamental change in emphasis and overlooks the possibility of a more just and equitable approach to shared fault in cases of intentional trespass to the person.

---

* Worcester College, Oxford. I am grateful to Mr Donal Nolan for his comments on an earlier draft. All errors remain my own.
1 See, e.g., W.V.H Rogers (ed), Winfield and Jolowicz on Tort (18th edn, Sweet & Maxwell 2010) 365.
2 W.E. Peel and J. Goudkamp (eds), Winfield and Jolowicz on Tort (19th edn, Sweet & Maxwell 2014) 708.
5 [2000] 1 AC 360 (HL).
6 Nance v British Columbia Electric Railway Co Ltd [1951] AC 601 (PC), 611 (Viscount Simon).
II. THE STATUTORY DEFINITION OF FAULT AND THE REEVES INTERPRETATION

Section 1(1) of the 1945 Act provides that the court shall reduce any award of damages ‘to such extent as the court thinks just and equitable having regard to the claimant’s share in the responsibility for the damage.’ This apportionment is to be applied ‘where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons.’ The meaning of fault is given by section 4. It says fault means ‘negligence, breach of statutory duty or other act or omission which gives rise to a liability in tort or would, apart from this Act, give rise to the defence of contributory negligence.’ On an ordinary reading it is difficult to see why the defence is automatically precluded from applying to cases of intentional trespass to the person: section 4 appears to do nothing more than import standard meanings of fault into the Act. The phrase ‘other act or omission which ... would, apart from this Act, give rise to the defence of contributory negligence’ would appear to simply serve a residual function, ensuring that the preceding definitions cover all scenarios that had previously given rise to the common law defence. This would have been a conventional reading of the section, given the truism that statute overrides common law, but the courts have chosen not to take this approach.

The House of Lords case that establishes the current approach to section 4 is Reeves. In Reeves the claimant (the deceased’s estate) brought an action in negligence against the police after the deceased committed suicide whilst in police custody. The deceased had created a ligature through an open spy hole and thereby hung himself. The spy hole was only accessible due to the negligence of the police. The question arose as to whether there could be an apportionment of damages between the two parties for contributory negligence. Reeves is a landmark case because the House held that contributory negligence could also be established upon an intentional act of the claimant, rather than exclusively on a negligent one. However, for present purposes, it is the House’s general approach to the section 4 definition of fault that is of significance. It was said that section 4 should be split into two constituent limbs, one applying to the defendant and one applying to the claimant.6 The part relating to liability arising in tort ‘is concerned with fault on the part of the defendant.’ The question to be asked in relation to the claimant was framed by Lord Hoffmann as ‘whether, apart from the [1945] Act’, the actions of the claimant ‘would have given rise to a defence of contributory negligence’.8 Thus section 4, once this judicial gloss is added, effectively reads:

Fault, in relation to the defendant, means negligence, breach of statutory duty or other act or omission which gives rise to a liability in tort.

Fault, in relation to the claimant, means an act or omission which would, apart from this Act, give rise to the defence of contributory negligence.

Despite this gloss placed on the section it is still difficult to see how this precludes the application of contributory negligence to cases of intentional trespass to the person. An example will help to illustrate this point. A physically assaults B, causing a fight. B hits A back, wounding A. A sues B in tort for battery. B admits liability but contends that both parties are at fault and asks the court to apply the 1945 Act and apportion damages accordingly. On the dual limb approach to section 4 adopted by Reeves, B could not rely on A’s prior assault being an act that gives rise to liability in tort in order to establish fault for the purposes of section 1. This part of the definition is restricted to the actions of B alone. However, the second limb refers to the actions of the claimant that, prior to the Act, would have

---

6 Reeves (n 4) 369 (Lord Hoffmann), 382 (Lord Hope).
7 ibid 369.
8 ibid.
given rise to the defence of contributory negligence. The test for determining whether an act of the claimant constituted contributory negligence at common law is whether the claimant failed to take reasonable care for his or her own safety. The initiation of a fight through physical assault by the claimant, as in the above illustration, could easily constitute a failure to take such reasonable care, depending of course on the particular facts. Thus it can be seen that the dual approach to the definition of fault as adopted in Reeves does not prima facie preclude the application of section 1 to cases of intentional trespass to the person where ‘apart from this Act, [would have given] rise to the defence of contributory negligence’ is taken to refer to the common law test. This is where it becomes crucial to maintain the distinction between the substantive common law test and its outcome as regards the award of damages. It is in Pritchard that this distinction is ignored.

III. THE PRITCHARD DEFINITION OF FAULT
AND INTENTIONAL TRESPASS TO THE PERSON

Pritchard was a Court of Appeal case involving the tort of battery. The claimant was an employee of the defendant company. Having been on sick leave for two weeks the claimant attempted to persuade her manager to give her an additional day off as she was still feeling unwell. When the manager refused, the claimant, along with her sister and a friend, went to the store to confront the manager. After a heated exchange, in which the claimant was verbally abusive towards her manager, the manager laid hands on the claimant in an attempt to forcibly remove her. A struggle ensued whereby the claimant bit the manager. The claimant brought an action for damages, alleging that the assault by the manager had given rise to a near complete psychiatric breakdown, depression and agoraphobia and caused her inability to work. The defendant company admitted liability but sought to have damages reduced for contributory negligence. The Court of Appeal held that contributory negligence under the 1945 Act was not applicable to cases of intentional trespass to the person.

In his judgment, Aikens LJ purported to adopt the dual limb approach employed by Reeves. He said that fault, in relation to the claimant, meant an act or omission ‘which would at common law and but for the 1945 Act have given rise to the complete defence of “contributory negligence” to the claim being made by the claimant.’ Aikens LJ went on to conduct a comprehensive review of the case law prior to 1945 before concluding that, at common law, contributory negligence was ‘not a defence in the case of an “intentional tort” such as assault and battery.’ The conclusion that there was no common law defence of contributory negligence to an intentional tort will not be contested here. The reasoning which follows from this is also sound, given the interpretation of section 4 that the Court of Appeal adopted. The approach appears to be this: (i) the courts will examine the case law prior to the 1945 Act; then (ii) if the facts under consideration would not have given rise to the complete defence of contributory negligence at common law then the 1945 Act, and consequently the defence, does not apply. On this view the 1945 Act does nothing more than reform the effect of the existing common law defence through the introduction of apportionment; the Act does not affect the substance of the defence.

---

9 Nance (n 5) 611 (Viscount Simon).
10 Pritchard (n 3) 330.
11 ibid 338.
This approach relies heavily on the reasoning of Lord Hoffmann in *Standard Chartered Bank v Pakistan National Shipping Corporation and others (Nos 2 and 4).* This was the second House of Lords decision, after *Reeves,* to adopt the dual limb approach to section 4. Here the claimant was claiming damages for deceit and the defendants sought to rely on the 1945 Act, alleging that the claimant was also partly at fault for their loss and that therefore any damages should be reduced for contributory negligence. Lord Hoffmann framed the question as ‘whether at common law [the claimant’s] conduct would be a defence to its claim for deceit.’ His Lordship, with whom the House unanimously agreed, concluded that it would not have been. The result was that the 1945 Act could not be applied to the facts at hand. Lord Hoffmann considered this approach to be in accordance with the purpose of the Act, ‘which was to relieve plaintiffs whose actions would previously have failed and not to reduce the damages which previously would have been awarded against defendants.’ It would seem, therefore, that the decision in *Pritchard* is completely sound legally, backed up by no less than two decisions of the House of Lords. However, the approach in both *Pritchard* and *Standard Chartered Bank* loses sight of the fundamental distinction between the substantive common law test and the outcome it had on any award of damages. That this is so can be shown by reference back to the case of *Reeves.*

**IV. THE CORRECT INTERPRETATION? COMPARING PRITCHARD WITH Reeves**

Whilst the Court of Appeal clearly thought that it was applying established law it will be argued that *Pritchard,* upon closer inspection, amounts to a misinterpretation of the dual limb approach. As above, the House in *Reeves* held that the second limb of the definition, the limb that relates to the actions of the claimant, required an act or omission that would, apart from the Act, give rise to the defence of contributory negligence. As explained above, this can be read as entailing nothing more than asking whether the claimant took reasonable care of his or her safety, the common law test, and does not preclude the application of the 1945 Act to intentional trespass to the person. However, the question that the Court of Appeal posed in *Pritchard* was whether the act or omission would have given rise to the complete defence of contributory negligence. Admittedly the difference appears initially to be mere semantics but this is to confuse the important distinction already mentioned between the substantive content of the common law test and the effect that the defence had on liability.

In short there are two possible interpretations of the second limb of the section 4 definition of fault. Either the one proposed above is adopted or section 4 is read as not only incorporating the pre-existing test for contributory negligence but also restricting the use of that test, and thus the statute and apportionment of damages, to cases in which the defendant would have been absolved of all liability. The latter reading incorporates both the pre-existing test and the pre-existing outcome of the common law defence. The approach in *Pritchard,* by using the phrase ‘complete defence’, follows the latter interpretation. As will be shown, this interpretation is incompatible with the facts of *Reeves.* In order to demonstrate this it will be helpful to apply the *Pritchard* interpretation to the facts of *Reeves* itself to assess whether the approach of Aikens LJ amounts to a substantive departure from the approach taken by the House of Lords.

13 ibid 966.
14 ibid 965.
15 *Reeves* (n 4) 369.
16 *Pritchard* (n 3) 330.
As Reeves and other cases demonstrate the police owe a duty of care to those in their custody. They are liable if they negligently breach this duty of care, as was the case in Reeves itself. The issue is that applying the Pritchard approach to section 4 will necessarily obviate such duties of care. If section 4, as this article proposes, incorporates solely the common law test into its definition then the question to be asked is whether the claimant failed to take reasonable care for his or her safety. In Reeves the House clearly felt that the claimant, after deciding that intentional acts can constitute contributory negligence, had satisfied this test. However, per the approach in Pritchard the claimant must be held to have failed to take reasonable care for his or her own safety and it must be a case in which prior to the Act the defendant would have been absolved of all liability. On the facts of Reeves the latter requirement is not met. Otherwise an absurd and unjust result is reached: namely that the police owe a duty of care to detainees but only up to the point before that detainee commits suicide.

Just as it is contradictory to simultaneously maintain that the police have a duty to prevent a detainee from committing suicide and to hold that suicide constitutes a novus actus interveniens, so too is it contradictory to hold that the complete defence of contributory negligence could apply in conjunction with such a duty. Thus, had Reeves been decided prior to 1945 the courts must have held that the common law defence did not apply or abandon the notion that police owe an effective duty of care towards detainees. This demonstrates the misunderstanding of the dual limb approach that Pritchard amounts to, having failed to separate the substantive common law test from the outcome of successfully pleading the defence; the approach adopted by the Court of Appeal, whilst prima facie a valid one, is actually irreconcilable with the facts of the very House of Lords case it is based upon.

This same reasoning can be applied to cases of intentional trespass to the person. To return to the simple illustration above, where A physically antagonises B into a fight in which A is injured sufficient for A to sue B in tort, whilst the common law test for contributory negligence might be capable of being satisfied the court could not apply the defence without obviating B's duty to respect A's bodily integrity. Thus the common law defence was barred from applying in actions for battery or assault. Of course, the same issue arises in the standard negligence cases where the common law defence did apply, but here the courts were willing to live with the injustice caused by the operation of the complete defence. The crucial point is that it is no longer necessary to choose between these two extremes given the introduction of apportionment. The Pritchard approach to section 4 refuses to acknowledge this change by restricting the scope of the 1945 Act in the way that it has.

However, there are a number of issues with adopting the proposed interpretation of section 4 over that adopted in Pritchard. The first, and perhaps the greatest, obstacle is the Standard Chartered Bank case itself. The approach of Aikens LJ effectively mirrors the approach of the House of Lords in that case, except in relation to intentional trespass to the person rather than deceit. There are two important points to make here. The first is that Standard Chartered Bank is also based on the dual limb approach in Reeves and so consequently the arguments raised against Pritchard above apply equally to Standard Chartered Bank. The second point is that Lord Hoffmann did not go as far as to say, as Aikens LJ did, that section 4 required the act or omission of the claimant to give rise to the complete defence at common law. Rather he used the same language as in Reeves. This means that it is still possible to accommodate Standard Chartered Bank within a new interpretation of section 4.

The second issue with the proposed interpretation is the argument that it was clearly Parliament's intention that the effect of the 1945 Act was to be so restricted to cases where the defendant would previously have been absolved of all liability. This is how Lord Hoffmann conceived of Parliament's intention in Standard Chartered Bank, holding that the purpose of the Act was to

‘relieve plaintiffs whose actions would previously have failed and not to reduce the damages which previously would have been awarded against defendants.’ Aikens LJ relied on this conception of Parliament’s intent in his judgment in Pritchard. Lord Hoffmann puts forward little evidence for this contention, however. The only part of the statute that could be relied upon is section 1(1) where it states ‘a claim in respect of that damage shall not be defeated by reason of the fault of the persons suffering the damage’ but it does not necessarily follow that the defence should be restricted accordingly to exclusively those cases. Just as there were cases where the claimant’s action failed, leading to unjust results, so too, as Reeves demonstrates, would there be cases where the defendant’s defence would have to fail. The introduction of apportionment renders both of these extreme outcomes unnecessary. There is evidence that can be adduced to suggest that Parliament did in fact intend contributory negligence to be broader than its common law ambit. This can be seen by reference to the Torts (Interference with Goods) Act 1977.

Section 11(1) of the Torts (Interference with Goods) Act 1977 states that contributory negligence is no defence in cases of intentional trespass to goods; Aikens LJ referred to this provision in Pritchard, stating that ‘there was no doubt that there was no such defence in relation to intentional trespass to goods’ at common law and that s 11(1) ‘merely makes the position plain’. However, applying the presumption that Parliament never legislates in vain, if the position at common law was as clear as Aikens LJ claims then that points not to the conclusion that s 11(1) ‘merely makes the position plain’ but that the 1945 Act is not automatically precluded from applying where previously the complete defence at common law would not have arisen on the facts. Otherwise s 11(1) is superfluous. There are clearly doctrinal differences between interference with goods and interference with bodily integrity but the point is that the provision should not have been necessary if Parliament’s intention in respect of the 1945 Act was as clear as Pritchard and Standard Chartered would suggest. Whilst admittedly this argument may seem overly technical and remote it is equally the case that the intention of Parliament was presumed rather than sufficiently evidenced in Pritchard and Standard Chartered Bank.

Ultimately, however, what Parliament intended is now a moot point. This is because, it will be argued, the introduction of apportionment fundamentally altered the doctrine of contributory negligence. In its misplaced preoccupation with pre-Act case law Pritchard has failed to reflect this fundamental change. In doing so, the Court of Appeal overlooked the new normative arguments in favour of allowing the apportionment of damages in cases involving intentional trespass to the person.

V. THE NEW LEGAL LANDSCAPE: NORMATIVE JUSTIFICATIONS FOR ALLOWING APPORTIONMENT IN CASES OF INTENTIONAL TRESPASS TO THE PERSON

Where before it would have been unthinkable to deny the claimant any and all damages in cases of intentional trespass to the person, apportionment allows for a just and equitable reflection of corresponding fault within monetary awards. This change in the law has had a fundamental effect not just on the defence of contributory negligence but also on the law of tort as a whole. As Jenny Steele has said, the 1945 Act reflects a growing trend towards the ‘exorcism of absolutes’. It represents a

18 Standard Chartered Bank (n 12) 965.
19 Pritchard (n 3) 337-8.
fundamental shift towards the ‘sharing of responsibility and denial of ideas of sole responsibility or sole cause’. This gives rise to a wealth of new normative justifications for extending the defence of contributory negligence beyond its common law ambit; arguments which the arbitrary approach to section 4 in *Pritchard* fails to take account of. That this is so can be seen even in *Pritchard* itself. Smith LJ, though she felt compelled to follow the reasoning of Aikens LJ, did so ‘with regret’ because she believed that ‘apportionment ought to be available to a defendant who has committed the tort of battery where the claimant has, by his misconduct, contributed to the happening of the incident, for example by provocative speech or behaviour.’

At the heart of this frustration that Smith LJ felt is the court’s illogically strict adherence to pre-Act case law. Lord Rodger in *Standard Chartered Bank*, when coming to the conclusion that contributory negligence was not available as a complete defence at common law to the tort of deceit, remarked that such a state of affairs would have been an ‘extreme doctrine’ given that it would ‘absolve’ the fraudulent defendant of all liability. However, to then hold that modern contributory negligence should not therefore apply is illogical and fails to reflect this fundamental shift in tort law towards shared responsibility. It is illogical because the reason for the introduction of apportionment is also given as the reason for restricting its use despite the fact that apportionment provides the means of rectifying the unjust results the complete defence would have otherwise resulted in.

As Sedley LJ remarked in *Vellino v Chief Constable of the Greater Manchester Police*, there is no ‘substantial justice … in sacrificing a judicial apportionment of responsibility on the altar of a doctrinal refusal to adjudicate.’ Instead, apportionment ‘[exemplifies] an idea that shared responsibility is the most appropriate and most nuanced approach’. The case law prior to 1945 that *Pritchard* and *Standard Chartered Bank* cling to is devoid of this nuance. This makes it ‘impossible’, in the words of Lord Wright, ‘to get a true theory of contributory negligence’ prior to the 1945 Act. This is because the cases are ‘apt to be unsatisfactory and misleading’ by virtue of suffering from a kind of tunnel vision: a binary choice between full responsibility or no responsibility at all. It is probably true that this fundamental shift towards shared responsibility ‘demonstrably goes beyond the intentions of those who devised it’, but the law was changed fifty years ago to the year with no move by Parliament to reverse it.

Not only does this shift towards a nuanced approach to shared responsibility make the *Pritchard* interpretation, with its narrow focus on prior case law, seem outdated, but it also outmodes many of the normative arguments against applying contributory negligence to cases of intentional trespass to the person. This can be seen by re-evaluating some of the normative arguments that Aikens LJ uses in his judgment to justify excluding the defence. The principal normative argument was drawn from Professor Glanville Williams and will be addressed directly. Williams has argued that the exclusion of the defence is a ‘penal provision aimed at repressing conduct flagrantly wrongful.’ It is also, he says, the result of ‘ordinary human feeling that the defendant’s wrongful intention so outweighs the [claimant’s] wrongful negligence as to efface it altogether.’ Whilst these are two distinct arguments they both appear to be premised on the idea that the presence of intention makes these torts sufficiently different from the general tort of negligence to warrant excluding the defence.

---

21 Steele (n 15).
22 *Pritchard* (n 3) 343.
23 *Standard Chartered Bank* (n 12) 975.
25 ibid 229.
26 Steele (n 20) 162.
27 Lord Wright, ‘Contributory Negligence’ (1950) 13 MLR 2, 10.
28 ibid.
29 Steele (n 20) 161.
30 Glanville Williams, *Joint Torts and Contributory Negligence* (Stevens 1951) 198, cited in *Pritchard* (n 3) 332.
31 ibid.
Admittedly this conception of intentional torts does indeed appeal to ‘ordinary human feeling.’ Generally both the layman and the lawyer would regard something done intentionally as a greater wrong than something done carelessly or by pure accident, at least at first glance. Indeed the criminal law’s hierarchical approach to *mens rea* reflects this. However, as Dr Goudkamp has argued, such an approach fails to take into account the actual legal nature of these intentional torts. The tort of battery, for instance, does not require an intention to injure, merely an intention to trespass, i.e. to make physical contact. Thus battery ‘may range from innocuous physical contact to brutal beatings, rape, and murder.’ This makes it very difficult to argue that, in the case of tort liability, the presence of intention necessarily reflects a certain degree of wrongdoing. It also undermines the argument that excluding the defence of contributory negligence is an effective punitive measure as this could lead to rather disproportionate results. Take, for example, the facts of *Pritchard* itself. The claimant in that case verbally harassed the store manager *en masse* with her sister and friend and then, after the battery occurred against her (which amounted to the store manager holding her arms out in front of her), proceeded to bite the manager.

It seems very unrealistic to say that excluding the defence of contributory negligence provides a useful punitive function here: just as it may appeal to ‘ordinary human feeling’ that intention connotes a greater degree of wrongdoing so too does it appeal to ordinary feeling that both parties are at fault in this kind of case, with the potential for the claimant to be more at fault than the defendant. Whilst it is possible to argue that the seriousness of the physical contact is irrelevant because the presence of intention automatically alters the moral position of the wrongdoer vis-à-vis the victim, such arguments, setting aside the desirability or otherwise of incorporating morality into the law, seem to stray too far into issues generally left to the criminal law. The change of position, if any, affected by the presence of intention plays a much larger role in criminal responsibility (e.g., the ‘thin-skull’ rule) than tort law, which is focused more on issues of fault and responsibility for loss rather than moral culpability. It is suggested that it is more due to the fact that the courts were forced to choose between two extremes, i.e. a full award of damages or none at all, prior to apportionment that gave the impression that intentional torts were in some way conceptually distinct from other torts to warrant the exclusion of the defence. Now that the 1945 Act has been passed and a choice between two extremes is no longer necessary it is easier to see that this is not the case and that there is a fairer alternative available.

If there is nothing conceptually distinct about intentional torts to warrant excluding the defence of contributory negligence out of hand, then, with the introduction of apportionment, it seems a much fairer approach to allow the defence to be applied. Where both parties are at fault for the claimant’s loss then damages are apportioned accordingly. There appears little justification, now that contributory negligence is no longer a complete defence, to not apply this approach just because intentional trespass to the person is involved. The criminal law allows even the crime of murder to be relegated to one of manslaughter where the defendant lost control due, *inter alia*, to things the victim said or did. Whilst tort law is not interested in the characteristics of the individual parties or with human frailty it is interested in regulating the private interference with rights, and it does so by ascribing fault. The claimant who provokes the defendant with the intention of starting a fight can be said to be at fault, in other words to have failed to take reasonable care for his or her own safety per the proposed interpretation of section 4 above. That the defendant then commits the tort of battery, which as mentioned can cover an incredibly varied range of conduct, does not justify the complete exclusion of the claimant’s actions from consideration.

---

32 James Goudkamp, ‘Contributory Negligence and Trespass to the Person’ (2011) 127 LQR 519.
34 Goudkamp (n 32) 520.
35 Coroners and Justice Act 2009, ss 54-55.
Prior to Pritchard the courts seemed to be moving towards this approach. In Murphy v Culbane the defendant had assaulted and beat the deceased by hitting him on the head with a plank. It was alleged that this assault occurred during a criminal affray that the deceased and others had initiated with the joint intent of harming the defendant. Lord Denning MR, obiter, that had the deceased’s widow been entitled to damages they might fall to be reduced under the 1945 Act because 'the death of her husband might be the result partly of his own fault and partly of the defendant' within the meaning of sections 1 and 4. In Barnes v Nayer two families had for a prolonged period of time subjected each other to serious abuse. The two families one day goaded their respective sons into a fight. The defendant, having been so provoked and having also been assaulted himself, went on to kill the deceased. May LJ said he saw, prima facie, 'no reason why, … given the facts, a defendant to a claim for damages for assault cannot rely upon the Law Reform (Contributory Negligence) Act [1945].' These cases illustrate the capacity for contributory negligence to provide for a more just reflection of blame, in line with the idea of shared responsibility, in cases of intentional trespass to the person.

There are a number of additional concerns that still need to be addressed, however. First, is the argument that it is not the presence of intention in intentional torts that justifies the exclusion of the defence but rather the concept, expressed in, among other cases, Collins v Wilcock, that 'every person’s body is inviolate'. However, if it were this doctrine, rather than the presence of intention, that precludes the application of contributory negligence then this would seem to be inconsistent with allowing the defence to apply in cases of ordinary negligence. By the very nature of personal injury claims a person’s bodily integrity has been violated and yet prior to apportionment the courts were even willing to absolve the defendant of all liability in negligence cases where the defence applied. If anything the right to complete bodily integrity explains the vast range of physical conduct that can constitute battery but it does not follow that the doctrine precludes the sharing of responsibility for the infringement of that right. This again seemingly leaves the presence of intention as the underlying rationale behind distinguishing negligence from trespass to the person for the purposes of contributory negligence but as above this does not seem a convincing distinction, especially considering negligence, strictly speaking, can include intentional conduct anyway.

The second additional concern is that, even if it is desirable to allow contributory negligence to apply to cases of intentional trespass to the person, it is a matter best left for Parliament not for the judiciary. The reason why this argument is unconvincing is two-fold. Primarily, as explained earlier in relation to the dual limb approach to section 4, it is perfectly possible to read the definition of fault as accommodating cases of intentional trespass to the person. No more violence is done to the language of the statute on this approach than the alternative approach taken in Pritchard. On this view the courts would merely be applying the statute and, crucially, in a way that is a natural development of a general trend. This is the second reason. As argued above, the 1945 Act can be seen as part of a wider rethinking of the concept of fault in tort law, this rethinking being founded on the language of shared responsibility. Applying contributory negligence to cases of intentional trespass to the person would not constitute an exercise in unrestrained and spontaneous judicial creativity but would rather be a natural development in line with this trend, allowing a more nuanced – and consequently fairer – approach to cases of intentional trespass to the person.

37 ibid 99.
38 [1986] CA Transcript No 1085.
39 ibid 6.
40 [1984] 1 WLR 1172 (QB).
41 ibid 1178 (Goff LJ).
VI. CONCLUSION

Whilst at first the legal reasoning employed in *Pritchard* seems sound, and has previously gone largely unchallenged, an attempt has been made to show that the foundations of the decision are not as solid as they appear. Ultimately *Pritchard* represents a reading of the 1945 Act that arbitrarily restricts the operation of the contributory negligence defence to the law as it was over half a century ago. However, the law has moved on significantly since then with the introduction of apportionment, as part of a wider shift in the law of tort towards shared responsibility for loss. It is better to adopt an approach to the section 4 definition of fault that allows for this change to be reflected in a natural development of the law, namely by reading into the Act solely the requirement that the actions of the claimant constitute a failure to take reasonable care for his or her own safety, as opposed to also arbitrarily restricting its scope to pre-1945 situations. This is indeed the only interpretation of section 4 that is consistent with the facts of *Reeves* and is at least capable of accommodating cases such as *Standard Chartered Bank*. Neither does such an interpretation necessarily have to be at odds with Parliamentary intention if it is accepted that Parliament must have been open to the idea of contributory negligence developing beyond its prior common law scope. Regardless, of greater importance is that the law of tort should be allowed to continue this trend towards shared responsibility, and thus more just and equitable awards of damages, by allowing contributory negligence to apply in cases of intentional trespass to the person.