The Blame Game: Contributory Negligence

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Outline

1. Contributory negligence is an issue that (seemingly) impacts nearly every case that personal injury practitioners deal with. It is a topic and issue which most of us feel confident with, but in practice consideration of principles are often pushed to the back of our minds and we apply rough approximations. In short we all play ‘the Blame Game’ with the gut.

2. The aim of this paper is to revisit the principles and issues that surround contributory negligence in several areas (including looking at some recent cases) so that the next time Defendants ask us to take a seat at the table we will play ‘the Blame Game’ with our head and hopefully walk away with more ‘chips from the table’. The areas that will be considered in the paper are:
   a) The general principles of contributory negligence for a cause of action under common law and statute: paras 3-10
   b) Differences in contributory negligence for a cause of action in negligence compared with (statutory) employer liability cases: paras 11-16
   c) Does 100% contributory negligence exist: paras 17-20
   d) Contributory negligence for the emergency services and rescuers: paras 21-24
   e) Impact on failure to wear a seatbelt in a car or helmet on a bicycle on contributory negligence: paras 25-29
   f) Self-harm and suicide cases: paras 31-35
   g) Hidden dangers of agreeing contributory negligence: para 36
   h) Contributory negligence in the medical negligence context: paras 37-46

a) The general principles of contributory negligence for a cause of action under common law and statute
3. Prior to the Law Reform (Contributory Negligence) Act 1945 (the “1945 Act”) contributory negligence used to operate as a complete defence.

4. Since the 1945 Act contributory negligence has been a partial defence – it can reduce but not extinguish liability. The material wording of the 1945 Act is found in s.1(1):

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

5. Section 4 of the 1945 Act defines the terms ‘damage’ and ‘fault’ as:

   The following expressions have the meanings hereby respectively assigned to them, that is to say—
   “damage” includes loss of life and personal injury;
   …
   “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.

6. This section does not specifically state that damage includes property damage. However, the wording of the legislation is inclusive (as opposed to exhaustive) and so damages recoverable for damage to property can be reduced by virtue of contributory negligence. This principle has even been extended to include pure economic loss claims: Platform Home Loans Ltd v Oyston Shipways Ltd.

7. It is also worth noting the breadth of claims that may face reductions for contributory negligence under the 1945 Act:

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1 Butterfield v Forrester (1809) 103 ER 926 – a non-intoxicated Plaintiff was injured when he fell off his horse because the Defendant (who was making repairs on his house) had left a pole across a highway. The Plaintiff failed to recover because he was riding the horse too fast; a person with reasonable care would have been slower and thereby avoided the obstruction.
   The courts attempted to modify the harshness through use of two rules
   (i) the rule of last opportunity – if Defendant had the last opportunity to avoid the accident a Plaintiff was able to recover (Davies v Mann (1842) 152 ER 588)
   (ii) the rule of constructive last opportunity – if Defendant would have had the last opportunity to avoid the accident a Plaintiff was able to recover (British Columbia Electric Railway v Loach [1916] 1 AC 719 (PC). [2000] 2 AC 190 (HL)
a. nuisance\(^3\) (including it is assumed under private nuisance and ‘Rylands v Fletcher’);
b. possibly intentional torts such as trespass to the person\(^4\);
c. claims under the Consumer Protection Act 1987\(^5\);
d. claims under Animals Act 1971\(^6\).

8. Of course, not all claims lead to defences of contributory negligence, some of those outside the 1945 Act remit are:
   a. deceit\(^7\);
   b. conversion or intentional trespass to goods\(^8\);
   c. breach of contract (where there is no concurrent liability in tort)\(^9\).

9. The three key ingredients for assessing contributory negligence are:
   a. fault of Claimant;
   b. -if so, was this causative of damage;
   c. -if so, what is the extent it would be just and equitable to reduce damages\(^10\).

10. Finally, he who asserts must prove. It is for the Defendant to prove on the balance of probabilities that contributory negligence is made out. Importantly, although inferences

\(^3\) Trevett Lee [1955] 1 WLR 113 (CA)  
\(^5\) Section 6(4) of the Consumer Protection Act 1987  
\(^6\) Section 10 of the Animals Act 1971  
\(^7\) Standard Chartered Bank v Pakistan National Shipping Corp (No 4) [2001] QB 167 (CA)  
\(^8\) Torts (Interference with Goods) Act 1977 s.11(1)  
\(^9\) Forsikringaktieselskapet Vesta v Butcher [1988] 3 W.L.R. 565 (CA) at 572 O’Connor LJ re-states the three categories of contract that Hobhouse J defined at first instance and the CA agrees that in category three case the 1945 Act applies. Therefore there is no benefit in framing a claim under contract as opposed to tort in employer liability type cases – contributory negligence will apply either way. This analysis of concurrent liability in tort means that so far as the Misrepresentation Act 1967 is concerned: (i) negligent misrepresentation (s.2(1) Misrepresentation Act 1967) is liable to reductions under the 1945 Act; (ii) innocent misrepresentation (s.2(2) Misrepresentation Act 1967) does not fall under the scope of the 1945 Act.  
\(^10\) As far as the issue of whether it is possible to have 0% reduction despite finding ‘fault’ and ‘causation’ on the grounds that it would not be just and equitable to have a reduction the answer appears to be no: Boothman v British Northrop Ltd (1972) 13 KIR 112 (CA). However, another way of reaching an apparent 0% reduction despite some sort of contributory fault is “it is open to the court to conclude that the share of a claimant's responsibility is so small by reference to that of the defendant that it would not be just and equitable to reduce the damages at all”: Sahib Foods Ltd v Paskin Kyriakides Sands (A Firm) [2003] EWCA Civ 1832; [2004] PNLR 22 at [69].
can be used\textsuperscript{11}, it is not something that a Court will automatically decide – Defendants need to plead it and argue the point at trial\textsuperscript{12}.

\textbf{b) Differences in contributory negligence for a cause of action in negligence compared with (statutory) employer liability cases}

11. As far as negligence cases are concerned the general principles of 1945 Act apply. The issue in ascertaining the ‘fault’ of the Claimant is whether judged objectively\textsuperscript{13} there was any fault on the part of the Claimant for the damage suffered. In the personal injury context the next issue is whether such act or omission (falling below the conduct expected of a reasonable, prudent person) caused (in part) the injury or worsened its effects – although there is no need for the exact manner of injury to be foreseeable.\textsuperscript{14} Finally, in deciding how to apportion blame between the parties, although there is a large amount of discretion left to a Court, the two main issues\textsuperscript{15} are comparative:
   a. ‘Causative potency’, and
   b. ‘Blameworthiness’.

12. So far none of this will seem unusual. But in employer liability claims, based on breach of statutory duty imposed on employers to protect workers from their own carelessness, the purpose of the protective legislation would be undermined unless the employer’s breach was weighted more heavily in the apportionment exercise than the fault of the employee. For example, momentary carelessness or inattention, of the type which the health and safety legislation was designed to protect the employee, will rarely justify a reduction for contributory negligence. Different considerations would apply if the injured worker was a supervisor with responsibility for discharging the employer’s statutory duty.

\textsuperscript{11} \textit{Hames v Ferguson} [2008] EWCA Civ 1268 is an example of such a case where the CA felt inferences made from facts by the trial judge were reasonable to support the finding of contributory negligence.
\textsuperscript{12} \textit{Fookes v Slaytor} [1978] 1 WLR 1293 (CA). In \textit{CTO Gesellschaft fur Containertransport MBH and Co v Dziennik} [2006] EWCA Civ 1456 the trial judge’s decision of contributory negligence was overturned on appeal given the Defendant failed to plead particulars upon which the trial judge’s judgment on contributory negligence was based.
\textsuperscript{13} “…foreseen that, if he did not act as a reasonable, prudent man, he might hurt himself”. Although objective allowances are made for those in emergencies, children and the disabled: in such cases these circumstances are to some extent applied to the ‘objective’ comparator.
\textsuperscript{14} \textit{Jones v Livox Quarries Ltd} [1952] 2 QB 608 (CA)
\textsuperscript{15} \textit{Davies v Swan Motor Co} [1949] 2 KB 291 CA at 326
13. Indeed, the position in such employer liability cases based on statutes or regulations is summarised by Keene LJ’s judgment in *Cooper v Carillion Plc*.[16]

[13] In the same passage to which I have earlier referred in *Jones v Livox Quarries Ltd*, Denning LJ went on to say that in his reckonings the claimant must take into account the possibility of others being careless. That is generally so, but it is also well established by many cases that an employee is normally entitled to assume that his employer has complied with his statutory duties (see in particular the House of Lords' decision in *Westwood v Post Office* [1974] AC 1). Where there has been such a breach of statutory duty by the employer, as in the present case, it is important to ensure that the statutory requirement placed on the employer is not emasculated by too great a willingness on the part of the courts to find that the employee has been guilty of contributory negligence. It is very easy for a judge with the advantage of hindsight to identify some act on the part of the employee which would have avoided the accident occurring. That in itself does not demonstrate negligence on the part of the employee. As Lord Tucker put it in *Staveley Iron & Chemical Co Ltd v Jones* [1956] AC 627 at 648, one must avoid treating every risky act by an employee due to familiarity with the work or some inattention resulting from noise or strain as contributory negligence. The same point was made in *Mullard v Ben Line Steamers Ltd* [1971] 2 All ER 424, at 428. To impose too strict a standard of care on the workman would defeat the object of the statutory requirement. (emphasis added)

14. The problem in approaching these cases is that practitioners (and even judges) can skip straight to the apportionment stage and reduce damages because the Claimant is in the everyday sense seemingly to blame for what occurred. The two cases below, which might appear to show Claimants being ‘authors of their own misfortune’, illustrate how simple it is for such an error to be made.

15. The first is *Anderson v Newham College of Further Education*.[17] In this case the Claimant was called to site when the internal security system had sounded. He went into a classroom that was well lit and could see a broken window. He proceeded to walk towards the window and tripped over the protruding feet of a whiteboard. There was ample room for him to avoid the obvious ‘hazard’, which the Claimant admitted to having seen). Common law negligence failed but there was a breach of Reg.12(3) of the Workplace (Health, Safety and Welfare Regulations) 1992 as the whiteboard frame could have been turned the other way towards the wall (it would have resulted in a barked shin rather than a trip). On appeal the contributory negligence was decreased from 90% to 50%.

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[16] [2003] EWCA Civ 1811
[17] [2002] EWCA Civ 505; [2003] ICR 212
16. The second is *Toole v Bolton Metropolitan Borough Council*\(^{18}\). The Claimant sustained a needle stick injury when he attempted to remove a discarded syringe from the toilets wearing only rubber gloves, and not the Kevlar gloves required under the employer’s guidance notes. He knew of the requirement, but could not find any Kevlar gloves. The trial judge was critical of the Claimant’s actions, disbelieved that he had adequately looked for the gloves, and found the Claimant could have waited, there being no urgency to do the job. But there was a breach found in the failure to supply suitable work equipment under Reg.6 of the Personal Protective Equipment at Work Regulations 1992 as the Kevlar gloves would not have protected him from the needle stick injury. The Court of Appeal removed the 75% finding of contributory negligence because the Claimant’s failure to take a precaution which was itself a breach of duty (failing to provide adequately protective gloves) had not caused the injury. The Court of Appeal also noted that such a degree of contributory negligence in a breach of statutory duty case is unusual.

c) Does 100% contributory negligence exist

17. There is no such thing as 100% contributory negligence. But it is something that Defendant's often appear to state, perhaps this is because there is such a thing as 100% contribution as between Defendants or wrongdoers (which would be under the Civil Liability (Contribution) Act 1978) and because some sources (such as Atkin's for example) still cite it as a possibility.

18. The Court of Appeal in *Anderson v Newham College Further Education*\(^{19}\) was the most recent decision in the area and Sedley LJ at [11]-[12] and [19] stated as follows:

\[11\] Secondly, there was then and still is binding authority against this approach, which was not cited to the Court of Appeal. In *Boyle v Kodak Ltd* [1969] 1 WLR 661 the House of Lords held that to escape liability for a breach of statutory duty by which a workman has been injured, the employer must prove not only that his breach was co-extensive with breach by the injured workman of the same statutory duty, but that the employer had done all he reasonably could to ensure compliance by the employee.

\[12\] Boyle v Kodak Ltd seems to me to be authority for at least two relevant things. One is how high a standard of proof is required to shift the entire blame for a breach

\(^{18}\) [2002] EWCA Civ 588
\(^{19}\) [2002] EWCA Civ 505; [2003] ICR 212
of statutory duty to the injured employee himself. If the court which heard Jayes v IMI (Kynoch) Ltd [1985] ICR 155 had been reminded of Boyle v Kodak Ltd it is at least doubtful whether the result, in what was a case of a breach by other employees of an absolute statutory duty under section 14 of the Factories Act 1961, would have been the same. The other is that where such a situation is achieved by the defendant employer, there is no liability capable of apportionment: the claimant fails altogether in such a case: see in particular the speech of Lord Diplock at pp 672–673…

[19] In sum, Jayes v IMI should, in my respectful view, not be followed by judges of first instance and should not be relied upon by advocates in argument. The relevant principles are straightforward. Whether the claim is in negligence or for breach of statutory duty, if the evidence, once it has been appraised as the law requires, shows the entire fault to lie with the claimant there is no liability on the defendant. If not, then the court will consider to what extent, if any, the claimant's share in the responsibility for the damage makes it just and equitable to reduce his damages. The phrase “100% contributory negligence”, while expressive, is unhelpful, because it invites the court to treat a statutory qualification of the measure of damages as if it were a secondary or surrogate approach to liability, which it is not. If there is liability, contributory negligence can reduce its monetary quantification, but it cannot legally or logically nullify it.

19. Often the issue arises in pre-action correspondence and a Defendant (having received a letter before claim) may make a pre-action admission of liability subject to the issue of contributory negligence. Once that is the position (and notwithstanding that a Defendant is perhaps alleging 100% contributory negligence) consideration should be turned to CPR r.14.1A – under CPR r.14.1A(5) upon commencement of proceedings judgment can be entered on the pre-action admission. The Defendant will need court permission to withdraw from the pre-action admission and could then be left in a position where it is only holding out on contributory negligence as opposed to causation (which would be a full ‘defence’).

20. Raising contributory negligence as an issue on the pleadings is no bar to the claimant obtaining judgment, including summary or default judgment. The assessment of the degree of contributory negligence, if any, can be determined at the assessment of damages – though it will often be appropriate for the court to determine it as a preliminary issue. The danger for Claimants is that in practice it is often difficult to undertake a

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20 The case of Lunnun v Singh [1999] NPC 83, [1999] 31 LS Gaz R 36, Pugh v Cantor Fitzgerald International [2001] EWCA Civ 307, 145 Sol Jo LB 83 stand for the authority that contributory negligence can be argued at the assessment of damages stage after “default judgment” has occurred. Therefore given this and that contributory negligence is a partial defence the same logic should apply to judgment being entered on liability following summary judgment – so long as the issue of contributory negligence has not been decided at the summary judgment stage.
properly comparative exercise of apportioning blameworthiness between the parties at the assessment stage after the defendant has admitted, or submitted to, primary liability. Also, with their focus on assessment, Claimants in such cases often overlook the need to adequately plead the Defendant’s ‘fault’ or to secure the necessary evidence and disclosure to show how blameworthy it was. Just think: what do I need to prove about the defendant’s ‘fault’ in order to put the claimant’s ‘fault’ into context? If all the court has in mind is that the claimant tripped up over the obvious hazard (see above) then contributory negligence will be assessed too high. This is another reason why a preliminary trial is often apt, lest the focus on the Defendant’s own liability be lost in a sea of quantum evidence.

d) Contributory negligence for the emergency services and rescuers

21. The general principle, espoused by Cardozo J in the US case of **Wagner v International Rly Co**\(^{21}\) and in the UK first resonating in **Haynes v Harwood**\(^{22}\), is that if a Defendant through his breach of duty puts another person or his property in peril it is no answer to an action against him by a rescuer injured through a reasonable attempt at rescue to say that he ‘assumed the risk’ or was contributorily negligent. See **Baker v T.E. Hopkins & Son Ltd**\(^{23}\) at 973, 981, 984:

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\begin{align*}
\text{[973]} & \text{ The decision of this court in Haynes v. Harwood shows (i) that there may be circumstances in which, if A by negligence places B in peril, A ought reasonably to contemplate or to have contemplated that C might endeavour to rescue B, and (ii) that if in such circumstances C suffers hurt he may recover damages from A…} \\
\text{[981]} & \text{…Where the act of the wrongdoer has been such as to be likely to put someone in peril, reasonable foresight will normally contemplate the probability of an attempted rescue, in the course of which the rescuer may receive injury. In the American case of Wagner v. International Railway Co, Cardozo J., as it seems to me, foreshadowed in a remarkable way Lord Atkin's statement of principle, and applied it to a typical rescue case. He said “Danger invites rescue. The cry of distress is the summons to relief. The law does not ignore these reactions of the mind in tracing conduct to its consequences. It recognises them as normal. It places their effects within the range of the natural and probable. The wrong that imperils life is a wrong to the imperilled victim; it is a wrong also to his rescuer.” Then a little later he went on: “The risk of rescue, if only it be not wanton, is born of the occasion. The emergency begets the man. The wrongdoer may not have foreseen the coming of a deliverer. He is accountable as if he had.”…}
\end{align*}
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\(^{21}\) (1921) NY Rep 176

\(^{22}\) [1935] 1 KB 146 (CA)

\(^{23}\) [1959] 1 W.L.R. 966
I pass, therefore, to the fourth and last question, which is raised by the defendants’ plea that the death of Dr. Baker was caused or contributed to by his own negligence. The burden of proof with regard to this allegation is upon the defendants, and in order to succeed I think they would have to show that the conduct of Dr. Baker was so foolhardy as to amount to a wholly unreasonable disregard for his own safety. Bearing in mind that danger invites rescue, the court should not be astute to accept criticism of the rescuer’s conduct from the wrongdoer who created the danger. Moreover, I think it should be remembered that it is fatally easy to be wise after the event. It is not enough that, when all the evidence has been sifted and all the facts ascertained in the calm and deliberate atmosphere of a court of law, the rescuer’s conduct can be shown ex post facto to have been misguided or foolhardy. He is entitled to be judged in the light of the situation as it appeared to him at the time, i.e., in a context of immediate and pressing emergency.

22. The recent case of Tolley v Carr\(^\text{24}\) has revisited the issue of contributory negligence in a non-professional rescuer situation\(^\text{25}\). It makes clear that the same principle applies to both professional rescuers and ‘good Samaritans’ and summarises the general principles that apply to rescuer cases as follows:

a. the law imposes on those who create a danger a duty of care owed to those who go to the aid of people put at risk thereby (whether those who act are members of the professional emergency services or members of the public) (at [21]);

b. the law is slow and cautious in finding negligence in those who imperil themselves to save persons from risks caused by the negligence of others (at [21]);

c. the law recognises the greater the risk to others trying to be averted the greater the risk a rescuer may be said to reasonably expose himself to in the eyes of the law and it is not appropriate to subject rescuers’ actions/subjective views of risk to the fine scrutiny of a court room (at [22]-[23]);

d. it does not matter whether the rescue was successful or not or that the rescuer reasonably or properly considered that a person imperilled by the negligent act of one person may also—consequently and foreseeably—run the risk of being the object of future negligent acts of others from which he may require to be saved (at [24]);

\(^{24}\) [2010] EWHC 2191 (QB), [2011] RTR 7 QBD

\(^{25}\) The case of Ogwo v Taylor [1987] 2 WLR 988 (CA) is an illustration of the ‘rescuer principle’ applying to a professional “rescuer” - an occupier whose negligence resulted in a fire which got out of control owed a duty of care to a fire-fighter, notwithstanding that i) it was a fire-fighter’s duty to fight fires for the benefit of the public and ii) there was no immediate danger to others.
e. it does not matter a great deal in assessing reasonableness of the rescuers actions whether they were instinctive or followed deliberation: either are regarded by the law as meritorious (at [25]).

23. In Tolley the Claimant having already rescued the driver of a car that crashed into the central barrier of a motorway. He then decided that the car posed a danger to oncoming traffic given the rear of the car was in the ‘fast lane’, so he went back to move the car. Unfortunately, whilst attempting to move the car another motorist collided with the car causing serious injuries to the Claimant. The Defendant failed to establish contributory negligence in the case as it had not establish the Claimant’s action were foolhardy and unreasonable:

[47] In his opening Mr Braithwaite QC for the claimant said that, in doing what he did—getting Ms Carr out of the vehicle and then going back to move her car to avert the risk of a further possibly major accident—Mr Tolley acted as any decent man would hopefully act. That is a high aspiration for decent men. There are many decent men who I doubt are as brave as Mr Tolley. Not all even decent men would act “under the compulsion of instincts as a brave man” as he, and indeed Dr Baker (see Baker v Hopkins at 979 per Ormerod L.J.), acted. But exceptional bravery is not the same as foolhardiness. On the basis of the evidence I have seen and heard, it is my clear and firm judgment that Mr Tolley’s actions on November 21, 2006 fell within the category of the brave and commendable, not the foolhardy and unreasonable. He acted with proper regard for his own safety in all of the circumstances, but, meritoriously, with greater regard for the lives and well-being of others.

24. Rescue cases can unfortunately by their nature give rise to very serious injuries. The result is that Defendants are likely to try and slice down the damages. However, the high threshold that needs to be passed for ‘foolhardy or unreasonable’ conduct by a person in a rescue situation means that in reality it is unlikely to be made out and courts will be slow to make such findings in genuine rescue situations. Therefore, Claimant personal injury practitioners need to be equally slow in entertaining reductions of contributory negligence in genuine rescuer cases.

e) Failing to wear a seatbelt in a car or a crash helmet on a bicycle

25. There is too much law on contributory negligence in road traffic accidents for us to cover in this talk. So we concentrate on two areas: seat-belts and crash helmets.
26. **SEAT-BELTS**: In *Stanton v. Collinson*\(^\text{26}\) the Court of Appeal revisited the decision in *Froom v. Butcher*\(^\text{27}\) which has shaped the law and practice in this area. Stanton was a 16 year old boy who suffered major brain damage in a car accident in which he had not worn a seat-belt in the front passenger seat and had had another passenger on his lap. No reduction was made for contributory negligence because the Defendant had not shown that wearing a seat belt would have reduced the injuries sufficiently. The Judge could not determine from the engineers’ evidence, notwithstanding their agreement that the head injuries would have been less severe, whether the brain damage would have been significantly less if the belt had been worn. There was no medical evidence on this issue and the Judge was held entitled to rule, in a case with grave disabilities, that without such evidence no reduction should be made.

27. Caution: the Judge could have gone the other way in *Stanton*, and then it would have been difficult to argue she had reached a conclusion that was not available to her in light of the engineer’s evidence. Rather than relying on another Judge to reach the same conclusion in a different case, practitioners should ensure directions are given for medical evidence to assist the court on causation in proportionate cases.

28. The position is now as follows for those who fail to wear a seat-belt which was available:
   a. It is for the Defendant to show that the Claimant’s failure to wear a belt probably made a considerable difference in that the injuries would have been either prevented or a good deal less severe if he had worn one.
   b. If the injuries would have been prevented, damages will normally be reduced by 25%;
   c. If proper use of the belt would have made a considerable difference, then damages should be reduced by 15%;
   d. If proper use of the belt would not have made a considerable difference then, save in exceptional circumstances, there should be no reduction at all;
   e. There might be unusual cases in which neither of the two brackets of finding contemplated by *Froom* would be appropriate but these would be rare and there was a powerful public interest in avoiding intensive inquiry into fine

\(^{26}\) [2010] EWCA Civ 81
\(^{27}\) [1976] QB 286
degrees of contributory negligence so that the vast majority of cases could be settled according to the Froom formula.

29. **CRASH HELMETS:** Despite there being no legal compulsion for cyclists to wear helmets, by failing to do so they expose themselves to greater risk of injury and Froom applies: *Smith v. French*²⁸. This was a first instance decision that has met with some criticism but it has not been overturned or disapproved²⁹ and is consistent with the way in which the law has developed in this area: Froom was decided before it became obligatory to wear seat-belts. As a result of the Defendant’s negligent motor-cycle driving Smith, a cyclist without a crash helmet, had hit the ground faster than 12 mph and sustained serious head injuries. The Defendant was entirely to blame for the accident, had lied about the accident and had adduced no medical evidence to support his case that the injuries would have been considerably reduced or prevented by the use of crash helmet and had failed to discharge the burden of proving contributory negligence.

30. In *Phethean-Hubble v. Coles*³⁰ the 16 year old cyclist who rode suddenly from a pavement to a road was held 1/3rd responsible for a collision with a vehicle driving 5 mph above the speed limit, but his failure to wear a helmet was not shown to have contributed to his injuries. The degree of contributory negligence in ‘bunny-hopping’ would have been assessed at 50% but because of his youth, it was assessed at 1/3rd.

**f) Dealing with contributory negligence in self-harm and suicide**

31. Self harm (including suicide) cases usually lead to many defences being pursued but almost certainly contributory negligence will be alleged (in case factual causation is made out). Some factual scenarios in which a successful claim involving self harm may be made out include:

a. The Defendant owing a duty to prevent the self harm itself (custodian type cases).

b. The Defendant causing a psychiatric injury and the psychiatric injury leading to foreseeable self harm. This is very common in child sex abuse cases.

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²⁸ [2009] EWHC 53 (QB), see para 44
²⁹ e.g. it was considered in Reynolds v. Strutt [2011] EWHC 2263 (QB)
³⁰ Official transcript, QBD, 24 February 2011
c. Lifestyle choices e.g. is an obese patient obliged to follow medical advice to lose weight.

d. Negligent self-harm cases e.g. the plastered arm as a weapon.

32. In the first type of case the issue in deciding contributory negligence appears to be whether the Claimant was ‘of sound mind’ when self-harming: Reeves v Commissioner of Police for the Metropolis. If the Claimant was not of diminished mental capacity contributory negligence comes into play as normal, but if he had diminished mental capacity then the more seriously capacity is diminished the less responsibility the self-harmer will bear – Reeves 384-385:

[384] In Champagne v. United States of America, 513 N.W.2d 75, after examining a number of cases about comparative fault in cases of suicide including the Hickey case, the Supreme Court of North Dakota rejected the argument that, when a patient's act of suicide is a foreseeable result of a medical provider's failure to treat reasonably to prevent the suicide, it is never appropriate to compare the victim's act of suicide with the medical provider's fault. If the patient was capable of being responsible for his own care, allocation of fault was in order. But a mentally ill patient could only be held to the degree of care permitted by his diminished capacity. The worse the suicidal patient's diminished capacity, the greater the medical provider's responsibility.

I would apply that approach to the present case. The judge found that the deceased was of sound mind. One may question whether that is an appropriate description of a person who for no obvious reason decides to end his own life. But the judge felt that he was bound to proceed on the evidence and we also must accept that evidence. So there are no grounds for minimising the deceased's share of the responsibility on the basis of diminished mental capacity.

33. The rationale however is questionable; can serious self-harm (including suicide) ever be a rational response to a problem? In any event, the bizarre situation is that practitioners will need to consider medical evidence carefully in respect of the issue of ‘free will’ and diminished mental capacity.

34. In the second type of case the issue of contributory negligence has been left more open given the House of Lords decision in Corr v IBC. Lord Neuberger and Lord Mance thought in principle a reduction was possible but it was not sufficiently argued below;


32 [2008] UKHL 13; [2008] 1 AC 884 (HL)
Lord Bingham and Lord Walker thought no such reduction was possible as one could not attach blame to the Claimant's actions. Only Lord Scott (who in this part was dissenting) was unequivocally willing to make a finding of contributory negligence of 20%. Those who thought contributory negligence was possible adopted a similar analysis to that of Reeves considering the degree of impairment of the Claimant's ‘free will (sanity)’.

35. That leaves the claimant personal injury practitioner in a bizarre situation in which the greater degree of 'mental' impairment the higher the damages but the act itself (for example suicide) is not necessarily evidential of the 'mental' impairment. Although the principles are difficult to grapple in order to arrive at the right figure one must not settle at too high a degree of contributory fault (absent real doubts on causation). In the custodian case the contributory fault was 50% if the claimant’s mind was not ‘impaired’. But in the non-custodian case, Lord Scott (the only Lord to give a figure) put it at 20%.

g) The impact of agreeing contributory negligence
36. In Reddington v. South Yorkshire Fire and Rescue Authority,\(^{33}\) decided that a firefighter’s contributory negligence could constitute ‘default’ under his pension scheme so as to lead to a reduction of his pension entitlement. Reddington, as claimant in a civil action against the same defendant, had agreed to apportion liability in his civil claim 75:25 in his favour and a consent order had been made accordingly\(^ {34}\). The Crown Court reluctantly held that he was not estopped thereby from denying he was contributorily negligent because of both the vague wording used in the correspondence and the consent order and the differences between the issues in the negligence claim from those in the pension case. After exploring the facts, the court found he was not guilty of contributory negligence. Beware any express concession of contributory negligence on behalf of workers who may be entitled to an injury award, such as firefighters, police, military personnel and other emergency response workers.

h) Contributory negligence in the clinical context
37. The scope of contributory negligence in clinical negligence cases is very much untested – indeed for many legal practitioners in the UK there is no such thing as contributory

\(^{33}\)HHJ Robinson, unreported, in the Crown Court at Sheffield under case No. A2009/0105, judgment handed down on 28/07/11
\(^{34}\)set out at para 66 and compared to a consent order which would have created issue estoppel at para 78.
negligence in medical negligence cases. This however is a possible area of future litigation with patients being considered consumers who are offered more choice of both doctors and treatments, and so the argument goes, having greater responsibilities in their treatment than the ‘paradigm’ patient has hitherto borne.

38. **Pidgeon v Doncaster Health Authority**, a first instance decision by HHJ Bullimore - is the only reported clinical negligence case in the UK in which damages have been reduced for contributory negligence reduction. It involved a Claimant who had a smear test in 1988 that was negligently reported as negative. Unfortunately, owing to the Claimant finding the smear test embarrassing and painful, she did not have any subsequent smear tests (despite frequent reminders from the Health Authority) and in 1997 she was diagnosed with cervical carcinoma. It was held that the Claimant was two-thirds responsible. However the contributory negligence point was not the subject of detailed argument – there was no consideration of causative potency, nor was there any argument that other ways of smear/cancer testing could have been offered.

39. Clinical negligence cases are fraught with difficulty in causation, particularly in loss of chance cases. If the contributory negligence is more than 50%, does that break the chain of causation? Should a judge only consider a degree of under 50%? What is the ‘causative potency’ of the Claimant’s breach? In considering what is ‘just and equitable’ is the existence of the practitioner’s professional insurance relevant? What weight should be given to the desirability of affording an effective remedy to victims of clinical negligence? In a contractual claim arising out of private treatment, would the bar be set higher?

40. We shall now close by turning to two scenarios in which contributory negligence has been used in other jurisdictions and the possible response that may be used.

41. The first example is **Burnett v Kalokerinos**. This was case of the New South Wales (Australia) Court of Appeal in which the Claimant was found to have been 20% contributory negligent. After the birth of her second child the Claimant suffered heavy vaginal bleeding and visited her GP who eventually referred her to a specialist.

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35 [2002] Lloyd's Rep Med 130
36 (Unreported) NSW Court of Appeal, 24 December 1996
obstetrician and gynaecologist in a Tamworth. Tamworth was quite some distance for
her (as she had no car and would need to stay overnight which along with sorting out
childcare she could not afford to do) and the Claimant asked for an appointment with a
specialist closer in a town called Inverell. The Claimant claimed (which the Respondent,
the GP, denied) that the GP merely said “keep an eye on [the bleeding] and see if it
settles down”. The Claimant never went to the specialist in Tamworth but revisited
another doctor about 9 months after the date her GP had referred her – this doctor
diagnosed cervical cancer.

42. In Burnett the contributory negligence stemmed from her own delay in seeking medical
assistance given:

| …a reasonable person, placed in the position of [the Claimant] and with her knowledge that the bleeding could be caused by a developing cancer, would not have accepted [the Respondent] reassurances but would have sought other assistance… |
| …her failure to take any steps to seek medical attention for a condition which she knew was potentially very dangerous…constituted a failure to take reasonable care for her own safety. |
| …The majority of the damages should be borne by [the Respondent] for the reason that he, as her treating doctor, should have been alive to the serious risk and not let the matter rest when she said she could not attend the appointment which he had arranged… |

43. A possible counter to a plea of Burnett style contributory negligence (failure to
appreciate severity of condition and follow through on doctor’s scheduled appointment)
is that it places too much emphasis on the knowledge of patients.

44. If the breach involves a doctor not adequately warning of a danger (as in effect the Court disagreed with the Respondent’s version of events that he did not have such a blasé attitude) than a Claimant cannot be liable for not foreseeing that very danger. It was accepted that the Claimant asked for an appointment elsewhere. The causal link was established for there to be liability. There were socio-economic reasons put forward for not visiting the specialist which must have been accepted for causation to be met.
Further, as the Claimant was not fixed with any knowledge from visiting the Respondent a ‘reasonable patient’ would not necessarily have acted any differently. It is ‘just and equitable’ for the medical practitioner or relevant health authority to be completely liable

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as it is the one who has the requisite knowledge to pass on and if there is no breach for not passing on or adequately informing the patient it can rely on no causation.

45. The second example is **Locher v Turner**\(^{37}\). This was case of the Queensland Court of Appeal in which the Claimant suffered a 20% reduction to his claim of clinical negligence by virtue of his contributory negligence. The GP in **Locher** failed to conduct proper investigations of the Claimant’s colon cancer – the result being too late a diagnosis for effective treatment. The failure to conduct a proper investigation included not asking if the patient was still suffering the rectal bleeding at the consultation that occurred in November 1992 (this symptom had been mentioned at earlier consultations in May 1992 and September 1992).

46. A possible counter to a plea of **Locher** style contributory negligence (failure to appreciate severity of condition and follow through on doctor’s advice) is that it fails to appropriately regard the lack of medical knowledge (patients will often reveal lots of irrelevant information – the bane of medical practitioners) of a patient and the difficulty in discussing health topics. Once again causation was established this is not a case in which there was deliberate non-disclosure. The fault lies in not asking the correct question or not making the patient sufficient comfortable in disclosing of their own accord. If the latter troubles those in the medical profession it should not – you can have lousy patient care so long as you ask the right questions and you will not be liable. The doctor had been even given the relevant information on previous occasions and in should therefore have followed this up if the symptom is of medical significance (if it is not there would be difficulty in establishing causation if it later transpired there was a failure to diagnose).\(^{38}\)

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**Martin Seaward**  
**Nathaniel Caiden**  
15\(^{th}\) September 2011

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\(^{38}\) Interestingly in a failed clinical negligence case in NSW it was stated *obiter* that the Defence had made the right decision not to pursue at trial contributory negligence as it was probably not contributory negligence in for a patient not to provide a complete and accurate medical history to the defendant. **Kocev v Toh** MLC 1631 (Australia: NSW DC, Hungerford ADCJ, July 9, 2009).