McCabes

Contributory Negligence Summaries

October 2022

Seat Belt Cases		
Kluenner v Kljijic [1979] VSC 113	The Plaintiff was an unrestrained front seat passenger in a taxi travelling at night on a gravel road. They did not put a seat belt on upon entering the taxi and fell asleep. The taxi collided with another vehicle while overtaking a car in front of him that was turning right. There was limited evidence as to the Defendant's conduct and after an assessment of the Defendant's negligence and the Plaintiff's omission, 50% contributory negligence was found on the part of the Plaintiff. The Plaintiff's appeal was dismissed on the basis there was no error established.	50%
Nominal Defendant v Campbell, Green & Golding [2013] NSWCA 219	The first Plaintiff was travelling as a front seat passenger in a vehicle driven by her intoxicated twin brother. She was not wearing a seat belt. The Court of Appeal upheld the decision of the trial judge who reduced the first Plaintiff's damages by 35%. The second and third Plaintiffs were travelling in the boot of the same vehicle. The Court of Appeal upheld the decision of the trial judge who reduced the second and third Plaintiffs' damages by 40%. In each case, the Court found the Defendant's intoxication contributed to the accident and the Plaintiffs' lack of restraint contributed to their injuries.	35% - 40%
Benning v Richardson [2021] ACTSC 34	The Plaintiff was drinking in a pub with several friends including the Defendant driver. Although the Plaintiff was uncertain how many alcohol drinks she had consumed whilst at the pub, it was clear from both the subsequent blood analysis and from the CCTV footage of the group leaving that she was well under the influence of alcohol when departing. The group previously planned to return home by taxi but this was abandoned despite the ready availability of taxis at the pub. The group instead decided to drive home. The Defendant's blood alcohol reading was 0.190. The Plaintiff was the front seat passenger, she had no memory of entering the vehicle and could not remember if she had fastened her seatbelt. The Defendant lost control of the vehicle and collided with a tree. The Plaintiff struck the windscreen with her face and her left shoulder as well sustaining serious injuries to her ankles. The Defendant alleged the Plaintiff had interfered with the control of the vehicle by taking hold of the steering wheel and 'ripping' it out of his hands. The court did not accept this allegation and found the Defendant did not discharge the onus to prove the Plaintiff interfered with the steering. The Judge assessed 35% contributory negligence for the Plaintiff's failure to wear a seat belt and knowingly being in a car with an intoxicated driver. Her intoxication did not negate her own negligence when making that decision.	35%
Allen v Chadwick [2015] HCA 47	The Plaintiff sustained serious spinal injuries which rendered her a paraplegic when the vehicle she was travelling in as a rear seat passenger collided with a tree. The Defendant driver had been drinking alcohol prior to the collision and had a blood alcohol level of 0.229 %. Prior to the collision, the Plaintiff, the Defendant, and a friend decided to buy cigarettes. Initially, the Plaintiff was driving but she stopped to relieve herself. Upon returning to the vehicle, she was presented with the Defendant in the driver's seat telling her to get in as a passenger. Despite an argument about who should drive, the Plaintiff entered as a	25%

	passenger and the Defendant drove until he lost control. The Plaintiff was not wearing a seat belt. The court found the Defendant's intoxication contributed to the accident and the Plaintiff's lack of restraint contributed to her injuries.	
Tabe v Stanbury & Kumar [1988] SASC 826	The Plaintiff sustained a serious head injury as she was lying on her back, unrestrained, in the rear of a station wagon that collided with another vehicle. The Plaintiff was 6 or 7 months pregnant at the time. The Judge found the Plaintiff failed to have sufficient regard for her own safety and would not have sustained such severe injuries if she was wearing a seat belt and had been seated in a more or less normal position.	15%
Densley v Nominal Defendant (Queensland) & Ors [1993] QSC 160	The Plaintiff had acquired an old and unregistered vehicle (it was unclear if it was purchased or stolen). He was 15 years old when travelling, unrestrained, in the vehicle being driven by his friend, an inexperienced driver, in a convoy with two other vehicles. During the drive, the vehicle's engine slipped off its mounts. The Plaintiff and his friends used a tree to lever it back on to the mounts and continued their journey. The road was wet from rain. As the vehicle negotiated a sharp bend, it lost control. The Plaintiff was thrown from the car and sustained severe brain damage. The Defendant alleged the Plaintiff contributed to his own injury by consenting to be driven by an inexperienced driver in an old, mechanically unsound motor vehicle and by not wearing a seat belt. The Judge found that there was nothing about the vehicle that should have alerted the Plaintiff to danger due to mechanical defects in the car. There was nothing to suggest that the failure of the car to "take" the curve in the highway was due to anything other than the Defendant's negligent driving. The Judge found that had the Plaintiff worn a seatbelt, his injuries would have been significantly less severe, giving rise to 20% contributory negligence.	20%
Alcohol Cases - Drivers		
Mackenzie v The Nominal Defendant [2005] NSWCA 180	The Plaintiff was the pillion passenger on an uninsured motorcycle ridden by the Defendant. The Defendant and the Plaintiff were both heavily affected by alcohol. The motorcycle ran off the road and Plaintiff was severely injured.	80%
March v E & MH Stramare (1991) 65 ALJR 334	The intoxicated Plaintiff was the driver of the vehicle and collided with an illegally parked vehicle.	70%
Watt v Bretag (1982) 56 ALJR 760	The Plaintiff overtook another vehicle on the crest of a hill at speed and whilst intoxicated.	60%
Alcohol Cases – Passengers		

Mackenzie v The Nominal Defendant [2005] NSWCA 180	The Plaintiff was the pillion passenger on an uninsured motorcycle ridden by an inexperienced rider. The Plaintiff owned the motorcycle and invited the rider to take control of the motorcycle despite knowing that he was inexperienced. The motorcycle ran off the road.	80%
Joslyn v Berryman [2003] HCA 34	The Plaintiff and the Defendant attended a party in a remote country location, and each proceeded to drink alcohol steadily until approximately 4am. After a short period of sleep, the Defendant drove the Plaintiff to Mildura for breakfast. On the way back, the Defendant noticed that the Plaintiff was falling asleep at the wheel and insisted upon driving. Shortly afterwards, the vehicle rolled over and the Plaintiff was seriously injured.	60%
Fitzgerald v Dansey [2001] NSWCA 339	The Plaintiff was a passenger in a utility driven by the Defendant. Both the Plaintiff and Defendant were 'moderately affected' by alcohol. During the journey, the Plaintiff crawled out of the cabin, through a small window, and sat on the rear tray of the vehicle. The Defendant tried to stop the Plaintiff but continued to drive. After sitting for a period, the Plaintiff decided to stand up. At the same time, the Defendant drove around a bend and the Plaintiff lost his balance, causing him to fall from the vehicle and suffer serious injury. The Court of Appeal found that standing up was the immediate cause of the Plaintiff's injury. The negligence of the defendant amounted to a failure to save the plaintiff from his own folly. While the Court found the apportionment of equal blame by the Trial Judge was generous to the Plaintiff, it was open to him on the basis that each party was in control of the situation. The finding of 50% contributory negligence was upheld.	50%
Chan v Heak (2011) NSWCA 420	The Plaintiff was a passenger in a car driven by the Defendant which swerved to avoid another car, left the road and collided into a power role. Both the Plaintiff and the Defendant had been in each other's company between 5pm and 12.30am, drinking and playing poker machines. Expert evidence found the Defendant had consumed the equivalent of 9 schooners of full-strength beer during this period, mostly paid for by the Plaintiff. After the accident, the Claimant returned a BAC of 0.092 and the driver returned a BAC of 0.197. Expert evidence considered this was probably higher at the time of the accident. At first instance, the trial judge found the Plaintiff could have returned home by other means and the Plaintiff did not suggest to the Defendant to wait longer in the car park while they sobered up. Waiting in the car park also indicated the Claimant knew there was a problem if the Insured were to drive. On appeal, the Plaintiff challenged the 40% contributory negligence finding on the basis it was excessive and unjust, and argued that a 25% finding was more appropriate. The Court of Appeal found the 40% deduction was within the range open to the Trial Judge on the evidence.	40%

Benning v Richardson [2021] ACTSC 34	The Plaintiff was drinking in a pub with several friends including the Defendant driver. Although the Plaintiff was uncertain how many alcohol drinks she had consumed whilst at the pub, it was clear from both the subsequent blood analysis and from the CCTV footage of the group leaving that she was well under the influence of alcohol when departing. The group previously planned to return home by taxi but this was abandoned despite the ready availability of taxis at the pub. The group instead decided to drive home. The Defendant's blood alcohol reading was 0.190. The Plaintiff was the front seat passenger, she had no memory of entering the vehicle and could not remember if she had fastened her seatbelt. The Defendant lost control of the vehicle and collided with a tree. The Plaintiff struck the windscreen with her face and her left shoulder as well sustaining serious injuries to her ankles. The Defendant alleged the Plaintiff had interfered with the control of the vehicle by taking hold of the steering wheel and 'ripping' it out of his hands. The court did not accept this allegation and found the Defendant did not discharge the onus to prove the Plaintiff interfered with the steering. The Judge assessed 35% contributory negligence for the Plaintiff's failure to wear a seat belt and knowingly being in a car with an intoxicated driver. Her intoxication did not negate her own negligence when making that decision.	35%
Pedestrian Cases – Driver at Fault		
Turkmani v Visvalingam [2009] NSWCA 211	The Defendant drove through the intersection of Fox Valley Road and the Comenarra Parkway. The lights were green in his favour. The Deceased jogged in front of the waiting vehicles, within the pedestrian crossing, and was run down by the Defendant. The Defendant was travelling at 40 to 50 kph.	80%
Hawthorne v Hillcoat [2008] NSWCA 340	The Plaintiff was struck by the Defendant’s motor vehicle whilst walking along a dark and poorly lit roadway late at night in a traffic lane.	80%
Zanner v Zannner [2010] NSWCA 343	The Plaintiff sustained serious injuries as she was directing her 11-year-old Defendant son who was parking a vehicle at her home. The son's foot slipped onto the accelerator causing the vehicle to collide with the Plaintiff. The Defendant had some limited experience parking a different car, having done so with his father on 5 or 6 prior occasions.	80%
Cook v Hawes [2002] NSWCA 79	The Plaintiff emerged from the QVB and ran across George Street against a red pedestrian light despite other pedestrians standing on the kerb, waiting for the lights to change. The Defendant was travelling along George Street towards Circular Quay at 50 kph and was confronted with the Plaintiff moving at a fast pace across his path from the left.	75%
T and X Company Pty Ltd v Chivas [2014] NSWCA 235	The Defendant drove down Market Street. He had a green light permitting him to cross George Street. As he approached the intersection, two men ran across Market Street, ignoring the red pedestrian light. The men passed in front of the Defendant’s vehicle and the Defendant did not slow down. The Deceased man ran onto Market Street	75%

	behind the other men and was fatally injured when hit by the vehicle.	
Vale v Eggins [2006] NSWCA 348	The Defendant was driving along Anzac Parade. The Plaintiff stumbled across the Defendant's lane. The Plaintiff appeared to see the Defendant's vehicle approaching him and stumbled away from the line of travel. Seconds before impact, however, the Plaintiff, without warning, "quickly stumbled" back into the Defendant's path.	75%
Manley v Alexander [2005] HCA 79	The Plaintiff was lying in the middle of a remote, country road in the early hours of the morning. The Defendant driver was focussed on another pedestrian on the side of the road and failed to see the Plaintiff.	70%
Allianz Australia Insurance Limited v Glenn Swainson [2011] QCA 136	The Plaintiff was walking the 6 km distance home from the local hotel and deciding to hitch hike (despite having his bicycle available to ride home from the pub). To increase the likelihood of being picked up by a passing motorist, the Plaintiff walked within the 'fog line' on the left-hand side of the road and on the journey, the Defendant collided with the Plaintiff on one of the darker stretches of road.	60%
Steen v Senton [2015] ACTCA 57	The Plaintiff was a pedestrian in a country town. He was eating a hamburger and crossed the westbound lane. As he stepped across the centreline into the eastbound lane, he came into collision with the Defendant. Each party had an equal opportunity to see each other.	50%
Jones v Bradley [2003] NSWCA 81	The Plaintiff hurried across the Princes Highway without the aid of a pedestrian crossing and without regard for the passing vehicles. This action caused one driver to brake hard and swerve to miss her. However, the Plaintiff continued to cross and was run down by the Defendant. Both the Plaintiff and the Defendant were affected by alcohol or drugs.	50%
Gordon v Truong [2014] NSWCA 164	The Plaintiff was crossing Regent Street, Chippendale when struck by the Defendant's vehicle. The Defendant was travelling between 40 kph to 50 kph. The Plaintiff would have had six seconds to perceive the Defendant's vehicle. Expert evidence established that it would have taken the Plaintiff no more than six seconds to cross from the kerb to the median strip. The Plaintiff did not see the Defendant's vehicle until a second before the impact.	35%
Boral Bricks Pty Ltd v Cosmidis (No 2) [2014] NSWCA 139	The Plaintiff was hit from behind by a forklift in an industrial area. The Plaintiff was wearing a hi-vis vest. He did not hear the forklift approaching because he was wearing earplugs. The Plaintiff was aware of a sign stating that forklifts were used in the area.	30%
Taheer v AAMI [2010] NSWCA 191	The Plaintiff was walking across Helena Street in Auburn when she was struck by a vehicle being driven the Defendant. The accident occurred at night time and the Plaintiff was wearing dark clothing. The driver's headlights were not illuminated. The Plaintiff had almost crossed the road when struck.	30%

Nominal Defendant v Meakes [2012] NSWCA 66	The Plaintiff was run down by a taxi on a busy city street. He was crossing on a marked pedestrian walkway between gridlocked vehicles, whilst walking at a fast pace. He did not look at oncoming traffic.	25%
Pedestrian Cases – Driver Blameless		
Davis v Swift [2014] NSWCA 458	The Plaintiff stepped backwards from the middle of the road into the path of the Defendant's vehicle, which was pulling away from a parking lane.	80%
Axiak v Ingram [2012] NSWCA 311	The Plaintiff was 14 years old. She and her younger sister alighted from a school bus. The girls walked towards the rear of the bus and then ran across the northbound traffic into the southbound lane, into the Defendant's path. The Defendant slowed from 80 kph to 40 kph when he saw the flashing lights on the bus. His view of the girls was, however, obscured by the bus. Despite braking immediately, the Defendant's vehicle hit the Plaintiff.	50%
Bicycle Cases		
Cheng v Geussens [2014] NSWCA 113	The Plaintiff was riding his bicycle on the footpath of Coogee Bay Road. The Defendant was driving along Carrington Road at the intersection with Coogee Bay Road. As the Plaintiff attempted to cross Coogee Bay Road, the Defendant's vehicle was proceeding across the intersection and a collision resulted.	67%
Yip v Zreika [2001] NSWCA 446	The Plaintiff rode a bicycle down a sloping driveway, across a level footpath and out onto a road. He knew that the bicycle had no brakes. The Defendant turned into the street at a point 40 metres away and collided with the Plaintiff.	50%
Nettleton v Rondeau [2014] NSWSC 903	The Plaintiff rode his bicycle on a road when the Defendant's vehicle emerged from a driveway between parked cars. Apart from an initial glimpse, the Defendant could not see passing traffic until she had cleared the line of parked vehicles. The Defendant could have taken a longer route which would have caused less risk.	25%
Itskos v The Nominal Defendant [2021] NSWDC 244	The Plaintiff was riding his motorcycle when he was struck by an oncoming unidentified vehicle which crossed onto his side of the road. However, the Plaintiff was able to see the unidentified vehicle and take evasive action. The collision caused the Plaintiff to lose control of his motorcycle and sustain injuries.	10%
Driver versus Driver Cases		
Ayre v Swan [2019] NSWCA 202	The Defendant attempted to make a right hand turn into a driveway. At the same time a car and a motorcycle driven by the Plaintiff were travelling in the opposite direction. The Plaintiff was travelling directly behind the car, such that the Defendant's view of the Plaintiff was obstructed. The Defendant commenced turning right, without coming to a complete stop. At the same time, the Plaintiff increased his speed, passing the car on the inside, resulting in the	80%

	Plaintiff colliding with the back passenger side of the Defendant's vehicle, sustaining injuries.	
AV Jennings v Maumill (1956) 30 ALJ 100	The Plaintiff driver elected to risk overtaking parked cars whilst approaching a curve knowing there was insufficient room for 3 vehicles abreast on the road.	66%
Watt v Bretag (1982) 56 ALJR 760	The Plaintiff overtook another vehicle on the crest of a hill at speed and whilst intoxicated.	60%
Nominal Defendant v Bacon [2014] NSWCA 275	The Plaintiff was driving at approximately 80 km/h along an unsealed road. The First Defendant was driving a semi-trailer in the opposite direction. Both vehicles were travelling in the middle of the unsealed road 'on the beaten track', which was the section of the road where the ground had been compacted or beaten by the wheels of vehicles travelling along the centre of the road. The Plaintiff was driving in a cloud of dust created by a prime mover that was travelling at approximately 60 km/h in front of her. The prime mover was being driven by the Second Defendant. The Plaintiff gave evidence that she could only see a car length in front of her and, as the dust thickened, she veered slightly to the left side of the road. The First Defendant saw the prime mover being driven in the opposite direction and moved his semi-trailer to the left side of the road and off the beaten track. It was found that after, or as the two trucks were passing one other, the Second Defendant moved his semi-trailer to the right and back 'on the beaten track' before it collided with the Plaintiff's vehicle.	50%
Gable v Carlyle [2001] NSWCA 134	The Plaintiff was riding a motorcycle at 45 kph in the left lane of the F4 freeway. The Plaintiff moved into the breakdown lane on his left to get a clear view of the traffic ahead. The Defendant, travelling in the same direction at between 60 kph to 70 kph overtook some vehicles by also moving into the breakdown lane and a collision resulted.	40%

Further Information

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