



'Mostly At Fault' Guidelines



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Circumstances where greater than 61% contributory negligence arguable

Single Vehicle Accidents

- The accident was caused by the driver's actual fault, such as speeding, misjudging a corner or driving whilst intoxicated (as distinct from, for example, a bee sting or an unexpected medical emergency).

Vulnerable Claimants

- The injured motorcyclist, pedestrian or bicyclist failed to take reasonable steps for their own safety despite their vulnerability to serious injury.

Alcohol Cases – Passengers

- The injured passenger was aware that the driver was heavily intoxicated and voluntarily entered the vehicle; and
- Some additional factor was at play such as knowledge that the driver was inexperienced OR the passenger abdicated control of the vehicle to the intoxicated driver.

Alcohol Cases – Drivers

- Most cases where the injured driver was intoxicated and their intoxication contributed to the accident (although most intoxicated drivers will be guilty of a serious driving offence and precluded from any statutory benefits by s 3.37)

Pedestrian Cases – Driver at Fault

- The injured pedestrian was reckless to the presence of vehicles; and
- The injured pedestrian gave the driver little time to react because they were running, or because they stepped into the path of the vehicle at the last moment or because they were difficult to see due to poor lighting.

Pedestrian Cases – Driver was Blameless

- The injured pedestrian was an adult and capable of assessing the risk of crossing the road.

Driver v Driver Cases

- The injured driver exhibited an extra degree of recklessness by, for example, overtaking on a crest or curve.

How to use these Guidelines

Where an injured person is ‘*mostly at fault*’, their statutory benefits cease after 26 weeks – ss 3.11 and 3.28 of the *Motor Accident Injuries Act 2017 (MAIA)*. ‘*Mostly at fault*’ is defined in s 3.11(2) to be “*greater than 61%*” contributory negligence.

Even if an injured person is not mostly at fault, their weekly payments may be reduced after 26 weeks by the extent of their contributory negligence – s 3.38 of MAIA.

The assessment of contributory negligence is always difficult because multiple variables are at play and no two cases are exactly the same. It is impossible to define, with precision, when contributory negligence will be assessed over 61%. Based on the contributory negligence case summaries, however, these guidelines may assist in assessing whether it is likely that the injured person’s contributory negligence exceeds 61%.

Contributory Negligence Summaries

Seat Belt Cases

Kluenner v Kljijic VSC 23 March 1979	The Plaintiff was an unrestrained front seat passenger in a vehicle travelling at night on a gravel road.	50%
Taber v Stanbury (1988) 8 MVR 48	The Plaintiff sustained a head injury as she was lying on her back, unrestrained, in the rear of a station wagon.	20%
Densley v Nominal Defendant QSC 15 June 1993	The Plaintiff suffered severe brain damage whilst unrestrained.	20%
El Khouri v Weddley NSWSC 25 Aug 1992	The Plaintiff was lying across the back seat of a vehicle without a seatbelt.	15%

Alcohol Cases – Drivers

March v E & M H 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 motor cycle ridden by an inexperienced rider. Both the Plaintiff and the rider of the motor cycle were heavily affected by alcohol. The Plaintiff owned the motor cycle and invited the rider to take control of the motor cycle despite knowing that he was inexperienced. The motor cycle ran off the road and the appellant was severely injured.	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 4 am. 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. The Plaintiff had a BAC of 0.190 at the time of the accident and that the Defendant's BAC was 0.138. Additionally, the Plaintiff had been disqualified from driving for a period of three years following a drink driving offence and was unfamiliar with the vehicle in question which had a faulty speedometer and a propensity to roll over.	60%

Alcohol Cases – Passengers (cont.)

Fitzgerald v Dansey [2001] NSWCA 339	The Plaintiff was a passenger in an utility driven by the Defendant. Both parties were intoxicated. 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.	50%
Nominal Defendant v Campbell [2013] NSWCA 219	The Plaintiff was injured when the vehicle he was travelling in hit a power pole. The driver was affected by alcohol and had a BAC of 0.09. The parties all drank together during the evening, but the accident occurred some 25 kms away. The Plaintiff was not wearing a seatbelt.	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%
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 and was fatally injured when hit by the vehicle.	75%

Pedestrian Cases – Driver at Fault (cont.)		
Vale v Eggins [2006] NSWCA 348	The Defendant was driving along Anzac Parade in Chifley. 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%
Steen v Senton [2015] ACTCA 57	The Plaintiff was a pedestrian in Cowra. 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 in order 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. The Plaintiff was suffering from the effects of two to four Rohypnol tablets, whereas the Defendant had a blood alcohol concentration of 0.150.	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. Significantly, the Plaintiff 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%
Driver versus Driver Cases		
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%
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

For further details about the content in this publication please contact:



Peter Hunt **Principal**
peter.hunt@mccabes.com.au
+61 2 8231 6284
+61 414 425 879