

# Guidance note



## Contributory Negligence

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This guidance note relates to the *Motor Accident Injuries Act 2017* (the Act) and the Motor Accident Guidelines made under that Act published by the State Insurance Regulatory Authority (SIRA). It provides information and guidance for insurers on contributory negligence. This information is guidance only and cannot be used for legal advice.

### Contributory Negligence

Contributory negligence is where a person does something (or fails to do something) which contributes to the accident or the severity of their injury. Each case will depend on its own facts. Depending on the circumstances, contributing to an accident could occur by a pedestrian not keeping a proper lookout when crossing a road or by a driver of a car involved in an accident with other cars. A person may contribute to the severity of their injuries, such as a motorcyclist not wearing a helmet or a passenger in a car not wearing a seatbelt.

Where there is evidence to suggest contributory negligence, an insurer may assess contributory negligence anywhere from 0% to 100% depending on the evidence available and relevant case law.

### Decision timeframes

When a claim for statutory benefits has been made, contributory negligence must be assessed within 9 months after the claim has been made when determining the entitlement to benefits beyond 52 weeks. There can be no reduction to entitlements within the first 52 weeks for contributory negligence.

The decision for liability beyond 52 weeks should be reviewed at a later stage if new information becomes available. There are scenarios under [section 3.38\(2\)](#) of the Act in which a finding of contributory negligence must be made.

### Impact of contributory negligence decision on statutory benefits claim

If the claimant is entitled to weekly payments of statutory benefits after 52 weeks, the payments are to be reduced on account of contributory negligence by:

- a) the percentage fixed by regulation; (no percentage is currently fixed by regulation)
- b) a percentage agreed between the insurer and claimant; or
- c) a percentage determined by the Dispute Resolution Service (DRS).

This will not affect the claimant's access to treatment and care which are not reduced by any percentage for contributory negligence.

If the level of contributory negligence is greater than 61%, then ongoing benefits are no longer payable. Therefore, the allegation of contributory negligence is significant and may have significant impact on the claimant's entitlements.

If the claimant is a Lifetime Care participant, the insurer is required to notify Lifetime Care and Support Authority before any adverse decisions are made.

### **Impact of contributory negligence decision on common law damages claim**

Contributory negligence is also relevant for common law claims. [Section 4.17\(2\)](#) of the Act lists cases in which contributory negligence must be found. Common law damages are to be reduced on account of contributory negligence as outlined in [section 4.17\(3\)](#) of the Act.

The contributory negligence percentage used for a statutory benefits claim may not be the same as for a common law claim. This percentage for a common law claim may be determined by the DRS claims assessor or Court.

### **Considerations when determining contributory negligence**

The insurer must consider:

- the facts and circumstances of the accident
- the facts and circumstances of the injuries
- the age, capacity and knowledge of the claimant
- the available evidence and its quality
- the Act, regulations and guidelines
- relevant legal precedents
- whether it is a no-fault accident

Depending on the insurer's knowledge, experience and delegated authorities, they may need to speak with a trained and experienced technical advisor or manager about which legal precedents should be relied on (if relevant).

### **Communicating a contributory negligence decision**

Initially, the decision should be delivered via phone to allow the claimant to ask any immediate questions. If the information is confusing or potentially worrying to the claimant, calling them in the first instance gives the insurer the opportunity to ensure the claimant has access to support, such as their GP, or providing them with the contact details for CTP Assist.

Ultimately, the decision must be delivered in writing. The correspondence must be in plain English with clear details of what the impact on their entitlements will be and an outline of the legal precedent the decision has been based on. The correspondence must also outline the insurer's internal review process and the contact details of CTP Assist.

### **Options for claimant's to further understand contributory negligence**

A claimant may contact CTP Assist on 1300 656 919 for assistance in relation to any aspect of their claim.

The claimant may request an internal review and this request must be made within 28 days of the claimant receiving the decision. While the claimant can submit a request for an internal review after 28 days, the insurer does not have to accept the application (in which case the claimant will not be able to seek an internal review).

### **Further information**

More information regarding contributory negligence including some specific examples can be found on the SIRA website - search [contributory negligence](#)

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