

SOUTH AFRICAN LAW REFORM COMMISSION

PROJECT 96

THE APPORTIONMENT OF DAMAGES ACT 34 of 1956

REPORT

JULY 2003

(iii)

**TO DR PM MADUNA, MINISTER FOR JUSTICE AND CONSTITUTIONAL
DEVELOPMENT**

I am honoured to submit to you in terms of section 7(1) of the South African Law Reform Commission Act, 1973 (Act 19 of 1973), for your consideration the Commission's report on the Apportionment of Damages Act, 1956 (Act No 34 of 1956).

**MADAM JUSTICE Y MOKGORO
CHAIRPERSON
JULY 2003**

INTRODUCTION

The South African Law Reform Commission was established by the South African Law Commission Act, 1973 (Act 19 of 1973).

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This report will be made available on the Commission's Internet Website once the report has been submitted to the Minister.

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SUMMARY

1. The Apportionment of Damages Act 34 of 1956 (“the Act”) is reviewed in this report. Since the Act was passed, there have been major developments in the law of delict. The traditional sphere of application of the law of delict has been extended considerably. The courts have extended Aquilian liability to negligent misstatements causing pure economic loss; and to negligent misstatements inducing contract; allowed concurrence of delictual and contractual actions in certain circumstances; and held that a collecting banker who negligently collects payment of a cheque can be held liable under the extended Aquilian action for pure economic loss. These changes in the law of delict were not envisaged by the legislature at the time of the enactment of the Act. The Act has been unable to accommodate these developments and this has led to anomalies in this area of the law. There is an urgent need for legislative intervention to remove these anomalies.

2. Under the Act fault is the sole criterion of apportionment. The courts have traditionally interpreted fault in the Act to mean negligence and to exclude intentional wrongdoing. The Commission recommends that so far as fault is used as a basis for or factor in apportionment, it should include both intention and negligence. This is achieved in the draft Bill by using the term “fault” in section 3(2)(b)(iii) in its ordinary and accepted sense of including both intention and negligence and by expressly referring to intention in the definition of “wrong” in section 1.

3. The Commission advocates a broader basis for apportionment than fault. The Commission recommends that fault should be one of a wide range of relevant factors which the courts are to consider in attributing responsibility for the loss suffered. Section 3(1) of the draft Bill requires the court to attribute the responsibility for the loss suffered in proportions that are just and equitable. Subsection 2 states that the court must take into account all relevant factors, including

- (a) the relationship between the parties;
- (b) the nature, quality and causative effect of –
 - (i) the acts and omissions of the wrongdoer or of each joint wrongdoer;
 - (ii) the plaintiff’s failure, if any, to act with due regard to his or her own interest; and
 - (iii) any fault on the part of the plaintiff or any wrongdoer.

The court is left with a complete discretion with regard to the method of determining appropriate proportions having regard to all relevant factors. Responsibility means more than fault and will allow the courts to consider a much wider range of factors including the causative potency of the parties’ acts.

4. Due to the use of fault in the form of negligence as the sole criterion of apportionment, the courts have interpreted the Act as being applicable to delictual claims only. The Act could not be applied to contractual claims because fault is not always a requirement of breach of contract although it may be present on some occasions. The term “responsibility” is wide enough to include strict liability, to cover both fault (on the part of (joint) wrongdoer(s)) and failure to have proper regard for one’s own interests (on the part of the plaintiff) and is also wide enough to be applicable in the contractual as well as the delictual contexts. With the broader basis for apportionment advocated in the draft Bill, it is possible to extend apportionment to other areas of the law.

5. The Commission recommends the extension of apportionment to contractual claims where there is liability for breach of a duty of care owed in contract. The Commission recommends that apportionment should apply to all breaches of statutory duty irrespective of whether fault is present. The Commission supports the application of the draft Bill to all cases covered by the definition of wrong, which includes strict liability in delict. The Commission also considered whether the operation of the Act should be extended to breaches of fiduciary duty, including breaches of trust. The Commission decided to define “wrong” widely to include “other legal duty” in order to include other acts or omissions giving rise to civil liability. This would allow a court to include, where appropriate, breaches of fiduciary duties giving rise to loss.

6. Joint wrongdoers and the right to contribution are two further aspects which required attention. The Commission recommends that “joint wrongdoer” be expressly defined in the Act and that it be specified that joint wrongdoers who are liable in terms of vicarious liability qualify as joint wrongdoers. Joint wrongdoers are defined as follows in section 1 of the draft Bill:

“**joint wrongdoer**” means each of two or more wrongdoers whose wrongs gave rise to the same loss, and includes –

- (a) a person who is vicariously liable for any act or omission of the wrongdoer;
- (b) a person who would have been a joint wrongdoer but for the fact that he or she is married in community of property to the plaintiff;
- (c) an injured person or the estate of a deceased person where it is alleged that the plaintiff has suffered loss as a result of the injury to or death of such person and such injury or death was attributed to a wrong committed partly by such injured or deceased person and partly by any other person”.

7. The question of whether and to what extent joint wrongdoers should continue to be liable *in solidum* or whether the rule should be changed in favour of separate (or several)

liability has elicited strong comment from contributors to the discussion paper who recommended a move to proportionate liability. They have argued strongly that the principle of joint and several liability should be abolished and substituted by a system of proportionate liability whereby each wrongdoer would be liable in proportion to his or her fault. Although the Commission recognises the force of these arguments in favour of full proportionate liability, it is not at this stage convinced that there should be any change in the law in this regard. The Commission is therefore of the view that the joint and several liability rule should remain unchanged.

8. The present procedure for proceeding against joint wrongdoers is inadequate. Joint wrongdoers are jointly and severally liable for the same damage. The plaintiff is entitled to recover his or her entire loss from any one of the joint wrongdoers. Although one of the prime objectives of legislation on this subject should be to limit litigation, the Commission believes that the plaintiff should be allowed to decide how to proceed in order to receive full compensation for his or her loss with the least amount of effort. The Commission is opposed to any rule which might result in unfairness to the plaintiff.

9. The Commission proposes the following procedure.

9.1 The plaintiff may sue any one of the joint wrongdoers for the full amount of the damages payable to him or her or may sue two or more wrongdoers in the same action subject to the condition that the plaintiff must serve notice of the proceedings on all the other joint wrongdoers who are not sued in the action. (Sections 5(2) and 6(1) of the draft Bill).

9.2 Where the plaintiff enters into a settlement agreement with one joint wrongdoer in terms of which he or she accepts payment of an amount less than the loss suffered, the plaintiff may proceed against any of the remaining wrongdoers for the balance of the claim. (Section 7 of the draft Bill).

9.3 Where a joint wrongdoer discharges the plaintiff's claim in full, every other joint wrongdoer is released from liability to the plaintiff. (Section 8 of the draft Bill).

9.4 Where the plaintiff sues the first joint wrongdoer (J1) and is unsuccessful in recovering his or her damages or all his or her damages, he or she may sue another joint wrongdoer in a subsequent action. (Section 9(1) of the draft Bill). However, the plaintiff will have to show good reason for not having joined the joint wrongdoer in the first action and if he or she cannot, the court may impose a costs sanction.

9.5. In any subsequent action against another joint wrongdoer, any amount recovered from any joint wrongdoer in a prior action shall be deemed to have been

applied towards the payment of the costs awarded in the prior action in priority to the liquidation of the damages awarded in that action. (Section 9(3) of the draft Bill).

9.6. The plaintiff may not recover damages in excess of the full amount of his or her loss from all the joint wrongdoers. (Section 9(4) of the draft Bill).

10. While rejecting the abolition of the principle of joint and several liability, the Commission recognises the hardship that the rule may cause. The Commission is therefore of the view that it is necessary to improve the position of the defendant by implementing measures to liberalise the law of contribution.

11. The Commission recommends that the amount of contribution recoverable by one joint wrongdoer from another be determined on the same basis as prescribed in general for the apportionment of loss. (Section 10(1) read with section 3 of the draft Bill).

12. The Commission recommends that rights of contribution should be extended to include wrongdoers whose liability to a plaintiff differs, with the only common feature being that each caused the same loss (mixed joint wrongdoers). (Section 2(1) of the draft Bill read with the definition of wrong in section 1 of the draft Bill). The Commission recommends that the courts should be allowed a wide discretion as to the apportionment of liability including the right to allow a full contribution against a defendant depending on the facts of the case. (Section 10 read with section 3 of the draft Bill).

13. Section 10(2) of the draft Bill sets out the circumstances in which the first joint wrongdoer (J1) may claim a contribution from the second joint wrongdoer (J2). An important consideration is whether J1 can claim a contribution from J2 when he or she has not settled the plaintiff's claim in full. The Commission recommends that a joint wrongdoer who in good faith has paid or is obliged by judgment to pay an amount which exceeds the proportion of the loss for which he or she is responsible is entitled to recover a contribution from any other joint wrongdoer. Section 12(2) of the draft Bill states that the court must satisfy itself that the first joint wrongdoer has made arrangements to pay or secure the plaintiff's claim before granting a contribution order.

14. The Commission recommends that a joint wrongdoer whose liability to a plaintiff is limited or excluded by an agreement is not liable to pay by way of contribution a sum that exceeds the amount of his or her liability to the plaintiff. (Section 11(1) of the draft Bill).

15. The Commission proposes that a joint wrongdoer whose wrong consists of the failure to prevent another's intentional wrong or harm arising from that wrong is not liable to pay a contribution to that other person. (Section 11(2) of the draft Bill).

16. Section 12(1) of the draft Bill sets out the procedure to be followed in order to recover a contribution. In this regard the Commission recommends that a claim for a contribution may be made by a first joint wrongdoer against a second joint wrongdoer either in the action brought by the plaintiff by issuing a third party notice or in a separate (subsequent) action brought by the first joint wrongdoer against a second joint wrongdoer.

17. The effect of joinder under Rule 28(2) of the Magistrate's Court Rules is much more limited in scope than the joinder of a third party under Rule 13 of the High Court Rules. The finding of the magistrate is not binding on the party joined under Rule 28(2), and such joinder does not have the effect of avoiding a multiplicity of actions. The Commission recommends that the Rules Board be requested to consider introducing a third party procedure for the Magistrates' Courts similar to that contained in Rule 13 of the High Court.

18. The Commission recommends that provision should be made for the defendant who is unable to recover a contribution from one of the other defendants to apply for a secondary judgment having the effect of distributing the deficiency among the other defendants at fault in such proportions as may be just and equitable. (Section 13(1) of the draft Bill). In terms of the Commission's recommendation, the re-attribution of uncollectable contribution does not discharge the joint wrongdoer whose contribution is uncollectable from liability to pay a contribution. Costs incurred by a joint wrongdoer in an attempt to recover an uncollectable contribution should also be taken into account in determining the re-attribution of that contribution.

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Rabie v Kimberly Munisipaliteit 1991 (4) SA 243 (NC)
Randbond Investments (Pty) Ltd v FPS (Northern Region) (Pty) Ltd 1992 (2) SA 608 (W)
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S v Shange 1083 (4) SA 46 (N)
S v Zoko 1983 (1) SA 871 (N)
Sackville West v Nourse and another 1925 AD 516
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Santam Versekeringsmaatskapy Bpk v Letlojane 1982 (3) SA 318 (A)
Shield Insurance Co Ltd v Zervoudakis 1967 (4) SA 735 (E)
South British Insurance Company Ltd v Smit 1962 (3) SA 826 (A)
Strijdom Park Extension 6 (Pty) Ltd v Abcon (Pty) Ltd 1998 (4) SA 844 (A)

Swart v Scottish Union & National Insurance Co Ltd 1971 (1) SA 384 (W)
Thoroughbred Breeders' Association v Price Waterhouse 2001 (4) SA 551 (A)
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Union Government (Minister of Railways) v Lee 1927 AD 202
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Butterfield v Forrester (1809) 11 East 60
Davies v Mann (1842) 10 M & W 546
De Meza and Stuart vs Apple, Van Straten, Shena and Stone [1974] 1 Lloyds Rep 508 (QB)
Forsikringsaktieselskapet Vesta v Butcher [1989] 1 AC 852 (CA)
Quinn v Burch Brothers (Builders) Ltd [1965] 3 All ER 801 (QB); (1966) 2 All ER 283 (CA)
Sayers v Harlow Urban District Council [1958] 2 All ER 342 (CA)
Stapley v Gypsum Mines Ltd [1953] AC 663

New Zealand

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Rowe v Turner Hopkins & Partners 1982 1 NZLR 178 (CA)

CHAPTER 1

1. INTRODUCTION

A. ORIGIN OF THE INVESTIGATION

1.1 The inclusion of the investigation in the Commission's programme in 1994 resulted from a recommendation by the erstwhile project committee for the law of delict. The committee was of the opinion that the Apportionment of Damages Act, 34 of 1956 ("the Act") should be reviewed in its entirety as it causes several problems in practice. The committee found that there is uncertainty about the meaning of fault as defined in the Act and that problems are experienced with regard to the joinder of parties, to mention only two aspects. On 29 April 1994 the then Minister of Justice¹ approved the inclusion of the investigation in the Commission's programme.

B. WORKING METHODOLOGY

1.2 In order to conduct the investigation in a thorough and systematic manner and to promote community involvement in its work, the Commission at the inception stage invited² various role-players to bring to its attention any problems experienced with the Act in practice, and to suggest solutions to such problems. Eight submissions were received. The Commission sincerely thanks the various contributors for their submissions, and especially Advocates J J Gauntlett, SC and T J Nel who submitted a most comprehensive submission on behalf of the Parliamentary Committee of the General Council of the Bar of South Africa ("the GCB"). The Commission also records its appreciation to its former deputy chairman (and chairman of the original project committee), the Honourable Mr Justice PJJ Olivier, for his work on the project.

1.3 These submissions were taken into account in compiling the discussion paper which was subsequently published.³ The closing date for comment on the discussion paper was 30 November 1996. Ten submissions were received.⁴ Since the publication of the discussion paper in 1996, the Commission has had to give attention to other urgent projects

¹ Minister HJ Coetsee, MP.

² See July 1994 *De Rebus* 499.

³ *Discussion Paper 67: The Apportionment of Damages Act, 1956*, published in 1996.

⁴ See Annexure A for a list of the contributors.

related to transformation of the legal system. These have had high priority and the finalisation of this report has been delayed as a result.

1.4 The investigation received renewed attention in 2002 when research capacity became available. The work of the specialist advisers listed in Annexure B in finalising the draft report is also noted with gratitude.

C. HISTORICAL OVERVIEW

1.5 This report is concerned principally with shared responsibility for loss. Responsibility is usually regarded as individual. However, it is frequently possible to identify more than one cause for a particular effect and it is sometimes possible to assign responsibility for each cause to different persons. A person who fails to observe a legal responsibility to another will be responsible to him or her to make good that failure. If only one person is liable to another, rights of recovery are relatively straightforward. Where two or more people share liability, or the person who suffers damage also shares responsibility for his or her loss, liability must be apportioned. The courts must determine how each of the responsible persons should bear the loss caused by their actions. Apportionment of shared liability can present numerous practical and theoretical problems.⁵

1.6 At common law it was thought that liability could not be apportioned. Degree of fault seemed too vague a concept. Shared liability was regarded as an indivisible obligation for which all who shared liability were responsible.

(a) THE POSITION OF THE PLAINTIFF AT FAULT

(i) Roman and Roman-Dutch law

1.7 Originally in Roman law, due to the procedural formula applicable to the Aquilian action, a strict all-or-nothing approach prevailed. If somebody suffered harm through his or her own fault, he or she was denied recovery. Contributory negligence on the part of a plaintiff was a complete defence to a claim for damages. The judge only had the alternative to condemn in the full amount or to absolve the defendant.⁶ A person who was partly to blame for the damage to his or her person or property was not entitled to compensation from any other person contributing to that damage.⁷

⁵ British Columbia Law Reform Commission *Shared Liability* 7.

⁶ This principle appears from two texts in the *Digesta* dealing with general principles applicable to the Aquilian action, D.9.2.9.4 *in fine* (Ulpian) and D.9.2.31 (Paul). Olivier JA in *Thoroughbred Breeders' Association v Price Waterhouse* 2001 (4) SA 551 (A) refers to the commentary by Zimmermann *Law of Obligations* 1010.

⁷ D 9 2 9 4, 9 2 II pr, 9 2 28 pr-29, 9 2 30 4, 9 2 52 3; Voet Commentaries 9 2 17.

1.8 Two cases have elicited debate through the ages. The first is the case of the athlete who is training at javelin throwing, discussed in D.9.2.9.4. A slave is passing by and is injured by the javelin. If this happens on a proper sports field, the athlete is not held liable. If outside a recognised sports field, he is liable. Is this a case of contributory negligence? Or, rather, *volenti non fit injuria*?⁸

1.9 The second case is that of a barber who sets up his chair near a playing field. While shaving a slave, the barber's hand is hit by a ball thrown or kicked by one of the players. The slave is injured. The text (9.2.11pr) mentions three opinions, none of which applies an apportionment of damages. Mela says the one who is negligent is liable. But who is negligent: the player or the barber? Mela does not say. Proculus thinks the barber is negligent for setting up his chair in a dangerous place. Ulpian states that it is rightly said that the slave only has himself to blame because he entrusted himself to a barber who has his chair in a dangerous place.

1.10 We do not know how the Romans actually solved the problem. Mela and Proculus clearly thought that the answer lay in the field of *culpa*. Does Ulpian invoke the *volenti* defence? It is clear that the problem of concurrent causation of loss by a plaintiff and a defendant was not solved by what Fleming⁹ calls "the abracadabra of causation" but by having regard to fault or wrongfulness.¹⁰

1.11 At a later stage, D50.17.203, a text ascribed to Pomponius, assumed more importance. The text lays down the principle that "If anyone incurs loss which is his own fault, he is not regarded as incurring loss". This principle was used by medieval lawyers to begin to develop a theory applicable to a concurrence of fault in the field of delict. Zimmerman¹¹ explains that the approach of the Roman law was retained, but that it was now more clearly explained in terms of fault:

"The fault of the plaintiff/victim was, in a way, 'set off' against that of the defendant/wrongdoer, with the result that '*culpa culpam abolet*'. In the later *usus modernus*, at any rate, the issue seems to have been decided on a preponderance of fault; only if he had displayed the same or a greater degree of negligence than the wrongdoer did the victim lose his claim. Where, on the other hand, his negligence was less significant, when compared with that of the wrongdoer, his claim for damages remained completely unaffected."

(ii) English law

⁸ He who consents cannot receive an injury (own translation).

⁹ *Torts* at 244.

¹⁰ Olivier JA in the *Thoroughbred* case (*supra*).

¹¹ *Op cit* at 1030.

1.12 In the English common law contributory negligence on the plaintiff's part denied the plaintiff any recovery for damages. In the original case of *Butterfield v Forrester*,¹² the defendant who was repairing his house had placed a pole across the road. The plaintiff left a nearby public house at dusk and, failing to see the pole, rode into it and was badly injured. The court denied the plaintiff any compensation stating:

“A party is not to cast himself upon an obstruction which has been made by the fault of another, and avail himself of it, if he does not himself use common and ordinary caution to be in the right ... one person being in fault will not dispense with another's using ordinary care for himself.”

1.13 This rule was a harsh one since the slightest negligence on the plaintiff's part denied any recovery at all. The harsh and inequitable results produced by the application of the doctrine led the English courts to evolve and introduce the so-called 'last opportunity' rule which is generally explained in terms of causation. According to this rule the party who had the last opportunity of avoiding the harmful event by the exercise of reasonable care was held to be solely responsible for the damage. The rule is found in *Davies v Mann*,¹³ the donkey case. The defendant's wagon and horses killed the plaintiff's donkey which had been left hobbled at the side of the road. The court said that even if the plaintiff had been careless in tethering the donkey, “it would have made no difference, for as the defendant might, by proper care, have avoided the animal, and did not, he is liable for the consequences of his negligence, although the animal may have been improperly there”.

1.14 The last opportunity rule depended on decisions as to who acted last or whose negligence operated later. It was particularly difficult to apply when there was continuing negligence by the parties, or when their actions were nearly or actually contemporaneous, as in the case of a collision between two cars both travelling at high speed.

¹² (1809) 11 East 60.

¹³ (1842) 10 M & W 546.

(iii) South African law

1.15 The South African law of delict followed the “all-or-nothing” rule of the English law rather than the relative fault principle of the Roman-Dutch law. This was lamented by Watermeyer J in *Pierce v Hau Mon*.¹⁴

“The law relating to the subject of contributory negligence which is applied by our Courts has been taken over from English law and it is seldom that any Roman-Dutch authority is referred to. In fact there is plenty of authority in Roman law (see Grueber, *Lex Aquilia* (2.7.4, p. 228 *et seq*) and also in Roman-Dutch law (see *Voet* 9.2.17; 9.2.22), and the principle of *culpa compensatio* was referred to by De Villiers CJ in *Lennon’s* case 1914 AD 1 by Kotze JA in *Jacobs v Union Government* 1919 AD 325 and by Gardiner AJA in the case of *Union Government v Lee* 1927 AD 202. It may be that if Roman-Dutch authorities had been more fully referred to in earlier South African cases, our law of contributory negligence might have developed on different lines from the English law. However, if we take the English law on the subject as it now is, and as it had been adopted in our Courts, we shall find that there are still doubts and difficulties about its application in certain classes of cases.”

1.16 The South African courts, though sometimes citing the well-known Roman law texts referred to above to show that the defence of contributory negligence had a Roman pedigree, relied mainly on English decisions when applying that defence in railway and road accidents.¹⁵ The South African courts also imported the “last opportunity” rule from the English courts.

(b) THE POSITION OF THE DEFENDANT

1.17 At common law, where two or more defendants acted in such a way to cause a single loss to the plaintiff, they would share liability to the plaintiff. The common law found difficulty in apportioning blame. It regarded a shared liability as an indivisible liability. Those who shared liability were all fully responsible for the entire loss.

1.18 A distinction was made between joint wrongdoers and concurrent wrongdoers and the liability of the two kinds of wrongdoers was treated differently.

1.19 Joint wrongdoers were persons who jointly committed a delict by acting in pursuance of a concerted purpose, or in furtherance of a common design. They were jointly and severally liable for the same wrong (liable *in solidum*). Payment of the damages by one absolved the other from liability. One joint wrongdoer could not claim a contribution from another joint wrongdoer.¹⁶

¹⁴ 1944 AD 175 at 195.

¹⁵ *Boberg Law of Delict* 661.

¹⁶ Digest 27.3.1 para 13; *Voet* 9.2.12; Digest 27.8.7; Van der Merwe and Olivier *Onregmatige Daad* 302; McKerron *Law of Delict* 309; *Randbond Investments (Pty) Ltd v FPS (Northern Region) (Pty) Ltd* 1992 (2) SA 608 (W) at 619.

1.20 Concurrent wrongdoers were persons whose independent wrongful acts had combined to produce the same harmful consequences. They were also jointly and severally liable to the plaintiff for the same delict. However, a right of recourse was recognised between concurrent wrongdoers.¹⁷

1.21 Where separate wrongdoers each caused separate harmful consequences or loss to a plaintiff, each wrongdoer could be held liable only for the harm caused by each of them, and the plaintiff had to prove for which part of the harm each was responsible.

1.22 The central rationale for the principle of joint and several liability is that since the conduct of each wrongdoer was a cause of the damage suffered by the injured person, it is fundamentally just that each should be fully liable to the injured person for the consequences. The fact that the conduct of another wrongdoer may have also contributed to the same injury should not prejudice the right of the injured person to obtain full compensation for the damage; rather, it should be a matter for resolution between the wrongdoers themselves.

1.23 At common law there was no right of contribution between joint wrongdoers. A joint wrongdoer who had paid the entire judgment debt was not able to bring a claim against the other joint wrongdoers to make them pay their share of the damages and was forced to bear the whole of the loss caused partly by himself and partly by someone else, even if the plaintiff had obtained judgment against that other person.

1.24 The Aquilian action was originally penal in nature hence the refusal to enforce contribution between joint wrongdoers.¹⁸ The no-contribution rule was justified by reference to the maxim *ex turpi causa non oritur actio*: that an action does not arise from a wrongful cause. A contribution action was seen as an attempt to recover part of a penalty which had been imposed for a wrongful act and the view was that one wrongdoer should not be able to escape responsibility for a wrongful action by passing the consequences on to another wrongdoer.

1.25 The fundamental concern of the common law was that a plaintiff should be able to recover the full amount of his or her loss. Any possible unfairness to the defendants was subordinate to this principle. Because of the defendants' wrongdoing, they were considered to be not worthy of much consideration. The principle of joint and several liability is clearly of great benefit to the plaintiff as it provides control of the action. The plaintiff can choose to sue only one or each of the wrongdoers, in a single action. The rule facilitates satisfaction of

¹⁷ McKerron *Law of Delict* 108; Kelly 2001 *SA Merc LJ* 518.

¹⁸ *Allen v Allen* 1951 (3) SA 320 (AD) at 327 per Van den Heever JA.

the plaintiff's judgment, which may be fully satisfied by execution against only one wrongdoer, presumably the best insured or most solvent.

1.26 The no-contribution rule produced very unjust results. Where the fault was predominantly on one side, or where one wrongdoer had acted innocently at the request of the other, injustice would result if the more innocent wrongdoer, rather than the guiltier wrongdoer, was made to assume the burden of compensating the plaintiff. This was very controversial because it allowed the plaintiff to determine the incidence of loss distribution as the joint wrongdoer who paid the damages was not able to recover a contribution from the other wrongdoer. These common law rules were considered to be profoundly unsatisfactory. The no-contribution rule was severely criticised.

(c) LEGISLATIVE REFORM OF THE LAW

1.27 By the early twentieth century, the common law rules were generally considered to be profoundly unsatisfactory. The "inveterate predilection of the common law for assigning occurrences to a single response or cause"¹⁹ was being replaced by recognition that responsibility for so-called indivisible losses should be apportioned when that would promote the ends of justice.²⁰

1.28 Judicial and academic dissatisfaction led to reform of the law and the statutory introduction of the principle of apportionment.²¹

(i) England

1.29 In 1934 a Law Revision Committee was set up to consider the reform of a number of questions of law including proceedings against and contribution between joint and several tortfeasors. The committee's recommendations were enacted in Section 6 of the Law Reform (Married Women and Tortfeasors) Act 1935.

1.30 The Law Reform (Contributory Negligence) Act of 1945 was enacted to remedy the harshness of the common law rule that the plaintiff's contributory negligence, however slight, provided a complete defence to an action in delict.

(ii) New Zealand

¹⁹ Fleming *Torts* 243.

²⁰ New Zealand Law Commission *Preliminary Paper* 19 12.

²¹ Boberg *Law of Delict* 652.

1.31 The legislation in regard to proceedings against and contribution between joint and several tortfeasors was copied in New Zealand in section 17 of the Law Reform Act 1936. The Contributory Negligence Act 1947 was modelled on the English Act of 1945.

(iii) Australia

1.32 The apportionment legislation is virtually uniform in all Australian jurisdictions, the English precedent having been followed.²²

(iv) South Africa

1.33 In South Africa, the Apportionment of Damages Act 34 of 1956 ("the Act") was promulgated on 1 June 1956. The Act brought about dramatic changes to our common law relating to contributory negligence. The Act abolished the last opportunity rule²³ and introduced the principle of apportionment of liability.²⁴ The more flexible and equitable principle of apportionment of damages in accordance with the respective degrees of fault of the parties in relation to the damage was introduced.

1.34 The Act also regulated proceedings against joint wrongdoers.²⁵ The Act placed joint and concurrent wrongdoers on the same footing and abolished the common law distinction between joint and concurrent wrongdoers. The definition of joint wrongdoer in section 2(1) includes a concurrent wrongdoer at common law. Section 2(6)(a) provided for the recognition and regulation of a right of contribution between wrongdoers as defined in the section.

1.35 The provisions relating to contributory negligence were based on the Law Reform (Contributory Negligence) Act, 1945. The provisions relating to joint and several wrongdoers were based on the Law Reform (Married Women and Tortfeasors) Act, 1935. The wording of our Act differed in material respects and our Act contained a number of provisions which were not included in the English Acts.²⁶

1.36 Academic writers were quick to analyse the new Act.²⁷ While welcoming the Act in principle, these writers wrestled with problems such as the scope of the Act, the criterion of

²² Swanton 1981 *Australian Law Journal* 278.

²³ Section 1(1)(b).

²⁴ Section 1(1)(a).

²⁵ Section 2.

²⁶ McKerron *The Apportionment of Damages Act*.

²⁷ The principal commentary was by McKerron *Apportionment of Damages Act 1956*. Commentaries were also written by Kotzé 1956 (19) *THRHR* 186; 1957 (20) *THRHR* 148; Millner 1956 (53) *SALJ* 319; 1956 *Annual Survey* 188; Boberg 1959 (56) *SALJ* 253.

causation, the basis of apportionment and the proper treatment of the dependant's action.²⁸ Practitioners and the courts experienced difficulty in interpreting the Act. Fortunately most of the difficulties of interpretation have been resolved by the courts. An amendment to the Act in 1971 solved the problem of the dependant's action.²⁹

D. THE NEED FOR REFORM

1.37 Since the Act was passed, there have been major developments in the law of delict. The traditional sphere of application of the law of delict has been extended considerably. The courts have extended Aquilian liability to negligent misstatements causing pure economic loss,³⁰ and to negligent misstatements inducing contract;³¹ allowed concurrence of delictual and contractual actions in certain circumstances;³² and held that a collecting banker, who negligently collects payment of a cheque can be held liable under the extended Aquilian action for pure economic loss.³³ These developments in the law of delict have led to anomalies in this area of the law especially in regard to the meaning of "fault" and have led to a need for the Act to be extended to other areas of the law, particularly contract. There is an urgent need for legislative intervention to remove these anomalies. There have been attempts to apply the Act to areas which were not and could not have been envisaged by the legislature at the time of the enactment of the Act.³⁴ These attempts have been unsuccessful in the light of the clear intention of the legislature.

1.38 Joint wrongdoers and the right to contribution are two further aspects which require attention. The mechanisms for apportionment and contribution are still inadequate. The scheme of contribution can benefit one wrongdoer only where the other wrongdoer is available and capable of satisfying his or her portion of the liability. Where one joint wrongdoer is insolvent, the right to claim contribution does not assist the other joint wrongdoer who has paid. The most significant advantage to a wronged person of the principle of joint and several liability is that it imposes on a joint wrongdoer the risk that the other wrongdoer may be insolvent or otherwise unavailable to satisfy his or her share of the liability to the injured person. This principle operates primarily to ensure full compensation to

²⁸ Boberg *Law of Delict* 663.

²⁹ For a discussion of events leading to the 1971 Amendments, see Buchanan *Liability in Motor Cases 1 et seq.*

³⁰ *Administrator, Natal v Trust Bank van Afrika Bpk* 1979 (3) SA 824 (A).

³¹ *Bayer South Africa (Pty) Ltd v Frost* 1991 (4) SA 559 (A).

³² *Van Wyk v Lewis* 1924 AD 438; *Lillicrap, Wassenaar and Partners v Pilkington Brothers* 1985 (1) SA 475 (A).

³³ *Indac Electronics (Pty) Ltd v Volkskas Bank Ltd* 1992 (1) SA 783 (A).

³⁴ *Randbond Investments (Pty) Ltd v FPS (Northern Region) (Pty) Ltd* 1992 (2) SA 608 (W); *Lloyd-Gray Lithographers (Pty) Ltd v Nedcor Bank Ltd t/a Nedbank* 1998 (2) SA 667 (W); 2000 (4) SA 915 (A).

the injured person, to the occasional detriment of a solvent wrongdoer who is required to satisfy the entire liability, regardless of his or her degree of fault. This principle has operated very unfairly in some instances. Professionals and other persons or bodies³⁵ who are perceived to have deep pockets feel a strong sense of injustice at these consequences. Such persons have no objection to paying for the results of their own mistakes, but they are aggrieved when they find themselves also paying for the mistakes of others.³⁶

1.39 There have been many developments in the law of apportionment of civil liability in other jurisdictions which we have found useful in the compilation of this report. There have also been developments in the South African case law which have necessitated a reconsideration of some of the proposals which were made in the discussion paper.

³⁵ In the bank cases referred to in the next chapter, negligent banks have had to pay the full amount of the plaintiff's damages, while the person who stole the cheque, although much more culpable, gets off scot-free.

³⁶ Ontario Law Reform Commission *Report on contribution* 34.

CHAPTER 2

2. THE MEANING OF FAULT

A. INTRODUCTION

2.1 Section 1(1)(a) of the Act provides that where the plaintiff has been guilty of contributory negligence, the damages to which he is entitled shall be reduced to such extent as the court thinks just and equitable “*having regard to the degree in which the claimant was at fault in relation to the damage.*” The English Act provides that where the plaintiff has been guilty of contributory negligence, the damages to which he is entitled shall be reduced to such extent as the court thinks just and equitable “*having regard to the plaintiff’s share in the responsibility for the loss*”. In deciding how liability is to be apportioned in terms of the English Act, regard must be had not only to the relative degrees of fault of the parties, but also to the relative importance of the acts in causing the damage.¹ On the wording of our Act this is not a tenable view. Under our Act fault is the sole criterion of apportionment.²

2.2 The use of the word “fault” in the Act has given rise to several divergent interpretations. Since “fault” in the widest sense embraces both negligence and intention, it might seem that even a defendant who has harmed the plaintiff intentionally could raise the plaintiff’s contributory negligence as a ground for reducing his or her damages. However, it has been argued that it should be strictly interpreted as referring exclusively to negligence.

B. THE ACT

2.3 The long title of the Act reads:

“To amend the law relating to contributory negligence and the law relating to the liability of persons jointly and severally liable for the case damage, and to provide for matters incidental thereto.” (*underlining inserted for emphasis*).

2.4 The heading to section 1 reads

“1. Apportionment of liability in case of contributory negligence”

Section 1(1)(a) reads

“Where any person suffers damage which is caused partly by his own fault and partly by the fault of any other person, a claim in respect of that damage shall not be defeated by reason of the fault of the claimant but the damages recoverable in respect thereof shall be

¹ *Stapley v Gypsum Mines Ltd* [1953] AC 663.

² McKerron *The Apportionment of Damages Act 1956* 5.

reduced by the court to such extent as the court may deem just and equitable having regard to the degree in which the claimant was at fault in relation to the damage.”

2.5 Section 1(3) defines “fault” as follows:

“(3) For the purposes of this section 'fault' includes any act or omission which would, but for the provisions of this section, have given rise to the defence of contributory negligence.”

2.6 Section 2(1) of the Act reads:

“Where it is alleged that two or more persons are jointly or severally liable in delict to a third person (hereinafter referred to as the plaintiff) for the same damage, such persons (hereinafter referred to as joint wrongdoers) may be sued in the same action.”

C. INTERPRETATION OF “FAULT” IN THE ACT

(a) Section 1 of the Act

2.7 There are certain academic writers who show no hesitation in asserting that the word “fault” in section 1(1)(a) of the Act should be given its plain common law meaning, as a term including both negligence and intent.³ Others argue that it should be strictly interpreted as referring exclusively to negligence.⁴

2.8 Van der Walt and Midgley⁵ state that the explicit reference to contributory negligence in both the long title of the Act and the heading to section 1, the use of a similar concept of “fault” with reference to both the plaintiff and the defendant and the historical background to the enactment of section 1 indicate that “fault” bears the restricted meaning of either contributory negligence on the part of the plaintiff or negligence on the part of the defendant.⁶

2.9 In the past the debate in regard to the recognition of the defence of contributory intention largely revolved around and was influenced by the alleged overlap between the defence of *volenti non fit injuria* and contributory intent. Boberg⁷ refers to the substantial body of academic opinion that would limit the *volenti* defence to consent given reasonably in the circumstances.⁸ For these writers an unreasonable consent gives rise, not to the

³ Van der Merwe and Olivier *Onregmatige Daad* 168; Burchell *Principles of Delict* 110.

⁴ McKerron *Law of Delict* 296; Macintosh *Negligence in Delict* 68; Neethling, Potgieter and Visser *Deliktereg* 152-153.

⁵ *Delict Principles and Cases* para 152.

⁶ Van der Walt and Midgley *Delict: Principles and Cases* para 152. See generally *South British Insurance Co v Smit* 1962 (3) SA 826 (A) at 835 – 836.

⁷ *Law of Delict* 740.

⁸ K Schwietering 1957 (20) *THRHR* 138; S A Strauss 1964 (61) *SALJ* 179; Van der Merwe and Olivier *Onregmatige Daad* 96; JD van der Vyver 1968 (31) *THRHR* 295; JJ Gauntlett 1974 (37) *THRHR* 195; WE Scott 1976 *De Jure* 218.

defence of *volenti* but to the defence, either of “contributory intention” (“medewerkende opset”) or of contributory negligence, depending on the circumstances. Van der Merwe and Olivier⁹ criticised four Supreme Court of Appeal decisions¹⁰ on *volenti* on the basis that there could be no defence of *volenti* because any consent that might have been given would have been *contra bonos mores* and hence ineffective.

2.10 The courts have interpreted “fault” in section 1 of the Act to mean negligence and have held that the legislature clearly intended “fault” in section 1 of the Act to connote either negligence or contributory negligence.¹¹

2.11 In the case of *South British Insurance Company Ltd v Smit*¹² the court considered the meaning of fault in section 1(3) and held that the legislature used the word “fault” throughout the section as embracing a negligent act or omission causally linked with the damage in question. The court held that “fault” means “negligent act or omission”. Fault means negligence causally linked with the damage suffered. The Court is required to determine the respective degrees of negligence of the parties. The court held that blameworthiness is not the correct criterion of apportionment.

2.12 In *King v Pearl Insurance Co Ltd*¹³ the court held that “fault” as used in section 1 of the Act in relation to the plaintiff, means and refers exclusively to conduct which would have grounded a defence of contributory negligence at common law.

2.13 In the case of *Mabaso v Felix*¹⁴ the court *obiter* expressed the view that it was “extremely doubtful” that section 1(1)(a) of the Act was applicable where the fault of the defendant was intentional *wrongdoing*.

2.14 In *Wapnick v Durban City Council*¹⁵ Booysen J said that it was clear that a defendant who had wrongfully and intentionally caused a plaintiff to suffer damages was not entitled to plead contributory negligence and equally clear that a plaintiff who had intentionally contributed to his own damage cannot claim his own damage or part of it from the defendant on the ground of the latter’s negligent conduct.

⁹ *Onregmatige Daad* 96.

¹⁰ *Lampert v Hefer* NO 1955 (2) SA 507 (A); *Netherlands Insurance Co of SA Ltd v Van der Vyver* 1968 (1) SA 412 (A); *Santam Insurance Co v Vorster* 1973 (4) SA 764 (A); *Union and South West Africa Insurance Co Ltd v Humphrey* 1979 (3) SA 1 (A).

¹¹ *Mabaso v Felix* 1981 (3) SA 865 (A); *Wapnick v Durban City Garage* 1984 (2) SA 414 (D).

¹² 1962 (3) SA 826 (A).

¹³ 1970 (1) SA 462 (W).

¹⁴ 1981 (3) SA 865 (A).

¹⁵ 1984 (2) SA 414 (D).

2.15 In the case of *Minister van Wet en Orde en 'n Ander v Ntsane*¹⁶ the second appellant (a policeman) had intentionally wounded the respondent who was escaping from lawful arrest. The court held that where the legislature in section 1(1)(a) of the Act used the phrases “his own fault” and “by the fault of any other person” next to one another, it had the same form of fault in mind. Put differently, if the fault of the plaintiff was negligence, the legislature, by the use of the second phrase, refers to, and only to, negligence of the defendant. The court accordingly found that the appellants could not rely on the contributory negligence of the respondent and were not entitled to an apportionment of damages in terms of the Act.

2.16 According to Potgieter,¹⁷ the legislature in section 1 of the Act clearly intended to regulate the defence of contributory negligence; in other words, the apportionment of damages where both the claimant and the defendant were negligent. An intentional defendant who caused a contributorily negligent plaintiff to suffer damages could not depend on the claimant’s contributory negligence to claim an apportionment of damages. In the common law the position was that such a defence did not apply to the intentional actions of a defendant and it is generally accepted that the Act did not change this rule.

2.17 Potgieter¹⁸ argues that it cannot be deduced from the wording of the Act that section 1 is applicable to the defence of contributory intent on the part of the claimant. He says the Act did not intend to make apportionment possible where the claimant acted intentionally and the defendant negligently or where both parties acted intentionally. In both these eventualities, the claimant forfeited his claim according to the common law.

(b) Section 2 of the Act

2.18 Section 2 of the Act regulates the situation where more than one person is responsible for causing the plaintiff harm. A debate has arisen as to whether liability in terms of section 2 is limited to negligent wrongdoing or whether it also applies to intentional wrongdoing.

2.19 Section 2(1) of the Act refers to persons “liable in delict”:

“Where it is alleged that two or more persons are jointly or severally liable in delict to a third person (hereinafter referred to as the plaintiff) for the same damage, such persons (hereinafter referred to as joint wrongdoers) may be sued in the same action.”

¹⁶ 1993 (1) SA 560 (A).

¹⁷ Potgieter 1998 (61) *THRHR* 734.

¹⁸ Potgieter 1998 (61) *THRHR* 734.

2.20 The Act contains no definition of the term “delict”. McKerron¹⁹ states that in the absence of any definition of the term, it must be assumed that it bears its generally accepted meaning. Liability in delict may arise out of intentional or negligent wrongdoing. The expression “liable in delict” has been interpreted to indicate that section 2 applies to both intentional and negligent wrongdoing. Unlike section 1, there is nothing in section 2 which indicates that liability is limited to negligent wrongdoing only.²⁰ The scope of section 2 is wider than that of section 1. It has been held that section 2 applies where both joint wrongdoers acted intentionally.²¹

2.21 However, Potgieter²² suggests that the legislature did not intend to change the common law in terms of which apportionment of damages between intentional and negligent joint wrongdoers was not possible. There is considerable authority for the view that one joint wrongdoer cannot claim a contribution from another joint wrongdoer where the wrongful delictual act has been perpetrated intentionally.²³ A statute is not to be understood to vary the common law unless it plainly does so.²⁴

2.22 In support of his argument Potgieter²⁵ further states that another factor which confirms that the legislature intended to confine the provisions of section 2 to negligent wrongdoers is that in section 3 of the Act the provisions of section 2 are expressly made applicable to liability under the Motor Vehicle Insurance Act 29 of 1942 for damages arising from the driving of a car. It is well known that liability in terms of this Act and its successors is based exclusively on negligence and not on intention.²⁶

¹⁹ *Law of Delict* 109.

²⁰ Van der Walt and Midgley *Delict* 214.

²¹ *Randbond Investments (Pty) Ltd v FPS (Northern Region) (Pty) Ltd* 1992 (2) SA 608 (W).

²² 1998 (60) *THRHR* 735.

²³ McKerron *Law of Delict* 309.

²⁴ Steyn *Uitleg van Wette* 237.

²⁵ 1998 (61) *THRHR* 736.

²⁶ Potgieter 1998 (61) *THRHR* 736.

D COMMISSION'S RECOMMENDATIONS IN DISCUSSION PAPER

2.23 In the discussion paper, the Commission supported the interpretation of "fault" to mean negligence and recommended that all references to "fault" in section 1 be removed and substituted by "negligent conduct" or words to that effect. The Commission also recommended that the partial definition of "fault" in section 1(3) be repealed in its entirety or alternatively, that "negligent conduct" be defined as any act or omission which would, but for the provisions of this section, have given rise to the defence of contributory negligence.²⁷

2.24 Mr Chris Petty of Stegmanns Attorneys is in agreement with the Commission's recommendation that the word "fault" in section 1 of the Act should be substituted by the words "negligent conduct". He is certain that "fault" means negligence and that it would be preferable for the Act simply to say this. The Law Society of the Cape of Good Hope holds the same view.

2.25 A contrary view is held by Dr J C Knobel and Mr C-J Pretorius²⁸ of the Department of Private Law, UNISA. With reference to the *Greater Johannesburg Transitional Metropolitan Council* decision²⁹ the respondents argue that there is positive legal authority for the view that "fault" in section 1 of the Act should have its ordinary meaning and should therefore not be restricted to negligence. They further argue that scope should be left for the courts to include contributory intent as a basis for the apportionment of damages.

E. EXPANSION OF THE DELICTUAL ACTION IN THE INDAC CASE

2.26 Since the beginning of the last century, the traditional sphere of application of the law of delict has been extended considerably. In the case of *Administrator, Natal v Trust Bank van Afrika Bpk*³⁰ the Appellate Division clearly recognised the right to sue in delict for damages for a negligent misstatement causing pure economic loss. Following the approach taken in the above case, the Appellate Division in *Indac Electronics (Pty) Ltd v Volkskas Bank Ltd*³¹ acknowledged that in principle, a collecting banker who negligently collects payment of a cheque on behalf of a customer who has no title thereto, can be held liable under the extended Aquilian action for pure economic loss sustained by the true owner of the cheque who is not its customer. The court held that the collecting banker owed the true owner a legal duty to avoid pure economic loss by negligently dealing with such cheque.

²⁷ Discussion Paper 67, page 9, para 2.14.

²⁸ Their submissions was prepared in consultation with Prof J Neethling, Prof JM Potgieter, Prof A Roos and Mrs L Steynberg.

²⁹ 1997 (2) SA 591 (W).

³⁰ 1979 (3) SA 824 (A).

³¹ 1992 (1) SA 783 (A).

2.27 Before the extension of the *lex Aquilia* to claims against negligent collecting banks in the case of *Indac Electronics*, the possibility of apportionment between negligent and intentional wrongdoers (wrongdoers) was relatively rare. It is therefore not surprising that the Act did not make provision for the extension of Aquilian responsibility to a situation which came to the fore almost 40 years after the Act came into operation.³²

F. INTERPRETATION OF THE ACT AFTER THE INDAC CASE

(a) Joint wrongdoers

2.28 In the case of *Ranbond Investments (Pty) Ltd v FPS (Northern Region) (Pty) Ltd*³³ it was recognised that apportionment could also occur between joint wrongdoers who acted intentionally. The applicant had invested a sum of money with the respondent. One of the respondent's employees, Beaumont, had informed the applicant that the respondent had invested the money with an NBS agency. The applicant averred that Beaumont had misappropriated the money and instituted action against the respondent for payment of the amount.

2.29 The respondent sought to join the NBS agency and two others as joint wrongdoers and served third party notices on them. Counsel for the NBS agency argued that "any delictual liability on the part of the agency or the others would be based on *dolus* and not *culpa* and that a claim for contribution in terms of the Act could not be made where the delict perpetrated was constituted by *dolus* or 'intentional wrongdoing'".

2.30 The court considered the applicability of the Act. The court distinguished the case of *Mabaso v Felix*³⁴ on the basis that the court in the *Mabaso* case pronounced on the definition of fault in section 1(1)(a) of the Act whereas in the present case the respondent's case was based on the provisions of section 2 of the Act. The court held that in a claim for a contribution by one joint wrongdoer against another in terms of section 2(1) of the Act, it was required to be alleged "that two or more persons are jointly or severally liable in delict to a third person". A delict may in our law be perpetrated by an intentional act of wrongdoing. The court found that there was no attempt to limit the operation of the section to such delicts as are constituted by negligent acts. The court concluded that there was "nothing in the plain and ordinary meaning of sections 2(1) and 2(2) to justify any limitation upon the kind of

³² Potgieter 1998 (60) THRHR 738.

³³ 1992 (2) SA 608 (W).

³⁴ *Supra*.

delict which a joint wrongdoer must be alleged to have perpetrated before he can be joined as a party in the proceedings for the purpose of determining his liability".³⁵

2.31 In the case of *Holscher v Absa Bank*³⁶ the plaintiff instituted action against the first defendant bank for the payment of damages on the basis of the principles set out in *Indac Electronics*.³⁷ The plaintiff was the true owner of a cheque which, at his instruction, was posted to his broker, for investment in a retirement annuity. The broker's managing director, Hamman, stole the cheque and deposited it into his account at the first defendant bank. Despite the fact that the cheque was marked "not transferable" and made payable to "SA Mutual Retirement Annuity Fund" the bank collected the proceeds of the cheque for the broker, which subsequently went into liquidation.

2.32 The plaintiff proceeded only against the first defendant bank for the proceeds of the cheque and did not attempt to recover the proceeds of the cheque or any part thereof from either the broker in liquidation or Hamman. The court held that in the quantification of damages under the Aquilian action, the value of the plaintiff's estate immediately after the delict must be subtracted from the value of the estate immediately before. The value of rights of action accruing to the plaintiff against third persons fall into his estate and must be ascertained and taken into account. Accordingly, the plaintiff's rights of action against the broker or Hamman had to be valued and deducted from the amount of the stolen cheque in order to quantify the plaintiff's loss. The court therefore reduced the plaintiff's claim by the dividend he would have received had he in fact instituted a claim against the broker's estate.

2.33 In *Lloyd-Gray Lithographers (Pty) Ltd v Nedcor Bank Ltd t/a Nedbank*³⁸ the court recognised that apportionment could occur between negligent and intentional joint wrongdoers. Two cheques made out in favour of the plaintiff, crossed and marked restrictively, were misappropriated by one S, who deposited the cheques into his account with the defendant bank which collected the proceeds of the cheques for S. The plaintiff instituted a delictual action against the defendant bank.

2.34 The court held that the defendant bank and S had clearly not acted in concert, but that their independent, wrongful acts had combined to produce the same damage, namely, the loss by the plaintiff of its claims against the drawers of the two stolen cheques. The court found that the defendant bank and S were concurrent wrongdoers in the terminology of the common law and accordingly joint wrongdoers in terms of the Act. Boruchowitz J

³⁵ At 619.

³⁶ 1994 (2) SA 667 (T).

³⁷ *Supra*.

³⁸ 1998 (2) SA 667 (W).

referred to Mahomed J's judgment in the *Randbond* case and held that although Mahomed J was dealing with a situation in which both wrongdoers had acted intentionally, there was no reason in principle why there could not be an apportionment of liability where one joint wrongdoer has acted intentionally and the other negligently. Intention and negligence were not mutually exclusive concepts, and it was logically possible for both to be present simultaneously.

2.35 Boruchowitz J disagreed with and rejected as manifestly incorrect, Van Dijkhorst J's decision in *Holscher* to deduct from the plaintiff's claim the amount of the liquidation dividend he would have received from the broker had he lodged a claim against him. Boruchowitz J stated that in terms of section 2(6)(a) of the Act the plaintiff was entitled to institute action against any joint wrongdoer for the full amount of the damage suffered. Boruchowitz J concluded that the plaintiff was entitled to recover from the defendant the total face value of the two stolen cheques.

2.36 The case was taken on appeal to the Supreme Court of Appeal.³⁹ Counsel for the appellant submitted that S and Nedbank were not "joint wrongdoers" within the meaning of the Act as the Act did not apply in a situation where damage was caused by two or more wrongdoers acting wilfully or by one wrongdoer's negligence and the other's wilfulness.

2.37 The court found that Nedbank and S were concurrent wrongdoers at common law. It was accepted by the Appellate Division in *Union Government (Minister of Railways) v Lee*⁴⁰ that one concurrent wrongdoer may be sued for the full amount of the plaintiff's loss, ie that concurrent wrongdoers are liable *in solidum*.

2.38 The court therefore held that Nedbank would be liable to the respondent *in solidum* at common law. The respondent was therefore entitled to recover the full amount of its loss from Nedbank and for the purpose of calculating the loss the respondent's right of action against S must be disregarded.

(b) Contributory fault

2.39 The express recognition of the defence of contributory intent first occurred in the case of *Greater Johannesburg Transitional Metropolitan Council v ABSA Bank Ltd t/a Volkskas Bank*.⁴¹ Goldstein J held that "fault" includes *dolus* where there is *dolus* on both sides. *In casu* the court found that there was *dolus* on both sides since both the plaintiff's servant and the defendant's servant intentionally caused the harm which befell the plaintiff.

³⁹ Reported as *Nedcor Bank Ltd t/a Nedbank v Lloyd-Gray Lithographers (Pty) Ltd* 2000 (4) SA 915 (A).

⁴⁰ 1927 AD 202.

⁴¹ 1997 (2) SA 591 (W).

The court found that there was no reason not to give the word “fault” its ordinary meaning, that is, to include *dolus*.

2.40 Goldstein J discounted the reference to negligence in the long title and the headings of the Act. He relied on the rule of construction that in construing a provision of an Act of Parliament the plain meaning of its language must be adopted unless it leads to some absurdity, inconsistency, hardship or anomaly which from a consideration of the enactment as a whole a court of law is satisfied the legislature could not have intended. He held that in the present matter, his interpretation led to no absurdity, inconsistency, hardship or anomaly. He therefore held that applying section 1(1)(a) in the present matter produced a result which was fair and which the language of the statute indicates the legislature must have intended. He further held that where the intention of the lawgiver as expressed in any particular clause is quite clear, then it cannot be overridden by the words of a heading. He therefore held that the ordinary meaning of the words of the statute should be given effect to and that the plaintiff's claim fell to be reduced by the operation of section 1(1)(a).

2.41 In similar cases where an employee had stolen a cheque from his employer (the plaintiff) and deposited it into an account at the defendant bank which negligently collected the proceeds for the thief,⁴² the courts have avoided the application and interpretation of section 1 by interpreting “scope of employment” narrowly and finding that the employer was not vicariously liable for the dishonest employee's conduct. In the case of *Energy Measurements (Pty) Ltd v First National Bank of South Africa Ltd*⁴³ the plaintiff's employee had stolen two cheques from the plaintiff and deposited them into an account at the defendant bank which negligently collected the cheques on behalf of the thief. The court considered whether the plaintiff's claim should be reduced in terms of section 1 of the Act. The defendant alleged that the employee had acted in the course and scope of his employment with the plaintiff in stealing the cheques and that the plaintiff should be held vicariously liable for his employee's acts. The court held that the employee in stealing the cheques had abandoned and disengaged himself from the duties of his employment and that the plaintiff could therefore not be held liable for his acts. The defendant further alleged that the plaintiff had been negligent in not supervising his employee. The court held that the Plaintiff had been careless but that mere carelessness could not form the basis of liability or lead to apportionment in terms of the Act. The defendant would have to establish that the plaintiff was under a legal duty of care to the world at large to avoid the theft of its own cheque.

⁴² *Energy Measurements (Pty) Ltd v First National Bank of South Africa Ltd* [2000] 2 All SA 396 (W); *Columbus Joint Venture v ABSA Bank Ltd* 2000 (2) SA 491 (W); *Ess-Kay Electronics PTE Ltd v First National Bank of South Africa Ltd* 1998 (4) SA 1102 (W).

⁴³ [2000] 2 All SA 396 (W).

2.42 In the case of *Bond Equipment (Pretoria) (Pty) Ltd v ABSA Bank (Ltd)*,⁴⁴ the plaintiff's employee had stolen a cheque from the plaintiff and deposited it into his (the employee's) account at the defendant bank. On appeal – reported as *ABSA Bank Ltd v Bond Equipment (Pretoria) (Pty) Ltd*⁴⁵ – the court confirmed the conclusion of the court *a quo* that the thief was not acting in the course and scope of his employment with the true owner of the cheque at the relevant time, and that the true owner was accordingly not vicariously liable or responsible for his employee's wrongful and intentional conduct. The court held that the defendant bank and the thief were concurrent wrongdoers at common law. The plaintiff was entitled to hold either of them liable for its admitted loss. The plaintiff's damages could not be reduced in terms of section 1 of the Act as it was held to be not vicariously liable for its employee's conduct in stealing the cheques.

G REACTION OF ACADEMIC WRITERS TO CASES AFTER *INDAC*

2.43 Academic writers largely welcomed the express recognition of the defence of contributory intent in the *Greater Johannesburg* case and the recognition in the *Randbond* case that apportionment could also occur between joint wrongdoers who acted intentionally. Malan and Pretorius⁴⁶ expressed the opinion that Goldstein J was correct in the *Greater Johannesburg* case in applying section 1(1)(a) of the Act to reduce the plaintiff's damages by 50% when the fault of both the plaintiff and the defendant was intent. Johan Scott in a commentary on the *Greater Johannesburg* case⁴⁷ agreed with Goldstein J's decision and his reasoning in arriving at that decision on the basis that the decision was equitable.

2.44 Mervyn Dendy⁴⁸ criticised the *Holscher* case on the basis that the broker, the thief and the collecting bank were joint wrongdoers in terms of section 2 of the Act in relation to the loss suffered by the plaintiff and were therefore jointly and severally liable for the amount of the stolen cheque and that the plaintiff was therefore entitled to recover the full amount of the cheque from whichever joint wrongdoer he chose.

2.45 Dendy raised the concern that the decision in the *Holscher* case would mean that despite the principle that had been established in the *Indac* case – that a collecting bank is liable in delict to the true owner of a lost or stolen cheque which was negligently collected by the bank for a person not entitled to its proceeds cheque – in the overwhelming majority of cases, no claim would lie against the collecting banker.

⁴⁴ 1999 (2) SA 63 (W).

⁴⁵ [2001] 1 All SA 1 (A).

⁴⁶ 1997 (60) *THRHR* 155.

⁴⁷ 1997 *De Jure* 388.

⁴⁸ 1998 (61) *THRHR* 512.

2.46 He commended the decision of the court *a quo* in the *Lloyd-Gray* case in extending the Act to cases where one joint wrongdoer had acted intentionally and the other negligently and noted that the decision in *Lloyd-Gray* had the effect that damages were claimable from the negligent collecting bank after all.

2.47 J Neethling⁴⁹ evaluated the *Lloyd-Gray* case and agreed with Boruchowitz J that the decision in *Holscher* is incorrect.

2.48 However, JM Potgieter⁵⁰ disagreed with the decision of the court *a quo* in the *Lloyd Gray* decision. He stated that intentional and negligent wrongdoers who cause the same damage to a third party do not qualify as joint wrongdoers for purposes of the Act. He stated that “fault” has the same meaning in section 1 and section 2 of the Act and that the court should have considered the meaning in section 1 in determining the meaning in section 2.

2.49 Potgieter further states that in section 1 the legislature clearly intended to regulate the defence of contributory negligence where both the plaintiff and the defendant were negligent. In the common law an intentional defendant could not depend on the plaintiff’s negligence to reduce damages and it is generally accepted that the principles of the Act did not change this rule. Potgieter further stated that the legislature did not intend to apportion damages where the plaintiff acted intentionally and the defendant negligently. In both these cases, the plaintiff would lose his claim in terms of the common law.

2.50 If it is accepted that fault means only negligence in section 1 it must be accepted in section 2 also. The common law in regard to intentional and negligent wrongdoers was that a joint wrongdoer could not claim a contribution from another where the wrongful act was perpetrated intentionally. The legislature did not intend to alter the common law. It would have been absurd for the legislature to confine the meaning of fault in section 1 to negligence, but to allow another form of fault in section 2 without giving any indication that the form of fault in section 2 was different. Where an Act intends to alter the common law, it must be expressly stated. Unless the contrary is apparent, it is presumed that the legislature did not intend to alter the common law more than necessary. Potgieter submits that if the legislature intended to do away with the common law rule regarding contributory intent, it would have done so expressly. Consequently the common law rule is still in operation, in contrast with the decisions in *Randbond* and *Lloyd-Gray*.

2.51 Potgieter concludes that the negligent defendant (Nedcor) and the thief (S) in the *Lloyd-Gray* case were thus not joint wrongdoers for purposes of section 2.

⁴⁹ 1998 (61) *THRHR* 518.

⁵⁰ 1998 (61) *THRHR* 731.

2.52 Potgieter further states that Boruchowitz's rejection in the *Lloyd-Gray* case of the decision in *Holscher v ABSA Bank* was based on the incorrect conclusion that the negligent bank and the thief were joint wrongdoers in terms of section 2 of the Act and that the claimant could therefore claim the full amount of his loss from the bank.

2.53 Potgieter states that the decision in the *Holscher* case at least gave effect to the common law position that the negligent bank and the thief could not be joint wrongdoers for purposes of apportionment; that the intentional actions of a wrongdoer is a defence against a claim which is brought against the negligent wrongdoer; and that the claimant must first proceed against the intentional wrongdoer, the thief, before his claim against the negligent wrongdoer can succeed.

2.54 Potgieter concludes that if it is deemed to be inequitable that the owner of a stolen cheque fails in his claim against a negligent bank in cases like *Lloyd-Gray*, either because the bank is not held liable because the bank and the thief are not joint wrongdoers in terms of the Act, or because of the approach in *Holscher* where the claimant must subtract his claim against the thief for purposes of calculating his claim against the bank, neither the common law, nor the Act, as it now stands, offer a satisfactory solution. The legal position must be altered by means of legislation.

2.55 Neethling and Potgieter⁵¹ have criticised the decision of the court *a quo* in the *Bond Equipment* case and question the court's application of the requirements of vicarious liability. They compare the judgment of the court in the *Greater Johannesburg* case where the court found that the employer was vicariously liable as the thief acted within the bounds of his employment and stated that it was unclear why the employer was held to be liable vicariously in the one case and not the other. They conclude that the judgment was motivated by the judge's interpretation of the sense of justice of the community on the grounds of policy considerations. On the one hand you have the conviction that an employer should not be held liable for the dishonest acts of his employee because the employee's behaviour, according to the standard test, advances his own interests and falls outside the scope of his work. On the other hand you have the view that the employer should be held responsible in such cases because the intentional delict is so closely connected to the employee's duties that it can be regarded as a manner (even though improper) of doing his work. They question whether policy considerations do not demand that the employer be held vicariously liable. Seen from the side of the innocent prejudiced person, it is unfair to exclude the employer's liability for the actions of an untrustworthy employee who commits theft or fraud, especially where the employer could have insured

⁵¹ 1999 (4) TSAR 772; Also criticised in the 1999 *Annual Survey* at 267.

himself against such loss. It can be argued that the employer should bear the risk of the consequences of appointing an untrustworthy employee.⁵²

H. DEVELOPMENTS IN OTHER COUNTRIES

2.56 Various countries with apportionment legislation similar to that of South Africa are introducing sweeping changes to their legislation.⁵³ The New Zealand Law Commission stated at page 83 of their preliminary paper 19 on the apportionment of civil liability -

“The Act is to apply whether or not the act or omission causing the loss was deliberate on the part of the wrongdoer. The fact that the defendant’s act was deliberate may sometimes lead the court in its discretion to determine that no contribution shall be ordered in favour of that person. But it would not be an absolute bar. The consequences of the deliberate act may not have been intended. The negligent behaviour of a co-defendant may have played a more significant part in the plaintiff’s loss.”

2.57 The Ontario Law Reform Commission states in their *Report on contribution among wrongdoers and contributory negligence* (1988) that the proposed draft Act by its definition of ‘fault’ includes all torts, whether or not intentional.

2.58 The New South Wales Reform Commission states:⁵⁴

“Further arguments in favour of retaining rights of contribution for intentional tortfeasors consider the position of the other concurrent tortfeasors whose wrongdoing may or may not be categorised as intentional. It can be argued that a negligent concurrent tortfeasor should not be allowed to escape liability for some share of the harm to a plaintiff simply because the intentional tortfeasor was also responsible. There is also a possibility that an intentional tortfeasor could escape liability simply because of the presence of another intentional tortfeasor against whom the plaintiff seeks recovery.”

⁵² Cf *Nedcor Bank Ltd t/a Nedbank v Lloyd-Gray Lithographers (Pty) Ltd* 2000 (4) SA 915 (SCA).

⁵³ New Zealand Law Commission *Report 47*; Alberta Law Reform Institute *Report 75*; British Law Commission *Investigation of joint and several liability* Ontario Law Reform Commission *Report on contribution*; New South Wales Law Reform Commission *Discussion paper 38*; Hong Kong Law Reform Commission *Report on contribution between wrongdoers*.

⁵⁴ At para 4.81 of their discussion paper

I. CONCLUSION

2.59 The abovementioned cases have highlighted certain anomalies in the Act which need to be addressed. It must be borne in mind that cases like *Lloyd-Gray* only recently came to the fore. The extension of the *lex Aquilia* to claims against negligent collecting banks was only confirmed by the Supreme Court of Appeal as late as 1992. Before this development, the occasions of apportionment between negligent and intentional joint wrongdoers were relatively scarce. It is therefore not surprising that the legislature did not make provision for extensions of the Aquilian action which took place nearly forty years after the Act came into operation.⁵⁵

2.60 It is the task of the courts to apply the Act consistently according to the intention of the legislature until the legislature alters the law. While courts can avail themselves of the scope to make necessary adjustments to the law in regard to the existing legislation, it is unrealistic to expect the courts to give judgments which go against the manifest intention of the legislature. If it is found that legislation no longer accommodates changed demands and circumstances, the legislature will have to bring about the necessary changes.

2.61 The Act clearly allows for reduction of the plaintiff's damages where the plaintiff's action is in negligence. However, many delicts are committed intentionally. Can and should the plaintiff's damages be reduced for the plaintiff's own fault in relation to an intentional delict?

2.62 The results which were achieved in cases like *Greater Johannesburg Transitional Metropolitan Council v ABSA Bank Ltd t/a Volkskas Bank*⁵⁶ where Goldstein J apportioned damages between a plaintiff and a defendant who both acted intentionally and in the case of *Randbond Investments (Pty) Ltd v FPS (Northern Region) (Pty) Ltd*⁵⁷ where there were two intentional joint wrongdoers better satisfy the sense of justice. In contrast, the decisions in the cases which strictly adhered to the correct interpretation of the Act as applying only to negligent conduct did not produce fair or equitable results. It is however, undesirable that the courts must search outside the confines of the Act for grounds for a just and equitable basis for apportionment while they incorrectly assert that the Act justifies their findings.

⁵⁵ Potgieter 1998 (61) *THRHR* 731.

⁵⁶ *Supra*.

⁵⁷ *Supra*.

2.63 JM Potgieter⁵⁸ submits that the legislature should act speedily to identify lacunae in the law and to rectify them. In the light of the urgent need for reform highlighted in the recent cases the legislature should give priority to the revision of the law in this area.

2.64 McKerron⁵⁹ suggests that the defect in the Act can be remedied by simply restoring the definition of “fault” contained in the Bills of 1952 and 1955, where fault was defined to include a breach of a statutory duty, or any other act or omission which gives rise to delictual liability.

2.65 Michelle Kelly⁶⁰ recommends that a comprehensive definition of “fault” should be included in the Act. She submits that “fault” should include both negligent and intentional conduct and that a defence of contributory intent should be allowed. She further agrees with the submission in the *Ranbond* case that the difficulty of apportioning liability between joint wrongdoers who both acted intentionally can be overcome by taking their degrees of culpability (blameworthiness) into account, and with the suggestion made by Neethling that if a person acts intentionally, he simultaneously acts negligently and therefore that an intentional act deviates 100 per cent from the norm of a reasonable person. She suggests that the Act should apply, firstly, in the situations where both the plaintiff and the defendant acted intentionally and contributed to the plaintiff’s loss and secondly, where both wrongdoers acted intentionally and caused the same damage.

2.66 Intention and negligence are not mutually exclusive concepts. It is logically possible for both to be present simultaneously.⁶¹ The interrelationship between *dolus* and *culpa* is aptly described by Thirion J in *S v Zoko*:⁶²

“The division between *culpa* and *dolus* in the *lex Aquilia* is not one into mutually exclusive concepts. If one accepts with Mucius (D9.2.31) that “*culpam autem esse quod cum diligente provideri poterit, non esset provisum*”, then *culpa* is the blame attaching to the wrongdoer for not having taken the precautions which he could reasonably have taken in the circumstances to prevent harm from resulting from his conduct. That blameworthiness remains, despite the fact that he actually foresaw the possibility of the resultant harm (which he ought reasonably to have foreseen and guarded against) and intentionally brought it about. All that happens in the case where *dolus* is present is that an additional element, namely that of *dolus*, is added. I think therefore that it is correct to say that *culpa* underlies the whole field of liability under the *lex Aquilia*, and that in this part of the law *dolus* is merely a species or a particular form of the blameworthiness which constitutes *culpa*.”

⁵⁸ 1998 (61) *THRHR* 518

⁵⁹ See McKerron 1968 (85) *SALJ* 15 at 20.

⁶⁰ Kelly 2001 *SA Merc LJ* 529.

⁶¹ Mahomed J in *Ranbond Investments (Pty) Ltd v FPS (Northern Region) (Pty) Ltd* 1992 (2) SA 608 (W) at 621.

⁶² 1983 (1) SA 871 (N) at 896F–H.

2.67 In Chapter 5 of the report the Commission advocates a broader basis for apportionment than fault. The Commission recommends that fault should be one of a wide range of relevant factors which the courts are to consider in attributing responsibility for the loss suffered.

2.68 The Commission believes that as far as fault is used as a basis for or factor in apportionment it should include both intention and negligence. This is achieved in the draft Bill by using the term “fault” in section 3(2)(b)(iii) in its ordinary and accepted sense of including both intention and negligence and by expressly referring to intention in the definition of “wrong” in section 1.

CHAPTER 3

3. APPLICATION OF THE ACT

A. INTRODUCTION

3.1 In this Chapter and in Chapter 4, we consider the application of the Act and whether the Act should be applied to other areas of the law. In this Chapter we consider the applicability of the Act to breach of statutory duty, strict liability and breach of fiduciary duty including breach of trust. In Chapter 4, we consider whether the application of the Act should be extended to contractual claims.

B. BREACH OF STATUTORY DUTY

3.2 In the Discussion Paper the Commission considered whether the negligent defendant who has breached a statutory duty can claim apportionment in terms of the Act.¹

3.3 In terms of the current South African approach, breach of a statutory duty is regarded as being *per se* unlawful.² According to McKerron,³ to entitle a person to sue for breach of a statutory duty, it must be shown that (a) the statute was intended to give a right of action; (b) that the claimant was one of the persons for whose benefit the duty was imposed; (c) the damage was of the kind contemplated by the statute; (d) the defendant's conduct constituted a breach of the duty; and (e) the breach caused or materially contributed to the damage.

3.4 In language which is more consistent with the contemporary approach to the distinction between unlawfulness and fault, once McKerron's categories (a), (b), and (c) are satisfied and it is found that the statute in question establishes a legal duty which the defendant has breached, the only questions remaining are whether the defendant has been negligent and whether his or her negligence has caused the economic loss of the plaintiff.⁴

¹ Discussion Paper 11.

² Burchell *Principles of Delict* 46.

³ *Law of Delict* 276. These requirements were applied by Jansen JA in *Da Silva v Coutinho* 1971 (3) SA 123 (A).

⁴ Burchell *Principles of Delict* 46.

3.5 Where the damage results from the breach of an absolute duty imposed by statute, it might be argued that the breach would ground a defence of contributory negligence at common law, and would therefore constitute fault on the part of the defendant in terms of section 1(3). McKerron⁵ submits that there is no substance in this argument as breach of a statutory duty is not *per se* contributory negligence as “at most it is evidence of contributory negligence”. The GCB, on the other hand, submits that the Act should apply to cases of breach of a statutory duty.

3.6 In all Australian jurisdictions, except New South Wales, fault includes breach of a statutory duty.⁶ In New South Wales contributory negligence is not available as a defence to an action for personal injuries ‘founded on a breach of statutory duty imposed on the defendant for the benefit of a class of persons of which the person so injured was a member at the time the injury was sustained’.⁷

3.7 The Commission invited comment on the opposing viewpoints. Attorneys Stegmanns, Joubert, Galpin and Searle and the Cape Law Society were all of the view that the Act should be extended to breach of a statutory duty.

3.8 In chapter 5 of the report, the Commission recommends that the basis of apportionment be extended beyond fault and that the criterion for apportionment should be responsibility for loss rather than fault. This will allow the courts to consider a much wider range of factors.

3.9 The Commission thus recommends that the Act should apply to all breaches of statutory duty irrespective of whether fault is present.

C. STRICT LIABILITY

3.10 The South African law of delict is founded on the basic principle that all harm caused by wrongful and blameworthy (or culpable) conduct can be recovered by delictual action.⁸ A wrongdoer who caused damage could be delictually liable only if there was fault (intent or negligence) on his part.⁹ This view of the basis of delictual liability is referred to as the fault theory.

⁵ *Law of Delict* 297.

⁶ Trindade and Cane *Law of Torts* 428.

⁷ Section 2 of the Statutory Duties (Contributory Negligence) Act, 1945.

⁸ Van der Walt and Midgley *Delict* 19.

⁹ Neethling, Potgieter, Visser *Law of Delict* 363.

3.11 Despite the entrenched position of the fault principle, the phenomenon of strict or risk liability is not unknown in South African law. Recognised instances of strict liability arise from historical actions of Roman origin, principles of English law, or modern legislation.¹⁰

3.12 South African law still recognises some common law instances of strict liability.¹¹ The most important are:

3.12.1 Damage caused by animals

3.12.1.1 *Actio de pauperie* – this action lay against the owner of an domestic animal for the recovery of damages caused by the animal acting *contra naturam sui generis*;

3.12.1.2 *Actio de pastu* – for the recovery of damages caused by grazing animals;

3.12.1.3 *Actio de feris* – this action lay against a person who brought wild or dangerous animals into a public place.

3.12.2 Recovery of damages from occupier of a building

3.12.2.1 *Actio de effusis vel deiectis* – for damages caused by the throwing of something from a building;

3.12.2.2 *Actio positi vel suspensi* – for damages caused by something falling from a building.

3.12.3 Damage caused by owners of neighbouring property

3.12.3.1 *Interdictum quod vi aut clam* – for damage caused by the interference with the natural flow of water;

3.12.3.2 *Actio pluviae arcendae* – to interdict the owner of land who interferes with the natural flow of rain-water.

3.13 For policy reasons, the usual requirements of the *actio iniuriarum* have been deviated from in respect of liability of the press. The press is strictly liable. Liability without fault is also the basis of two other forms of *iniuria*, namely wrongful deprivation of liberty and wrongful attachment of property.

3.14 Vicarious liability may in general terms be described as the strict liability of one person for the delict of another. The former is thus indirectly or vicariously liable

¹⁰ Van der Walt and Midgley *Delict* 22.

¹¹ Neethling, Potgieter, Visser *Law of Delict* 365.

for the damage caused by the latter. This liability applies where there is a particular relationship between two persons. Three such relationships are important, namely that of employer- employee, principal- agent and motor car owner-motor car driver.¹²

3.15 New instances of strict liability have also been created by the legislature as well as by the courts.¹³ Industrial and technological developments brought about radical social and economic changes and gave rise to a need to re-evaluate the traditional basis of delictual liability. Individuals were increasingly exposed to potentially dangerous situations. This led to a need to protect the individual and the development of a field of liability without fault. The Post Office Act 44 of 1958, for example, creates strict liability for any person who directly or indirectly injures or destroys telecommunication lines. In terms of the Nuclear Energy Act 131 of 1993 the holder of certain nuclear licences is “liable (without fault) for all nuclear damage” caused during his period of responsibility. The licence holder may not raise fault (intent or negligence) on the part of a third party or the negligence of the plaintiff as a defence.

3.16 Liability in instances of strict liability is not based on fault. The Act applies to the apportionment of fault.¹⁴ The Act can have no application to damage caused by the breach of a strict or absolute duty in circumstances excluding negligence.¹⁵ The Commission’s recommendation that the basis of apportionment be extended beyond fault and that the criterion for apportionment should be responsibility for loss rather than fault will allow the courts to consider a much wider range of factors.

3.17 The Commission supports the application of the draft Bill to all cases covered by the definition of wrong, which includes strict liability in delict.

¹² Neethling, Potgieter, Visser *Law of Delict* 373.

¹³ Neethling, Potgieter, Visser *Law of Delict* 365.

¹⁴ Burchell *Principles of Delict* 111.

¹⁵ McKerron *Apportionment of Damages Act 1957* 13.

D. BREACH OF FIDUCIARY DUTY INCLUDING BREACH OF TRUST

3.18 The Commission also considered whether the operation of the Act should be extended to breach of fiduciary duty, including breach of trust. This issue was also considered by other law commissions.¹⁶

3.19 In the New Zealand case of *Day v Mead*,¹⁷ Mead (a solicitor) had persuaded his client Day to invest in a company in which Mead had an interest. The company failed and Day sued Mead to recover the money invested. The New Zealand Court of Appeal found that there had been a breach of fiduciary duty by Mead and that Day was entitled to equitable damages. However, the Court also found that Day had contributed to his own loss by making a second investment after becoming aware of the true state of the enterprise. To take account of this, damages in relation to the second investment were reduced by 25%. It would seem likely that where equitable damages are to be thus reduced, the very high standard of behaviour which a fiduciary is required to exhibit may require a clearer case of plaintiff fault to be made out by the fiduciary before the court will allow the reduction.¹⁸

3.20 The New Zealand Law Commission proposed in the Draft Civil Liability and Contribution Act¹⁹ that the Act was to apply to breach of trust. Section 5 of the Draft Act reads as follows:

“5 Application

(1) This Act applies to any loss or damage if the person who suffered it, or anyone representing that person’s estate or dependants is entitled to recover compensation from some other person in respect of that loss or damage, whatever the legal basis of liability, whether tort, breach of contract, breach of trust, or otherwise.”

3.21 A similar provision appears in the Civil Liability (Contribution) Act 1978 (Eng). Section 6(1) provides:

“(1) A person is liable in respect of any damage for the purposes of this Act if the person who suffered it (or anyone representing his estate or dependants) is entitled to recover compensation from him in respect of that damage (whatever the legal basis of his liability, whether tort, breach of contract, breach of trust, or otherwise).”

¹⁶ Ontario Law Commission *Report on Contribution*; New Zealand Law Commission *Preliminary Paper 19*; Alberta Institute of Law Research and Reform, *Contributory Negligence and Concurrent Wrongdoers*, Report No. 31 (1979).

¹⁷ [1987] 2 NZLR 443.

¹⁸ New Zealand Law Commission *Preliminary Paper 19* at 18.

¹⁹ New Zealand Law Commission *Report 47* at 16.

3.22 The Report of the Alberta Institute of Law Research and Reform²⁰ also addressed the issue as far as trusts are concerned and decided to exclude breach of trust from the scope of their apportionment legislation for the reason that they believed that the liability between the trustees and beneficiaries of trusts was adequately covered by the law of trusts.

3.23 The Ontario Law Reform Commission²¹ considered whether the partial defence of contributory fault ought to be extended by statute to breach of fiduciary duty, including breach of trust and recommended that as the law in this area was fluid and developing, the issue of the applicability of apportionment in this context should be determined by the courts on a case-by-case basis.

3.24 The Commission decided to define “wrong” widely to include “other legal duty” in order to include other acts or omissions giving rise to civil liability. This would allow a court to include, where appropriate, breaches of fiduciary duties giving rise to loss.

²⁰ *Contributory Negligence and Concurrent Wrongdoers*, Report No. 31 (1979).

²¹ *Report on Contribution* 249.

CHAPTER 4

4. CONTRACTUAL CLAIMS

A. INTRODUCTION

4.1 The question of the applicability of the Act and its counterparts in other countries to contractual clauses has elicited strongly opposed views and judgments in England, Australia, New Zealand and Canada and in our country.¹ All these common law countries share apportionment legislation. However, the wording of the various Acts differs as do the interpretation of the legislation by the courts.

B. THE COMMISSION'S PRELIMINARY RECOMMENDATIONS

4.2 The Commission suggested two possible solutions in the discussion paper. The first solution, which the Commission preferred, was to state unequivocally that claims for contractual damages fall within the ambit of the Act. The second solution was to spell out that claims for contractual damages are excluded from the ambit of the Act. The Commission was of the opinion that the matter could not be regarded as settled as it had not come before the Appellate Division. The matter came before the Supreme Court of Appeal in the case of *Thoroughbred Breeders' Association v Price Waterhouse*² which decided that the Act was not applicable to contractual claims. This decision was based on the history of contributory negligence and the intention of the legislature in enacting the Act. Nienaber JA stated in the majority judgment.³

"[74] ... The intention of the legislature as to the scope and range of the Act must be determined in the light of the situation prevailing at the time it was enacted. At that time the concepts of both contributory negligence and "last opportunity" rule were unknown to a claim based on breach of contract. It seems that the Act was designed to address and correct a particular mischief that was identified as such within the law of delict; that it was confined to that particular mischief; and that the corresponding problem that might arise within the law of contract was never within the legislature's compass. "The express wording used in the Act does not fit a contractual claim. In my view the comfort of the Act was accordingly not available to PW in this case to counter or curtail TBA's claim for damages."

¹ Olivier JA in *Thoroughbred Breeders Association v Price Waterhouse* 2001 (4) SA 551 (SCA) 605.

² 2001 (4) SA 551 (A).

³ At 590.

4.3 Olivier JA delivered a dissenting judgment in which he disagreed with the majority decision that the Act was not applicable to contractual claims. Nienaber JA stated:⁴

“My sympathies and inclination are wholly on the side of the views expressed by Olivier JA. There is, I believe, for the reasons stated by him, a pressing need for legislative intervention in a situation such as the present where the defendant’s breach of contract is defined in terms of his negligent conduct, but the plaintiff, by his own carelessness, contributed to the ultimate harm. But having said that, I am afraid that this particular piece of legislation does not fulfil that function.”

4.4 Marais JA, Farlam JA and Brand AJA delivered a concurring judgment expanding on the issue of the applicability of the Act. They state as follows:⁵

“By drawing attention to some of the implications of boldly applying the Act to cases in contract, (even if only to those where a breach entails negligence), we do not wish to be thought to be hostile to the very idea of extending the operation of the Act to contract cases by legislation. All that we would caution against is a decision to do so without a full appreciation and consideration of all its implications.”

C. RESPONSES TO THE DISCUSSION PAPER

4.5 The majority of responses to the discussion paper have been in favour of the extension of the Act to contractual claims.

4.6 The SA Institute of Chartered Accountants, the Public Accountants and Auditors Board, and attorneys Stegmanns were all in favour of the extension of the Act to include contractual claims.

4.7 Joubert, Galpin and Searle, attorneys of Port Elizabeth, responded that the extension of apportionment to breach of contract and a breach of statutory duty made good sense. They also expressed the view that the Act would, however, have to be amended to provide for breach as opposed to negligent conduct as, although negligent conduct may be a breach, not every breach amounted to negligent conduct.

“Presumably the apportionment could only apply to a claim for damages and not to specific performance. There will also have to be a provision preventing ‘contracting out’”.

4.8 Dr J C Knobel and Mr C-J Pretorius of the UNISA Law Faculty stated in their response that the concurrence of liability for breach of contract on the one hand and delict on the other hand and also the possibility that liability in contract and delict can overlap in certain circumstances, lend strength to the argument that the Act should

⁴ At 590.

⁵ At 605.

also apply to claims for compensation which flow from breach of contract. They questioned whether damages should be apportioned in cases where fault is not a requirement for breach of contract, and the claimant is nonetheless also at fault; whether an enquiry as to fault on the part of both parties was relevant where the defendant had bound himself to possible strict liability by means of a guarantee; and whether apportionment was appropriate in a contract where both parties had suitable remedies at their disposal.

4.9 The Law Society of the Cape of Good Hope could conceive of no circumstance in which a claim for damages flowing from a breach of contract might usefully be apportioned in terms of the Act. They further stated that “our now well established law of contract has been so developed as to cater appropriately for all conceivable and conflicting claims arising from contract. In the ordinary courts, claims arising from the same contract are dealt with by way of counter-claim and our courts are experienced adjudicators of such claims.”

4.10 In his response to the discussion paper, Professor A J Kerr⁶ refers to two cases involving contracts – *Kohler Flexible Packaging (Pinetown) (Pty) Ltd v Marianhill Mission Institute and Others*⁷ and *Thoroughbred Breeders Association v Price Waterhouse*⁸ – in which the courts took diametrically opposed views on the applicability of the Act.

4.11 Professor Kerr states that the Act was introduced to abolish the “last opportunity rule” which had developed from the “all-or-nothing” rule. As none of these rules applied in contract cases, the approach to similar problems in contract is quite different and deals with the problem from the point of view of causation. If the breach of contract did not cause or materially contribute to the occurrence of the loss, there is no liability in contract; if it did, the legal significance of the breach has to be determined.

4.12 Kerr holds the view that the Act should not be extended to claims in contract for three reasons. Firstly, because the Act was designed to counter the effects of two rules which did not and do not apply in contractual matters; secondly, because there are some questions on damages in delict which need attention before one can say that there is no substantial difference between damages in contract and delict; and thirdly, because the method of calculation in *Jones v Santam*⁹ takes no account of a

⁶ Published as “Responsibility in contract for loss suffered” 2000 (117) SALJ 210.

⁷ 2000 (1) SA 141 (D).

⁸ *Supra*.

⁹ *Supra*.

vital proposition, namely that the act is supplementary to, not in substitution of the principles of causation. The method of calculation requires the court to assess the divergence of each of the different parties conduct from the standard of the *bonus paterfamilias* and then to determine the amount for which each one is responsible *by taking account of that divergence*, NOT *by taking account of the magnitude of the causal effect of the factor for which each party is responsible*.¹⁰

4.13 Professor Kerr says causation does not depend on the magnitude of negligence or of any other kind of delictual fault. If the courts were bound by the terms of the Act to calculate by reference to degrees of fault of the different parties irrespective of the causal significance of the respective causal factors, this would show that the Act should not be extended to cases on contract either by legislation or by decision of the courts.

4.14 Professor Kerr believes that if there are pressing reasons for regulating aspects of damages in contract by statute, there should be a separate act. If cases where there are parties other than the plaintiff and the defendant involved in a single action occur with sufficient frequency, a new act would be advisable – it should deal only with claims between those responsible for different causal factors. One should not call those persons joint wrongdoers because fault is not a requirement of breach of contract though it may be present on some occasions.

D. APPORTIONMENT IN CONTRACTUAL ACTIONS

(a) Roman Law

4.15 In Roman and Roman-Dutch law *culpa* played a significant role in the law relating to breach of contract. In post-classical Roman law all claims for breach of contract were given content *ex aequo et bono*.¹¹ From then on, through medieval law, *usus modernus* and Roman-Dutch law, what mattered was whether the debtor had complied with his contractual obligations and if not, whether his failure to perform was attributable to his fault. The emphasis was on the subjective requirements for liability for breach of contract; and the attempts to analyse, refine and systematize the various degrees of *culpa*.¹²

¹⁰ Author's emphasis.

¹¹ Olivier JA in the *Thoroughbred* case (*supra*) 607.

¹² Zimmerman *op cit* 807 *et seq*; Ramsden *Supervening impossibility of performance in the South African law of contract* (1985) at 19 *et seq*.

4.16 The basic requirements for contractual and delictual liability in our common law did not differ fundamentally. Both kinds of liability were based on *culpa*. The incidence of onus may have been different, and the quantum of damages may have been different, but there was a basic unitary approach. Zimmerman¹³ pointed out that, during the *usus modernus*, liability arising as a consequence of deficient performance for breach of contract “tended to be based on the *lex aquilia* rather than on contractual principles”.

(b) English law

4.17 There were fundamental differences between our common-law roots and that of the English law in relation to the role played by *culpa* as a requirement for an action in contract. Zimmerman puts it as follows:¹⁴

“Contrary to the tradition of the *ius commune*, the debtor’s liability [in English law], in contract does not depend on fault. The reason is, of course, that the English common law regards all contractual promises as guarantees:

‘[W]hen [a] party by his own contract creates a duty or charge upon himself, he is bound to make it good,notwithstanding any accident by inevitable necessity.’”

4.18 This harsh and uncompromising rule of English contract law led to the creation of fictional “implied” terms and “implied” conditions to assist the debtor. But, it has also led to view that as fault is not relevant in contract cases, the principle of apportionment could not be relevant. Olivier JA states in the *Thoroughbred* case¹⁵ that this explains the omission in the English Act of 1945 of a reference to actions based on contracts.

4.19 There is no authority on the subject of how our common law dealt with cases where the plaintiff, suing on contract, was also at fault in respect of the loss suffered by him.

E. INTERPRETATION OF THE LEGISLATION BY THE COURTS

(a) England

4.20 Section 1 of the Law Reform (Contributory Negligence) Act of 1945 provides:

“(1) Where any person suffers damage as a 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 damage, but the damage recoverable in respect thereof shall be reduced to such extent as the court thinks just

¹³ *Op cit* 808.

¹⁴ *Op cit* 814.

¹⁵ *Supra*.

and equitable having regard to the claimant's share in the responsibility for the damage:

Provided that –

- this subsection shall not operate to defeat any defence arising under a contract;
- where any contract or enactment providing for the limitation of liability is applicable to the claim, the amount of damages recoverable by the claimant by virtue of this subsection shall not exceed the maximum limit so applicable”

4.21 Section 4 of the English Act contained a definition of fault, viz

“‘fault’ means negligence, breach of a 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.”

4.22 In 1951, Glanville Williams' book *Joint Torts and Contributory Negligence* was published, containing a forceful argument for applying the 1945 Act to breaches of a contractual duty not to be negligent.

4.23 At one time it was thought that the Act could apply where the defendant was in breach of a duty of care owed only in contract.¹⁶ Eventually, the matter came before the Court of Appeal in the case of *Forsikringsaktieselskapet Vesta v Butcher*.¹⁷

4.24 The plaintiff, Vesta, having correctly settled a claim against it, instituted action against the first defendant, Butcher, an underwriter, for indemnification by virtue of a policy of insurance. In the alternative, Vesta claimed damages against the second and third defendants (insurance brokers), alleging that they had failed to obtain a valid contract of re-insurance and failed to inform the first defendant that the plaintiff could not comply with its conditions. The second and third defendants denied liability. Hobhouse J found that the third defendants were in breach of their duty towards the plaintiff, but that the plaintiff was contributorily negligent in not making sure that the matter of the re-insurance had been solved by the third defendants. He held that the Act of 1945 was applicable.

4.25 Hobhouse J stated that the question of whether the Act applies to claims brought in contract can arise in a number of cases of which he identified three categories:

- (1) Where the defendant's liability arises from some contractual provision which does not depend on negligence on the part of the defendant;

¹⁶ *Artintoll v Hewen's Garages Ltd* [1973] R.T.R. 197; *De Meza and Stuart v Apple, Van Straton, Shena and Stone* [1974] 1 Lloyd's Rep 508 (QB); English Law Commission *Paper No 219* at 3; Havenga 2001 (64) *THRHR* 124; Olivier JA in the *Thoroughbred case (supra)* at 612.

¹⁷ [1989] 1 AC 852 (CA) ("*Vesta v Butcher*").

- (2) Where the defendant's liability arises from a contractual liability which is expressed in terms of taking care but does not correspond to a common law duty to take care which would exist in the case independently of contract; and
- (3) Where the defendant's liability in contract is the same as his liability in the tort of negligence independently of any contract.

4.26 According to Hobhouse J, the Act applies only to category (3) as there was a contractual as well as a tortious relationship. In such cases apportionment of damages would take place regardless of whether the plaintiff's claim was framed in tort or delict. On appeal, the decision was upheld by three judges of the Court of Appeal. Sir Roger Ormond held that although the Act was concerned only with tortious liability, the contract created a degree of proximity between the parties sufficient to give rise to a duty of care and therefore to a claim in negligence. He agreed that the damages should be apportioned.

4.27 The conclusion reached in *Vesta v Butcher* that the Act only applies to actions in contract where the defendant's liability in contract is the same as his liability in the tort of negligence independently of the existence of any contract, has been accepted by the English courts.¹⁸

(b) New Zealand

4.28 Section 3(1) of the New Zealand Act is identical to section 1(1) of the English Act, while the definition of "fault" in section 2 of the New Zealand Act corresponds exactly to that contained in section 4 of the English Act. The applicability of the New Zealand Act to contractual claims was first raised in *Rowe v Turner Hopkins and Partners*,¹⁹ where the Court of Appeal, without finding it necessary to decide the point, drew attention to the view that the Contributory Negligence Act, 1947 "can apply wherever negligence is an essential ingredient of the plaintiff's cause of action, whatever the source of the duty."

4.29 In the case of *Mouat v Clark Boyce*²⁰ the Court of Appeal considered the issue and unequivocally found that the New Zealand Act applies whether the source of the duty which is breached arises from contract or from tort. The court went even further and held that "whenever liability depends upon a breach of a duty of care

¹⁸ English Law Commission *Paper No 219* at 3 and the cases referred to therein.

¹⁹ 1982 1 NZLR 178 (CA).

²⁰ 1992 2 NZLR 178 (CA).

(however arising) apportionment for contributory negligence is available even if the Contributory Negligence Act be considered inapplicable.”

4.30 In the case of *Dairy Containers Ltd v NZI Bank Ltd; Dairy Containers Ltd v Auditor- General*,²¹ the Auditor-General (“AG”) was the auditor of Dairy Containers Ltd (“DCL”) by virtue of a contract between them. DCL sued the AG for damages, relying on a breach of contract by the latter, alleging a number of negligent acts and omissions.

4.31 The Court held that the AG had been negligent and had thus committed a breach of contract. The AG argued that the damages awarded against him should be reduced having regard to DCL’s contributory negligence, *inter alia* in failing to provide any clear direction or supervision in respect of a major part of the company’s business.

4.32 The Court held that the Contributory Negligence Act was enacted to remedy the arbitrary consequences of the all-or-nothing approach which developed where the plaintiff was in part responsible for the loss which he or she suffered. It was inappropriate to apply the Act in a matter which would perpetuate arbitrary consequences of the kind which the Act was designed to remedy. The court held that

“It is for the Courts, in implementing the Act, to fashion a regime under the Act which is fair and efficient in apportioning responsibility for the loss to where it rightly belongs.”

4.33 The Court held that it would be wrong in principle to expose the negligent auditor to the payment of the whole of the loss when much of the damage lay at the door of the company. Apportionment was applied and DCL’s damages were reduced by 40%.

(c) Australia

4.34 The apportionment legislation is virtually uniform in all Australian jurisdictions, the English precedent having been followed.²²

4.35 The High Court of Australia rejected the English and New Zealand approaches and in the case of *Astley and others v Austrust Ltd*,²³ legislation similar

²¹ [1995] 2 NZLR 30 (HC Auckland).

²² Swanton 1981 *Australian Law Journal* 278.

²³ [1999] HCA 6 (197 CLR 1).

to the English Law Reform (Contributory Negligence) Act, 1945 was held to have no application to claims for breach of contract. Austrust was a trustee company, which had sought advice from a firm of attorneys, Astley. Astley advised Austrust wrongly. Austrust suffered damages and sued Astley. Astley denied liability but pleaded, in the alternative, contributory negligence on the part of Austrust

4.36 The trial judge found that both parties had been negligent and apportioned the damages payable by Astley pursuant to the provisions of section 27A of the Wrongs Act 1936 of South Australia. On appeal it was held that the finding of contributory negligence on the part of Austrust was wrong. Astley was held liable for the full extent of damage. On further appeal it was held that Austrust was contributorily negligent. However, it was held that the Act was not intended to apply to claims for breach of contract. The Court held that the natural and ordinary meaning of section 27A(3) in the light of the definitions lead to the conclusion that the section was concerned with claims in tort rather than claims in contract. The Court considered whether the Act was applicable where the defendant's obligation under the contract coincided with the duty imposed by the general law of negligence, ie where concurrent delictual and contractual liability were present. The majority held that the Act was not applicable.

4.37 The decision was criticised by Masel and Kelly²⁴ as follows:

"In principle, the rules of our legal system should be consistent with one another. There should not be a different answer in tort from the one given in contract to *precisely* the same issue – liability for negligent advice in performing a contract. If a plea of contributory negligence is available in one action, why not also in the other? If the plea can lead to apportionment in one action, why not also in the other? If we expect our legal system to be efficient and to be respected, we cannot tolerate overlaps and inconsistencies which have no rational foundation, but which are explicable only in terms of procedural history."

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4.38 Chapter 1 of the Act deals with the apportionment of liability in case of contributory negligence. This Chapter was modelled on the English Act and closely followed the language of section 1(1) of the English Act. The only significant departure from the English text is in the definition of "fault". The definition of fault in the English Act appears to confine section 1(1) to claims in tort. The English definition exhaustively defines fault ("fault means ..."). Our section is open-ended

²⁴ 74 *Australian Law Journal* 306 *op cit*.

("...fault includes ...").²⁵ The effect of our section is to extend the ordinary meaning of fault and not to limit it as the English Act has.

4.39 After the Act was enacted it was unclear whether it applied also to a claim for damages for breach of contract, that is, whether damages for breach of contract could also be apportioned in terms of the Act. Section 1 of the Act did not expressly refer to delictual liability. Boberg²⁶ and McKerron²⁷ argued that if a plaintiff's loss from a breach of contract had been "caused partly by his own fault and partly by the fault of the defendant", his or her damages had to be reduced in terms of section 1(1)(a) of the Act.

4.40 The question whether the Act applies to claims for breach of contract was first raised in *Barclays Bank v Straw*²⁸ in which both the bank and the customer were negligent. The customer had signed a cheque for R1, and left a space between the words 'one' and 'rand'. When presented, the amount had been raised to R1 000,00 by the insertion of the word 'thousand' in this space. The bank was held to have been negligent in paying out R1000,00 because the alteration was in a lighter ink, the increased amount exceeded the drawer's account by around R400,00 and a total stranger had presented the cheque for payment.

4.41 The court held that the loss suffered by the customer could not be apportioned because (a) the customer was not claiming damages but seeking a declaratory order and (b) historically the Act had not been intended to apply to claims based on contract.

4.42 This aspect of the decision has been the subject of criticism by Jean Davids²⁹ who pointed out that "there is nothing in the wording of section 1 of the Act which should have prevented the damages from being reduced by the court, to the extent which the court deemed just and equitable, having regard to the degree in which the claimant was at fault in relation to the damage". The decision in *Barclays Bank v Straw* has been criticised by a number of other academic writers.³⁰

²⁵ For the wording of section 1(3) of the Act, see par. 2.5 above.

²⁶ *Law of Delict* 713.

²⁷ *Law of Delict* 298.

²⁸ 1965 (2) SA 93 (O).

²⁹ 1965 (82) SALJ 292.

³⁰ Boberg 1965 *Annual Survey* 180; Pretorius 1997 *SA Merc LJ*; Havenga 2001 (64) *THRHR* 124; Mofokeng 1999 (62) *THRHR* 120; Lotz 1996 (1) *TSAR* 170.

4.43 In *OK Bazaars (1929) Ltd v Stern and Ekerman*³¹ the matter was pertinently raised. In this case, the plaintiff claimed damages from a firm of land surveyors, for, *inter alia*, failing to exercise due care and skill in the performance of its obligations. The defendants claimed that the plaintiff was partly responsible for causing the damage and that since the plaintiff's cause of action was based on delict, the Act would apply.

4.44 The court held that the plaintiff's claim was based solely on breach of contract. The court³² held that section 1 of the Act does not apply to such a claim, for the following reasons:

1. The defendants argued that the word "fault" in section 1 of the Act, insofar as it referred to the defendant, was wide enough to include a breach of contract. But, Watermeyer J held that fault normally connotes a degree of blameworthiness and a contract can be breached by a party through no fault of his own. If section 1 is then construed as covering claims based upon breach of contract, should it be held to apply to certain breaches of contract only and not to others?
2. The history of the Act shows that it was intended to apply to delictual actions only. Prior to the passage of the Act, contributory negligence on the part of the plaintiff had the effect of completely defeating his or her claim. To alleviate this harsh consequence the "last opportunity" rule was developed, but even this was not satisfactory. Chapter 1 of the Act was designed to overcome this state of affairs.
3. This object of the legislature seems to be borne out by the words "shall not be defeated by reason of the fault of the claimant" in section 1(1). Watermeyer J said:

"Although in a claim based upon breach of contract negligence on the part of the plaintiff might be relevant in determining whether or not the damages claimed flowed from the defendant's breach, it would not be apposite to say that such negligence (fault) 'defeated' the plaintiff's claim. The plaintiff's claim would fail because he did not show that the damages flowed from the breach."

The learned Judge also stated that whilst this reasoning may not be entirely conclusive, it seems to be far more likely that the legislature had in mind the well-known defence of contributory negligence to a delictual claim.

³¹ 1976 (2) SA 521 (C).

³² Per Watermeyer J; Steyn J concurring.

4. A further indication is that contributory negligence was not normally one of the recognised defences to a claim based upon a breach of contract.
5. The meaning of section 1, if it is ambiguous, has then to be found by applying the canons of construction, which all indicate that the section is not applicable to actions based upon breach of contract, *inter alia*, that the legislature knows the existing state of the law; that an ambiguous statute should be interpreted in such a way as to conform to the existing law, and that in cases of obscurity the long title may be looked to. The learned Judge remarked that the long title makes it clear that the Act is one to amend the law relating to contributory negligence.
6. Inasmuch as prior to the passing of the Act contributory negligence was not one of the recognised common law defences to a claim based upon a breach of contract it seems unlikely that, had the legislature intended to introduce a radical change in the law, it would have done so in an oblique way and without using clear language to express such an intention.
7. An alternative argument was raised by the defendant. It was that even if section 1 of the Act did not apply to all claims for breach of contract, then it should at least be construed as covering claims for breaches of contract which import a duty not to be negligent. Counsel for the defendant relied on a number of English cases.³³ Watermeyer J held that the first case, *Sayers*, appears to have been brought in tort, the second, *Quinn* was decided on the basis of causation, and the last, *De Meza* was unconvincing. Apart from these considerations, Watermeyer J held that the English common law is not the same as ours and that there are material differences between the English Act and our Act. The alternative was thus also rejected.

4.45 The above decision has been widely criticised, *inter alia* by Van der Merwe and Olivier.³⁴ These authors stated that for them there was “geen prinsipiële verskil ...tussen 'n eis om skadevergoeding op grond van kontrakbreuk en op grond van onregmatige daad nie”.

³³ *Sayers v Harlow Urban District Council* [1958] 2 All ER 342 (CA); *Quinn v Burch Brothers (Builders) Ltd* [1965] 3 All ER 801 (QB); (1966) 2 All ER 283 (CA) and *De Meza and Stuart v Apple, Van Straton, Shena and Stone* [1974] 1 Lloyd's Rep 508 (QB).

³⁴ *Onregmatige Daad* 168.

4.46 Olivier JA in a dissenting judgment in the case of *Thoroughbred Breeders' Association v Price Waterhouse*³⁵ states that the *OK Bazaars'* judgment was and can be criticised on the following bases:

1. In regard to Watermeyer J's argument that the word "fault" in section 1 of the Act did not include a breach of contract, Olivier JA states that the argument is not convincing as the object of the Act was to regulate those cases where both parties acted negligently. It excluded from its operation cases of strict liability, statutory liability and contractual liability which do not depend on proof of negligence. Section 1(1)(a) of the Act specifically refers to cases where both parties are at "fault". The argument that the section cannot be applied, even if this particular party is at fault because other parties in other contracts may be liable without any fault, is not sound.
2. The argument that the history of the Act shows that it was intended to apply to delictual actions only loses sight of the crucial difference between our Act and the English Act. If our legislature intended section 1 to apply to delictual actions only, why did it not simply follow the English Act.
3. Olivier JA states that the argument that fault on the part of a plaintiff who sued in contract would not "defeat" his or her claim is untenable as by 1956 the same could be said of a claim in delict. By 1956 a plaintiff's claim in delict would not be defeated by reason of his or her fault – it would fail, sometimes, because the plaintiff's conduct, and not that of the defendant, was the proximate cause of the loss (ie he or she had the last opportunity to avoid the loss).
4. In regard to the argument that contributory negligence was not normally one of the recognised defences to a claim based upon a breach of contract, Olivier JA referred to the submission by Price Waterhouse (PW) that this argument overlooks the wording of the whole of the Act and the principle laid down in *Principal Immigration Officer v Bhula*³⁶ that in the case of conflicting or ambiguous provisions, the fair and equitable interpretation should be followed rather than a harsh and uncompromising one or rather than an approach which leads to unjustifiable discrimination between classes of defendants.
5. In regard to the argument that the application of various canons of constructions indicate that the Act was intended to apply to delictual claims

³⁵ *Supra* at 630B.

³⁶ *Supra*.

only, Olivier JA referred to the submission by PW that there is no canon of construction which militates against the view that the Act applies to contractual claims. On the contrary, it was argued, an analysis of the wording of the long title and of section 1(1)(a) show the opposite.

6. In regard to the argument that the legislature would have explicitly changed the legal position if it intended to, Olivier JA referred to PW's submission that if the legislature intended the Act to apply only to delictual claims, it would have simply followed the English Act.
7. In regard to the argument that even if the Act did not apply to all contractual claims, it should at least be construed as covering claims for breach of contract which import a duty not to be negligent, PW argued that Watermeyer J had not addressed the substance of the argument: if the breach of contract by the defendant requires proof of fault to found a claim for damages against the defendant, and the plaintiff is also at fault, why should section 1(1)(a) of the Act, according to its clear terms, and as a matter of logic, legal policy, fairness and justice, not be applicable.

4.47 In *Thoroughbred Breeder's Association v Price Waterhouse*,³⁷ the plaintiff sued its auditors for breach of contract, alleging that the auditors had failed to realise, in the course of a routine audit that the plaintiff's financial manager had been stealing from the company. The plaintiff contended that the auditors were contractually bound to exercise reasonable care in the execution of the audit, and not to perform their duties negligently and that the auditors had breached this duty. The court found that the auditor's failure to perform their contractual duties as auditors was an important cause of the loss but that the plaintiff's highly irresponsible employment of a convicted thief as a financial manager was the predominant effective or real cause of the loss suffered. The court considered whether the plaintiff's claim could be saved by the provisions of Chapter 1 of the Act.

4.48 Goldstein J interpreted the Act as being applicable to contractual claims. He stated:³⁸

"There is nothing in section 1(1)(b) or 1(3) which dissuades me from applying section 1(1)(a) to the present case. Clearly section (1)(1)(b) was introduced to effect the demise of the 'last opportunity' rule. It does not limit the content of the fault referred to in section 1(1)."

³⁷ 1999 (4) SA 968 (W).

³⁸ At 1025.

4.49 He held that the provisions of section 1(1)(a) were applicable without straining the language and by simply applying it to the facts of the case. The court deemed it just and equitable to reduce the plaintiff's claim having regard to the degree to which it was at fault. The judge distinguished the case of *Barclays Bank DCO v Straw*³⁹ and disagreed with the judgement in *OK Bazaars (1929) Ltd and Others v Stern and Ekermans*.⁴⁰

4.50 Havenga⁴¹ comments on the above judgment and expresses the view that "it is clearly desirable that the differences between contractual and delictual actions based on the same set of facts should be eliminated as far as possible". The author further states⁴² that

"Goldstein J's interpretation of the Act is to be commended. It is not absurd, inconsistent or anomalous. Quite the contrary: it is absurd to non-suit a plaintiff merely because he or she has suffered damage caused partly by his or her own fault. In this case, it would also be inconsistent and anomalous to have different rules for claims based on breach of contract and for claims founded in delict."

4.51 Christie⁴³ states that Goldstein J's reasoning is so convincing that it is no longer necessary to repeat the arguments in favour of applying the act to damages for breach of contract which were set out in the third edition of his book, but that it is perhaps still worth drawing attention to the major practical defect which existed in the law. Christie stated that it was open to a negligent plaintiff who had suffered loss from the defendant's breach of a contractual duty not to be negligent to choose whether to claim in delict or damages, and because damages could be apportioned in delict and not in contract, his choice might have a substantial effect on the amount of damages he could recover. This degree of knife-edge technicality should, he argued, be eliminated from the law where possible, and Goldstein J had achieved this desirable result.

4.52 Both parties appealed the decision. The majority decision of the Supreme Court of Appeal in the matter of *Thoroughbred Breeder's Association v Price Waterhouse*⁴⁴ overruled the judgment of the court *a quo*. The court referred to Goldstein's findings in the court *a quo* and expressed the view that both the dictum and the submissions were wrong, in fact and in law. "It is wrong as a proposition of

³⁹ *Supra*.

⁴⁰ *Supra*.

⁴¹ 2001 (64) *THRHR* 124.

⁴² At 128.

⁴³ *Law of Contract* 645.

⁴⁴ 2001 (4) SA 551 (A).

law since it seeks to convert an approach which is more appropriate to the law of delict to the law of contract where it is not appropriate.”

4.53 Olivier JA, in his dissenting judgment, expressed the view that the Act is in fact applicable to contractual claims. The learned judge conducted a detailed analysis of the common law, the legislation in English, South African, Australian and New Zealand law, and the case law on the subject. His criticism of the judgment in the *OK Bazaars* case⁴⁵ is set out above. TBA submitted that the decision in the *OK Bazaars* case had stood for more than two decades and should not be overturned even if wrong, except by a clear legislative intervention. Olivier JA’s reply to this was that the Appellate Division had on several occasions rejected this approach. He referred to the case of *Dukes v Marthinusen*⁴⁶ in which Stratford ACJ said:⁴⁷

“If the decisions had disregarded fundamental principles of our law, we might have to reassert those principles even at the cost of reversing judgments of long standing.”

4.54 Olivier JA concluded that “the feasibility of a plea of contributory negligence in the case of a claim for breach of contract on the defendant’s failure to exercise due care depends upon an exercise of statutory interpretation.” He stated further that important policy considerations lay behind this. He stated that there were two interrelated considerations which cause him to lean in favour of the applicability of section 1 to claims of a contractual nature. These are:

- “(i) The need for its applicability. This is not simply an academic exercise: there is a definite lacuna in the law if such a defence is to be denied in the narrow circumstances which apply in this case; and
- (ii) the glaring inequity of denying the existence of such a defence in circumstances such as those prevailing in this case.”

4.55 Oliver JA continued that it would be patently unfair if PW should have to bear the full brunt of the entire loss when TBA was itself partly to blame for its occurrence. The greater the comparative degree of a plaintiff’s lack of precaution in relation to the harm of which he complains, the more apparent will be the inequity of the denial of a plea of contributory negligence.

4.56 The judge referred to other comparable instances eg where a building contract is entered into between a building owner and a contractor. The specifications furnished by the building owner to the contractor negligently stipulate an incorrect mix for the concrete he is to use. The contractor is also negligent in that

⁴⁵ *Supra*

⁴⁶ 1937 AD 12.

⁴⁷ At 23.

he provides inadequate reinforcing. As a result a wall collapses. According to expert evidence, both factors contributed thereto. The building owner sues the contractor for the damage it sustained as a result thereof. Is it fair that the plaintiff should succeed in full or not at all?

4.57 Olivier JA gave other examples of how unfair the operation of the effect of the existing law can be, citing the *OK Bazaars* case⁴⁸ and the case of *British South Africa Co v Lennon Bros Ltd.*⁴⁹ He contrasted the case of *De Meza and Stuart vs Apple, Van Straten, Shena and Stone*,⁵⁰ where the defendant's auditors and the instructing plaintiff, a firm of attorneys were both found to be negligent. The court held that the contract had imported a duty on the part of the auditors not to be negligent and held that the English Law Reform (Contributory Negligence) Act of 1945 did apply. This decision led to a fair result.

4.58 Olivier JA noted⁵¹ that the last opportunity rule formed no part of the Roman-Dutch law and was imported into this country from England. It may be that the Act was primarily concerned to rectify the kind of problem which occurred consistently in the law of delict and less in the law of contract. But could the Act not also provide a satisfactory answer to a problem which, although it may have occurred less often in the law of contract, was nevertheless a real one? Olivier JA concluded that the loss suffered by TBA should be apportioned according to the standard laid down in the Act.

4.59 In regard to the interpretation of section 1, Olivier JA states that two conflicting interpretations can be given to section 1 as in regard to the definition of "fault" section 1(1)(a) would unambiguously allow apportionment in contractual claims, while section 1(3) is ambiguous. He states that the correct approach is laid down in *Principal Immigration Officer v Bhula*.⁵² Where two meanings may be given to a section, and the one meaning leads to harshness and injustice, whilst the other does not, the court will hold that the legislature rather intended the milder than the harsher meaning. Olivier JA states that fairness and justice favour the approach that section 1 of the Act should apply also to contractual claims.

⁴⁸ *Supra.*

⁴⁹ 1913 SR 94.

⁵⁰ [1974] 1 Lloyds Rep 508 (QB).

⁵¹ At 633.

⁵² 1931 AD 323.

4.60 In the case of *OK Bazaars (1929) Ltd v Stern and Ekermans*,⁵³ one of the reasons the court gave for the non-applicability of the Act to contractual claims was that historically the “all-or-nothing” rule and last opportunity rule did not apply to contract. Kerr⁵⁴ states that the Act was introduced to abolish the “last opportunity rule” which had developed from the “all-or-nothing” rule and that the Act should not be extended to claims in contract because the Act was designed to counter the effects of two rules which did not and do not apply in contractual matters.

4.61 Christie⁵⁵ states that our common law derives the “all-or-nothing rule” from a factual situation⁵⁶ which could equally well be treated as delictual or contractual. In the example of the man being shaved by a barber in a place where ballgames are being played, it is apparent that situation is not a purely delictual one and the customer whose throat is cut by the barber would have the choice of suing him either under the *lex Aquilia* or in contract. Christie concludes that this being the common law background to our Act, our courts ought to be even more ready than the English courts have been to apply the Act to claims in contract.

4.62 Lotz⁵⁷ agrees with Christie’s theory that the history of the “all-or-nothing” rule shows that it applied also to breach of contract and concludes that there is thus no historical reason why the Act should not apply to contractual damages.

4.63 Christie⁵⁸ refers to the *OK Bazaars* case as a judgment based on the construction of the Act as an Act directed at reforming law of delict. Nevertheless he suggests that the decision might be reconsidered and the Act applied to claims in contract, as has been done with the equivalent English Act by the English courts. He states that it is undesirable to leave the law in a state where the employment of purely technical skill in pleading may lead to a result fundamentally different from that which would be reached if a lesser degree of technical skill were employed. When a contract contains an express or implied term imposing an obligation not to be

⁵³ *Supra*.

⁵⁴ 2000 (117) SALJ 210 at 217.

⁵⁵ *Law of Contract* 615.

⁵⁶ D 50 17 203 lays down the general principle and in D19 2 11 pr Ulpian discusses it in connection with claims under the *lex Aquilia*. Voet 9 2 17 and Van der Linden’s note to this passage in Voet both comment upon Ulpian’s discussion of the shaving incident along the lines that the “all-or-nothing” rule would result in the customer recovering either full damages or no damages at all according to whether the barber or the customer was more to blame. Voet, like Ulpian is discussing the *lex Aquilia* and neither he nor Van der Linden comment on the possibility of a different result occurring according to whether the customer sues in contract or in delict.

⁵⁷ 1996 (1) TSAR 170.

⁵⁸ *Law of Contract* at 612.

negligent, a breach of this term may equally well be described as a breach of contract or a delict giving rise to Aquilian liability. A skilful pleader, by pleading such a case in contract, could avoid the danger of a reduction of damages by apportionment under the Act. This degree of technicality should be eliminated from our law. It is instructive to see how the English courts appear to have achieved this desirable result.

4.64 Christie refers to the publication of Glanville Williams *Joint torts and contributory negligence* in 1951 after the enactment of the English Act and concludes that in changing the definition of fault, our legislature was departing from the restrictiveness of the English definition so as to leave it open to the courts to apply the Act in the widest possible circumstances, including cases of breach of contract. It could even be argued that because our Act deliberately omitted the first part of the English definition with its reference to negligence and liability in tort, it should be interpreted as covering cases of breach of contract which had not involved negligence and which could not also be regarded as delicts. Our courts should therefore be more ready than the English courts have been to apply the Act to claims in contract.

4.65 Our courts have, however, adopted a conservative approach to the extension of the Act to contractual claims and it appears that the legislature will have to take remedial steps to change the law.

F. CONCURRENCE OF CONTRACT AND DELICT

4.66 Since the beginning of the last century, perceptions about the traditional area of application of the law of contract and delict have changed. The traditional sphere of application of the law of delict has been extended considerably to include not only liability without fault or so-called risk liability, but also liability based on negligence for harm caused in an indirect manner such as by omission or misrepresentation, and for pure economic loss.⁵⁹ These changes have tended to highlight the similarities between contractual and delictual liability. As a result of this process the overlap between these forms of liability (and therefore the numbers of situations of concurrence) has grown enormously. The law of contract and delict do not constitute completely separate and independent compartments. Because of the expansion of delictual and contractual liability to situations falling outside the traditional paradigm,

⁵⁹ *Administrator, Natal v Trust Bank van Afrika Bpk* 1979 (3) SA 824 (A); *Bayer South Africa (Pty) Ltd v Frost* 1991 (4) SA 559 (A); *Indac Electronics (Pty) Ltd v Volkskas Bank Ltd* 1992 (1) SA 783 (A).

a wide overlap exists where both types of liability apply.⁶⁰ In her LLD thesis on the topic and in articles on the subject⁶¹, Annél van Aswegen has dealt specifically with concurrence of claims for breach of contract and delict.

4.67 In the case of *Van Wyk v Lewis*⁶² the courts accepted that a surgeon who performs an operation negligently acts wrongfully towards the patient and is liable in delict, irrespective of the existence of a contract, because he has infringed the patient's right to bodily integrity, and his duty of care towards the patient exists even if no contract were concluded.

4.68 In *Administrator, Natal v Trust Bank van Afrika Bpk*,⁶³ the Appellate Division held that in our law Aquilian liability could in principle arise from negligent misstatements which caused pure economic loss, but cautioned against an extension which was either too wide or too rapid.

4.69 From the decision in *Van Wyk v Lewis*,⁶⁴ it was clear that the courts were not averse, in principle, to the idea of a concurrence of liability in contract and delict, at any rate when the loss in question is of a physical nature. However, when in the early 1970's and thereafter, they were faced with claims in delict for economic loss caused by negligent breach of contract, their attitude was different. The courts stressed that our law adopts a more cautious, incremental approach to the extension of Aquilian liability into new fields, particularly when the claim involves pure economic loss.⁶⁵

4.70 The high point of this conservative phase was reached in the case of *Lillicrap, Wassenaar and Partners v Pilkington Brothers*.⁶⁶ This case involved a claim for pure economic loss arising out of a contract by Lillicrap, Wassenaar and Partners (L), a firm of consulting and structural engineers to render professional services to Pilkington Brothers (P). The claim was brought in delict because the contractual claim had prescribed. The Court held that P did not have a concurrent claim in delict.

⁶⁰ Van Aswegen 1997 *Acta Juridica* at 89.

⁶¹ LLD thesis UNISA 1991; 1992 (55) *THRHR* 271; 1994 (57) *THRHR* 147; 1997 (60) *THRHR* 453.

⁶² 1924 AD 438.

⁶³ 1979 (3) SA 824 (A).

⁶⁴ *Supra*.

⁶⁵ Hutchison and Van Heerden 1997 *Acta Juridica* 97 at 100.

⁶⁶ 1985 (1) SA 475 (A).

4.71 Annel van Aswegen⁶⁷ gives a brief analysis of the phenomenon of concurrence of contractual and delictual liability for damages and thereafter a synopsis of the possible solutions adopted in different legal systems for situations of concurrence. She states⁶⁸ that there are three main types of solutions adopted in cases of strict concurrence: alternativity or election; exclusivity; and cumulation or coordination.

4.72 Alternativity or election allows the plaintiff to choose freely which of two competing claims he or she wishes to institute. Exclusivity limits the plaintiff to one of the two possible claims and allows no freedom of choice in the matter: the law prescribes which claim may be instituted. This is achieved in two ways, either by the acceptance of the application of the rules of contract law to the total exclusion of the rules of the law of delict, or by the gravamen approach which consists of determining from the pleadings the gist of the plaintiff's claim and then only allowing the claim indicated. Cumulation or coordination allows the plaintiff to cumulate or combine the consequences of the two claims. The different consequences attached to each of the claims may be combined in respect of the claim instituted to obtain full compensation.

4.73 The question of which solution has been accepted by courts in South Africa has been discussed in a number of articles on the subject.⁶⁹ According to Hutchison and Visser,⁷⁰ the approach in *Lillicrap* was to follow the alternative system where physical loss is involved and the exclusive system in pure-economic-loss cases. Midgley⁷¹ disagrees with this view, stating that the court did not draw such a line of demarcation. He states that although the loss in *Lillicrap* was purely economic, this does not seem to be the prime reason for the decision. In Midgley's view, the *Lillicrap* decision, in line with *Van Wyk v Lewis*, indicates that South African law accepts the alternative system of concurrence in all cases.

4.74 Hutchison and Van Heerden⁷² consider various situations of concurrence which arise in the case law. They categorise the situations as follows. Firstly, where there is a direct contractual link between plaintiff and defendant; where both contractual and delictual liability are present; where the plaintiff can elect to bring the

⁶⁷ *Op cit* at 75.

⁶⁸ At 79.

⁶⁹ Hutchison and Visser 1985 (102) *SALJ* 587; Van Aswegen 1997 *Acta Juridica* 75 at 82; Midgley 1990 (107) *SALJ* 621 at 627.

⁷⁰ 1985 (102) *SALJ* 587 at 591.

⁷¹ Midgley 1990 (107) *SALJ* 621 at 627.

⁷² 1997 *Acta Juridica* 97 at 112.

claim in contract or in delict.⁷³ Secondly, where there is no direct contractual link between the plaintiff and the defendant as in the case of a disappointed beneficiary. The plaintiff has no alternative but to bring the case in delict.⁷⁴ Thirdly, where the breach of contract causes loss within a 'contractual matrix'-type situation, there is no privity of contract between the plaintiff and the defendant⁷⁵ Each of the parties is linked by way of contracts to a middle party. This involves two linked but independent contracts. The fourth situation of concurrence arises where a breach of contract causes loss to a party at the end of the contractual chain.⁷⁶

4.75 There has been much academic disapproval of the *Lillicrap* decision and the courts have seemed inclined, for the most part, to distinguish it whenever they could.⁷⁷ Olivier JA in the *Thoroughbred* case stated that the decision of the court in the *Lillicrap* case that the plaintiff who had suffered economic loss arising out of a contract, did not have a concurrent claim in delict meant that the approach followed in *Vesta v Butcher* in England and *Dairy Containers* in New Zealand is not open to us.

4.76 However, Midgley⁷⁸ states that the interpretations of the judgment and the alternative solutions offered are flawed because the courts and the majority of commentators have failed to determine the nature of the inquiry into the concurrence of actions. The writer refers to the theory⁷⁹ that the problem of concurrence involves two questions. The first question is whether a given set of facts satisfies the requirements of two or more distinct bases of liability. An affirmative answer in this regard raises the second issue, whether, as a matter of legal policy, the plaintiff should have a choice between the alternatives.

4.77 Midgley agrees with the view that there should be a two-pronged inquiry, but believes that the decision to allow or deny concurrence should be the preliminary

⁷³ Examples of this situation arose in the case of *Van Wyk v Lewis* 1924 AD 438 where a surgeon had been negligent in operating on the plaintiff.

⁷⁴ *Arthur E Abrahams and Gross v Cohen and Others* 1991 (2) SA 301 (C); *Ries v Boland Bank PKS Ltd and another* [2000] 1 All SA 599 (C); *Pretorius and others v McCallum* 2002 (2) SA 423 (C); *Aucamp and others v University of Stellenbosch* 2002 (4) SA 544 (C).

⁷⁵ *Combrinck Chiropraktiese Kliniek (Edms) Bpk v Datsun Motor Vehicle Distribution (Pty) Ltd* 1972(4) SA 185 (T); *Compass Motors Industries (Pty) Ltd v Callguard (Pty) Ltd* 1990 (2) SA 520 (W).

⁷⁶ *Tsimatakopoulos v Hemingway, Isaacs and Coetzee CC and another* 1993 (4) SA 428 (C).

⁷⁷ *Hutchison and Van Heerden* 1997 *Acta Juridica* 97 at 100; *Greenfield Engineering Works (Pty) Ltd v NKR Construction (Pty) Ltd* 1978 (4) SA 901 (N).

⁷⁸ 1990 (107) SALJ 621.

⁷⁹ This theory was expounded by Lubbe and Murray *Farlam and Hathaway Contract* 11 following Hosten, 1960 (23) *THRHR* 251. Also referred to by Annel van Aswegen 1997 *Acta Juridica* 75 at 78.

one. Midgley analysed the *Lillicrap* judgment using the two-pronged approach. He states that the court conducted the first enquiry – (whether the plaintiff should have a choice between the alternatives) – at 496 of the judgment where Grosskopf AJA declared:

“In modern South African Law we are of course no longer bound by the formal *actiones* of Roman law, but our law also acknowledges that the same facts may give rise to a claim for damages *ex delicto* as well as one *ex contractu*, and allows the plaintiff to choose which he wishes to pursue ... The mere fact that the respondent might have framed his action in contract therefore does not *per se* debar him from claiming in delict. All that he need show is that the facts pleaded establish a cause of action in delict. That the relevant facts may have been pleaded in a different manner so as to raise a claim for contractual damages is, in principal, irrelevant.”

4.78 Midgley concluded that as the court answered the first question in the affirmative and in line with *Van Wyk v Lewis*⁸⁰ this indicated that South African law accepts the alternative system of concurrence in all cases.

4.79 The court then proceeded to conduct the second part of the enquiry (whether the set of facts satisfied the requirements of two or more bases of liability). The court considered whether all the elements of a delict were present. The court considered the wrongfulness element, applying the test of reasonableness, which it said, involves policy considerations. It held that a breach of a contractual duty is not *per se* wrongful for delictual purposes. The majority considered whether policy factors dictated that the “negligent performance of professional services, rendered pursuant to a contract, can give rise to the *action legis Aquilia*”. The court held that the engineers’ negligent rendering of services did not amount to wrongful conduct. The majority was not prepared to extend the Aquilian action to this kind of case, since there was no need to do so. Midgley states⁸¹ that

“The majority distinguished infringements of rights of persons and property from the mere failure to perform specific professional work with due diligence. Although the loss in *Lillicrap* was purely economic, this does not seem to have been the prime reason for the decision. The majority was concerned with ‘whether the negligent performance of professional services, rendered pursuant to a contract, can give rise to the *action legis Aquiliae*.’”

4.80 Midgley further states that statements made in the *Lillicrap* case such as “the Aquilian action does not fit comfortably in a contractual setting like the present” and “I do not consider that policy considerations require that delictual liability be imposed for the negligent breach of a contract of professional employment of the sort with which we are here concerned” indicate that delictual liability may extend to other contractual situations involving negligently inflicted pure economic loss.

⁸⁰ *Supra*.

⁸¹ At 629.

4.81 Midgley concludes that

“the problem, therefore is not *whether* we should allow concurrence in pure-economic-loss cases, but *when* it should be allowed.”

4.82 In *Pinshaw v Nexus Securities (Pty) Ltd*,⁸² Comrie J applied the theory that the problem of concurrence involves two questions and used the two-pronged approach as discussed by Midgley⁸³ to allow concurrence. The plaintiff had appointed the first defendant (Nexus) to manage her investments. The second defendant (Van Zyl) was employed by Nexus. The plaintiff brought a contractual claim against Nexus, alleging that the company had acted in bad faith, dishonestly and against her interests. The plaintiff brought a delictual claim against Van Zyl, alleging that Van Zyl in dealing with her portfolio on Nexus’ behalf acted fraudulently, recklessly or grossly negligently.

4.83 Van Zyl raised an exception to the particulars of claim on the basis that in the circumstances pleaded, including the fact that the claim was one for pure economic loss, he did not owe the plaintiff a duty of care. The exception was based largely on the *Lillicrap* decision. Comrie J in his judgment applied the two-pronged approach discussed above to his interpretation of *Lillicrap* and concluded that concurrency was permissible in principle.

4.84 As a result of the expansion of the traditional sphere of application of the law of delict in the South African law, the divisions and distinctions between contract and delict have decreased. The overlaps between these forms of liability and therefore the numbers of situations of concurrence have grown enormously. In the light of the emergence of the principle of concurrent liability, the Act should be made applicable to cases of contributory negligence in contract also to avoid the anomaly that arises if the legislation is restricted to actions brought in delict.⁸⁴

4.85 Swanton⁸⁵ states

“The problem of whether contributory negligence is, or should be, a defence to actions for breach of contract may be seen as an aspect of the wider question of the relationship between tort and contract and the extent to which an assimilation of the two fields is taking place. It is one of the legal complications resulting from the great expansion of the tort of negligence. Negligence is encroaching on fields previously considered to be the sole province of the law of contract. Observers have discerned a gradual amalgamation of tort and contract and the comment has been made that the dichotomy between the two has outlived its utility. Distinctions which might once

⁸² [2001] 2 All SA 589 (C).

⁸³ 1990 (107) SALJ 621.

⁸⁴ Masel and Kelly 74 *Australian Law Journal* 313.

⁸⁵ 1981 *Australian Law Journal* 289.

have been validly drawn to differentiate the fields of tort and contract eg between physical and financial loss, are constantly being eroded. There is no longer a clear cut division between tort and contract.

It may be thought that, especially as there is legislation in existence in the field already, the complexities and uncertainties which have been discussed above call for legislative resolution. Perhaps the important questions of policy which arise are too far-reaching ever to receive proper consideration on a case-by case basis.

Apportionment of damages is a concept which was introduced to overcome cases of obvious injustice in the law of tort. But the question inevitably arises why a plaintiff who is to some degree at fault should lose part of his civil entitlement if he sues in respect of one civil wrong but not another. Attention should be directed to the question whether there is justification for apportionment only in cases of tortious negligence or whether it should be available in respect of any negligence or of any tort or even any civil wrong. Beyond that, of course, the significance, so far as contributory negligence is concerned, of the availability of concurrent remedies in tort and contract needs to be resolved. It might also be asked whether types of fault other than negligence on the plaintiff's part justify reduction of damages."

4.86 PH Havenga⁸⁶ in a commentary on the judgment of the court *a quo* in the *Thoroughbred* case states that it is clearly desirable that the differences between contractual and delictual actions based on the same set of facts should be eliminated as far as possible. He commends Goldstein J's interpretation of the Act and states that it would be inconsistent and anomalous to have different rules for claims based on breach of contract and for claims founded in delict. The writer concludes that in a number of cases a plaintiff will have a concurrent claim against the defendant. It seems illogical and unjust that a plaintiff should be able to escape the consequences of his or her own negligence by suing in contract alone. There seems to be a good reason why, in an appropriate case, the defence of contributory negligence should be available whether the claimant chooses to sue in contract or delict or both.

4.87 DJ Lotz⁸⁷ states that the decisions in the cases of *Barclays v Straw*⁸⁸ and *OK Bazaars (1929) Ltd v Stern and Ekermans*⁸⁹ were made before the Appellate Division recognised in *Lillicrap* the possible overlap of delictual liability and liability on grounds of breach of contract which occurred negligently. It would be anomalous where there is a concurrence of negligent delictual and contractual damages to apply the Act to one and not the other. He also states that there is no principal difference between a contractual action (where fault plays a part) and a delictual damages claim.

4.88 Lotz concludes that whether the Act should be applied is a question which must be answered on grounds of equity. If the apportionment of contractual

⁸⁶ 2001 (64) *THRHR* 124.

⁸⁷ 1996 (1) *TSAR* 170.

⁸⁸ *Supra*.

⁸⁹ *Supra*.

damages will result in a more flexible system, the writer favours the application and believes that it should be endorsed.

4.89 Olivier JA stated⁹⁰ in the *Thoroughbred* case:

“The phenomenon of causative negligence on the part of both a plaintiff and a defendant is not limited to delictual claims. In many instances of contractual claims for damages there can and will be a co-incident of both delictual and contractual liability (ie if there was damage of the kind giving rise to Aquilian liability eg, in the case of a physician’s negligence). If the plaintiff sues in delict, the Act would apply and the plaintiff would be liable only in part; if the action is brought in contract, the plaintiff would succeed totally if one follows the approach of our courts at present Why should there be a difference, ... depending not on the acts, or the respective degrees of fault or blameworthiness of the parties, which are the same in both actions, but on the form of action chosen by one of the parties vis the plaintiff?”

4.90 Olivier JA referred to Buckley’s commentary on the English law where Buckley says of the approach in *Vesta v Butcher* that it is sensible and proceeds:

“A rigid demarcation between tort and contract would seem mechanistic and outdated today, not least in the expanding field of professional negligence where allegations, amounting to claims that defendants failed to take reasonable care, are often advanced in a contractual context.”

4.91 Olivier JA pointed out that South African writers have also remarked on the indefensibility of the distinction between contractual and delictual claims as far as the applicability of section 1(1)(a) of the Act is concerned. He referred to Christie’s comments:⁹¹

“...Where a contract contains an express or implied terms imposing an obligation not to be negligent (which very frequently happens) a breach of this term may equally be described as a breach of contract or a delict giving rise to Aquilian liability. It is undesirable that if the case is pleaded in delict this would lead to a reduction of damages whilst if pleaded in contract, a skilful pleader could avoid the danger of a reduction.

4.92 The Scottish Law Commission in the recent report titled “*Report on remedies for breach of contract*” (1999) gave an example of a contractor who contracts with an electricity supply company for a continuous supply of electricity. The company, in breach of the contract, allows an interruption in the supply. This is one of the causes of a loss to the contractor who has to re-lay a large column of concrete. Another causal factor was that the contractor failed to take reasonable steps to see that a back-up system was available before beginning a task for which a continuous supply of concrete was available. The Scottish Law Commission expresses the view that awarding the contractor full damages or no damages may be equally unattractive.

⁹⁰ At para [134].

⁹¹ Para 4.51 above.

The reasonable course may be to apportion the liability, taking into account the conduct of both parties.

4.93 The Scottish Law Commission further states that where loss or damage is sustained as a result of a breach of contract, the aggrieved party may be partly to blame for the loss or harm. It is desirable to take into account the conduct of the aggrieved party in contributing to the loss or harm. This is just an extension of the policy underlying the well established rules on mitigation of loss. To force courts into an all or nothing choice is to produce unreasonable results. The reasonable course is to apportion the liability, taking the conduct of both parties into account.

4.94 Lubbe and Van der Merwe⁹² refer to the case of *Strijdom Park Extension 6 (Pty) Ltd v Abcon (Pty) Ltd*⁹³ in which the respondent, a building contractor who had committed a positive malperformance in the construction of a concrete roofing slab, alleged that an engineer acting on behalf of the building owner had contributed to damage resulting from the collapse of the roof by the manner in which he had executed the design and exercised his duty to inspect and supervise the construction work. The court found that the contractor's breach was in a factual sense the sole cause of the failure of the slab. Lubbe and van der Merwe considered the position under the common law in respect of situations where apportionment might become an issue in the contractual setting. They came to the conclusion that contributory conduct should be a relevant factor in dealing with instances of dual causality. They found that the tentative pronouncements of the courts were an unsatisfactory basis for the further development of the law in this regard and that there was a need for the Act to be amended to extend its operation to breach of contract.

4.95 MM Loubser⁹⁴ examines some of the problems that arise where contract and delict intersect. He considers whether substantive and procedural differences stand in the way of convergence. On the subject of the effect of contributory or comparative fault, he states that in civil law countries the rule that damages are reduced if the plaintiff's fault contributed to the harm, is often contained in the general part of the law of obligations and therefore applies equally and identically in contract and delict. In common law countries the situation is more complex and contributory or comparative negligence is a defence in a negligence case but not always in a contract case.

⁹² 1999 *Stell LR* 141

⁹³ 1998 (4) SA 844 (A).

⁹⁴ 1997 *Stell LR* 113.

4.96 He states that the question of contributory negligence may be highly relevant in malpractice actions arising from contracts between clients and professional service providers, where the client alleges negligence in the performance of a professional duty and the service provider alleges that the client's own negligence contributed to the loss. With reference to the rulings by the South African courts to the effect that the rules of contributory negligence under the Act do not apply to actions in contract, he comments that the South African law in this regard is in an unsatisfactory state. He refers to common law countries, where contributory negligence is likewise not generally recognised in a contract action, but where the courts nevertheless accept concurrence of the principles of contract and tort where a claim is based on the duty to exercise professional skill and diligence. However the action is classified in such a case, the plaintiff's damages are reduced on account of his contributory negligence.

4.97 He states that there is currently a substantial body of common law authority in support of the position that apportionment legislation applies in all breach of contract cases where a defendant is concurrently liable in tort for the damage flowing from the breach of contract, no matter how the cause of action is framed, except in cases of a breach of a strict contractual liability. The result of this trend has been to widen the field in which the apportionment legislation operates.

4.98 Mofokeng⁹⁵ states that although the courts have held that the Act does not apply to breaches of contract, should a client sue his or her bank in delict for breach of contract, the bank should be able to raise the contributory negligence of the customer and ask for an apportionment of damages. She further states that although the courts have held that the Act does not apply to contractual claims for damages, there seems to be no reason why the Act should not apply to a contractual relationship, where the claimant has based his or her claim in delict. The choice of action brings into play the issues of apportionment of damages and recoverability of pure economic loss. A bank may not be allowed an apportionment of damages if the claim is based on contract, but if the claim is for recovery of delictual damages and all the elements of the *Lex Aquilia* are present, the court should allow an apportionment where both the bank and the customer have been negligent.

⁹⁵ 1999 (62) *THRHR* at 126.

4.99 JT Pretorius⁹⁶ states:

“There appears to be no reason in principle why the provisions of the Apportionment of Damages Act should not apply in the case of an altered cheque if both the drawee and the collecting banks were negligent with regard to the collection and payment of such cheque. (The decision in *Greater Johannesburg TMC v ABSA Bank Ltd* [1996] 4 All SA 278 (W) is a good example where an apportionment has been applied between two banks.Each particular case must be decided on its own merits with due regard to all the principles set out above. It is also not inconceivable that an apportionment can take place between the drawee bank, the collecting bank and the drawer of a cheque if the drawer drew the cheque in breach of his duty to prevent forgery and not to facilitate alteration of the cheque, provided, of course that there was a causal link between the negligence of each party and the ultimate loss. ... It is a question of fact and no more difficult to decide than many others that arise in negligence cases.”

G. CATEGORIES

4.100 In the case of *Vesta v Butcher*,⁹⁷ Hobhouse J stated that the question of whether the Act applies to claims brought in contract can arise in a number of cases of which he identified three categories:

- (a) Where the defendant’s liability arises from some contractual provision which does not depend on negligence on the part of the defendant;
- (b) Where the defendant’s liability arises from a contractual liability which is expressed in terms of taking care but does not correspond to a common law duty to take care which would exist in the case independently of contract; and
- (c) Where the defendant’s liability in contract is the same as his liability in the tort of negligence independently of any contract.

4.101 According to Hobhouse J, the Act applies only to category (c) as there was a contractual as well as a tortious relationship. In such cases apportionment of damages would take place regardless of whether the plaintiff’s claim was framed in tort or delict. The English Law Commission⁹⁸ identifies three categories:

- 1. Where there is liability for breach of a strict contractual duty;
- 2. Where there is liability for breach of a contractual duty of care where there is no concurrent liability in tort; and

⁹⁶ 1997 SA *Merc LJ* at 379.

⁹⁷ *Supra*.

⁹⁸ Law Commission Report No. 219 *Contributory Negligence as a defence in contract* at 5.

3. Where there is concurrent liability in contract and delict.

(a) Breach of a strict contractual duty

4.102 The common law jurisdictions do not generally permit apportionment where there is liability for breach of a strict contractual duty. This is the position in New Zealand,⁹⁹ Australia¹⁰⁰ and Canada.¹⁰¹

4.103 In the United Kingdom, the Law Commission rejected the extension of apportionment to cases where the defendant's liability arises from a contractual provision that does not depend on negligence on his part. Such an extension was regarded as unwarranted if regard is had to the position before the plaintiff was aware, or had to be taken as being aware of the defendant's breach. A plaintiff is entitled to rely on the defendant fulfilling an obligation of this kind and it is unreasonable to expect the plaintiff to take precautionary measures against the possibility that a breach might occur. Unfairness towards the defendant is to some extent addressed by the doctrine of mitigation which sanctions unreasonable behaviour on the part of the plaintiff once he becomes aware of the defendant's breach. An extension of apportionment to breach of a strict contractual liability is also problematic from a pragmatic perspective in that it would require an evaluation of the conduct of the defendant in relation to that of the plaintiff. This it was felt, would burden litigation with greater complexity and uncertainty, render settlements more difficult to achieve and payments into court harder to assess and make trials longer and more expensive.¹⁰²

4.104 The Scottish Law Commission considered that where a party had undertaken to be bound by the contract in all circumstances, the contributory negligence of the other party should not be relevant in determining his liability under that contract. It also stated that apportionment would undermine the rights of consumers in contracts for the supply of goods, and that it would introduce unacceptable uncertainty in commercial dealings.¹⁰³

⁹⁹ *Preliminary Paper 19*, para. 113.

¹⁰⁰ *Belous v Willets* [1970] VR 45 (Vic); *Arthur Young & Co v WA Chip & Pulp Co Pty Ltd* [1989] WAR 100 (WA).

¹⁰¹ Ontario Law Reform Commission *Report on Contribution* 241.

¹⁰² Law Com No 219 *Contributory Negligence as a defence in Contract* §§4.2 – 4.3, 4.5.

¹⁰³ Scottish Law Commission No. 115, *Report on Civil Liability – Contribution* (December 1988), para. 4.19.

4.105 The New Zealand Law Commission has nevertheless concluded that apportionment should be available in actions for breaches of all types of contractual duty. However, it was concerned about the possibility of the plaintiff being found contributorily negligent merely for failing to monitor performance or anticipate default where the defendant was in breach of an express absolute warranty. It therefore recommended that the legislation should specify that the plaintiff should not be held contributorily negligent merely for acting in justified reliance on a contract.¹⁰⁴ It has been doubted whether this provision provides adequate protection to the plaintiff,¹⁰⁵ and the proposal has been criticised as vague.¹⁰⁶

(b) Breach of a duty of care owed only in contract

4.106 The New Zealand Court of Appeal in *Rowe v Turner Hopkins and Partners*¹⁰⁷ stated that apportionment would be available where “negligence is an essential ingredient of the plaintiff’s cause of action, whatever the source of the duty”.

4.107 In *Mouat v Clark Boyce*¹⁰⁸ an attorney was sued by a widow who had mortgaged her house as security for a loan to her son. The solicitor had acted for both mother and son. The widow alleged negligence in tort and contract and breach of fiduciary duty. The court held that a duty of care had been imposed on the solicitor. There had been a breach of that duty and apportionment was available under the Contributory Negligence Act of 1947. The court held that the Act applies where there are concurrent sources of duty, the question being whether there was a breach of the basic duty resulting from a relationship requiring the exercise of professional skill, reasonable care and due diligence.

4.108 The New Zealand Law Commission recommended that the Contributory Negligence Act 1947 should be replaced with new legislation which would make a reduction of damages for contributory negligence available for all breaches of contract.

¹⁰⁴ New Zealand Law Commission Preliminary Paper No. 19, *Apportionment of Civil Liability* (1992), para. 193

¹⁰⁵ Coote [1992] *NZ Recent L Rev* 313 320.

¹⁰⁶ Ontario Law Reform Commission *Report on Contribution* 247.

¹⁰⁷ *Supra.*

¹⁰⁸ *Supra.*

4.109 In Canada the contributory negligence legislation in some provinces has been interpreted to apply to a breach of contract involving fault.¹⁰⁹

4.110 In Australia in the case of *AWA Ltd v Daniels t/a Deloitte Haskin and Sells* 1992 in the Supreme Court of New South Wales the plaintiffs brought an action for breach of contract against their auditors, alleging negligence. The auditors claimed contributory negligence on the part of the plaintiff. The court held that the auditors were negligent and found contributory negligence on the part of the plaintiff.

4.111 There have also been recommendations that apportionment be applied where there is breach of a duty of care owed only in contract from the Alberta Institute of Law Research, the Ontario Law Reform Commission and the Scottish Law Commission.¹¹⁰

(c) Concurrent liability in contract and delict

4.112 Where there is concurrent liability in contract and delict, the courts in most common law jurisdictions have been willing either to assume that liability for breach of a duty of reasonable care owed concurrently in delict and contract come within the definition of “negligence” in the relevant statute or that the essence of such a concurrent action is delictual and therefore within the ambit of the statute.

4.113 McKerron¹¹¹ states

“It is clear for the reference to the ‘last opportunity’ rule in para (b) and from the Chapter read as a whole, that the Chapter was intended to apply only to liability in delict. It follows that the provisions have no application to actions for breach of contract, even where the breach was due to the defendant’s negligence. But it is submitted that it is otherwise if the contract involved a duty to exercise care and the failure to exercise it would have given the plaintiff a cause of action in delict as well as in contract, eg, the purchase by a farmer from a firm of manufacturing chemists of a quantity of sheep dip in drums bearing a label containing wrong directions as to its use.”

4.114 Boberg¹¹² adheres to the view that the Act applies to damage caused by the breach of a term of a contract (express or implied) which imports a duty to be careful, so that the breach amounts to “fault” in terms of section 1(1)(a) of the Act. That this should be so is all the more necessary in the light of the recent tendency to “blend” contractual and delictual liability.

¹⁰⁹ Law Com No 219 *Contributory Negligence as a defence in Contract* §§2.10 – 2.11.

¹¹⁰ Law Com No 219 *Contributory Negligence as a defence in Contract* §§ 2.9 – 2.11.

¹¹¹ *Law of Delict* 298.

¹¹² *Law of Delict* Vol 1.

4.115 M M Loubser¹¹³ states that there is a substantial body of common law authority in support of the position that apportionment legislation applies in all breach of contract cases where a defendant is concurrently liable in delict for the damage flowing from the breach of contract, no matter how the cause of action is framed, except in cases of a breach of a strict contractual liability.

4.116 He states that the answer to the question whether a defence of contributory negligence is available in any particular action for damages for breach of contract may depend upon the construction of the contract. In respect of a duty of care derived from concurrent sources in contract and delict, the principles of contributory negligence should apply regardless of whether the action is brought in contract or in delict. This applies particularly in a relationship requiring the exercise of professional skill, reasonable care and diligence.

(d) Evaluation

4.117 A review of law reform initiatives in comparable jurisdictions reveals a marked hesitancy to extend the notion of apportionment to breach of a strict contractual duty.¹¹⁴ The Commission is persuaded by the proposition that the undertaking by a party of a duty entailing a strict liability in the nature of a warranty for bringing about a result, entitles the other party to rely on compliance therewith, all the more so because the debtor will, in all probability be contractually compensated for the assumption of so onerous a duty. The attempt of the New Zealand Law Commission to balance the extension of apportionment even to such contractual duties with a proviso that it should not apply where the plaintiff merely failed to monitor performance or to anticipate default, is unpersuasive in so far as it tends to undermine the contractual allocation of risks between the parties. To extend apportionment to a breach of a strict contractual duty might also encourage cynical breaches of contract.¹¹⁵

4.118 The Commission is therefore of the view that the extension of the application of the act to the breach by a defendant of a strict contractual duty would run contrary to commercial expectations and carry a risk of uncertainty. The

¹¹³ 1997(8) *Stell LR* at 137.

¹¹⁴ See the discussion under para 4.101 *et seq* above.

¹¹⁵ See the Ontario Law Reform Commission *Report on Contribution* (1988) 244 regarding the possibility that a party faced with a disadvantageous contract might designedly repudiate the contract by basing a purported cancellation on an immaterial breach by the plaintiff in order to obtain a reduction in the liability for damages by a reliance on apportionment.

operation of the mitigation doctrine serves to prevent the plaintiff from acting unreasonably after becoming aware of the defendant's breach. The exclusion of such cases from apportionment also does not imply that the plaintiff's behaviour prior to the breach is wholly irrelevant. Apportionment presupposes that the defendant's behaviour is causally related to the loss. Where the behaviour of the plaintiff is of such a drastic nature as to constitute it the legal cause (*causa causans*) of the loss, the defendant will, on the general principles of the law of damages, be exculpated from liability.¹¹⁶

4.119 That the application of the Act should be extended to apply to cases where the defendant's breach of contract consists of a failure to comply with a contractual duty to exercise care seems well founded. Such a development of the law was favoured by both Nienaber and Olivier JJA in *Thoroughbred Breeders Association v Price Waterhouse*,¹¹⁷ and is supported by the majority of South African commentators.¹¹⁸ From a theoretical perspective, a breach of a contractual duty in such cases is congruent with the current understanding of delictual wrongdoing.¹¹⁹ As pointed out by the Law Commission for England and Wales, the defendant does not in such a case undertake a strict obligation guaranteeing a particular outcome, so that "it is unfair to assume that he has undertaken to compensate the plaintiff even where the plaintiff has contributed to his own loss". Nor would apportionment result in practical problems: because it is in any event necessary to consider the defendant's conduct, no uncertainty beyond that inherent in the enquiry is introduced. Problems regarding the quantum of the reduction are not insuperable in view of the experience of the courts in respect of delictual claims.¹²⁰

4.120 Of greater moment is the question whether the extension of the act to contractual claims should be subject to a further limitation, namely that the liability for breach of a contractual duty to take care should be echoed by a concurrent liability in delict. The Commission is of the view that any such proposal must be rejected for

¹¹⁶ See the discussion of *Hansen & Schrader v Deare* 1887 EDC 36; *Hendricks & Soeker v Atkins* (1903) 20 SC 310 and *Rabbich v Somerset East Municipality* (1888-1889) 13 EDC 107 in Lubbe and Van der Merwe 1999 (9) *Stell LR* 141 at 149-156; cf Law Commission *Contributory Negligence as a defence in Contract* (Law Com No 219) §4.3 regarding *Lambert v Lewis* [1982] AC 225).

¹¹⁷ 2001 (4) SA 551 (A). For a discussion of Olivier JA's dissenting judgment, see par. 4. 46 above.

¹¹⁸ See para. 4.45 *et seq* above.

¹¹⁹ Nienaber 1963 (26) *THRHR* 32, 1989 (52) *THRHR* 1; cf Van der Merwe *et al Contract: General Principles* §10.1.1.

¹²⁰ *Contributory Negligence as a defence in Contract* (Law Com No 219 §4.7).

the reason given by Marais JA, Farlam JA and Brand AJA in *Thoroughbred Breeders Association v Price Waterhouse*, where it is pointed out that:¹²¹

“The approach followed in England and New Zealand involves drawing a distinction between three categories of breach of contract and an acceptance of the proposition that their Acts only apply to the third category, being the category of concurrent contractual and delictual liability. This approach is dictated by the definition of fault in their Acts, more particularly the requirement in the definition that the defendant's conduct must give rise to a liability in tort. It follows that if the defendant is only liable in contract and not in tort there is no 'fault' on the part of the defendant and the English Act cannot apply. However, the expression 'which gives rise to liability in tort' does not form part of the definition of 'fault' in our Act. The existence of concurrent liability in delict and contract therefore appears to be irrelevant when construing our Act.”

4.121 South African law is therefore free to consider the issue untrammelled by the statutory notion of fault encapsulated in the English statute and its counterparts in the commonwealth jurisdictions. It is also apparent that the policy orientated approach postulated by the academic issue of concurrence ought not to be allowed to complicate the enquiry as to whether responsibility for loss should be shared between the plaintiff and the defendant where the defendant's breach consists of a failure to comply with a contractual duty of care.

H. RECOMMENDATION

4.122 **The Commission is of the opinion that the Act should be amended to extend the application of the Act to contractual claims where there is liability for breach of a duty of care owed in contract.**

¹²¹ 2001 (4) SA 551 (SCA) [19] at 603C-D.

CHAPTER 5

5. THE BASIS OF APPORTIONMENT

A. THE ACT

5.1 Section 1(1)(a) of the Act provides that where the plaintiff has been guilty of contributory negligence, the damages to which he or she is entitled shall be reduced to such extent as the court thinks just and equitable “*having regard to the degree in which the claimant was at fault in relation to the damage.*” The provisions of section 1 are modelled on those of section 1 of the English Law reform (Contributory Negligence) Act, 1945.¹ However, the English Act provides that where the plaintiff has been guilty of contributory negligence, the damages to which he or she is entitled shall be reduced to such extent as the court thinks just and equitable “*having regard to the plaintiff’s share in the responsibility for the loss.*” In *Stapley v Gypsum Mines Ltd*,² Lord Reid in interpreting the English Act expressed the view that in deciding how the liability is to be apportioned regard must be had not only to the relative degrees of fault of the parties, but also to the relative importance of the acts in causing the damage. McKerron³ submits that on the wording of our Act this is not a tenable view, and that under our Act fault is the sole criterion of apportionment.

B. INTERPRETATION OF THE ACT

5.2 Commentators on the Act were divided on the proper basis of apportionment.⁴ How should the court “reduce” the claimant’s damages “having regard to the degree in which the claimant was at fault in relation to the damage”? What role should causation play in the process? Some commentators thought that the court should proceed solely on the relative “blameworthiness” of the parties. Others were of the opinion that the causative effect of the parties’ acts also had a role to play together with their relative blameworthiness.⁵

5.3 The controversy was settled in *South British Insurance Co Ltd v Smit*.⁶ Eschewing “blameworthiness” with its uncertain meaning and moral overtones, the

¹ McKerron *The Apportionment of Damages Act 1956* 5.

² [1953] AC 663; [1953] 2 All ER 478 (HL).

³ McKerron *The Apportionment of Damages Act 1956* 5.

⁴ Boberg *Delict* 668; McKerron 1962 (79) SALJ 443.

⁵ Boberg *Delict* 668.

⁶ 1962 (3) SA 826 (A).

court held that “fault” means negligence and “degrees of fault” means degree of negligence. Causation is relevant only at the initial stage of identifying what acts or omissions caused the damage in issue; it plays no part in the apportionment process, which depends solely upon a comparison of the respective degrees of negligence of the parties.⁷

5.4 Unfortunately the court in *Smit* thought that determining the degree of the plaintiff’s fault would also automatically determine the degree in which the defendant was at fault in relation to the damage. This proposition was criticised by McKerron⁸ and rejected in the decision of *Jones NO v Santam Bpk*⁹ in which Williamson JA stated that a determination of the degree of the plaintiff’s fault would not automatically determine the degree of the defendant’s fault. The latter had to be assessed separately and the two degrees of fault had then to be compared to determine the extent to which the plaintiff’s damages should be reduced.¹⁰

5.5 Although Williamson JA then proceeded to illustrate a method of apportioning damages on a mathematical basis, he stated that no particular method had to be adopted and that the method was merely an example of a possible method. He further stated that a trial judge could use any method which he feels can best gauge how the respective degrees of fault of each of the parties combined to bring about the damage claimed.

5.6 Van der Walt and Midgley¹¹ state that the *Jones* case propounds a more mathematical approach. It requires the court to conduct a comparative evaluation of the respective degrees of fault to determine not only the degree in which the plaintiff was at fault but also the degree in which the defendant was at fault.

5.7 After *Jones*, the courts continued to go their own way – sometimes adopting the two-stage method of apportionment described by Williamson JA and sometimes simply comparing the parties negligence in a single-stage “rough and ready” way.¹² In *AA Mutual Insurance Association Ltd v Nomeka*,¹³ the court held that the degree of the plaintiff’s fault automatically determines the degree of fault of the defendant.

⁷ Boberg *Delict* 668.

⁸ 1962 (79) SALJ 443 at 449.

⁹ 1965 (2) SA 542 (A).

¹⁰ Boberg *Delict* 669.

¹¹ *Op cit* 210.

¹² Boberg *Delict* 670.

¹³ 1976 (3) SA 45 (A).

This decision has been criticised.¹⁴ Boberg¹⁵ states that it seems that Viljoen AJA completely overlooked the court's express rejection of this proposition in *Jones's* case for he did not even refer to *Jones's* case. There are many cases decided subsequent to the *Nomeka* case in which the courts have followed the *Nomeka* case.¹⁶ Neethling *et al*¹⁷ express the view that this has led to an unsatisfactory situation and that the Supreme Court of Appeal should, in the interests of legal certainty, reject the one approach and confirm the other. They submit that the approach in the *Jones's* case is preferable and that it should be confirmed.

5.8 In the case of *Union National South British Insurance Co Ltd v Vitoria*¹⁸ the Appellate Division without referring to the decision in the *Nomeka* case apparently confirmed the position in the *Jones* case, by stating that no matter how difficult it might be, the extent of the fault of the plaintiff and of the negligent driver (defendant) must be determined.

5.9 The last decade of decisions pays little attention to the method of apportioning suggested by Williamson JA in *Jones's* case, without exception preferring a simple, commonsense, intuitive allocation of fault to each party. The concept of blameworthiness has also not been banished entirely. Judges continue to use the term loosely in making apportionments and the Supreme Court of Appeal has suggested that there might yet be room for its relevance.¹⁹

5.10 There have also been calls for a more subjective criterion of *culpa*. In *Da Silva v Coutinho*²⁰ Jansen JA doubted whether it was fair to burden the plaintiff with the same standard of care as the defendant for the following reasons:

“If it is accepted that the plaintiff owes the defendant no ‘duty; but has only a ‘duty’ towards himself, he at no stage commits a wrong. It is the defendant's wrongful act which forces the plaintiff into the position of having to act in his own interest. Why should he now be saddled with the same standard of care as that applying to the wrongdoer on pain of forfeiting his damages?”

¹⁴ Boberg *Delict* 714; Neethling 1976 (39) *THRHR* 412; Burchell 1976 *Annual Survey* 172-3; Van der Merwe and Olivier *Onregmatige Daad* 164-5.

¹⁵ *Op cit* 715.

¹⁶ *Santam Versekeringsmaatskappy Bpk v Letlojane* 1982 (3) SA 318 (A); *Maphosa v Wilke* 1990 (3) SA 789 (T); *Rabie v Kimberly Munisipaliteit* 1991 (4) SA 243 (NC); *Payne v Minister of Transport* 1995 (4) SA 153 (C); *Goss v Crookes* 1998 (2) SA 946 (N).

¹⁷ *Op cit* 162.

¹⁸ 1982 (1) SA 444 (A).

¹⁹ Boberg *Delict* 670; *National South British Insurance Co Ltd v Vitoria* 1982 (1) SA 444 (A); *Weber v Santam Versekeringsmaatskappy Bpk* 1983 (1) SA 381 (A).

²⁰ 1971 (3) SA 123 (A).

5.11 Some academics have also called for a greater emphasis on moral blameworthiness.²¹ The cases of *Vitoria* and *Weber* reveal judicial dissatisfaction with the present primacy of “objective negligence”, and may well herald a new deal for “blameworthiness”. In any case judges since *Jones* have shown little inclination to adopt the quasi-mathematical approach of Williamson JA, preferring to hand down intuitive apportionments in which anything from blameworthiness to causative effect may have played a part.²²

5.12 In the case of *General Accident Versekeringsmaatskappy SA Bpk v Uijs*,²³ the plaintiff was a passenger in a vehicle driven by the defendant. The plaintiff had failed to comply with defendant’s request to wear a seat belt and was seriously injured in an accident caused by the defendant’s negligent conduct. The court assessed that both the plaintiff and the defendant had deviated to the same extent from the norm of the *bonus paterfamilias*. If the formula set out in *Jones v Santam Bpk* had been applied, the award of damages would have been reduced by half. However, the court felt that justice and equity demanded that the plaintiff’s fault was to be considered differently from that of the defendant, because the plaintiff’s fault did not contribute to the accident. The court found that a one-third reduction was proper in the circumstances. Van Heerden JA stated that the extent of a plaintiff’s fault is merely one of a number of factors which the court may take into account in order to reduce the plaintiff’s damages in a just and equitable manner.

5.13 Neethling *et al*²⁴ expressed the view that the approach by Van Heerden JA in the *Uijs* case may be justified in the light of criteria such as fairness and equity. They further expressed the view that in order to really achieve fairness and equity, not just the extent of the plaintiff’s fault but also other relevant factors should be considered. However, Scott²⁵ criticised the *Uijs* judgment on the basis that the introduction of reasonableness and fairness as criteria for the apportionment of damages may render it almost impossible to have fixed guidelines in particular situations.

5.14 Similarly, where the negligent plaintiff is a child, and circumstances were such that the defendant ought to have foreseen the presence of children and guarded against causing them harm, justice and equity require that the mathematical result be adjusted in favour of the child.²⁶

²¹ Boberg *Delict* 670; Botha 1977 (94) *SALJ* 29; Kemp 1979 *Obiter* 18.

²² Boberg *Delict* 671.

²³ 1993 (4) SA 228 (A).

²⁴ *Op cit* 162.

²⁵ 1995 *TSAR* (1) 132.

²⁶ Van der Walt and Midgley *Delict* 210.

5.15 Fleming²⁷, in commenting on the English Act, states that the most universal practice in apportioning damages is to compare the parties' responsibilities. He further states.²⁸

“Although some thought was given to the formulation of factors which should properly influence apportionment, it seems to be generally regarded as undesirable to perplex juries with detailed instructions and so abridge their discretion in determining, on the basis of common sense and experience, what is “just and equitable” in accordance with the statutory formula. However certain patterns have emerged which help to standardise awards to some extent.

The prescribed criterion under the English (and Australian) legislation is the claimant's ‘responsibility of the damage’. Paramount is the element of fault, provided only such fault be taken into account as contributed to the injury. Hence culpability should be measured by the degree of departure from the standard of conduct exacted by law rather than by *moral* blameworthiness ...

Beside fault, causal responsibility is also frequently cited as relevant for comparison.”

5.16 Fleming states further²⁹ that in cases where the defendant's liability arises, not from negligence, but from breach of statutory duty or some other rule of strict liability, if fault (in the literal sense) were the sole test, there would not only be lacking a common standard of comparison, but the slightest degree of contributory negligence would defeat the plaintiff's claim entirely. He states that this undesirable result will be avoided if due attention is given to the statutory criterion being responsibility, not fault.

5.17 JM Potgieter³⁰ in commenting on the interpretation of fault in the case of *Lloyd-Gray Lithographers (Pty) Ltd v Nedcor Bank Ltd t/a Nedbank*³¹ stated that fault, even if it includes both intention and negligence, is no longer a satisfactory criterion for the apportionment of damages. He stated that there was an urgent need for a more satisfactory basis for apportionment. He referred to certain foreign jurisdictions where there is a movement away from fault and where the courts are given a much wider discretion than before to make equitable apportionments.

²⁷ Law of torts 246.

²⁸ At 247.

²⁹ At 249.

³⁰ 1998 (61) *THRHR* 731.

³¹ 1998 (2) SA 667 (W).

C. DEVELOPMENTS IN OTHER JURISDICTIONS

5.18 Various countries with apportionment legislation similar to that of South Africa are introducing sweeping changes to their legislation.³²

5.19 The New Zealand Law Commission³³ referred to the following provision suggested by the Contracts and Commercial Law Reform Committee (CCLRC):

“The amount of contribution recoverable under this Act shall be such as shall be found by the Court to be just and equitable having regard to the extent of that person’s liability for the damage in question, the amount of his potential liability, and to the respective rights and obligations of the parties both as between themselves and in respect of P.”

The CCLRC emphasised the need to give the court a wide discretion but at the same time to draw the attention of the court to the particular considerations which should influence its decision.

5.20 Clause 8 of the New Zealand Law Commission’s draft Civil Liability and Contribution Act (1998) contained in Report 47 reads as follows:

“8(2) Loss suffered by a wronged person is attributable in the proportions that are just and equitable, having regard to

- (a) the nature, quality and causative effect of
 - (i) the wronged persons failure (if any) to act with due regard for the person’s own interest; and
 - (ii) the acts and omissions of the wrongdoer or of each concurrent wrongdoer; and
- (b) the rights and obligations of the wronged person and the wrongdoer or each concurrent wrongdoer in relation to one another.”

5.21 In a commentary on the above proposal, the Commission states:³⁴

“Because of the almost infinite variety of circumstances in which loss will fall to be attributed, the court is left with a complete discretion. The court must, however, have regard to the nature, quality and causative effect of the acts or omissions of the wronged person and the wrongdoer(s) ... The court must also have regard to the rights and obligations of each of these persons to the other(s): paragraph (b)

5.22 The New South Wales Law Reform Commission *Discussion Paper 39*³⁵ refers with approval to the wide discretion given to the courts in terms of section 5(2) of the Law Reform (Miscellaneous Provisions) Act 1946 (NSW) in terms of which a

³² New Zealand Law Commission *Report 47*; Alberta Law Reform Institute *Report 75*; British Law Commission *Investigation of joint and several liability*; Ontario Law Reform Commission *Report on contribution*; New South Wales Law Reform Commission *Discussion Paper 38*; Hong Kong Law Reform Commission *Report on contribution between wrongdoers*.

³³ Preliminary Paper No 19 *Apportionment of civil liability* 31.

³⁴ *Report 47*, 21.

³⁵ Par. 4.81.

contribution can be claimed from a wrongdoer in terms of what the court considers “just and equitable”, having regard to the extent of that person’s responsibility. The Commission comments as follows:³⁶

“Section 5(2) allows a court a wide discretion to achieve a just and equitable apportionment, having regard to the extent of each person’s responsibility. ‘Responsibility’ here is taken to mean more than fault, and invites consideration of individual culpability as well as the relevant ‘causal factors’.”

....

“This provision allows a court a wide discretion in apportioning liability including the power to order one defendant to pay 100% of the plaintiff’s liability. The extent of this discretion is important in allowing the court to apportion responsibility between the wrongdoers in a just and equitable way. This may be particularly important where one of the defendants has committed an intentional tort.”

5.23 The Ontario Law Reform Commission³⁷ recommended that the statute should expressly authorise the court “to include any degree of responsibility, including responsibility for none or all of the damage”. (Clause 9(2) of the draft bill.) Section 2(2) of the Civil Liability (Contribution) Act 1978 (England and Wales) empowers the court to “exempt any person from liability to make contribution, or to direct that the contribution to be recovered from any person shall amount to a complete indemnity.” The Scottish Law Commission³⁸ made a similar recommendation.

5.24 The Ontario Law Reform Commission also recommended in clause 9(3) of its draft bill that if the degree of responsibility of a concurrent wrongdoer cannot be determined in relation to another concurrent wrongdoer “they shall be deemed to be equally responsible”.

5.25 The New Zealand Law Commission³⁹ recommended the extension of the concept of contributory negligence and the right of contribution amongst defendants beyond the field of delict. They recommended that in considering how to apportion damages between defendants whose civil wrongs were of differing natures, “the courts should be left with considerable discretion so that their apportionments can reflect their view on the relative blameworthiness of the conduct of each defendant in the circumstances of each case.” The commission further proposed that in contract, as well as in other forms of claim, the question of whether the plaintiff’s action or inaction has been contributory to the loss and the exact apportionment of that responsibility should be matters for the court to decide on the facts of the case. They were of the opinion that detailed rules about the matters which the courts should take

³⁶ Par. 4.83.

³⁷ *Report on contribution among wrongdoers.*

³⁸ *Report on civil liability – contribution* No 115.

³⁹ *Preliminary Paper No 19 Apportionment of civil liability* 50.

into account would not be very helpful and would be difficult to draft and unlikely to cover every contingency. It seemed more appropriate for the courts to have a general discretion to apportion damages where appropriate on the facts of the case, leaving the courts to make decisions as they see best.

D. EVALUATION

5.26 The wide discretion given to the courts in the above foreign draft laws has also become necessary in South Africa in light of the recent cases in regard to apportionment.⁴⁰ The use of fault in the form of negligence as the sole criteria of apportionment has led to inequitable decisions. The wording of section 1(1)(a) of the Act restricted the courts to the criterion of the comparative culpability of the parties. The courts could not consider the causative potency of the parties' acts. The decisions in the cases which strictly adhered to the correct interpretation of the Act as applying only to negligent conduct did not produce fair or equitable results.⁴¹ The courts were forced to go outside the ambit of the Act in order to achieve an equitable solution in cases like *Greater Johannesburg Transitional Metropolitan Council v ABSA Bank Ltd t/a Volkskas Bank*⁴² and *Randbond Investments (Pty) Ltd v FPS (Northern Region) (Pty) Ltd*⁴³. Potgieter⁴⁴ states that in the *Ujjs* case Van Heerden JA had to exercise a wider discretion than the wording of section 1 allows in order to arrive at an equitable solution.

5.27 The application of the Act to contractual claims was problematic as was pointed out by the court in the *OK Bazaars* case. Watermeyer J held that fault normally connotes a degree of blameworthiness and a contract can be breached by a party through no fault of his own. Fault is also not always a requirement of breach of contract although it may be present on some occasions. It is clear that in order to apply the Act to contractual claims the basis of apportionment had to be widened.

E. RECOMMENDATION

5.28 The Commission is of the opinion that a broader basis for apportionment is necessary and that the criterion for apportionment should be responsibility for loss rather than fault. The following method of apportionment was therefore recommended in the draft Bill.

⁴⁰ JM Potgieter 1998 (60) *THRHR* 731

⁴¹ *Holscher v Absa Bank supra*

⁴² *Supra.*

⁴³ *Supra.*

⁴⁴ 1998 (60) *THRHR* 731 at 741

“3. (1) When apportioning loss the court must attribute the responsibility for the loss suffered in proportions that are just and equitable.

(2) In attributing responsibility for the loss suffered, the court must take into account all relevant factors, including -

- (a) the relationship between the parties;
- (b) the nature, quality and causative effect of –
 - (i) the acts and omissions of the wrongdoer or of each joint wrongdoer;
 - (ii) the plaintiff’s failure, if any, to act with due regard to his or her own interests;
 and
 - (iii) any fault on the part of the plaintiff or any wrongdoer.

(3) If the court cannot attribute responsibility for the loss in terms of subsection (1), responsibility for the loss must be shared equally.”

5.29 Subsection 1 requires the court to attribute the responsibility for loss suffered in proportions that are just and equitable. This gives the court a wide discretion. Subsection 2 prescribes certain factors which the court must *inter alia* take into account in that determination. Because of the almost infinite variety of circumstances in which loss will fall to be attributed, the court is left with a complete discretion with regard to the method of determining appropriate proportions having regard to all relevant factors.

5.30 With the extension of apportionment to other areas of law, it is necessary to have a broader basis for apportionment. In order to achieve fairness and equity in apportionment, not just the extent of the plaintiff’s fault but also other relevant factors should be considered. The criterion of responsibility rather than fault will allow the courts to consider a wider range of factors. Responsibility means more than fault and will allow the courts to consider a much wider range of factors including the causative potency of the parties’ acts.

5.31 The term “responsibility” is wide enough to include strict liability, to cover both fault (on the part of (joint) wrongdoer(s)) and failure to have proper regard of one’s own interests (on the part of the plaintiff) and is also wide enough to be applicable in the contractual as well as the delictual contexts. Furthermore, this term, as well as the fact that s 3(1) carefully refrains from mentioning fault, and the reference to causative effect, are designed to enable the courts to take account of “causative potency”, as is done in other countries and was in fact done in the *Ujjs* case. This will be even more important in a context where the act covers breaches of contract and “mixed” wrongs, where relative blameworthiness (fault) would not always be applicable. Subsection 3(2) will bring clarity to the law, and make it clear that factors such as the parties’ relative blameworthiness, type of fault, and whether one had a

protective duty or not are all relevant. This is important if the new act is to apply to breaches of contract, intentional wrongs and instances of strict liability.

5.32 The Commission recommends that the amount of contribution recoverable by one joint wrongdoer from another be determined on the same basis as prescribed in general for the apportionment of loss.⁴⁵

5.33 In a situation such as in the case of *Lloyd-Gray*, the application of the Act would mean that the negligent collecting bank and the thief would be joint wrongdoers as defined in the Act. This would have the effect of granting the intentional thief a right of contribution against the negligent collecting bank.⁴⁶ Scott JA stated in the case of *Nedcor Bank Ltd v Lloyd-Gray Lithographers (Pty) Ltd*⁴⁷

“I must confess to baulking at the notion of a thief such as S being entitled to recover a contribution from a collecting bank for negligently failing to prevent him from achieving his objective ...”

5.34 Michelle Kelly⁴⁸ suggests that a clause should be included which will expressly provide that the right of contribution will be at the disposal of the negligent wrongdoer alone.

5.35 The Commission proposes in the draft Bill that a joint wrongdoer whose wrong consists of the failure to prevent another’s wrong is not liable to pay a contribution to that other person.⁴⁹ It was decided to insert this provision to supplement the general criterion for apportionment as set out in section 3 of the draft Bill for reasons of clarity and to avoid leaving this issue to the vagaries of judicial interpretation.

F. COSTS

5.36 Mr Michael Searle of Joubert, Galpin & Searle Attorneys refers to “a rather unsatisfactory practice” that has developed in the Magistrates’ Court whereby costs in an action are awarded according to the degree of fault determined. This result follows irrespective of the fact that the plaintiff might have been 90% successful in his or her action. Mr Searle is of the view that costs should rather be awarded according

⁴⁵ Section 10(1) read with section 3(1) of the draft Bill.

⁴⁶ Kelly 2001 (13) *SA Merc LJ* at 529.

⁴⁷ *Supra* at para 9.

⁴⁸ *Op cit.*

⁴⁹ Section 11(2) of the draft Bill.

to that party which is economically successful in the action as there can be no justification for awarding costs according to the percentage of fault. He continues:

“This is illogical but it is a practice which has been endorsed by Supreme Court decisions and which is followed slavishly in some Magistrates’ Courts.”

5.37 The Commission is of the view that the general rules relating to costs should apply, i.e. the successful party is entitled to his or her costs incurred either in defending or bringing proceedings.⁵⁰

⁵⁰ *Sackville West v Nourse and another* 1925 AD 516.

CHAPTER 6

6. JOINT WRONGDOERS

A. INTRODUCTION

6.1 Damage can be caused not only by a single wrongdoer, but by more than one wrongdoer, that is joint wrongdoers.¹ Where only one person is liable to another, rights of recovery are relatively straightforward. Where two or more persons are liable for the same loss, recovery of damages can cause numerous practical and theoretical problems.

6.2 At common law, joint wrongdoers were persons who jointly committed a delict by acting in pursuance of a concerted purpose, or in furtherance of a common design. They were jointly and severally liable (*liable in solidum*) for the same wrong. Payment of damages by the one absolved the other from liability. One joint wrongdoer could not claim a contribution from another joint wrongdoer.²

6.3 At common law, concurrent wrongdoers were persons whose independent wrongful acts had combined to produce the same harmful consequences. They were also jointly and severally liable to the plaintiff for the same delict. However, a right of recourse was recognised between concurrent wrongdoers.³

6.4 The Act abolished the common law distinction between joint and concurrent wrongdoers⁴ and placed joint wrongdoers and concurrent wrongdoers on the same footing. The definition of joint wrongdoer in section 2(1) includes a concurrent wrongdoer at common law. Joint wrongdoers are defined in section 2(1) of the Act as people who are jointly or severally *liable in delict* to a third person (the plaintiff) for the same damage. A person may only be sued as a joint wrongdoer if he is delictually liable to the plaintiff.⁵

¹ Neethling, Potgieter and Visser *Law of Delict* 269.

² Digest 27.3.1 para 13; Voet 9.2.12; Digest 27.8.7; M de Villiers *The Roman-Dutch Law of Injuries* at 45; Van der Merwe and Olivier *Onreghmatige Daad* 302; McKerron *Law of Delict* 309.

³ McKerron *Law of Delict* 108.

⁴ McKerron *Law of Delict*; Kelly 2001 *SA Merc LJ* 518.

⁵ *Kohler Flexible Packaging (Pinetown) (Pty) Ltd v Marianhill Mission Institute* 2001 (1) SA 141 (D) at 145.

B. DEFINITION OF JOINT WRONGDOERS

6.5 Three special categories of joint wrongdoers deserve mention: Spouses married in community of property, the so-called “third party” cases, and wrongdoers held liable in terms of vicarious liability. The Act initially did not make provision for the first two categories. The Act was specifically amended in 1971 to bring those categories within the ambit of the Act.⁶

6.6 A spouse married in community of property may be deemed to be a joint wrongdoer with a third party as against the other spouse.⁷ This means that where a plaintiff suffers damages as a result of the actions of a third party where the actions of the plaintiff’s spouse also contributed to the damage, the plaintiff can claim the full amount of his damages from the third party who can thereafter claim a contribution from the spouse as a joint wrongdoer.

6.7 Where a plaintiff suffers damage as a result of injury to any person, in circumstances where the injured person and a third party contributed to the loss, the injured person and the third party are deemed to be joint wrongdoers as against the plaintiff.⁸ An example of this is where the actions of a third party cause injury to the plaintiff’s child who also contributed to the injuries. The father of the injured child may sue the third party for damages and the third party will have a right of recourse against the child as a joint wrongdoer.

6.8 Where a dependant suffers loss of support as a result of the conduct of a third party in circumstances where the conduct of the deceased breadwinner also contributed to the loss, the third party and the deceased estate are considered to be joint wrongdoers with regard to the loss of support.⁹ This means that the dependant may claim the full amount of damages from either the third party or the deceased estate. The joint wrongdoers will thereafter have a right of recourse against each other.

6.9 The question of wrongdoers liable in terms of vicarious liability being treated as joint wrongdoers is dealt with immediately below.

⁶ Sections 2(1A) and 2(1B) of the Act were inserted by the Apportionment of Damages Amendment Act 58 of 1971.

⁷ Section 2(1A).

⁸ Section 2(1B).

⁹ See section 2(1B) of the Act.

6.10 On the strength of the GCB submission, the Commission recommended in the Discussion Paper that a short and simple definition of “joint wrongdoer” be included in the Act. The Commission supported the 1971 amendments to the Act to cover spouses married in community of property and where third parties contributed to the loss suffered. It further recommended that the question of whether wrongdoers who are liable in terms of vicarious liability qualify as joint wrongdoers be answered in the affirmative and that this aspect be covered in the definition of “joint wrongdoer”.¹⁰

6.11 Respondents to the Discussion Paper supported the Commission’s approach. Mr Petty of Stegmanns Attorneys in particular stated his preference for a definition of “joint wrongdoer” which makes it clear that wrongdoers who are liable on the grounds of vicarious liability should qualify as joint wrongdoers for the purposes of the Act.

6.12 The Commission recommends that joint wrongdoer be expressly defined in the Act and that it be specified that joint wrongdoers who are liable in terms of vicarious liability qualify as joint wrongdoers. The need for the other two categories of joint wrongdoers introduced by the 1971 amendments is accepted without question.

6.13 It is therefore recommended that joint wrongdoers be defined in section 1 of the draft Bill as follows:

“**joint wrongdoer**” means each of two or more wrongdoers whose wrongs gave rise to the same loss, and includes –

- (a) a person who is vicariously liable for any act or omission of the wrongdoer;
- (b) a person who would have been a joint wrongdoer but for the fact that he or she is married in community of property to the plaintiff;
- (c) an injured person or the estate of a deceased person where it is alleged that the plaintiff has suffered loss as a result of the injury to or death of such person and such injury or death is attributed to a wrong committed partly by such injured or deceased person and partly by any other person”

¹⁰ Para. 3.9 and 3.12.

C. JOINT AND SEVERAL LIABILITY

6.14 The central rationale for the principle of joint and several liability is that since the conduct of each wrongdoer was a cause of the damage suffered by the injured person, it is fundamentally just that each should be fully liable to the injured person for the consequences. The fact that the conduct of another wrongdoer may have also contributed to the same injury should not prejudice the right of the injured person to obtain full compensation for the damage; rather, it should be a matter for resolution between the wrongdoers themselves.

6.15 At common law there was no right of contribution between joint wrongdoers. A joint wrongdoer who had paid the entire judgment debt was not able to bring a claim against the other joint wrongdoers to make them pay their share of the damages and was forced to bear the whole of the loss caused partly by himself and partly by someone else, even if the plaintiff had obtained judgment against that other person.

6.16 The Aquilian action was originally penal in nature hence the refusal to enforce contribution between joint wrongdoers.¹¹ The no-contribution rule was justified by reference to the maxim *ex turpi causa non oritur actio*: that an action does not arise from a wrongful cause. A contribution action was seen as an attempt to recover part of a penalty which had been imposed for a wrongful act and the view was that one wrongdoer should not be able to escape responsibility for a wrongful action by passing the consequences on to another wrongdoer.

6.17 The fundamental concern of the common law was that a plaintiff should be able to recover the full amount of his or her loss. Any possible unfairness to the defendants was subordinate to this principle. Because of the defendants' wrongdoing, they were considered to be not worthy of much consideration. The principle of joint and several liability is clearly of great benefit to the plaintiff as it provides control of the action. The plaintiff can choose to sue only one or each of the wrongdoers, in a single action. The rule facilitates satisfaction of the plaintiff's judgment, which may be fully satisfied by execution against only one wrongdoer, presumably the best insured or most solvent.

6.18 The no-contribution rule produced very unjust results. Where the fault was predominantly on one side, or where one wrongdoer had acted innocently at the request of the other, injustice would result if the more innocent wrongdoer, rather

¹¹ *Allen v Allen* 1951 (3) SA 320 (A) at 327 per Van den Heever JA.

than the guiltier second wrongdoer, was made to assume the burden of compensating the plaintiff. This was very controversial because it allowed the plaintiff to determine the incidence of loss distribution as the joint wrongdoer who paid the damages was not able to recover a contribution from the other wrongdoer. These common law rules were considered to be profoundly unsatisfactory. The no-contribution rule was severely criticised and eventually abolished by legislation.¹² However, the law relating to joint and several liability remains a fundamental principle of the law.

6.19 The reforms, while an improvement on the inflexibility of the common law, left several major difficulties unsolved. The mechanisms for apportionment and contribution were still inadequate. The scheme of contribution can benefit one wrongdoer only where the other wrongdoer is available and capable of satisfying his or her portion of the liability. Where one joint wrongdoer is insolvent, the right to claim contribution does not assist the other joint wrongdoer who has paid. The most significant advantage to an injured party of the principle of joint and several liability is that it imposes on a joint wrongdoer the risk that the other wrongdoer may be insolvent or otherwise unavailable to satisfy her share of the liability to the injured person. This principle operates primarily to ensure full compensation to the injured person, to the occasional detriment of a solvent wrongdoer who is required to satisfy the entire liability, regardless of his or her degree of fault. This principle has operated very unfairly in some instances. Professionals and other persons or bodies¹³ who are perceived to have deep pockets feel a strong sense of injustice at these consequences. Such persons have no objection to paying for the results of their own mistakes. But they are aggrieved when they find themselves also paying for the mistakes of others.¹⁴

6.20 The question of whether and to what extent joint wrongdoers should continue to be liable *in solidum* or whether the rule should be changed in favour of separate or several liability has been considered in detail by law reform agencies in other jurisdictions. The argument has elicited strong comment from contributors to the discussion paper who recommended a move to proportionate liability. They have argued strongly that the principle of joint and several liability should be abolished and

¹² In England by section 6 of the Law Reform (Married Women and Tortfeasors) Act 1935; In New Zealand by section 17 of the Law Reform Act 1936; In South Africa by section 2 of the Apportionment of Damages Act 34 of 1956.

¹³ In the bank cases referred to above, negligent banks, which can be regarded by plaintiffs as deep-pocketed wrongdoers, have had to pay the full amount of the claim while the thief who has stolen the cheque from his employer, the plaintiff, gets off scot-free.

¹⁴ Ontario Law Reform Commission *Report on contribution* at 34.

substituted for a system of proportionate liability whereby each wrongdoer would be liable in proportion to his fault. There would then not be a need to collect contributions and the problem of uncollectable contributions would be solved.

6.21 The King Committee on Corporate Governance states:¹⁵

“16. Directors or officers may, by their acts of commission or omission, have contributed to a company’s failure. They should be held liable for any conduct leading to a company’s failure. Damages against auditors for company failures are becoming a matter of grave concern. Directors and auditors should only be held liable for damages on a basis proportional to their contribution to the failure. Consideration should be given to amending the Apportionment of Damages Act (No 34 of 1956) accordingly.”

6.22 In New Zealand and Ontario there have been strong lobbying groups for joint and several liability to be changed to proportionate liability. Opponents of joint and several liability assert that the retention of the rule is inconsistent with the principle underlying comparative fault, which, they argue contemplates each party being liable only to the extent of his or her respective degree of fault.

6.23 Suggested motives and principles behind joint and several liability include compensation, punishment, deterrence, prevention of unjust enrichment, allocation of moral blame, distribution of losses and minimisation of risks.¹⁶ One of the central aims of the delictual system is compensation of the injured party. Imposition of joint and several liability reflects the compensation goal. The plaintiff can recover in full from any defendant and any loss caused by the inability of other defendants to compensate that defendant is borne by the defendant rather than the plaintiff. The abolition of the rule would have a negative effect on plaintiffs. The commitment to the objective of compensating the plaintiff is a strong motivating factor.

6.24 The above dilemma is captured forcefully in the submission by the Law Society of the Cape of Good Hope. It says:

“The committee considered the relative positions of a substantially responsible wrongdoer, who is a man of straw, and that of a marginally responsible wrongdoer, who, because of his healthy financial circumstances, is inevitably faced with the sum of the plaintiff’s claim for damages. ... The committee debated at length the relative positions of the plaintiff and the joint wrongdoers and came to the conclusion that a better result would be achieved if, after the determination by the court of the parties’ respective degrees of liability for the damage, the plaintiff’s right of recovery against the joint wrongdoers is always limited to that percentage, irrespective of the financial circumstances of the parties. The committee believes that it would be wrong to continue to permit the innocent plaintiff to recover in full against a marginally responsible wrongdoer because the substantially responsible wrongdoer lacks

¹⁵ King Report 2002 *Recommendations requiring statutory amendment* at 43.

¹⁶ New Zealand Law Commission *Preliminary Paper No. 19*; Ontario Law Reform Commission *Report on contribution*.

financial resources and recommends that recovery always be limited to the degree of the joint wrongdoer's negligent conduct. In effect, the committee recommends that the proviso to section 2(8) of the Act be deleted."

6.25 Reform of the law relating to shared liability may in some respects involve a choice between the objectives of fairness and efficiency. It may seem fairer that a wrongdoer should be made responsible for a proportionate share only of the plaintiff's loss, as is argued by the Law Society of the Cape of Good Hope. But, quite apart from the fact that this may be unfair to the plaintiff, it is inefficient in that it may require the court to assess the liability of a wrongdoer who is not (yet) before the court.

6.26 Legislators or reformers elsewhere in the Commonwealth have been reluctant to institute or recommend such a change. The New Zealand Law Reform Commission, after extensive research into the issue,¹⁷ decided that the *in solidum* rule should remain unchanged. The Ontario Law Reform Commission also conducted a review of the law in regard to joint and several liability and concluded that the arguments for the abolition or modification of the principle of joint and several liability on the grounds of fairness to defendants did not weigh sufficiently in favour of any change to the existing rule.¹⁸

6.27 In the United States of America, however, the Securities Legislation Reform Act, 1995 implements a system of proportionate liability in which peripheral defendants pay only their "fair share" of a judgment. Less culpable defendants will pay a proportionate share of the damages, but parties that knowingly engage in fraud are subject to the full force of joint and several liability. Defendants are also liable for up to an additional 50% of their share to help pay for insolvent co-defendants.

6.28 The New South Wales Law Reform Commission¹⁹ considered whether a plaintiff who was guilty of contributory negligence should be held liable for a portion of an uncollectable contribution. The Law Reform Commission pointed out that the rule of joint and several liability arose when only a completely innocent plaintiff could recover damages i.e. before the introduction of legislation which allowed for apportionment of damages where the plaintiff was partly responsible for his own loss. It can be argued that the movement to apportionment for contributory negligence requires some revision of the doctrine of joint and several liability and that a

¹⁷ *Preliminary Paper No 19* at 49.

¹⁸ *Report on contribution* at 47.

¹⁹ *Interim Report on solidary liability: Contribution among wrongdoers* 1990 at para 18.

contributorily negligent plaintiff deserves no greater favour than a defendant also partly to blame for the plaintiff's loss.

6.29 In the Discussion Paper²⁰ the Commission stated that it was not in a position to express a definite stand on whether "full" proportionate liability as opposed to some form of modified proportional liability should be introduced or whether the possibility of making a re-allocation of apportionment in the event of it becoming impossible to execute against one of the joint wrongdoers in respect of his share should be pursued.

6.30 In its response, the Law Society of the Cape of Good Hope expressed its support for the introduction of full proportionate liability, in line with the New Zealand proposals.²¹ It said:

"While the committee has some sympathy for a plaintiff who finds himself unable, as a consequence of the application of the full proportionate theory, to recover a portion of his claim, the committee could not be persuaded that a better balance of equities is achieved by improving the position of the plaintiff, who would not be able to recover against a sole impoverished wrongdoer, but permitting full recovery against a joint wrongdoer who might be only marginally blameworthy. In this respect, the committee considered also the position of dependants of a bread-winner and concluded that no just result was achieved where dependants of a seriously injured bread-winner are penalised as against the dependants of a deceased bread-winner who was substantially responsible for his own death.

For the purpose of implementing the above, the committee recommends that rule 13 of the Supreme Court Rules be amended to make provision for the joining of a joint wrongdoer as a full co-defendant with the result that an effective judgment might be obtained against such co-defendant."

6.31 A similar approach is advanced by Mr Michael Searle of Joubert, Galpin & Searle Attorneys. He said that no party should be liable to pay a plaintiff more than that party's percentage of fault. He continued:

"It does not make sense that someone who is 25% at fault in regard to (say) a motor accident has to pay the Plaintiff in full and then recover the other 75% from the other joint wrongdoer. This effectively means that the one party has become the insurer of the Plaintiff's claim."

6.32 Mr Searle suggested that provision be made for the defendant to pay into court an amount to cover his or her percentage of fault, which will conclude the litigation between that defendant and the plaintiff. He would not require the defendant to give notice to the other joint wrongdoers, but would place that

²⁰ Par. 3.75.

²¹ Mr Chris Petty of Stegmanns Attorneys shares this view. He said every defendant should be liable only to the extent of his or her fault and that the risk of the uncollectable share should always rest with the plaintiff.

responsibility on the plaintiff as the person best suited to join all joint wrongdoers as co-defendants in the action. Mr Searle pointed out that the plaintiff is the best person to identify the joint wrongdoers and to prove a case against them. In his experience, a joint wrongdoer who receives a notice in terms of the Act never intervenes as a defendant. Furthermore, the procedure of a contribution after a judgment between the initial defendant and a joint wrongdoer is difficult to enforce, he said. Mr Searle explained:

“The onus of proof changes. The initial defendant will have to prove the amount of the Plaintiff’s damages, which is difficult. Witnesses who may have been available to the Plaintiff will not necessarily be available to the initial defendant.”

6.33 The South African Institute of Chartered Accountants expressed itself in favour of the American approach discussed above.²²

6.34 Although the Commission recognises the force of these arguments in favour of full proportionate liability, it is not at this stage convinced that there should be any change in the law in this regard. Without further study and consultation, it is not possible to predict what the overall impact of the abolition or modification of the principle of joint and several liability would be. **The Commission is therefore of the view that the joint and several liability rule should remain unchanged.**²³

D. PROCEEDINGS AGAINST JOINT WRONGDOERS

6.35 Joint wrongdoers are jointly and severally liable (liable *in solidum*) for the same damage. Each joint wrongdoer is responsible to the plaintiff for the plaintiff’s entire loss, subject to the limit that the plaintiff can never recover more than the total loss suffered. In cases of multiple injuries, this has the consequence of relieving a claimant of the burden of proving who of several defendants was responsible for any particular injury.²⁴

6.36 However, one of the prime objectives of legislation on this subject should be to limit litigation. One way in which this objective can be achieved is by requiring that all matters pertaining to the same set of facts be litigated in one set of proceedings. So, it can be argued that the plaintiff should be entitled to bring only one set of proceedings, claiming against all the defendants or those whom he or she chooses to sue and should not be able to sue them successively in separate proceedings.

²² See par. 6. 27 above.

²³ See clause 5(1) of the draft Bill.

²⁴ Fleming *Torts*.

6.37 Various methods of achieving this objective have been tried over the years. At common law, judgment against one defendant entirely discharged the others even if the plaintiff was unable to successfully execute the judgment against the first joint wrongdoer.²⁵ Another common law rule was that a formal discharge of one joint wrongdoer discharged the rest. These rules were based on the concept that since there was a joint liability, there was only one cause of action. If that cause of action were extinguished, it simply ceased to exist. The plaintiff might thus be left without a remedy. This rule was abrogated in England by section 17 of the Law Reform Act of 1936.

6.38 However, a number of ways were employed in legislation to deter a multiplicity of actions. English legislation provided for sanctions against multiple proceedings by plaintiffs. A sanction in damages was imposed, namely that the plaintiff was not to receive more than the amount obtained in the first action to go to judgment. A sanction in costs was also imposed, namely that in the subsequent proceedings the plaintiff was not to have costs unless the court thought that there were reasonable grounds for proceeding in that manner.

6.39 **The Commission is opposed to any rule which might result in unfairness to the plaintiff. The Commission believes that the plaintiff should receive full compensation for injury caused by wrongdoers.** There may be good reason for the plaintiff initially electing to sue only one of the defendants. It is difficult to set a rigid rule as circumstances in each case might differ. **The Commission therefore advocates a procedure whereby the court should consider the merits of each case and where it concludes that good reason for successive proceedings do not exist, impose an appropriate sanction in costs.**²⁶

6.40 **The Commission believes that the plaintiff should be allowed the election to decide how to proceed in order to receive full compensation for his or her loss with the least amount of effort.** The plaintiff's common law right to an undivided judgment for the whole of his loss is contradicted by section 2(8) of the existing Act which empowers the court to apportion the damages and give separate judgments against each joint wrongdoer. McKerron²⁷ refers to this and states that the court should not exercise this power if there is a likelihood of the plaintiff being prejudiced thereby.

²⁵ *Brinsmead v Harrison* (1871) LR 7 CP 547.

²⁶ See section 9(2) of the draft Bill.

²⁷ McKerron *Law of Delict* 28.

6.41 The Commission therefore proposes the following procedure:

(a) Where the plaintiff elects to sue one or more but not all the joint wrongdoers.

6.42 The plaintiff may issue summons against any joint wrongdoer/s for the full amount of his or her loss subject to the condition that the plaintiff have notice of the proceedings served on all the other joint wrongdoers known to the plaintiff.²⁸ Where other joint wrongdoers have not been given notice, it is recommended that the court may order that such notice be given in a manner prescribed by the court.²⁹ The notice is essential to notify the other joint wrongdoers of the action as the joint wrongdoer/s who is sued (“the first joint wrongdoer”) may later claim a contribution from the joint wrongdoers who are not sued (“the second joint wrongdoer”).³⁰ The plaintiff may also proceed against the second joint wrongdoer in a subsequent action.³¹

(b) Where the plaintiff and the first joint wrongdoer settle the claim

6.43 This situation is presently regulated by section 2(10) of the Act which states that where the plaintiff (P) and the first joint wrongdoer (J1) come to an agreement whereby P exempts J1 from liability or reduces liability, P cannot claim the amount which J1 should have paid from any other joint wrongdoers.

6.44 McKerron³² states that this provision would appear to be both inequitable and contrary to principle. Why should one wrongdoer derive any benefit from an agreement between the plaintiff and another wrongdoer? This provision takes away the common law rights of the plaintiff. The purpose of the Act is to adjust liability between parties and not to deprive injured parties of their common law rights. There would therefore seem to be no justification for this provision.

6.45 The Commission recommends that where P and J1 come to a settlement, P should still be allowed to proceed against another joint wrongdoer for the outstanding amount of his loss.³³

(c) Where J1 pays the full amount of P’s damages

²⁸ See section 6(1) of the draft Bill.

²⁹ Section 6(2) of the draft Bill.

³⁰ Section 10 of the draft Bill.

³¹ See sections 7 and 9 of the draft Bill.

³² *Law of Delict* 32.

³³ See section 7 of the draft Bill.

6.46 Where judgment is given against J1 for the full amount of P's damages or where J1 agrees to pay the full amount of P's damages, and the judgment debt is paid in full, every other joint wrongdoer shall be released from liability to P.³⁴

(d) Where P sues J1 and is unsuccessful in recovering his damages or all his damages

6.47 The proposed procedure is set out in section 9 of the draft Bill. P should have the right to sue subsequent defendants if he has not recovered all his damages from J1. However, P will have to show good reason for not suing all the defendants together in one action, and if he cannot the court may impose a costs sanction on P. This will prevent unnecessary multiple actions by plaintiffs.

6.48 The plaintiff suing in a subsequent action will invariably have incurred costs in the first action. These costs could be substantial. It is therefore appropriate to provide in the Bill that any amount recovered from any joint wrongdoer in a prior action should first be applied towards the payment of costs awarded in the prior action in priority to the liquidation of the damages awarded in that action.³⁵

6.49 The other proviso to this section is that the plaintiff may not recover more than the full amount of his or her loss from all the joint wrongdoers.³⁶

E. CONTRIBUTION BETWEEN JOINT WRONGDOERS

6.50 Contribution between joint wrongdoers forms part of a wider law of contribution which spans many areas of traditional legal classification³⁷ and which is concerned with the circumstances in which a person (J1) who has made, or is liable to make, a payment to a third person (P) in discharge or a liability owed to P can claim from another person or persons (J2) the whole or part of that payment because the payment discharges a common liability of J1 and J2 to P. In such cases, J1 and J2 are not necessarily wrongdoers, nor are they responsible for the same damage.³⁸

³⁴ See section 8 of the draft Bill.

³⁵ Section 9(3) of the draft Bill.

³⁶ Section 9(4) of the draft Bill.

³⁷ These include delicts, contract and claims between co-sureties and insurers.

³⁸ New South Wales Law Reform Commission *Report 89*.

6.51 Contribution between joint wrongdoers can be defined as the right of one defendant (J1)³⁹ to claim contribution from another defendant (J2)⁴⁰ where both J1 and J2 are wrongdoers liable for causing the same damage to the plaintiff (P). The most common example of such a claim for contribution arises where J1 claims contribution from J2 where J1 has paid P's damages in full.

6.52 While rejecting the abolition of the principle of joint and several liability, the Commission recognises the hardship that the rule may cause. The Commission is therefore of the view that it is necessary to improve the position of the defendant by implementing measures to liberalise the law of contribution.

(a) Extension of the right to contribution

6.53 The right of contribution presently applies where both joint wrongdoers are liable in delict but not where the action is classified as some other type of civil wrong e.g. breach of contract. An example of the difficulties caused by this limitation is found in a dispute over a building contract. A developer engages an architect to draw up building plans and supervise the construction work. The developer separately employs a builder to carry out the work under the architect's supervision. The builder carries out the work badly and the architect fails to see that it is defective. The developer sues the architect for breach of contract. The architect will have to pay the whole of the damage. There is no right of contribution by which the architect can force the builder to shoulder some of the burden because the act does not apply to contract.

6.54 In England, the Civil Liability (Contribution) Act was passed in 1978. This Act extends the contribution provisions of the earlier legislation to all persons liable in respect of the same damage. This is given effect to by sections 1(1) and 6(1) of the Act.

S 1(1) "... Any person liable in respect of any damage suffered by another person may recover contribution from any other person liable in respect of the same damage (whether jointly with him or otherwise)."

S 6(1) "a person is liable in respect of any damage for the purposes of this Act if the person who suffered it (or anyone representing his estate or dependants) is entitled to recover compensation from him in respect of that damage (whatever the legal basis of his liability, whether tort, breach of contract, breach of trust or otherwise)."

³⁹ Defined in the draft Bill as the first joint wrongdoer.

⁴⁰ Defined in the draft Bill as the second joint wrongdoer.

6.55 The Law Reform Commission of Hong Kong⁴¹ agreed with this extension of the right to contribution, stating that “the present restriction of the right to contribution to tortfeasors cannot be justified on any policy grounds, and is merely an accident of legal history.”

6.56 The New South Wales Law Reform Commission⁴² considered whether there should be a right of contribution between defendants who have committed delicts that are also crimes; intentional wrongs or a breach of statutory duty. In regard to the first two categories, it was argued that these involve a high degree of wrongdoing and the wrongdoers should be wholly liable for committing them. It was also argued that the damage committed by the intentional wrongdoer and hence the basis for the award of damages was so different from that of other delicts that there was no just and equitable way to apportion responsibility.

6.57 However, they found that it was not possible to have a blanket provision preventing rights of contribution where a delict is also a crime. The question of whether a defendant should have a right of contribution should depend on the nature of the crime committed and the circumstances relevant to the case. It is also not possible to formulate a general rule excluding rights of contribution for intentional wrongdoers. It is both possible and just for courts to apportion responsibility between defendants. The right to contribution in the above instances should be qualified by allowing the court a wide discretion as to how to apportion liability. The courts should have the right to rule that a wrongdoer should not have a right of contribution depending upon the facts of the particular case.

6.58 The New South Wales Law Reform Commission reached the conclusion that the right to claim contribution should be available to all joint wrongdoers. Similar conclusions have been reached by others. Glanville Williams argued that the right of contribution should be applied to all joint wrongdoers.⁴³ The Ontario Law Reform Commission also recommended the extension of the rights of contribution to all joint wrongdoers.

6.59 The Commission recommends that the right of contribution should be available to all joint wrongdoers but that the courts be allowed a wide

⁴¹ *Report on contribution between wrongdoers* at 22.

⁴² *Discussion Paper 38* at 51.

⁴³ Williams (*op cit*) at 94.

discretion as to the apportionment of liability including the right to allow a full contribution against a defendant depending on the facts of the case.⁴⁴

(b) Contribution where liability arises from different sources of obligation

6.60 The extension of the Act to contract and to intentional acts will add a further degree of complexity to the law as it will require courts to apportion damages between wrongdoers whose liability to a plaintiff differs, with the only common feature being that each caused the same loss. This can arise where one wrongdoer is liable to the plaintiff delictually and another for breach of contract. This situation can also arise where one wrongdoer has negligently caused loss to the plaintiff and the other has acted intentionally in causing loss to the plaintiff.

6.61 The New South Wales Law Reform Commission⁴⁵ considered the arguments against extending rights of contribution to joint wrongdoers whose liability to a plaintiff differs (mixed joint wrongdoers). One of the arguments they considered was that the liability imposed by the law of delict was fundamentally different from liability arising out of the law of contract. The effect of extending the right of contribution between a wrongdoer liable in delict (D1) and one liable in contract (D2) might be to alter existing contractual arrangements by giving a D1 a right of contribution against (D2) whose breach of contract has caused the same damage to the plaintiff. This might be problematic where D2 has entered into a contract limiting or exempting his liability to P. D2 ought not to be liable to D1 through a claim for contribution.

6.62 The difference in the liability of joint wrongdoers might make it difficult for courts to decide how to apportion liability between them. The New South Wales Law Reform Commission⁴⁶ found that the simple answer was that the courts will have to do the best they can, just as they do in apportioning liability in cases of contributory negligence, which involve the apportionment of damages between wrongdoers and plaintiffs. The Alberta Institute of Law Reform,⁴⁷ while recognising that the rules relating to remoteness of damage and the measure of damages are not precisely the same in delict and in contract, observed that the claims for contribution would only be available in respect of the same “overlapping damage, flowing from the overlap in

⁴⁴ See section 10 read with section 3 of the draft Bill.

⁴⁵ *Discussion Paper 38* at 110.

⁴⁶ *Discussion paper 38* at 118.

⁴⁷ *Report 75* at 50.

liability, whether it arises in delict or in contract” and concluded that there would not be any serious problems with the proposed reform.

6.63 Whatever the basis of their liability, where joint wrongdoers have caused the same harm to the plaintiff, it is equitable that both wrongdoers be responsible for compensating the plaintiff, even though the courts might find it difficult to apportion liability between the defendants, especially in the situation where D2 and P have contracted to limit liability, or where D1’s right to contribution is limited by the contract between D2 and P.

6.64 Several law reform agencies have considered whether rights of contribution should be extended to mixed joint wrongdoers and each has recommended that they should be.⁴⁸ In a number of cases, these recommendations have been adopted in the form of new legislation defining rights of contribution between wrongdoers.⁴⁹

6.65 The Commission recommends that rights of contribution should be extended to include mixed joint wrongdoers.⁵⁰ Any defendant whose liability to the plaintiff in contract is limited by a clause limiting or excluding liability to the plaintiff should have the full benefit of those contractual terms.⁵¹

(c) Circumstances in which contribution may be claimed

6.66 Section 10(2) of the draft Bill sets out the circumstances in which the first joint wrongdoer (J1) may claim a contribution from the second joint wrongdoer (J2). An important consideration is whether J1 can claim a contribution from J2 when he has not settled P’s claim in full. Subsection 2(6) of the Act presently allows J1 to recover a contribution from J2 only after J1 had paid the full amount of P’s damages, whereas subsection 2(7) allows J1 to claim a contribution from J2 as long as J1 has paid more than his rightful share to P.

6.67 MA Millner⁵² expressed the view that the contradiction between the two subsections reflected inconsistent policies and that it was desirable to settle upon

⁴⁸ England and Wales, Law Commission *Law of Contract: Report on Contribution* (Law Com 79, 1977) at para 81; Victoria, Chief Justice’s Law Reform Committee *Report on Contribution* (1979); Scottish Law Commission *Report on Civil Liability: Contribution* (Scot Law Com No 15, 1988); Ontario Law Commission *Report on Contribution (op cit)*; New Zealand Law Commission *Preliminary Paper 19 (op cit)*.

⁴⁹ See *Civil Liability (Contribution) Act 1978* (Eng); *Wrongs Act 1958* (Vic) Pt 4; *Civil Liability Act 1961* (Ireland).

⁵⁰ Section 2(1) of the draft Bill read with the definition of wrong in section 1 of the draft Bill.

⁵¹ Section 2(2) of the draft Bill.

⁵² 1956 *Annual Survey* 188 at 193.

one policy. McKerron⁵³ submitted that contribution should never be permitted while the judgment remains unsatisfied as this might have the effect of prejudicing the plaintiff and might lead to complications and difficulties. To mention one, there might be competing claims; for example by the plaintiff seeking satisfaction of his or her judgment on the one hand and by a joint wrongdoer claiming contribution on the other.

6.68 However, the Commission is of the opinion that J1 should be allowed to commence contribution proceedings against J2 even though he or she has not completely paid P's damages.

6.69 The Commission recommends that a joint wrongdoer who in good faith has paid or is obliged by judgment to pay an amount which exceeds the proportion of the loss for which he or she is responsible is entitled to recover a contribution from any other joint wrongdoer.⁵⁴ The problems mentioned by McKerron are dealt with in section 12(2) which states that the court must enquire and satisfy itself that the first joint wrongdoer has made arrangements to pay or secure the plaintiff's claim before granting a contribution order.

(d) Determination of amount of contribution

6.70 Chapter 5 of the Report deals with the basis of apportionment of loss. The recommended method of apportionment is set out in section 3 of the draft Bill.

6.71 The Commission recommends that the amount of contribution recoverable by one joint wrongdoer from another be determined in accordance with section 3 of the draft Bill.⁵⁵

6.72 In the case of *Lloyd-Gray* Scott JA raised the concern that the application of the Act to intentional wrongdoers would mean that the negligent collecting bank and the thief would be joint wrongdoers and that this would have the effect of granting the intentional thief a right of contribution against the negligent collecting bank. **In order to prevent this, the Commission proposes in the draft Bill that a joint wrongdoer whose wrong consists of the failure to prevent another's intentional wrong or harm arising from that wrong is not liable to pay a contribution to that other person.⁵⁶** It was decided to insert this provision to supplement the general

⁵³ *Law of Delict* 27.

⁵⁴ Section 10(2) of the draft Bill.

⁵⁵ Section 10(1) read with section 3(1) of the draft Bill.

⁵⁶ Section 11(2) of the draft Bill.

criterion for apportionment as set out in section 3 of the draft bill for reasons of clarity and to avoid leaving the issue to the vagaries of judicial interpretation.

(e) Limits on liability and defences

6.73 There are several situations in which the liability of one or some of the joint wrongdoers to the plaintiff may be limited or excluded. Thus a contract between the plaintiff and a joint wrongdoer may limit or exclude the liability of the latter, or legislation may limit certain wrongdoers' liability. In effect, such provisions represent a decision, either by the parties to the contract or the legislature that the risk of loss and the burden of insurance are best borne by the potential victim of that loss. Often the views of insurers lie behind such decisions, but they typically also reflect trade-offs between the benefit and the cost of full liability, especially its impact on the price of a good or service. At other times, liability may be limited or excluded by reason of the plaintiff's conduct in relation to the loss. This is the case where a joint wrongdoer can rely on defences such as consent, voluntary assumption of risk and contributory negligence.

6.74 These situations raise two questions. First, how, if at all, should the plaintiff's claim against other joint wrongdoers be affected? Should the plaintiff's right of recovery against J1 be affected by an exclusion or limitation clause in a contract with J2, or some other defence that J2 could raise against P? Second, should contribution among wrongdoers be affected? Should J1's right against J2 for contribution be affected by the fact that J2's liability to P is excluded, or is limited to an amount that is less than the proportion of P's loss for which responsibility is attributed to him under the Act? These questions would receive a single and positive answer where the defence in question precludes the plaintiff from recovering compensation for any or all of his loss from *any* potential defendant. This happens where the plaintiff consented to, or voluntarily assumed the risk of, the harm, or contributed thereto by his or her own fault. Here the plaintiff's right to compensation, and the wrongdoers' correlative joint and several liability to him, are wholly or partly erased by his or her conduct. Consequently, both the amount recoverable by the plaintiff from any joint wrongdoer and the amount to be apportioned among joint wrongdoers are invariably affected. Where, however, the defence derives from something that is peculiar to the relationship between the plaintiff and only one of the joint wrongdoers, such as a contractual limitation or exclusion clause, the issue is more complicated. Here, it may be argued, the plaintiff (P) merely agreed with a wrongdoer (J2) not to enforce his or her (full) right to compensation (*a pactum de non*

petendo), which consequently survives against any other joint wrongdoer (J1). It would follow that J1 would remain fully liable to P. However, it would remain an open question whether J1 should be able to claim a contribution from J2 that is calculated irrespective of the agreement between P and J2: whereas the first question concerns the equitable treatment of the plaintiff, the second question concerns fairness among joint wrongdoers. Similarly where legislation, rather than an agreement, regulates the relationship between the plaintiff and one joint wrongdoer.

6.75 The Act addresses only the first of these questions directly, and then only in respect of contractual exclusion or limitation clauses. The plaintiff's claim against all joint wrongdoers is reduced where one of them is the beneficiary of such a clause. Indirectly, this also provides an answer to the second question, since it is the damages recoverable (or recovered) by a plaintiff that is apportioned among wrongdoers. The Act therefore assimilates the effect of a contractual limitation or exclusion with that of a defence, such as voluntary assumption of risk, which wholly or partly erases the plaintiff's right to compensation. Section 2(10) of the Act provides as follows:

“(10) If by reason of the terms of an agreement between a joint wrongdoer and the plaintiff the former is exempt from liability for the damage suffered by the plaintiff or his liability therefor is limited to an agreed amount, so much of that portion of the damages which, but for the said agreement and the provisions of paragraph (c) of subsection (6) or paragraph (b) of subsection (7), could have been recovered from the said joint wrongdoer in terms of subsection (6) or (7) or could have been apportioned to him in terms of subparagraph (ii) or (iii) of paragraph (a) of subsection (8), as exceeds the amount, if any, for which he is liable in terms of the said agreement, shall not be recoverable by the plaintiff from any other joint wrongdoer.”

6.76 The Ontario Law Reform Commission⁵⁷ refers to the approach in section 2(10) of the Act as apportioning to the wronged person the part of the loss that J2 would have had to bear *vis à vis* J1 if there had been no exemption clause in the contract between P and J2. McKerron⁵⁸ submits that there is not sufficient reason for taking away the plaintiff's common law right to recover his or her damages in full from any joint wrongdoer whose liability is not limited by contract: “The purpose of the Chapter is to adjust liability between joint wrongdoers, not to deprive injured persons of their common-law rights”. This accords with the criticism of the Ontario Law Reform Commission, which describes the position reflected in section 2(10) as “quite

⁵⁷ *Op cit* 126.

⁵⁸ *Law of Delict* 316.

retrogressive” at a time when it is widely recognized that such clauses are often contained in standard form contracts and accepted by people who do not have a genuine opportunity to negotiate the terms of the contract or the means to fully appreciate the meaning and consequences of such a clause.⁵⁹ The Commission agrees with these criticisms.

6.77 The Ontario Law Reform Commission identifies two alternatives to the method used in South Africa for dealing with the contribution consequences of contractual exemption and limitation clauses and statutory limitations of liability.⁶⁰ In contrast with section 2(10) of the Act, neither alternative allows a limitation or exclusion of liability in favour of one joint wrongdoer to affect another joint wrongdoer’s liability to the plaintiff. The first simply makes the liability of a joint wrongdoer (J2) to the plaintiff a condition precedent to J1’s right of contribution by J2. The result is that while P’s right to compensation against J1 is not affected by any exclusion or exemption clause in a contract between P and J2, J1 cannot recover from J2 a contribution that would exceed the latter’s liability to P. Hence P can recover damages in full by proceeding against a joint wrongdoer with whom he or she has not agreed to limit his liability, and only a wrongdoer who is party to such an agreement derives benefit therefrom. The second alternative limits the effect of the limitation or exemption clause to the parties to the contract, with the result that the existence of the clause is ignored in *both* a claim by P against J1 and a claim by J1 against J2 for contribution. Hence P can recover his or her full damages by proceeding against J1, and J1’s right of contribution against J2 is determined as if the latter were fully liable to P. The Ontario Commission preferred the first of these two alternatives in respect of both contractual clauses and statutory provisions, taking the view that a joint wrongdoer should not be required to pay by way of contribution a sum in excess of his or her liability to the plaintiff.⁶¹ It considered that the second alternative deprived J2 of the substance of her bargain with P and gave J1 a windfall for which he or she had not paid. It also preferred the first alternative’s refusal to allow J1 to recover a contribution from J2 where payment by J1 would not discharge a liability owed by J2 to J1 on the ground that this reflected “the more principled concept of unjust enrichment”, whereas the second alternative is (like the South African approach) “based upon a somewhat nebulous notion of ‘fairness’ between”

⁵⁹ *Op cit* 129.

⁶⁰ *Op cit* 124-128.

⁶¹ *Op cit* 128-131.

joint wrongdoers.⁶²

6.78 The Commission agrees with this, and endorses the position taken by the Ontario Law Reform Commission. It notes that this coincides with proposals made in South Australia,⁶³ British Columbia,⁶⁴ New South Wales⁶⁵ and New Zealand⁶⁶ in the context of the extension of rights of contribution to all civil wrongs. As the presence in the Act of section 2(10) attests, the problems discussed in the preceding paragraphs are not new. They will, however, grow in prominence and significance if, as the Commission recommends, rights of contribution apply to losses caused by breach of contract and to mixed wrongdoers. That recommendation will bring contractual chains and networks of contracts, where only some of the parties among whom liability might arise are in contractual privity, under the purview of the Act. In such cases, at least some of the parties (and/or their insurers) have calculated prices and obligations on the basis of contractual allocations of the risk of breach. Both alternatives to the Ontario proposal - to reduce the value of P's right of recovery against J1, giving the latter a windfall at P's expense, as current South African law does, or otherwise to deprive J2 of the protection for which she has bargained, now granting J1 a boon at J2's cost - would subvert the law of contract and the protections it can currently provide.⁶⁷ As the New Zealand Law Commission pointed out:⁶⁸

“Many contracts are, quite properly, entered upon only on the basis that there is to be no (or limited) liability should breaches of a particular kind occur. The existence of that protection may be reflected in the consideration to be received by the protected party. If freeing up the law of contribution removes the protection, the price payable by someone who wants goods or services usually provided on a protected basis may be very significantly increased. It may in some cases mean that the goods or services are no longer available.”

6.79 The combined effect of sections 5 and 2(2) of the draft Bill is that a plaintiff can recover the whole of the damages payable to him or her from any joint wrongdoer except one whose liability to him or her has been limited or excluded by

⁶² *Op cit* 128.

⁶³ *Op cit* 12.

⁶⁴ *Op cit* 29-30.

⁶⁵ *Op cit* 59.

⁶⁶ *Op cit* 66-68.

⁶⁷ See in this regard the concerns raised by Myburgh J in *Combrinck Chiropraktiese Kliniek (Edms) Bpk v Datsun Motor Vehicle Distributors (Pty) Ltd* 1972 (4) SA 185 (T) at 192. Compare also *Compass Motor Industries (Pty) Ltd v Callguard (Pty) Ltd* 1990 (2) SA 520 (W) at 529H-J.

⁶⁸ *Op cit* 66.

agreement. This means that P will retain his or her full claim against J1, while J2 will retain the protection of limitation or exclusion clause in an agreement with P. Section 11(1) ensures that J2 will not be deprived of that protection in contribution proceedings, but will be liable to pay contribution only up to the amount of his or her liability to the plaintiff. The draft Bill will not affect the consequences for joint wrongdoers of defences based on the conduct of the plaintiff in relation to the loss, such as contributory fault. In the Commission's view, the arguments advanced in paragraphs 6.77 and 6.78 apply only in respect of contractual exclusions and limitations of liability.

6.80 Finally, attention must be drawn to two points. The first is that it is likely sometimes to be difficult to determine as a matter of fact whether one is dealing with an instance of consent or voluntary assumption of risk, both of which would erase a plaintiff's entitlement to damages, and thus benefit all joint wrongdoers, or with a (possibly implied) limitation or exclusion of the liability of a wrongdoer, which would affect only that wrongdoer's liability. The Commission acknowledges that this difficulty will assume greater practical significance under its proposal than is currently the case. It is, however, of the view that the arguments in favour of treating contractual exclusions and limitations of liability differently, outweigh the inconvenience and cost such difficulties of fact may cause. Secondly, one of the contributors to the discussion paper suggested that the extension of the right of contribution to non-delictual claims would necessitate the insertion of a provision in the Act preventing the "contracting out" from liability under the Act. Apart from reiterating that, as other Law Reform Commissions have also observed, contractual limitations and exclusions of liability are a common and often essential component of commercial transactions, the Commission emphasizes that separate legislation dealing specifically with unfair contract terms would be better suited to addressing this concern, especially in consumer contracts. Section 11(1) of the Commission's draft Bill will, at any rate, ensure that an injured person's right of recovery is affected only if he or she agreed to limit or exclude the liability of the particular wrongdoer in question, and thus affect plaintiff's rights more narrowly than the current section 2(10) does.

(f) Procedure for recovery of contribution

6.81 Section 12(1) of the draft Bill sets out the procedure to be followed in order to recover a contribution. In this regard the Commission recommends that a claim for a contribution may be made by a first joint wrongdoer against a second joint wrongdoer either in the action brought by the plaintiff by issuing a third party notice or in a separate (subsequent) action brought by the first joint wrongdoer against a second joint wrongdoer.

6.82 Most of the submissions to the Discussion Paper pointed out the defective enforcement procedure against third parties in the Magistrates' Courts in that no judgment binding on a third party can be obtained in this way.⁶⁹ This problem relates not so much to the Act, but to the problem caused by the lack, in the Magistrates' Courts Rules, of third party procedures similar to those in the High Court. The Commission accordingly recommended in the Discussion Paper that the Rules Board introduce a third party procedure similar to that contained in Rule 13 of the High Court for the Magistrates' Court.⁷⁰

6.83 The gist of Rule 13, the relevant High Court Rule, is contained in subrules (1) and (2). They read as follows:

- "13. (1) Where a party in any action claims-
- (a) as against any other person not a party to the action (in this rule called a "third party") that such party is entitled, in respect of any relief claimed against him, to a contribution or indemnification from such third party, or
- (b) any question or issue in the action is substantially the same as a question or issue which has arisen or will arise between such party and the third party, or should be properly be determined not only as between any parties to the action but also as between such parties and the third party or between any of them, such party may issue a notice, hereinafter referred to as a third party notice, as near as may be in accordance with Form 7 of the First Schedule hereto, which notice shall be served by the Sheriff.
- (2) Such notice shall state the nature and grounds of the claim of the party issuing the same, the question or issue to be determined, and any relief or remedy claimed. In so far as the statement of the claim and the question or issue are concerned, the rules with regard to pleadings and to summonses shall *mutatis mutandis* apply."

6.84 A third party may therefore be joined either at the instigation of a defendant who claims to be entitled to a contribution from such third party or who seeks an indemnification in respect of such relief claimed by the plaintiff from such

⁶⁹ Par. 5.1.

⁷⁰ Par. 5.19.

defendant;⁷¹ or at the instigation of a defendant if the question of issue between them is substantially the same as that involved between the plaintiff and the defendant.⁷²

6.85 Rule 13 is used principally to complement the provisions of section 2 of the Act,⁷³ which section, it has been held,⁷⁴ contemplated a procedure of the kind regulated by the rule. When a litigant joins a third party by serving a notice upon him in terms of Rule 13 such third party does not become a joint defendant *vis-a-vis* the plaintiff and the court cannot give a judgement against the third party for the payment of a sum of money in respect of the amount being claimed in the action, but can merely make a declaratory order apportioning the degree of fault between the various wrongdoers. This was held in *Hart v Santam Insurance Co Ltd*,⁷⁵ purportedly following *Shield Insurance Co Ltd v Zervoudakis*.⁷⁶

6.86 A plaintiff may also issue a third party notice in terms of the rule.⁷⁷ The plaintiff is not, however, entitled to compel further particulars from a third party whom the plaintiff has joined, because there is no *lis* between the plaintiff and such third party.⁷⁸

6.87 The advantage of the procedure is that it avoids a multiplicity of actions concerning the same subject-matter. By joining J2, J1 can ensure that the court can make a decision on the apportionment of blame between J1 and J2 and J1 will not have to institute separate proceedings to determine the amount of the contribution.

6.88 The Magistrates' Court Rules contain no provision corresponding with High Court Rule 13, nor is there a rule sanctioning the use of a conditional counterclaim. In the Magistrates' Court the defendant must necessarily therefore employ the provisions of Rule 28(2) in terms of which he or she is obliged to bring an application consisting of notice of motion supported by affidavits covering all the necessary

⁷¹ Rule 13(1)(a).

⁷² Rule 13(1)(b).

⁷³ Harms *Civil Procedure in the Superior Courts* B-113. See also *Shield Insurance Co Ltd v Zervoudakis* 1967 (4) SA 735 (E); *Swart v Scottish Union and National Insurance Co Ltd* 1971 (1) SA 384 (W) at 395H; *Hart v Santam Insurance Co Ltd* 1975 (4) SA 275 (E) at 277C.

⁷⁴ *Gross v Commercial Union Assurance Co Ltd* 1974 (1) SA 630 (A); *Rondalia Assurance Corporation v Page* 1975 (1) SA 708 (A).

⁷⁵ 1975 (4) SA 275 (E).

⁷⁶ 1967 (4) SA 735 (E). In that case it was held that where a third party had been joined in terms of Rule 13 in an action for damages the prescriptive period provided for in section 11(2) of the Motor Vehicle Insurance Act 29 of 1942 did not apply to such third party as no compensation was being claimed from him in terms of section 11(1) of that Act. But compare *SA Onderlinge Brand- en Algemene Verzekering Maatskappy v Van den Berg* 1976 (1) SA 602 (A).

⁷⁷ *Montana Steel Corporation v New Zealand Insurance Co Ltd* 1975 (4) SA 339 (W).

⁷⁸ *Geduld Lands Ltd v Uys* 1980 (3) SA 335 (T).

allegations in order to affect such a joinder.⁷⁹ Once a joinder has been effected in terms of Magistrates' Court Rule 28(2), the magistrate is then requested either to implement the provisions of section 2(8)(a) of the Act,⁸⁰ or to apply section 2(6)(a) of the Act.⁸¹

6.89 Rule 28(2) of the Magistrates' Court Rules reads as follows:

“(2) The court may, on application by any party to any proceedings, order that another person shall be added either as a plaintiff or applicant or as a defendant or respondent on such terms as may be just.”

6.90 The rule is wide enough to embrace an application by a defendant to add another person as a defendant, even where the plaintiff and the proposed co-defendant object thereto. However, this does not encompass a power to compel a plaintiff to claim relief against a defendant whom he or she has not sued and does not wish to sue.⁸² It has been held⁸³ that the powers conferred upon a magistrate in terms of this sub-rule give a magistrate a discretion to permit the joinder of a defendant notwithstanding that the person sought to be joined does not have a direct and substantial interest in the proceedings and notwithstanding that his or her rights would not be affected by the judgement of the court if he or she were not joined. The test to be applied is that of convenience, especially in order to save costs or to avoid multiplicity of actions.

6.91 The effect of joinder under Rule 28(2) is, however, much more limited in scope than the joinder of a third party under Rule 13 of the High Court. The finding of the magistrate is not binding on the party joined under Rule 28(2), and such joinder does not have the effect of avoiding multiplicity of actions.⁸⁴ At best the finding of the magistrate would encourage a settlement out of court of a subsequent action by the plaintiff against the party who has been joined under Rule 28(2).⁸⁵

⁷⁹ *Car-to-Let (Pty) Ltd v Addisionele Landdros* 1973 (2) SA 99 (O).

⁸⁰ But see Honey *MVA Practice* 262 who argues that “such a request must be doomed to fail unless of course the magistrate concerned is unaware of those authorities or unless the appellate division pronounces positively on the applicability of section 2(8) in such a situation”.

⁸¹ Honey *MVA Practice* 263 argues that a joinder in the Magistrates' Court with a view to thereby implementing the provisions of section 2(6)(a) of the Act would also be futile as a magistrate does not appear to have jurisdiction to make a declaratory order.

⁸² See further Rubens 1976 *De Rebus* 115; Wessels 1976 *De Rebus* 374; Honey 1981 *De Rebus* 525.

⁸³ *Khumalo v Wilkins* 1972 (4) SA 470 (N) at 473, 475.

⁸⁴ Jones and Buckle *Civil Practice of the Magistrates' Courts* Volume II 248.

⁸⁵ Wessels 1976 *De Rebus* 374; contra Rubens 1976 *De Rebus* 115.

6.92 Most of the respondents to the discussion paper supported the Commission's preliminary recommendation in the discussion paper that a third party procedure similar to that contained in Rule 13 of the High Court be introduced at Magistrates' Court level.⁸⁶ Mr Michael Searle of Joubert, Galpin and Searle Attorneys, however, points out the difficulties that arise once a defendant joins a party as a third party in terms of Rule 13 of the High Court. He explains:

"Firstly, a Defendant cannot agree quantum and evidential matters with the Plaintiff unless the Third Party also agrees. Usually the Third Party refuses to do so.

A Defendant cannot easily settle with a Plaintiff if the Third Party refuses to be party to the settlement. The effect of this is that the Plaintiff has a free ride in the litigation and the Defendant is forced to go to a full judgment so that a contribution claim can be determined. The Court has no power to grant judgment against a Third Party in favour of a Plaintiff. If, therefore, a Court were to find that the Defendant was not to blame and the Third Party was entirely to blame, the Plaintiff would be left without a remedy against the Third Party as by that stage it is almost inevitable that the claim against the Third Party will have prescribed. In my view, the Third Party procedure does not achieve satisfactory results from the point of view of any party. My suggestion that no party should be liable for a greater degree of fault than can be attributed to that party would probably eliminate all the difficulties that I have mentioned but if this is not to be accepted, then the Third Party procedures have to be made workable. At present they are not workable."

6.93 The Commission has decided not to follow the full proportional liability option, as explained above. We take cognisance of the concerns raised by Mr Searle and emphasise that should our recommendation to implement a third party procedure in the Magistrates' Court be accepted, then such procedure must be made workable. With this caution in mind, **the Commission confirms its preliminary recommendation in the discussion paper that the Rules Board be requested to consider introducing a third party procedure similar to that contained in Rule 13 of the High Court for the Magistrates' Court.**

6.94 It is also worth pointing out that in terms of the draft Bill a first joint wrongdoer may, in a separate action, institute proceedings against a second joint wrongdoer to recover a contribution.⁸⁷

(g) The uncollectable contribution

6.95 Hardship may be caused to a defendant who cannot recover a contribution from a defendant who is insolvent or unavailable as recovery of a contribution depends on the availability and solvency of the defendant(s) against whom judgement is given. The question is then how the insolvency or unavailability of one

⁸⁶ Mr Chris Petty, Stegmanns Attorneys; Law Society of the Cape of Good Hope.

⁸⁷ Section 12(1)(b) of the draft Bill.

joint wrongdoer should impact on the other joint wrongdoers (each of whom is jointly and severally liable) and on the plaintiff?⁸⁸ In Ontario⁸⁹ and New Zealand⁹⁰ provision has been made for a re-allocation of the apportionment in the event of it becoming impossible to execute as against one of the wrongdoers in respect of his or her share. This might happen where one of the wrongdoers is insolvent, absent from the country, or cannot be found.

6.96 The GCB, in its submission to the Discussion Paper,⁹¹ argued that a court should apportion liability only between those who are parties before it, disregarding any potential defendant who has not been sued by the plaintiff or joined as a third party. If one of the wrongdoers is unable to pay his or her debts before judgement, that ought to be taken into account by the court by ignoring his or her contribution if there is no prospect of any recovery from such a source.⁹²

6.97 Should a dividend in the insolvency be a reasonable possibility, the GCB feels a court should enter judgment against all defendants. The plaintiff can then enforce judgment against one or more of the defendants and be fully compensated in that way. Should any of the defendants held liable by the court discover that no *aliquot* contribution is available from one of the co-defendants also held liable (e.g. because of insolvency), such defendant should be entitled to return to the court within a reasonable time and apply for the re-allocation of the unenforceable contribution among the remaining parties. In this way the plaintiff and the solvent defendants share, in a proportional way, between them the burden of such insolvency.

6.98 One possible approach for sharing the risk of insolvency is that advocated by Glanville Williams⁹³ and by the American Uniform Comparative Fault Act.⁹⁴ They

⁸⁸ See also New Zealand Law Commission Preliminary Paper 19.

⁸⁹ *Report on Contribution*.

⁹⁰ *Preliminary Paper 19*.

⁹¹ Para. 3.66 *et seq.*

⁹² See also par. 6.27 above with reference to the US Securities Legislation Reform Act, 1995.

⁹³ Williams *Joint torts and contributory negligence* 403 - 405. Professor Williams' views on this question were incorporated (applying his suggested draft bill almost word for word) in the Irish Civil Liability Act 1961.

⁹⁴ Section 2(d) of the Act provides as follows:

"Upon motion made not later than one year after judgment is entered, the court shall determine whether all or part of a party's equitable share of the obligation is uncollectible from that party, and shall reallocate any uncollectible amount among the other parties including a claimant at fault, according to their respective percentages of fault. The party whose liability is reallocated

suggest that a plaintiff at fault should initially only be entitled to a primary judgment against each defendant representing that defendant's proportionate share of responsibility. If the plaintiff is unable to recover against a particular defendant having taken reasonable steps to do so, a secondary judgment apportioning the insolvent defendant's share between the plaintiff and the remaining defendants would then be available. As a matter of procedure, it is suggested that it would normally be preferable not to give the secondary judgement automatically but rather to give the plaintiff the right to apply for it.

6.99 The Law Reform Commission of British Columbia⁹⁵ recommends that an uncollectable contribution be apportioned among the other joint wrongdoers and a plaintiff at fault. Section 9 of the proposed revised Uniform Contributory Fault Act reads as follows:

“Apportionment of uncollectable contribution

9(1) Where the court is satisfied that the contribution of a concurrent wrongdoer cannot be collected, the court shall, on or after giving judgment for contribution, make an order that it considers necessary, to apportion the contribution that cannot be collected among the other concurrent wrongdoers proportionate to the degrees to which their wrongful acts contributed to the damage.

(2) For the purposes of 9(1) a person who suffers the damage, where his wrongful act contributed to it, shall be deemed to be a concurrent wrongdoer.”

6.100 The Commission recommends that provision should be made for the defendant who is unable to recover a contribution from one of the other defendants to apply for a secondary judgment having the effect of distributing the deficiency among the other defendants at fault in such proportions as may be just and equitable.⁹⁶ In terms of the Commission's recommendation, the re-attribution of uncollectable contribution does not discharge the joint wrongdoer whose contribution is uncollectable from liability to pay a contribution. Costs incurred by a joint wrongdoer in an attempt to recover an uncollectable contribution should also be taken into account in determining the re-attribution of that contribution.⁹⁷

is nonetheless subject to contribution and to any continuing liability to the claimant on the judgment.”

⁹⁵ *Report on Shared Liability* 1986.

⁹⁶ Section 13(1), read with section 3, of the draft Bill.

⁹⁷ Section 13(4) of the draft Bill.

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THE APPORTIONMENT OF LOSS BILL, 2003

To amend the law relating to contributory fault; to attribute responsibility for loss caused by more than one person; to revise the law relating to proceedings against joint wrongdoers and contribution between joint wrongdoers; to repeal the Apportionment of Damages Act, 1956; and to provide for matters incidental thereto.

Introduced by the Minister of Justice and Constitutional Development

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows –

Definitions

1. In this Act, unless the context indicates otherwise –

“**action**” includes counterclaim and proceedings by way of arbitration;

“**court**” means, in relation to any claim, the court or arbitrator by or before whom the claim is to be determined;

“**defendant**” includes defendant to a counterclaim;

“**first joint wrongdoer**” means a joint wrongdoer who is sued by a plaintiff and who is entitled to recover a contribution as referred to in section 10(1) from another joint wrongdoer who is not sued by the plaintiff;

“**joint wrongdoer**” means each of two or more wrongdoers whose wrongs gave rise to the same loss, and includes –

(a) a person who is vicariously liable for any act or omission of the wrongdoer;

(b) a person who would have been a joint wrongdoer but for the fact that he or she is married in community of property to the plaintiff;

(c) an injured person or the estate of a deceased person where it is alleged that the plaintiff has suffered loss as a result of the injury to or death of any person and such injury or death is attributed to a wrong committed partly by such injured or deceased person and partly by any other person;

“**plaintiff**” includes a defendant counterclaiming and a defendant claiming against a co-defendant by notice or otherwise;

“**second joint wrongdoer**” means a joint wrongdoer who is not sued by the wronged person and who is liable to pay a contribution as referred to in section 10(1) to a first joint wrongdoer;

“**wrong**” means an act or omission giving rise to a loss that constitutes –

- (a) a delict;
- (b) a breach of a statutory or other legal duty;¹ or
- (c) a breach of a duty of care arising from a contract,

whether or not it is intentional;

“**wrongdoer**” means a person who commits or is otherwise liable for a wrong.

Application of Act

2. (1) This Act applies to the apportionment of loss, arising wholly or partly from a wrong, between –

- (a) a plaintiff, who has contributed to his or her loss, and a wrongdoer or joint wrongdoers; and
- (b) joint wrongdoers.

(2) This Act has effect subject to any agreement to the contrary.

¹ “Other legal duty” is intended to allow courts to include other acts or omissions giving rise to civil liability. The proposed Ontario Contribution and Comparative Fault draft Bill, for instance, also applies to “a breach of a fiduciary duty, including a trust” and “a breach of any other legal duty” (Section 3(1)(d) – (e)). The wide definition of “wrong” would allow a court to include, where appropriate, breaches of fiduciary or constitutional duties giving rise to loss.

- (3) The provisions of this Act apply –
- (a) in relation to any liability imposed by the Road Accident Fund Act, 1996 (Act 56 of 1996) on the State or any person in respect of loss caused by or arising out of the driving of a motor vehicle;
 - (b) notwithstanding the fact that a person has the opportunity of avoiding the consequences of loss caused by another person's wrong and fails to do so.²

- (4) This Act does not apply –
- (a) to any loss arising wholly or partly from any wrong that occurred before the commencement of this Act;
 - (b) to any law relating to collisions or accidents at sea.

Attributing responsibility for loss

3. (1) When apportioning loss the court must attribute the responsibility for the loss suffered in proportions that are just and equitable.

(2) In attributing responsibility for the loss suffered, the court must take into account all relevant factors, including -

- (a) the relationship between the parties;
- (b) the nature, quality and causative effect of –
 - (i) the acts and omissions of the wrongdoer or of each joint wrongdoer;
 - (ii) the plaintiff's failure, if any, to act with due regard to his or her own interests; and
 - (iii) any fault on the part of the plaintiff or any wrongdoer.

(3) If the court cannot attribute responsibility for the loss in terms of subsection (1), responsibility for the loss must be shared equally.

² This is basically a restatement of the existing section 1(1)(b) of the Act which abolished the "last opportunity" rule. For the sake of prudence and because the existing Act is to be repealed *in toto*, it is suggested that this be restated so as not to leave the door open for a possible revival of the common law rule in the absence of anything to the contrary.

Reduction of damages

4. Where a court attributes responsibility for part of the loss to the plaintiff, the court must reduce the damages payable to the plaintiff in accordance with such attribution.

Liability of joint wrongdoers

5. (1) Joint wrongdoers are jointly and severally liable for the whole of the damages payable to a plaintiff.

(2) A plaintiff may sue any one of the joint wrongdoers for the full amount of the damages claimed by him or her or may sue two or more wrongdoers in the same action.

Notice of proceedings

6. (1) A plaintiff who elects to sue one or more joint wrongdoers must serve notice of the proceedings on the other joint wrongdoers of whom the plaintiff has knowledge who are not sued in the action.

(2) Where other joint wrongdoers have not been given notice in accordance with the provisions of subsection (1), the court may order that such notice be given and may make such other order as it deems just.

Settlement and release

7. (1) If a plaintiff enters into a settlement agreement with one joint wrongdoer in terms of which he or she accepts payment of an amount less than the loss suffered, the plaintiff may proceed against any of the remaining wrongdoers for the balance of the claim.

(2) If a plaintiff releases a wrongdoer from liability, he or she may proceed against any of the remaining wrongdoers for the full amount of the claim.

Discharge of wrongdoers

8. If a joint wrongdoer discharges the plaintiff's claim in full, every other joint wrongdoer is released from liability to the plaintiff.

Proceedings against other joint wrongdoers

9. (1) A plaintiff may sue a joint wrongdoer who was not joined in an action against another joint wrongdoer in a subsequent action.

(2) Unless a plaintiff can show good reason for not having joined a joint wrongdoer in the first action, the court may impose a costs sanction.

(3) In any subsequent action against another joint wrongdoer, any amount recovered from any joint wrongdoer in a prior action shall be deemed to have been applied towards the payment of the costs awarded in the prior action in priority to the liquidation of the damages awarded in that action.

(4) A plaintiff may not recover damages in excess of the full amount of his or her loss from all the joint wrongdoers.

Contribution between joint wrongdoers

10. (1) The amount of the contribution recoverable by one joint wrongdoer from another must be determined in accordance with section 3.

(2) A joint wrongdoer who in good faith has paid, agreed to pay or is obliged by judgment to pay to a plaintiff an amount which exceeds the proportion of the loss for which he or she is responsible in terms of section 3, is entitled to recover a contribution from any other joint wrongdoer.

(3) Where a plaintiff has acquired a benefit from the estate of a joint wrongdoer, no contribution may be recovered from that estate which has the effect of depriving the plaintiff of that benefit or any portion thereof.

(4) Any joint wrongdoer from whom a contribution is claimed may raise against the joint wrongdoer who claims the contribution any defence which the latter could have raised against the plaintiff.

Limitation of contributions

11. (1) A joint wrongdoer whose liability to a plaintiff is excluded or limited by agreement is not liable to pay by way of contribution a sum that exceeds the amount of his or her liability to the plaintiff.

(2) A joint wrongdoer whose wrong consists of the failure to prevent another's intentional wrong or harm arising from that wrong is not liable to pay a contribution to that other person.

Recovery of contribution

12. (1) A claim for a contribution made by a first joint wrongdoer against a second joint wrongdoer may be made either –

- (a) in an action brought by a plaintiff against a first joint wrongdoer by issuing a third party notice, or
- (b) in a separate action brought by a first joint wrongdoer against a second joint wrongdoer for recovery of a contribution.

(2) Before granting a contribution order, the court must enquire and satisfy itself that the first joint wrongdoer has made arrangements to pay or secure a plaintiff's claim.

Re-attribution of contributions

13. (1) If a court is satisfied that a contribution cannot be collected, it may, on application, re-attribute the contribution payable among the other joint wrongdoers in accordance with section 3.

(2) An application under this section must be brought within two years³ after the original attribution of responsibility.

(3) The re-attribution of an uncollectable contribution does not discharge the joint wrongdoer whose contribution is uncollectable from liability to pay a contribution.

(4) Costs incurred by a joint wrongdoer in an attempt to recover an uncollectable contribution must be taken into account in determining that contribution.

Limitation period for contribution

14. (1) An action to recover a contribution must be commenced within two years⁴ after the right to a contribution arises.

(2) The right to a contribution arises on the date of judgment or settlement, as the case may be.

³ The question was raised whether this period is not too long, given the need to secure legal certainty and achieve finality. It is also true, however, that in some instances such as liquidations an even longer period might desirably be required to determine with certainty the extent of the contribution actually recovered.

⁴ See footnote 3 above.

Powers of the court

- 15.** A court may –
- (a) order that any payment arising from the provisions of this Act be made directly to a plaintiff, a joint wrongdoer or into court pending a further order;
 - (b) order that payment be postponed pending a further order; or
 - (c) make any other order that it considers necessary or desirable to give effect to this Act.

This Act binds the State

- 16.** This Act binds the State.

Repeal of laws

- 17.** The Apportionment of Damages Act, 1956 (Act 34 of 1956), is hereby repealed.

Short title

- 18.** This Act shall be called the Apportionment of Loss Act, 20.. (Act .. of 20..), and takes effect on a date fixed by the President by proclamation in the *Gazette*.