

SOUTH AFRICAN LAW COMMISSION

DISCUSSION PAPER 67

Project 96

THE APPORTIONMENT OF DAMAGES ACT, 1956

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INTRODUCTION

The South African Law Commission was established by the South African Law Commission Act 19 of 1973.

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PREFACE

This discussion paper (which reflects information gathered up to the end of April 1996) has been prepared by the research staff of the Commission to serve as a basis for the Commission's deliberations. The views, conclusions and recommendations contained herein should not be regarded as the Commission's final views. The discussion paper is published in full so as to provide persons and bodies wishing to comment or make suggestions for the reform of this particular branch of the law with sufficient background information to enable them to place reasoned submissions before the Commission.

Any request to treat submissions relating to the discussion paper as confidential will be respected. If no request for confidentiality or anonymity is made, it will be inferred that the respondents agree to the Commission quoting from or referring to comments and attributing comments to respondents. Respondents should be aware that the Commission may have to release information contained in submissions under the Constitution of the Republic of South Africa Act 200 of 1993.

Written comments, representations or requests should reach the Commission by 30 November 1996 at the address appearing on the previous page. Please contact the researcher if you are unable to submit your comments on time.

The project leader responsible for this project is the Honourable Mr Justice PJJ Olivier, Judge of Appeal, and the researcher, who may be contacted for further information, is Mr G O Hollamby.

SUMMARY OF RECOMMENDATIONS

This discussion paper relates to the revision of the entire Apportionment of Damages Act 34 of 1956 and contains *inter alia* the following recommendations:

* In the light of the Appeal Court's decision in **South British Insurance Co. Ltd v Smit** 1962 3 SA 826 (A) the Commission recommends that all references to "fault" in section 1 of the Act be substituted by "negligent conduct". If "fault" in section 1 of the Act means negligence (which we believe it does), then the Act should make it clear. This would necessitate either the repeal or amendment of the definition of "fault" in section 1(3) of the Act.

* It follows from the Commission's interpretation that section 1(1)(a) of the Act does not allow a defence of contributory intention.

* It is further recommended that the Act should apply to cases of breach of a statutory duty (where fault is a requirement) and breach of contract. However, the Commission is equally convinced that the Act does not cover no-fault liability on the part of the defendant.

* A "joint wrongdoer" is defined in the Act. The Commission, however, suggests a reformulation to make it clear that wrongdoers who are liable in terms of vicarious liability qualify as joint wrongdoers.

* No amendments are recommended regarding section 2(1B) of the Act which deals with the death of or injury to the breadwinner.

* By giving proper notice in terms of section 2(2) of the Act a joint wrongdoer not sued in an action can be joined with the other joint wrongdoer(s) in that action and this will entitle such joint wrongdoer to intervene as a defendant. If a joint wrongdoer is not sued and no notice is given, then the plaintiff cannot subsequently sue that joint wrongdoer except with leave of the court. No major amendments to sections 2(2) and

2(4) of the Act are recommended.

* No major amendments to section 2(3) of the Act are proposed. This section allows the court to order a separation of trials on application.

* The Commission proposes a re-arrangement and simplification of the various subsections dealing with costs.

* Section 2(7) of the Act deals with the recovery of payments in excess of the amount apportioned to the joint wrongdoers. The Commission recommends that this section be repealed.

* Consequential changes are suggested to sections 2(6), 2(8) and 2(10) of the Act. These sections respectively deal with contribution between joint wrongdoers, judgments in favour of the plaintiff and exemptions from or limitation of liability.

* The Commission also deals with the problem of contribution in cases of insolvency. It invites comment on the problems experienced in practice in this regard, and especially on the possibility of making a re-allocation of the apportionment in the event of it becoming impossible to execute against one of the joint wrongdoers in respect of his or her share, the introduction of full proportionate liability whereby defendants would be liable to plaintiffs only for the amount of damages equal to their proportionate share of the fault in the plaintiff's loss or whether some form of modified proportional liability should apply.

* No amendments to sections 2(12) and (13) of the Act are suggested. These sections respectively deal with payments in full settlement of the plaintiff's claim and discharge from liability once the judgement debt has been paid in full.

* The outdated references in the Act to, *inter alia*, the Motor Vehicle Insurance Act, 1942 and the Administration of Justice Proclamation, 1919 require amendment. Obviously, the Act no longer applies to South West Africa and section 6 of the Act can

also be repealed.

* The Commission does not recommend that the Act be made applicable to collisions or accidents at sea.

* The Commission also recommends that the Rules Board should seriously consider introducing a third party procedure similar to that contained in Rule 13 of the Supreme Court rules for the Magistrate's Court.

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CHAPTER 1

INTRODUCTION

Origin of this 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 (hereinafter "the Act") should be reviewed in its entirety as the Act 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 name only two aspects. On 29 April 1994 the former Minister of Justice confirmed the inclusion of the investigation in the Commission's programme.

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 invited¹ 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.² 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 (hereinafter "the GCB").

This discussion paper takes these submissions into account.

1 See July 1994 *De Rebus* 499.

2 See Annexure A for a list of the contributors.

1.3 It must be emphasised that this discussion paper serves only as a basis for discussion and should not be regarded as the Commission's final point of view. It is published for general information and specifically to elicit comment. After the closing date for submissions a final report will be prepared for submission to the Minister of Justice who may then take appropriate action.

Historical overview

1.4 When the Act was promulgated on 1 June 1956, it was heralded³ as 'the most important piece of law reform that has been carried out in the field of private law since Union.'⁴ It is easy to see why as in Roman and Roman-Dutch law contributory negligence on the part of a plaintiff was a complete defence to a claim for damages on the ground of the defendant's negligent conduct.⁵ This same 'all or nothing' rule applied in English law.⁶ 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. 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. South African law took over the rule from the English law, and although the rule has sometimes been criticized,⁷ there is no authoritative case in which it has not been applied.⁸ In fact, our courts have gone further than the English courts in their acceptance of the rule, for they have applied it not only in cases involving negligence by the plaintiff, but also in cases involving negligence by the plaintiff, but also in cases involving negligence by a third person.⁹

3 Boberg **Law of Delict** 663.

4 McKerron **The Apportionment of Damages Act** 1.

5 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.

6 **Butterfield v Forrester** (1809) II East 60; 103 ER 926.

7 See Visser and Potgieter **Skadevergoedingsreg** 127 for a discussion of the criticism.

8 McKerron **The Apportionment of Damages Act** 2. See also **Moore v Minister of Posts & Telegraphs** 1949 1 SA 815 (AD) at 827, per Schreiner, J.A.; **Coetzee v Van Rensburg** 1954 4 SA 616 (AD).

9 McKerron **The Apportionment of Damages Act** 2.

1.5 The Act is divided into three chapters, headed respectively 'Contributory Negligence', 'Joint or Several Wrongdoers' and 'General'. It contains seven sections and its essential provisions are embodied in sections 1 and 2. Section 1 is a comparative short section, divided into three subsections. Section 2 is a lengthy section, divided into fourteen subsections.

1.6 The purpose of section 1 of the Act is to abolish the common law doctrine of contributory negligence and introduced the principle of apportionment of liability.¹⁰ The last opportunity rule was expressly abolished,¹¹ and was replaced by 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.¹² The purpose of section 2 is to regulate proceedings against joint wrongdoers and to provide for a right of contribution between joint wrongdoers.¹³

1.7 With its introduction, the Act brought about dramatic changes to our common law relating to contributory negligence. However, for the past forty years the Act has been working fairly well especially if its frequency of use in our courts is considered. The Act has only been amended twice: once in 1971 by the Apportionment of Damages Amendment Act, 58 of 1971¹⁴ and again in 1984 by the Matrimonial Property Act, 88 of 1984.

Making the Act more understandable and accessible

1.8 After observing that the apportionment principle had reached the South African

10 Section 1(1)(a).

11 Section 1(1)(b).

12 The provisions of section 1 are modelled on those of section 1 of the English Law Reform (Contributory Negligence) Act, 1945. There are, however, noteworthy differences between our Act and the English Act: McKerron **The Apportionment of Damages Act** 5.

13 The provisions of section 2 are more elaborate than the corresponding provisions of the English Law Reform (Married Women and Tortfeasors) Act, 1935. In addition, there are important differences between these two Acts: McKerron **The Apportionment of Damages Act** 9.

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

statute book only eleven years after its introduction in England, Holmes J (as he then was), in one of the first cases¹⁵ on the Act, continued:

‘No matter,’ one thought with Voltaire, ‘perfection walks slowly - she requires the hand of time.’ And so it is a little disappointing to find that after all the lawgiver, with two and possibly three official languages at its disposal, has not expressed itself in words so simple and clear that he who runs may read.

Unfortunately it seems that this comment, both as to tardiness in coming and obscurity upon arrival, may also apply to the first amendments to the Act.¹⁶

1.9 In the submission of the GCB it is submitted that the Act would be greatly enhanced by redrafting it in plain and simple language. It was felt that the provisions of sections 2(10) and 7(a) in particular, in certain respects, should be rephrased in clearer terms.

1.10 The Commission supports the call for plain language in legal drafting and will attempt to encompass it in our draft bill.

The need for reform

1.11 From the submissions received and from a review of the literature, it appears that the Act as a whole needs to be revised.

15 **Taylor v SAR&H (1)** 1958 1 SA 139 (D) at 142.

16 Boberg 1971 **SALJ** 423.

CHAPTER 2

CONTRIBUTORY NEGLIGENCE

Introduction

2.1 Chapter 1 of the Act is headed 'Contributory negligence' and reads as follows:

1. Apportionment of liability in case of contributory negligence.- (1) (a) 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 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.

(b) Damage shall for the purpose of paragraph (a) be regarded as having been caused by a person's fault notwithstanding the fact that another person had an opportunity of avoiding the consequences thereof and negligently failed to do so.

(2) Where in any case to which the provisions of sub-section (1) apply, one of the persons at fault avoids liability to any claimant by pleading and proving that the time within which proceedings should have been instituted or notice should have been given in connection with such proceedings in terms of any law, has been exceeded, such person shall not by virtue of the provisions of the said sub-section, be entitled to recover damages from that claimant.

(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.

Apportionment of liability

2.2 The single-sentence prescription of section 1(1)(a) spawned difficulties of interpretation wholly disproportionate to its length.¹⁷ Fortunately most of them have now been resolved by the courts.

The meaning of 'own fault'

2.3 The application of section 1(1)(a) is expressly confined to damage caused partly by the plaintiff's **'own fault'**. Another person's fault will not do, unless the law imputes it to the plaintiff as with master and servant. Thus the dependant's damages cannot be reduced on account of the contributory negligence of his or her deceased breadwinner, for that is not his or her 'own fault', nor is it imputable to him or her.

2.4 This has important practical implications as there are exceptional situations in which our law permits one person to sue for pure economic loss sustained in consequence of the physical injury or death of another, provided a legal duty of support existed between them. In all these situations, the requirement of 'own fault' means that the contributory negligence of the physically injured or deceased person is no ground for reducing the damages to which his or her relatives, the plaintiff, is entitled, for the latter's damage was not caused partly by **his or her own fault**.

2.5 Thus a father's claim for medical expenses incurred on behalf of his dependant child, being the father's own personal claim, cannot be reduced on account of the child's contributory negligence.¹⁸ Likewise, a husband's claim for medical expenses incurred on behalf of his dependant wife cannot be reduced on account of the wife's contributory negligence.¹⁹ Finally, and perhaps most important of all, a dependant's claim for loss of support, being the dependant's own action and not one derived from the deceased's estate, cannot be reduced on account of the deceased breadwinner's contributory negligence.²⁰

18 **Nieuwenhuizen NO v Union & National Insurance Co Ltd** 1962 1 SA 760 (W); **Saitowitz v Provincial Insurance Co Ltd** 1962 3 SA 443 (W); **Du Preez v AA Mutual Insurance Association Ltd** 1981 3 SA 795 (E).

19 Whether an injured wife could be a joint wrongdoer in her husband's action for medical expenses depended on whether the spouses were married in or out of community of property. A marriage out of community of property presented no obstacle, but a marriage in community precluded either spouse from being a joint wrongdoer in an action by the other: **Kleinhans v African Guarantee & Indemnity Co Ltd** 1959 2 SA 619 (E); **Tomlin v London & Lancashire Insurance Co Ltd** 1962 2 SA 30 (D).

20 **Kleinhans v African Guarantee & Indemnity Co Ltd** 1959 2 SA 619 (E). In casu the accident occurred before the amending Act of 1971 came into force.

2.6 The application of this principle (in its above three manifestations) left defendants in a parlous position.²¹ Unable to require a reduction of the plaintiff's damages under section 1 of the Act, they could obtain legal recompense for the injured or deceased person's contributory negligence only if that person were a joint wrongdoer liable for a contribution under section 2 of the Act.

2.7 Legislative intervention was imperative, especially after the judgment in **Van Zyl v Gracie**.²² The alternatives were basic: (a) to create 'skuldidentifikasie'²³ between the innocent plaintiff and his or her contributory negligent relative by a suitable amendment to section 1 of the Act, so that the plaintiff's damages were reduced directly as though caused partly by 'his own fault'; or (b) to constitute the contributorily negligent relative a wrongdoer²⁴ by a suitable amendment to section 2 of the Act, leaving the innocent plaintiff's right to full compensation intact, and relegating the defendant to a right of recourse against the culpable relative (or his or her estate). While either alternative may yield the same economic result in many cases, it is clear that (a) favours the defendant where the fruits or recourse are uncertain.²⁵

2.8 The legislator opted for the joint wrongdoer solution in all the situations under discussion.²⁶ Leaving section 1 of the Act untouched and the innocent plaintiff's right to full damages intact, the Apportionment of Damages Amendment Act 58 of 1971 added two new subsections²⁷ to section 2. These thorny issues are now all dealt with by treating the negligent relative as a joint wrongdoer under section 2 of the Act and they

21 Boberg **Law of Delict** 665.

22 1964 2 SA 434 (T). See also Boberg **Law of Delict** 666; McKerron **Law of Delict** 67 footnote 59, 298 footnote 13; Van der Merwe and Olivier **Onregmatige Daad** 357 - 8.

23 'Skuldidentifikasie' was the solution favoured by Van der Merwe 1964 **Acta Juridica** 82 footnote 93. See also Van der Merwe and Olivier **Onregmatige Daad** (first edition) 204 - 8, (second edition) 305 - 15; Boberg **Law of Delict** 666.

24 The solution favoured by McKerron **Law of Delict** 306 footnote 53.

25 For a full summary of these submissions, see Boberg 1971 **SALJ** 423.

26 Boberg **Law of Delict** 666.

27 Sections 2(1A) and 2(1B). For a discussion see paragraphs 3.6 and 3.13 - 3.16 below.

need concern us no further here.²⁸

2.9 Mr RI Lister, an attorney from Pietermaritzburg, experiences problems with apportionment in cases involving motor vehicle accidents. As the driver is often a person of no financial substance, Mr Lister suggests that the law be changed so that there is automatically a presumption that the driver acted in the course and scope of his or her employment with the legal owner of the motor vehicle. Alternatively, he suggests to allow apportionment to be pleaded as if the driver were a servant. Mr Lister's justification is simple: "If one allows another person to drive one's vehicle, you, as owner, should be answerable, jointly and severally, for his unlawful actions."

2.10 A final aspect of the 'own fault' requirement that merits attention is the significance for a cessionary. A plaintiff who sues a cessionary of an innocent person's claim is entitled to full damages even though the plaintiff personally was guilty of contributory negligence.²⁹ This principle has been exploited by hire-purchasers of motor vehicles damaged partly by their own fault. Though a hire-purchaser has his or her own action for damage to the *merx*, a negligent hire-purchaser has sometimes preferred to sue as cessionary of the owner's concurrent action, thereby avoiding the reduction of damages that would have befallen his or her own action.³⁰

The meaning of 'fault'

2.11 The emphasis thus far has been on 'own fault'. What of the concepts of 'fault' itself, and the degree in which the claimant was at fault in relation to the damage', the criteria by which the plaintiff's damages must be reduced?

2.12 The use of the word 'fault' gave rise to several questions of interpretation³¹ as a

28 See paragraph 3.6 below.

29 **Windrum v Neunborn** 1968 4 SA 286 (T) at 288. See also Van der Merwe and Olivier **Onregmatige Daad** 168.

30 **Lean v Van der Mescht** 1972 2 SA 100 (O); **Stolp v Kruger** 1976 2 SA 477 (T). Van der Merwe 1972 **THRHR** 179 at 183-4 pointed out that this was not really unjust, because the defendant had a right of recourse against the hire-purchaser as a joint wrongdoer in terms of section 2 of the Act.

31 For a summary of views on the proper basis of apportionment, see McKerron 1962 **SALJ** 443.

partial definition in section 1(3) proved unhelpful. Since ‘fault’ in the widest sense embraces both negligence and intention,³² it might seem, on the literal wording of section 1(1)(a), that even a defendant who had harmed the plaintiff intentionally could raise the plaintiff’s contributory negligence as a ground for reducing his or her damages. But at common law contributory negligence was no defence to intentional wrongdoing,³³ and it is generally accepted that the legislature did not intend to alter this principle.

2.13 Then came **South British Insurance Co Ltd v Smit**.³⁴ Eschewing ‘blameworthiness’ with its uncertain meaning and moral overtones, the court held that ‘fault’ means negligence and ‘degree of fault’ means degree of negligence.³⁵ 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.³⁶

2.14 The Commission supports this interpretation of the word ‘fault’. Taken to its logical conclusion, if ‘fault’ in section 1 of the Act means negligence and if this meaning indeed reflects the intention of the legislature (which we believe it does), then the Act should simply say it. We therefore recommend that all references to ‘fault’ in section 1 be removed and be substituted by ‘negligent conduct’ or words to that effect. In the light of this recommendation, the partial definition of ‘fault’ in section 1(3) becomes redundant and it can be repealed in its entirety. Alternatively, ‘negligent conduct’ can be defined as any act or omission which

32 Visser and Potgieter **Skadevergoedingsreg** 242.

33 As confirmed in **Minister van Wet en Orde v Ntsane** 1993 1 SA 560 (A). See also 1993 **De Rebus** 293 - 294.

34 1962 3 SA 826 (A). See also Boberg **Law of Delict** 668; McKerron 1962 **SALJ** 443 .

35 Per Ogilvie Thompson JA at 835D - G.

36 Unfortunately the Court thought that determining the degree of the plaintiff’s fault would also automatically determine the degree of the defendant’s fault. Clarification came with **Jones NO v Santam Bpk** 1965 2 SA 542 (A). It was not true, said Williamson JA (at 555B - C), that a determination of the degree of the plaintiff’s fault also automatically determined 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. See also Boberg **Law of Delict** 669 - 670; 1965 **Annual Survey** 180 - 4.

would, but for the provisions of this section, have given rise to the defence of contributory negligence.

2.15 In New Zealand it is not certain whether contributory negligence may be a defence to an intentional tort.³⁷ In **Hoeberger v Koppens**³⁸ Moller J considered the defence against a claim of intentional assault. Distinguishing the English case of **Lane v Holloway**,³⁹ the New Zealand Supreme Court found that although the defendant had intended to assault the plaintiff, the plaintiff had been partly to blame for what had happened: he could easily have walked away from the situation and had provoked and insulted the defendant. The Court applied the Contributory Negligence Act, 1947 to reduce the plaintiff's damages by 15%. However, a contrary view was taken in **Dellabarca v Northern Storemen and Packers Union**⁴⁰ where Smellie J concluded that contributory negligence could not be raised as a defence to an intentional tort since it would not have been so available before the passing of the Contributory Negligence Act, 1947.

Contributory intention

2.16 A different question is whether section 1(1)(a) allows a defence of contributory intention - i.e. whether the defendant can reduce his or her liability for intentional wrongdoing by proving fault in the form of intention on the plaintiff's part. Van der Merwe and Olivier⁴¹ answer in the affirmative:

Daar bestaan derhalwe geen rede om aan te neem nie dat "skuld" in die artikel nie ook sy gemeenregtelike betekenis dra wat beide opset en medewerkende opset sowel as nalatigheid en medewerkende nalatigheid omvat nie. Trouens, waar artikel 2 van die Wet die woord "skuld" gebruik, kan beswaarlik ontken word

37 An intentional tort is one in which the wrongdoer either desires to bring about a result which is an injury to another, or believes that the result is substantially certain to follow from what he or she does: Fleming **Law of Torts** 70.

38 [1974] 2 NZLR 597.

39 [1968] 1 QB 379.

40 [1989] 2 NZLR 737 at 755 - 757.

41 **Onregmatige Daad** 168.

dat persone wat opsetlik aan 'n eiser skade berokken het, as mededaders in terme van dié artikel aan te merk is. As “skuld” in artikel 2 die betekenis van ook opset omvat, steun dit die beskouing dat “skuld” in artikel 1 ook in die betekenis van opset of medewerkende opset, na gelang van die geval, gebesig word. Om met proporsionele verdeling te werk waar die eiser medewerkend opsetlik en die verweerder opsetlik opgetree het, druis nie teen die regsgevoel in nie.

2.17 Though the Appellate Division has never had to decide this question, it has twice expressed grave doubts as to the availability of such a plea.⁴² Nevertheless, certain academics⁴³ regard consent to the unreasonable infliction of harm as giving rise to a defence of contributory intention. If this latter view were to prevail it would follow that the winner of the classic duel resulting in death would not be held liable to the dependants of the loser for any part of their loss of support even where those dependants had urged the duellists to refrain from their unlawful conduct.⁴⁴

2.18 In the light of our recommendation on the meaning of ‘fault’ above, it follows that the Commission finds that section 1(1)(a) does not allow a defence of contributory intention.

Breach of a statutory duty

2.19 For present purposes the only question that need concern us is whether the negligent defendant who has breached a statutory duty can claim apportionment in terms of the Act.

2.20 In terms of the current South African approach, breach of a statutory duty is regarded as being *per se* unlawful.⁴⁵ According to McKerron,⁴⁶ to entitle a person to sue

42 See **Netherlands Insurance Co Ltd v Van der Vyver** 1968 1 SA 412 (A) at 422; **Mabaso v Felix** 1981 3 SA 865 (A) at 876-7.

43 McKerron **Law of Delict** 297; Van der Walt **Delict** par 45.

44 **Wapnick v Durban City Garage** 1984 2 SA 414 (D) at 418H.

45 Burchell **Principles of Delict** 46.

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

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.

2.21 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 is whether the defendant has been negligent and whether his or her negligence has caused the economic loss of the plaintiff.⁴⁷

2.22 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). McKerron⁴⁸ 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.

2.23 The Commission invites comment on these two opposing viewpoints. What seems clear is that the whole basis of the Act is the apportionment of fault.⁴⁹ If fault is a requirement in an action for damages for breach of a statutory duty, that fault can be apportioned and the Act should apply. However, it is equally clear that the Act does not cover no-fault liability on the part of the defendant.

47 Burchell **Principles of Delict** 46.

48 **Law of Delict** 297.

49 Burchell **Principles of Delict** 111.

Similar issues are raised by torts of strict liability in New Zealand. In such a case, the defendant's intentions or reasonable care are irrelevant and, once it is shown that the defendant's act caused loss or damage, imposition of liability is automatic.⁵⁰ This also seems to be the case with breach of a fiduciary duty. In **Day v Mead**⁵¹ 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.⁵²

2.24 In all Australian jurisdictions, except New South Wales, fault includes breach of a statutory duty.⁵³ 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'.⁵⁴

The *actio de pauperie*

2.25 McKerron⁵⁵ convincingly argues that the Act does not apply to damage caused by *pauperies*. Since liability for *pauperies* is based not on fault but on ownership, it is

50 Some commentators, such as Fleming **Law of Torts** 318, suggest that in such cases policy should favour reduction of the plaintiff's damages where the plaintiff is contributory negligent in failing to discover or avoid the damage.

51 [1987] 2 NZLR 443.

52 New Zealand Law Commission **Preliminary Paper** 18.

53 Trindade and Cane **Law of Torts** 428.

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

55 **Law of Delict** 297.

difficult to see how the damage could properly be regarded as having been caused by the fault of the defendant. For the same reason, McKerron⁵⁶ submits that ‘the Act can have no application to damage caused by the breach of a strict or absolute duty in circumstances excluding negligence, for example, damage resulting from nuisance, interference with the natural flow of water, or the breach of an absolute duty imposed by statute’.

2.26 **The Commission supports this contention of McKerron.**

Non-delictual causes of action

2.27 In its submission, the GCB argues that the Act should be extended to cover cases of strict liability and intentional acts or omissions (whether constituting a crime or not). It is further submitted that in a relatively sophisticated commercial environment, such as that in South Africa, it is desirable that the provisions of the Act also be made applicable to contractual damages. If made applicable to contractual damages, the provisions of the Act should also in their view apply to cases of breach of trust and breach of a fiduciary duty. In support of this contention, the Bar Council refers to the position in England and Wales, where contributory negligence can be taken into consideration in **all** cases, whatever the legal basis of liability. Reference is also made of the Law Reform Commission of Hong Kong⁵⁷ and the Law Commission of New Zealand,⁵⁸ where a similar approach is recommended. As is stated by the Law Reform Commission of Hong Kong, the restriction of the right to a contribution to contributory wrongdoers alone cannot be justified on any policy grounds, and is merely an ‘accident of legal history’.⁵⁹

56 **The Apportionment of Damages Act 13.**

57 **Report on Contribution between Wrongdoers.**

58 **Preliminary Paper 50 - 52.**

59 **Report on Contribution between Wrongdoers 22.**

Contractual damages

2.28 The absence of any express reference to delictual liability in section 1 of the Act paved the way for a contention that its apportionment provisions could be applied also to a claim for damages for breach of contract. It was argued that if the plaintiff's loss arising 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).⁶⁰ This argument was rejected in **Barclays Bank v Straw**⁶¹ and **OK Bazaars (1929) Ltd v Stern and Ekermans**.⁶² However, these decisions were reached before the Appellate Division in **Lillicrap, Wassenaar and partners v Pilkington Brothers (SA) (Pty) Ltd**⁶³ had authoritatively accepted that, in limited circumstances,⁶⁴ liability for negligent breach of contract and delict may overlap.⁶⁵ After this decision, is it not possible to argue that, in these limited circumstances, the court may apportion fault between the defendant (who has negligently breached a contract which causes the plaintiff physical injury or damage to property) and the plaintiff (who has been contributory negligent)?⁶⁶

2.29 **Inasmuch as the question has not yet come before the Appellate Division, it cannot be regarded as settled. The Commission is therefore convinced that legal certainty in this regard necessitates amendment of the Act. Two possible solutions suggest themselves. The first is to state unequivocally that claims for**

60 Boberg **Law of Delict** 713; McKerron **Law of Delict** 298.

61 1965 2 SA 93 (O) at 98 - 9. This decision was criticised by Jean Davids 1965 **SALJ** 289, 1966 **SALJ** 226 and Boberg 1965 **Annual Survey** 179 - 180.

62 1976 2 SA 521 (C). Van der Merwe and Olivier **Onregmatige Daad** 168 criticised this decision. For them there is "geen prinsipiële verskil ... tussen 'n eis om skadevergoeding op grond van kontrakbreuk en op grond van onregmatige daad nie". See also Dlamini 1985 **De Jure** 346 for a discussion of the appropriate measure of damages for fraud inducing a contract.

63 1985 1 SA 475 (A).

64 Where the loss suffered by the plaintiff as a result of this conduct consists in physical injury or damage to property, as opposed to pure economic loss. See also Burchell **Principles of Delict** 112.

65 This is also the international trend. See **Basildon DC v Lesser** [1985] QB 839; **Forsikrings v Butcher** [1986] 2 All ER 488; **Rowe v Turner Hopkins** [1980] 2 NZLR 550.

66 Lötzt 1996 **TSAR** 170 at 173 answers this question in the affirmative.

contractual damages fall within the ambit of the Act. This is the option the Commission prefers. The second is to spell out that claims for contractual damages are excluded from the ambit of the Act.

2.30 The GCB submits that it is desirable that the provisions of the Act also be made applicable to contractual damages (excluding loss or damage arising wholly or partly from a failure to pay a debt). It further submits that the doctrine of mitigation of damages⁶⁷ does not go far enough to serve the important need (as a matter of legal policy) for reduction in contractual damages where such a reduction is appropriate.

2.31 For McKerron,⁶⁸ however, it is clear from the reference to the ‘last opportunity’ rule in section 1(1)(b), and from Chapter 1 of the Act read as a whole, that the Chapter was intended to apply only to liability in delict. It follows then that the provisions of section 1(1)(b) have no application to actions for breach of contract, even where the breach was due to the defendant’s negligence. The Natal Bar Council,⁶⁹ on the strength of particularly the **OK Bazaars**-decision, shares this view.⁷⁰

Pleadings

2.32 Whether a claim for apportionment has to be specifically pleaded has long been controversial.⁷¹ In **AA Mutual Insurance Association Ltd v Nomeka**⁷² it was held that the defendant’s plea denying all negligence and averring that the collision had been caused solely by the plaintiff’s negligence sufficiently placed the negligence of the plaintiff in issue to entitle the court to apportion the damages, although there was no

67 The duty to mitigate damage (more precisely, the penalty for not mitigating damages) applies to both delictual and contractual claims: Boberg **Law of Delict** 493. See, in general, Neethling, Potgieter and Visser **Deliktereg** 226 - 7; McKerron **Law of Delict** 139; Van der Merwe and Olivier **Onregmatige Daad** 188.

68 **Law of Delict** 298.

69 The memorandum was prepared by JE Hewitt SC on behalf of the Natal Bar Council.

70 See also the discussion on section 4(1)(b) of the Act below at paragraphs 4.3 and 4.4.

71 Boberg **Law of Delict** 672.

72 1976 3 SA 45 (A).

alternative plea claiming apportionment in the event of a finding of contributory negligence.⁷³

Costs

2.33 The question as to what order regarding costs should be made where damages are apportioned in terms of the Act gives rise to several problems.⁷⁴ Where the court is concerned only with a claim in convention - there is no counterclaim to complicate the issue - the position is reasonably clear. In the absence of an adequate tender of payment into court, an award of a substantial amount of damages will carry with it the costs of the action, irrespective of the proportion of fault attributed to the plaintiff or the amount by which his or her total damages have been reduced, having regard to such fault. Where there is both a claim in convention and a claim in reconvention, or counterclaim, and an apportionment of fault results in the damages upon both claim and counterclaim being proportionally reduced, no tender of payment into court having been made by either party, the position is by no means clear. Different courts have adopted different measures.⁷⁵

2.34 Gauntlett⁷⁶ offers the following tentative view as to the proper basis for dealing with this type of situation:

In the first place, it should be observed that because of individual differences in the facts of cases and because the award of costs is something very much within the court's discretion, no hard-and-fast rule can, or should, be laid down. In the second place, the fundamental principle is that legal costs should normally be borne by the party responsible for such costs having been incurred. It is submitted that such responsibility flows primarily not from the conduct of the

73 See also **Bata Shoe Co Ltd (SA) v Moss** 1977 4 SA 16 (W).

74 Gauntlett **Quantum of Damages** (Volume I) 79 - 80; Boberg **Law of Delict** 672 - 673.

75 Thus it has been held that in such a case the plaintiff should pay the defendant's costs and the defendant the plaintiff's costs: **Ihlenfeldt v Rieseberg** 1960 2 SA 455 (T) at 456 - 7. In cases where equal fault has been attributed to plaintiff and defendant that there should be no order as to costs has earned judicial approval: **Glatt v Evans** 1962 3 SA 959 (T) at 960 - 1. See also **Stolp v Du Plessis** 1960 2 SA 661 (T) where the plaintiff was awarded one-third of her cost as against the defendant and the defendant two-thirds of his costs against the plaintiff.

76 **Quantum of Damages** (Volume I) 80.

parties in and during the transaction which gives rise to the litigation, but to their subsequent conduct in and in regard to the litigation itself. ... Accordingly, the respective degrees of fault of the parties in regard to the accident causing the injuries should not have any direct bearing upon the question of costs.

2.35 The Commission supports the above point of view.

The cardinal questions

2.36 Important as these aspects of the meaning of 'fault' were, they were peripheral to the cardinal questions raised by section 1 of the Act.⁷⁷ These questions were formulated by Boberg⁷⁸ as follows:

(a) What is the connotation of 'fault' in relation to legal negligence and moral blameworthiness? (b) Since s 1(1)(b) abolished the last opportunity rule (a test of causation) without offering anything in its place, what test of causation should be applied to determine whether the plaintiff's damage was 'caused partly by his own fault and partly by the fault of' the defendant? (c) 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', and what role should causation play in this process?

2.37 After much academic debate and some judicial uncertainty, definitive and authoritative answers to these questions were given by the Appellate Division in **South British Insurance Co Ltd v Smit**⁷⁹ and **Jones NO v Santam Bpk.**⁸⁰

2.38 In **South British Insurance Co Ltd v Smit**,⁸¹ the Appellate Division approved an approach based on comparative culpability in these terms:

In directing the court to have "regard to the degree in which the claimant was at fault in relation to the damage" ("met inagneming van die mate van die eiser se

77 Boberg **Law of Delict** 657.

78 **Law of Delict** 657.

79 1962 3 SA 826 (A).

80 1965 2 SA 542 (A).

81 1962 3 SA 826 (A) at 836B - E.

skuld met betrekking tot die skade”) the legislature, in my opinion, requires the court to assess the degree of the claimant’s negligence in relation to the damage which has been caused by the combination of that negligence and the negligence of the defendant. That is not to say that the court is to embark upon the impossible task of determining degrees of causation. What the court is required to do is to determine, having regard to the circumstances of the particular case, the respective degrees of negligence of the parties. In assessing “the degree in which the claimant was at fault in relation to the damage”, the court must determine in how far the claimant’s acts or omissions, causally linked with the damage in issue, deviated from the norm of the *bonus paterfamilias*. In thus assessing the position, the court will, as explained above, determine the respective degrees of negligence, as reflected by the acts and omissions of the parties, which have together combined to bring about the damage in issue.

2.39 Subsequently the Appellate Division emphasised that it is the respective degrees of negligence of the parties which has to be determined, not only the degree of any negligence on the part of the claimant:⁸²

It is on the basis of comparison between the respective degrees of negligence of the two parties (or several parties if there be more than one claimant or defendant) that the court can determine in how far the fault or negligence of each combined with the other to bring about the damage in issue.

2.40 The extent to which a party departs from the standard of reasonableness in his or her conduct is usually expressed as a percentage.⁸³ Thus in **Jones NO v Santam Bpk**⁸⁴ Williamson JA used the example of a 60% deviation from the norm by a plaintiff and a 20% deviation by the defendant would mean that liability should be assessed upon the basis of 3 to 1, or 75% to 25%. The result would be a reduction of the plaintiff’s damages by 75%.

2.41 After **Jones**, courts continued to go their own way - sometimes adopting the two-stage method of apportionment described by Williamson JA and sometimes simply

82 **Jones NO v Santam Bpk** 1965 2 SA 542 (A) at 555C - D. In this respect the Court did not adopt the formulation of Ogilvie Thompson JA in **Smit** at 835H.

83 Compare Kotzé 1956 **THRHR** 186 at 187; Millner 1956 **Annual Survey** 188 at 191: “There is no unit of blame; no formula exists to quantify it or to measure deviation from the legal standard of care ... The matter can only lie in the discretion of the tribunal which will have regard for the circumstances of the particular case.” See also **Minister van Vervoer v Bekker** 1975 3 SA 128 (O) at 135A - D.

84 1965 2 SA 542 (A) at 555G.

comparing the parties' negligence in a single stage 'rough and ready' way.⁸⁵

2.42 Perhaps the most serious defect in the Act is that whereas the provisions of section 2 apply to all actions of delict, the provisions of section 1 are confined to actions based on fault.⁸⁶ McKerron⁸⁷ argues that this defect could be easily remedied by simply restoring the definition of "fault" contained in the 1952 and 1955 Bills.⁸⁸ "Fault" was there defined, in terms similar to those of the English Law Reform (Contributory Negligence) Act,⁸⁹ as including breach of a statutory duty or other act or omission which gives rise to delictual liability.

2.43 The wording of section 1(1)(a) "damage ... caused ... by ... fault" is jurisprudentially inelegant.⁹⁰ As Rumpff CJ pointed out in **Union National South British Insurance Co Ltd v Vitoria**,⁹¹ it is implicit in the subsection that the word "fault" relates to **conduct** which caused the damage, for fault, as a moral or legal **attribute** of conduct, cannot itself cause anything.

The Commission's recommendation

2.44 Although it is unfortunate that section 1 of the Act "beslis nie 'n toonbeeld van suiwerheid van denke en helderheid van formulering (is) nie",⁹² it must be emphasised that our courts, and especially the Appellate Division, have over the years given concrete content to this section. The Commission should therefore be extremely careful

85 See Boberg **Law of Delict** 669 - 670 for a list of authorities.

86 McKerron **The Apportionment of Damages Act** 10.

87 **The Apportionment of Damages Act** 10.

88 Union Gazette Extraordinary, 11 January 1952 and 30 December 1955.

89 "Fault" is defined in section 4 to mean 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.

90 Boberg **Law of Delict** 655; Swanepoel 1959 **THRHR** 262 at 264; Van der Merwe and Olivier **Onregmatige Daad** 161.

91 1982 1 SA 444 (A) at 456.

92 Van der Merwe and Olivier **Onregmatige Daad** 158.

in changing a section that has been the subject of several court decisions. With this in mind, we recommend the following:

Words underlined indicate insertions and words in square brackets in bold type [**bold**] indicate omissions from the text of the Act.

1. Apportionment of liability in case of contributory negligence.- (1) (a)

Where any person suffers damage which is caused partly by his or her own negligent conduct [**fault**] and partly by the negligent conduct [**fault**] of any other person, a claim in respect of that damage shall not be defeated by reason of the contributory negligence [**fault**] of the claimant but the damages recoverable in respect thereof shall be reduced by the court to such extent as the court may deem just and equitable having regard to the degree of contributory negligence of [**in which**] the claimant [**was at fault**] in relation to the damage.

(b) Damage shall for the purpose of paragraph (a) be regarded as having been caused by a person's negligent conduct [**fault**] notwithstanding the fact that another person had an opportunity of avoiding the consequences thereof and negligently failed to do so.

(c) Damage shall for the purpose of paragraph (a) include damage caused by a breach of a term of a contract.

(2) Where in any case to which the provisions of [**sub-**]section 1(1) apply, one of the persons who acted negligently [**at fault**] avoids liability to any claimant by pleading and proving that the time within which proceedings should have been instituted or notice should have been given in connection with such proceedings in terms of any law, has been exceeded, such person shall not by virtue of the provisions of [**the said sub-**]section 1(1), be entitled to recover damages from that claimant.

(3) For the purposes of this section 'negligent conduct' [**"fault"**] includes any

act or omission which would, but for the provisions of this section, have given rise to the defence of contributory negligence.

Alternatively, it is proposed that section 1(3) be repealed.

CHAPTER 3

JOINT AND SEVERAL WRONGDOERS

Introduction

3.1 Chapter II of the Act deals with joint or several wrongdoers and is much wider in scope than Chapter I for it applies to all delicts whereas Chapter I, as we have seen, applies only to those in which fault is a condition of liability. Chapter II consists of a single section, divided into fourteen subsections. It is a fairly lengthy and complicated section and can best be discussed by dismantling the section.

Joint wrongdoers

3.2 Sections 2(1), 2(1A) and 2(14) all deal with the elusive concept 'joint wrongdoer' and are treated together. The respective provisions read as follows:

2. Proceedings against and contributions between joint and several wrongdoers.- (1) 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.

(1A) A person shall for the purposes of this section be regarded as a joint wrongdoer if he would have been a joint wrongdoer but for the fact that he is married in community of property to the plaintiff.

(14) A person shall for the purposes of this section be regarded as a joint wrongdoer notwithstanding the fact that another person had an opportunity of avoiding the consequences of his wrongful act and negligently failed to do so.

3.3 Section 2 abolishes⁹³ the common law distinction between joint and concurrent wrongdoers⁹⁴ where the former, according to the generally accepted view, have a right

93 Although Trollip J in **Windrum v Neunborn** 1968 4 SA 286 (T) at 289 - 290 left open the question whether the common law right of contribution between concurrent wrongdoers is still available.

94 Neethling, Potgieter and Visser **Deliktereg** 269; Van der Walt **Delict** 110; McKerron **Law of Delict** 306.

of recourse, the latter not,⁹⁵ and provides for the recognition and regulation of a right of contribution between wrongdoers. Although section 2(1) does not purport to contain an extensive or complete definition of a joint wrongdoer, it gives an indication of the nature of the liability of the persons to whom the provisions apply as well as indications of the material characteristics of a joint wrongdoer in terms of the Act.⁹⁶

3.4 With reference to this definition, Millner⁹⁷ declares:

This definition fuses into a single category the distinct common law concepts of joint wrongdoers and several concurrent wrongdoers and, by referring to liability 'in delict' brings the whole field of delictual liability within the range of Chapter II (which, incidentally, heightens the anomaly of confining 1 to actions based on negligence, if it is so confined).

3.5 In terms of section 2(1) joint wrongdoers are persons who are **alleged** to be jointly or severally liable in delict to a third person for the same damage, and therefore not necessarily persons who are **in fact** so liable.⁹⁸

3.6 Section 2(1A) springs from the 1971 amendments to the Act.⁹⁹ Prior to 1971, the rule barring delictual actions between spouses married in community of property was held to prevent a third party, jointly responsible with one of the spouses for injuries to the other spouse from recovering a contribution from the negligent spouse as joint wrongdoer in terms of section 2 of the Act. It was, however, settled law that actions in delict were permitted between spouses who were married out of community of

95 See **Hughes v Transvaal Associated Hide & Skin Merchants (Pty) Ltd** 1955 2 SA 176 (T); **Windrum v Neunborn** 1968 4 SA 286 (T).

96 Van der Walt **Delict** 110. See also **Commercial Union Assurance Co Ltd v Pearl Assurance Co Ltd** 1962 3 SA 856 (E) at 863; **Saitowitz v Provincial Insurance Co Ltd** 1962 3 SA 443 (W); **Becker v Kellerman** 1971 2 SA 172 (T).

97 1956 **Annual Survey** 188 at 193.

98 **Shield Insurance Co Ltd v Zervoudakis** 1967 4 SA 735 (E) at 737 - 8 per Munnik J. However, in **South African Railways and Harbours v South African Stevedores Services Co Ltd** 1983 1 SA 1066 (A) at 1090 the Appellate Division states unequivocally that "... the Act does not ... deprive a person who, in terms of s 2(1), is alleged to be a joint and several wrongdoer of his right to plead that he is not actually liable as such". See also Van der Merwe and Olivier **Onregmatige Daad** 293 - 4; **Wapnick v Durban City Garage** 1984 2 SA 414 (D) at 421.

99 See Boberg 1971 **SALJ** 423 - 457 and Van der Merwe and Mynhardt 1971 **THRHR** 308 *et seq* for a full discussion of these amendments.

property.¹⁰⁰ Since the amendment of the Act a marriage in community of property does not prevent the spouse partly at fault from being a joint wrongdoer together with the third party vis-à-vis the injured spouse.¹⁰¹

3.7 Any definition of ‘joint wrongdoer’ must take this amendment into account.

3.8 The purpose of section 2(14) of the Act is to abolish the ‘last opportunity’ rule as a test for determining liability in the case of joint wrongdoers - just as it is the purpose of section 1(1)(b) to abolish the rule as the test for determining liability in the case of negligence by both parties.¹⁰²

3.9 The GCB submits that it would clarify the intention of the legislator should a short and simple definition of ‘joint wrongdoers’ be included in the Act. It further submits that the definition should, in particular, clarify the question of whether wrongdoers whom are liable in terms of vicarious liability qualify as joint wrongdoers. It is also submitted that they should indeed so qualify. This is in accordance with the extensive interpretation given to the concept ‘delict’ by Van der Walt,¹⁰³ McKerron¹⁰⁴ and Burchell¹⁰⁵ for whom ‘delict’ in section 2(1) includes *inter alia* wrongs of absolute or strict liability and the vicarious liability of a master for the delicts of his or her servant¹⁰⁶ and even the insurer of a motor vehicle,¹⁰⁷ but excludes a person who commits a breach of contract.¹⁰⁸

100 **Rohloff v Ocean Accident & Guarantee Corporation Ltd** 1960 2 SA 291 (A).

101 Section 2(1A) of the Act. See also **Delpont v Mutual and Federal Insurance Co Ltd** 1984 3 SA 191 (D); Sonnekus 1986 **De Jure** 150. See also sections 18 and 19 of the Matrimonial Property Act 88 of 1984.

102 McKerron **Law of Delict** 318. See also **Bondcrete (Pty) Ltd v City View Investments (Pty) Ltd** 1969 1 SA 134 (N) at 137E.

103 **Delict** 110. See also McKerron **Law of Delict** 306 - 7.

104 **The Apportionment of Damages Act** 7.

105 **Principles of Delict** 241.

106 **Becker v Kellerman** 1971 2 SA 172 (T); **Shield Insurance Co Ltd v Zervoudakis** 1967 4 SA 735 (E) at 737 - 738. See, however, **Smit v General Accident Fire and Life Assurance Corp Ltd** 1964 3 SA 739 (C).

107 **Maphosa v Wilke** 1990 3 SA 789 (T).

108 **Barclays Bank DCO v Straw** 1965 2 SA 93 (O); **OK Bazaars (1929) Ltd v Stern and Ekermans** 1976 2 SA 521 (C).

3.10 On a comparative basis, we could only find one formal definition of ‘**concurrent wrongdoer**’. The Law Commission of New Zealand defines a concurrent wrongdoer as follows:¹⁰⁹

concurrent wrongdoer means each of two or more wrongdoers whose acts or omissions give rise, wholly or partly, to the same loss, and includes a person who is vicariously liable for any act or omission of a wrongdoer¹¹⁰

3.11 Included in the term are persons such as employers or principals liable vicariously for the acts or omissions of their employees or agents.

3.12 **There is considerable merit in the submission of the GCB. We therefore suggest the following formulation:**

Words underlined indicate insertions and words in square brackets in bold type [**bold**] indicate omissions from the text of the Act.

2. Proceedings against and contributions between joint and several wrongdoers.- (1) Two or more joint wrongdoers may be sued in the same action.

(2) A person shall for the purpose of this section be regarded as a joint wrongdoer

(a) where it is alleged in an action that this person and another or more persons are jointly or severally liable in delict to a third person (hereinafter referred to as the plaintiff) for the same damages;¹¹¹

109 Preliminary Paper 80.

110 A wrongdoer is defined as a person whose acts or omissions give rise, wholly or partly, to a loss: Preliminary Paper 80.

111 A reformulation of section 2(1) of the Act.

(b) if such person would have been a joint wrongdoer but for the fact that he or she is married in community of property to the plaintiff;¹¹²

(c) if such person would have been vicariously liable for any act or omission of another wrongdoer;¹¹³

(d) notwithstanding the fact that another person had an opportunity of avoiding the consequences of his or her wrongful act and negligently failed to do so.¹¹⁴

Death of or injury to the breadwinner

3.13 Section 2(1B) and the second proviso to section 2(6)(a) form a unit and are treated together. Section 2(1B) reads as follows:

(1B) Subject to the provisions of the second proviso to subsection (6) (a), if it is alleged that the plaintiff has suffered damage as a result of any injury to or the death of any person and that such injury or death was caused partly by the fault of such injured or deceased person and partly by the fault of any other person, such injured person or the estate of such deceased person, as the case may be, and such other person shall for purposes of this section be regarded as joint wrongdoers.

3.14 Prior to 1971, the Act did not deal with the situation where the dependants sought to recover damages for loss of support where the deceased breadwinner had been contributory negligent. This situation was remedied by the insertion of a section 2(1B) in the Act which has the effect that dependants can recover in full from the third party responsible for the breadwinner's death or injury¹¹⁵ and that third party can then recover a contribution from the deceased's estate or the injured person himself or herself who are, for the purposes of section 2 of the Act regarded as joint wrongdoers vis-à-vis the

112 A reformulation of section 2(1A) of the Act.

113 See paragraph 3.9 above.

114 A reformulation of section 2(14) of the Act.

115 Before the 1971 amendment the dependant had no claim for loss of maintenance where the breadwinner was only injured: **De Vaal NO v Messing** 1938 TPD 34; **Lockhat's Estate v North British and Mercantile Insurance Co Ltd** 1959 3 SA 295 (A); **Evins v Shield Insurance Co Ltd** 1980 2 SA 814 (A). But see Van der Merwe and Olivier **Onregmatige Daad** 341; Klopper 1995 **De Rebus** 101 - 102.

dependants.¹¹⁶ A proviso was, however, added to section 2(6)(a) of the principal Act:

Provided further that if the court, in determining the full amount of the damage suffered by the plaintiff referred to in sub-section (1B), deducts from the estimated value of the support of which the plaintiff has been deprived by reason of the death of any person, the value of any benefit which the plaintiff has acquired from the estate of such deceased person no contribution which the said joint wrongdoer may so recover from the estate of the said deceased person shall deprive the plaintiff of the said benefit or any portion thereof.

3.15 The effect of this proviso is unsatisfactory in the amount of protection it gives to dependants.¹¹⁷ In many cases the bulk of a deceased breadwinner's estate consists of insurance monies or pension benefits. Since, in terms of section 1 of the Assessment of Damages Act 9 of 1969, these insurance or pension benefits are not to be taken into account in reduction of the dependant's damages, they are available for the satisfaction of the third party's action for a contribution against the deceased breadwinner's estate. The only possible limit to such a claim is in terms of section 40 of the Insurance Act 27 of 1943 which protects on death the proceeds of life policies against creditors up to a certain amount. Perhaps a practical way of avoiding the unsatisfactory result of the Assessment of Damages Act 9 of 1969 read with the proviso to section 2(6)(a) of the Act is for the breadwinner to stipulate in the insurance policy that the benefit is to be paid to the dependants, i.e. they become the beneficiaries and not the estate of the breadwinner.¹¹⁸

3.16 However, the Commission does not recommend any amendments to section 2(1B).

3.17 The question has been raised¹¹⁹ whether the legislature merely created a right of contribution against the breadwinner or his or her estate, or whether it has now also

116 See Van der Merwe and Olivier **Onregmatige Daad** 340 - 341 who have long advocated such an approach.

117 Van der Merwe and Olivier **Onregmatige Daad** 342; Burchell **Principles of Delict** 244.

118 Burchell **Principles of Delict** 244.

119 McKerron 1971 **SALJ** 449.

impliedly endorsed the view of Dr. NJ van der Merwe¹²⁰ that the true juridical basis of an action by one person for loss suffered in consequence of injury to or death of another is a wrong against the plaintiff himself or herself, not a wrong against the injured or deceased person, with the corollary that a breadwinner (or his or her estate) is liable to his or her dependant if he or she deprives the latter of support by negligently injuring or killing himself.

3.18 The Commission agrees with Boberg¹²¹ that the intention of the legislature was in all probability to give the defendant a right of contribution as against the estate of the deceased person and not to formulate general principles of Aquilian liability. This leaves the basic question, namely whether the estate of the deceased person is liable *ex delicto* against the dependants, unanswered.¹²² It is submitted that in principle there is no objection to the direct liability of the estate as against the dependants,¹²³ “mits daar in elke geval vasgestel word of die broodwinner se optrede, in die lig van die *boni mores*, onregmatig was teenoor sy afhanklikes”.¹²⁴

3.19 In a submission received from a member of the Natal Law Society¹²⁵ it is argued that the Act does not make adequate provision for effective apportionment against those who ‘benefit’ from the death of a joint wrongdoer. As prime example it cites the defendant in a MVA case where the deceased breadwinner may have been 95% to blame: the claims of the dependants are not reduced accordingly and there is no recourse unless the deceased left a substantial estate which can effectively be joined as third party.

120 1964 *Acta Juridica* 82. See also McKerron 1971 *SALJ* 443.

121 1971 *SALJ* 449.

122 As Boberg 1975 *SALJ* 332 realises. See also Boberg 1960 *SALJ* 447; Davel *Skadevergoeding aan Afhanklikes* 82; Dendy 1990 *SALJ* 155.

123 This is also the point of view of Conradie 1966 *THRHR* 61; Van der Merwe 1971 *De Rebus* 309 at 311; Davel *Skadevergoeding aan Afhanklikes* 82.

124 Davel *Skadevergoeding aan Afhanklikes* 82.

125 It is not clear who this member is. See the covering letter of the Natal Law Society dated 13 February 1995.

3.20 The GCB submits that the apportionment of liability between the plaintiff and defendants be kept separate from apportionment of contribution between the different defendants.¹²⁶ This submission is based on the decision of the House of Lords in **Fitzgerald v Lane**,¹²⁷ as well as on a similar recommendation contained in the New Zealand Law Commission's preliminary paper on the apportionment of civil liability.¹²⁸

3.21 The Commission supports this submission of the GCB.

Notice

3.22 Section 2(2) of the Act reads as follows:

(2) Notice of any action may at any time before the close of pleadings in that action be given-

(a) by the plaintiff;

(b) by any joint wrongdoer who is sued in that action

to any joint wrongdoer who is not sued in that action, and such joint wrongdoer may thereupon intervene as a defendant in that action.

3.23 Section 2(4), in turn, reads as follows:

(4) (a) If a joint wrongdoer is not sued in an action instituted against another joint wrongdoer and no notice is given to him in terms of paragraph (a) of sub-section (2), the plaintiff shall not thereafter sue him except with the leave of the court on good cause shown as to why notice was not given as aforesaid.

(b) If no notice is under paragraph (a) or (b) of sub-section (2) given to a joint wrongdoer who is not sued by the plaintiff, no proceedings for a contribution shall be instituted against him under sub-section (6) or (7) by any joint wrongdoer except with the leave of the court on good cause shown as to why notice was not given to him under paragraph (b) of sub-section (2).

126 See also **Grindrod Cotts Stevedoring (Pty) Ltd v Brock's Stevedoring Services** 1979 1 SA 239 (D).

127 [1989] 1 AC 328. The decision was applied by the Court of Appeal in **Drew v Abbassi and Packer**, unreported, 24 May 1995.

128 **Preliminary Paper.**

3.24 Oral notice is sufficient, though no doubt in practice notice is almost invariably given in writing. The importance of giving notice appears from section 2(4) of the Act.¹²⁹

The effect of notice is not to make the joint wrongdoer to whom it is given a party to the action, but merely to entitle him or her to become a party.¹³⁰

3.25 The Commission does not recommend any major amendments to these sections.

3.26 Sections 2(2), 2(4)(b) and 2(6)(a) of the Act will generally be used where the alleged wrongdoer is not before the Court **in that capacity**. For example, a father drives a motor vehicle, accompanied by his son. A collision occurs with another motor vehicle and the son is injured. The cause of the collision was the joint negligence of the two drivers. The father institutes a claim **in his representative capacity** only in respect of the general damages sustained by his son.

3.27 In such a case, the defendant has the following options:

- (a) He or she can simply issue a section 2(2) notice, which is served on the father in his personal capacity. In this way the father isn't joined to the action but the defendant has preserved the right to subsequently sue him; or
- (b) In the Supreme Court the defendant can join the father in his personal capacity by means of Rule 13, which requires no court application, or Rule 10, which would require such an application. Using Rule 10 is, therefore, a poor second choice. As we will see,¹³¹ there is no equivalent to Rule 13 in the Magistrate's Court Rules, and Magistrate's Court Rule 28 is a poor equivalent of Supreme Court Rule 10, with the result that in this court one would probably best content

129 Van der Merwe and Olivier **Onregmatige Daad** 301 - 302. See also **Lincoln v Ramsaran** 1962 3 SA 374 (D); **Becker v Kellerman** 1971 2 SA 172 (T); **Wapnick v Durban City Garage** 1984 2 SA 414 (D).

130 McKerron **Law of Delict** 307. See also **Du Raan v Maritz** 1973 4 SA 39 (SWA).

131 See Chapter 5 below.

oneself with the first option above.

3.28 Were the father to in such an instance institute action **in his personal capacity** (for example for the medical expenditure related to the son's injuries) **and in his representative capacity** (e.g. in respect of general damages), the defendant could directly raise apportionment as against the father in respect of his claim in his personal capacity. That much is obvious. But what about the claim in his representative capacity?

3.29 The defendant has the alternative of simply giving notice in terms of section 2(2) of the Act or to institute a conditional counter-claim against the father in his personal capacity.¹³² There was previously doubt as to whether such a conditional counter-claim could be brought in the Magistrate's Court.¹³³ Joinder would in such an event be unnecessary and indeed improper, because the plaintiff in his or her personal capacity is in such an event already before the Court.

Separation of trials

3.30 Section 2(3) deals with separation of trials and reads as follows:

(3) The court may on the application of the plaintiff or any joint wrongdoer in any action order that separate trials be held, or make such other order in this regard as it may consider just and expedient.

3.31 **The Commission finds no fault with the principle embodied in this subsection. We do, however, agree with Kotzé¹³⁴ that the concept 'any joint wrongdoer' refers to a 'aangespreekte mededader'. To clearly convey this**

132 I.e. the defendant denies that he or she was negligent, but if he or she was and the defendant has consequently to pay the entirety of the established general damages, then on so doing the defendant will be entitled to recover from the plaintiff in his or her personal capacity such percentage thereof as relates to the plaintiff's negligence.

133 See **Rondalia Bank Bpk v Pieter Nel Motors (Edms) Bpk** 1979 4 SA 467 (T) at 472E; **Erasmic v Botha** 1990 3 SA 230 (C). Supreme Court Rule 24(4) makes specific provision for bringing a conditional counter-claim.

134 1956 **THRHR** 192. See also Van der Merwe and Olivier **Onregmatige Daad** 301.

intention, we suggest that the word ‘sued’ be inserted after the phrase ‘any joint wrongdoer’.

3.32 It should, however, be noted that Rules 10(5)¹³⁵ and 13(9) of the Supreme Court Rules contain similar provisions. McKerron¹³⁶ submits that the only ground upon which the court would be justified in acceding to the application would be to prevent embarrassment to the applicant at the trial. Since it is desirable that, wherever practicable, joint wrongdoers should be sued in the same action, the onus of proving embarrassment would be a heavy one.

Cost orders

3.33 Several subsections deal with matters related to costs and can be treated together. The first is section 2(5), which reads as follows:

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

3.34 McKerron¹³⁷ illustrates the effect of this subsection by considering its application to the following example. Plaintiff (P) sues First Defendant (D1) and obtains judgement against her for R4000 and costs. P’s taxed costs amounts to R500. Assuming that P obtains from D1 only R1000 in satisfaction of the judgement, he can subsequently claim R3 500 from Second Defendant (D2), being as to R500 his taxed costs and as to R3000 the balance of his unpaid damages.

3.35 Section 2(8)(a)(iv) is quoted below¹³⁸ and deals with the various forms in which

135 See also **De Polo v Dreyer** 1990 2 SA 290 (W).

136 **Law of Delict** 308.

137 **Law of Delict** 309.

138 See paragraph 3.53 below.

an order as to costs may be made where the court gives judgement against one or more joint wrongdoers and is almost identical to rule 10(4) of the Supreme Court rules. Section 2(9)¹³⁹ is likewise almost a replica of the same Supreme Court rule and reads as follows:

(9) If judgment is given in favour of any joint wrongdoer or if any joint wrongdoer is absolved from the instance, the court may make such order as to costs as it may consider just, including an order-

- (a) that the plaintiff pay such joint wrongdoer's costs; or
- (b) that the unsuccessful joint wrongdoers pay the cost of the successful joint wrongdoer jointly and severally, the one paying the other to be absolved, and that if one of the unsuccessful joint wrongdoers pays more than his **pro rata** share of the cost of the successful joint wrongdoer, that he shall be entitled to recover from each of the other unsuccessful joint wrongdoers his **pro rata** share of such excess, and that if the successful joint wrongdoer is unable to recover the whole or any part of his costs from the unsuccessful joint wrongdoers, that he shall be entitled to recover from the plaintiff such part of his costs as he is unable to recover from the unsuccessful joint wrongdoers.

3.36 Section 2(11)(b) is quoted below.¹⁴⁰ It provides that any costs incurred by a joint wrongdoer in an unsuccessful attempt to recover a contribution from another joint wrongdoer shall be added to the amount of that contribution.

3.37 The Commission recommends a rearrangement of the various subsections dealing with costs. These provisions can further be simplified as the present Supreme Court rules regarding costs given for or against joint wrongdoers are adequate. If the Act, for example, simply empowers the court to make an appropriate order as to costs then sections 2(8)(a)(iv) and 2(9) can be amended accordingly.

3.38 The Commission therefore recommends the following section:

139 Subsection (9) deals with orders as to cost where judgment was given in **favour** of one or more joint wrongdoers.

140 See paragraph 3.65 below.

Words underlined indicate insertions and words in square brackets in bold type **[bold]** indicate omissions from the text of the Act.

(1) The Court may make such order as to costs as shall to it seem to be just: Provided that in any subsequent action against another joint wrongdoer, any amount recovered from any joint wrongdoer in a former action shall be deemed to have been applied towards the payment of the costs awarded in the former action in priority to the liquidation of the damages awarded in that action.¹⁴¹

Contribution between joint wrongdoers

3.39 Section 2(6) reads as follows:

(6) (a) If judgment is in any action given against any joint wrongdoer for the full amount of the damage suffered by the plaintiff, the said joint wrongdoer may, if the judgment debt has been paid in full, subject to the provisions of paragraph (b) of sub-section (4), recover from any other joint wrongdoer a contribution in respect of his responsibility for such damage of such an amount as the court may deem just and equitable having regard to the degree in which that other joint wrongdoer was at fault in relation to the damage suffered by the plaintiff, and to the damages awarded: Provided further that if the court, in determining the full amount of the damage suffered by the plaintiff referred to in sub-section (1B), deducts from the estimated value of the support of which the plaintiff has been deprived by reason of the death of any person, the value of any benefit which the plaintiff has acquired from the estate of such deceased person no contribution which the said joint wrongdoer may so recover from the estate of the said deceased person shall deprive the plaintiff of the said benefit or any portion thereof.

(b) The period of extinctive prescription in respect of a claim for a contribution shall be twelve months calculated from the date of the judgment in respect of which a contribution is claimed or, where an appeal is made against such judgment, the date of the final judgment on appeal: Provided that if, in the case of any joint wrongdoer, the period of extinctive prescription in relation to any action which may be instituted against him by the plaintiff, is governed by a law which prescribes a period of less than twelve months as the period within which legal proceedings shall be instituted against him or within which notice shall be given that proceedings will be instituted against him, the provisions of such law

141 The proviso is a reformulation of section 2(5) of the Act.

shall apply **mutatis mutandis** in relation to any action for a contribution by a joint wrongdoer, the period or periods concerned being calculated from the date of the judgment as aforesaid instead of from the date of the original cause of action.

(c) 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.

3.40 Paragraph (a) only applies where a judgment has been given against (a) a single joint wrongdoer, or (b) two or more joint wrongdoers jointly and severally liable and the damages have not been apportioned between them in terms of section 2(8)(a)(iii) of the Act.¹⁴²

3.41 The joint wrongdoer against whom judgement has been given can obtain a declaratory order from the court determining the contribution which the other joint wrongdoer will have to make even where the debt has not been satisfied in full.¹⁴³ The contribution from the other joint wrongdoer will, therefore, have to be recovered in a subsequent separate action but the proceedings will be simplified by the existing declaratory order.¹⁴⁴

3.42 Notice to a joint wrongdoer of intention to join him or her in a action can be given either under section 2(2) of the Act or under Rule 13 of the Supreme Court Rules. The consequences of these two ways of joining parties as joint wrongdoers differ and are discussed elsewhere.¹⁴⁵ Suffice it to say that the effect of a section 2(2) notice is not to make the joint wrongdoer to whom the notice is given a party to the action, but merely to entitle him or her to become a party. However, if the joint wrongdoer does become a party to the action then a judgement sounding in money can be made in his or her favour. On service of a notice to a joint wrongdoer in terms of Rule 13 of the Supreme Court Rules the joint wrongdoer automatically becomes a party to the action and will be

142 McKerron **Law of Delict** 309.

143 **Suid-Afrikaanse Onderlinge Brand- en Algemene Versekeringsmaatskappy Bpk v Van den Berg** 1976 1 SA 602 (A).

144 Burchell **Principles of Delict** 242.

145 See Chapter 5 below.

bound by the judgement whether he or she intervenes or not. However, it is important to note that under Rule 13 all that can be sought by one alleged wrongdoer against another is an apportionment of fault in the form of a declaratory order. The rule makes no provision for a judgement sounding in money in favour of one joint wrongdoer against another.¹⁴⁶

3.43 It is to be observed that paragraph (a) provides that in determining the amount of the contribution, regard must be had to the damages awarded.¹⁴⁷ This is clearly so where the wrongdoer from whom contribution is sought was a party to the action or where the damages awarded are equal to or less than the damages suffered. McKerron¹⁴⁸ argues that it would be unjust to have regard to the damages awarded where the wrongdoer was not a party to the action and the damages exceed the damage suffered. He submits¹⁴⁹ that in such a case, since the court must decide the matter in accordance with what it considers just and equitable, it would be open to the court, notwithstanding the wording of the paragraph, to have regard only to the amount of the damage actually suffered by the plaintiff. McKerron continues:

If this interpretation of the paragraph is not permissible, it is submitted that the paragraph should be amended by the deletion of the words ‘and to the damages awarded’. If these words were deleted, it is conceived that the court, where it was right and proper to do so, could still have regard to the damages awarded, since it is required to have regard to what is just and equitable in determining the amount of the contribution.

3.44 As is shown by Kotzé¹⁵⁰ the use of the word ‘responsibility’ in paragraph (a) of this subsection is unfortunate. The better word is ‘liability’.¹⁵¹ We would support such a

146 Burchell **Principles of Delict** 242.

147 See **Suid-Afrikaanse Onderlinge Brand- en Algemene Versekeringsmaatskappy Bpk v Van den Berg** 1976 1 SA 602 (A); **Grindrod Cotts Stevedoring (Pty) Ltd v Bock's Stevedoring Services** 1979 1 SA 239 (D); **Govender v SA Stevedores Services Co Ltd** 1981 1 SA 353 (D); **Callender-Easby v Grahamstown Municipality** 1981 2 SA 810 (E).

148 **Law of Delict** 310.

149 **Law of Delict** 311.

150 1956 **THRHR** 193.

151 See also Van der Merwe and Olivier **Onregmatige Daad** 302.

change.

3.45 The Commission therefore recommends the following amendments:

Words underlined indicate insertions and words in square brackets in bold type [**bold**] indicate omissions from the text of the Act.

(6) (a) If judgment is in any action given against any joint wrongdoer for the full amount of the damage suffered by the plaintiff, the said joint wrongdoer may, if the judgment debt has been paid in full, subject to the provisions of paragraph (b) of sub-section (4), recover from any other joint wrongdoer a contribution in respect of his or her liability [**responsibility**] for such damage (including the reasonable costs incurred in defending the action) of such an amount as the court may deem just and equitable having regard to the degree in which that other joint wrongdoer was at fault in relation to the damage suffered by the plaintiff[, **and to the damages awarded**]: Provided further that if the court, in determining the full amount of the damage suffered by the plaintiff referred to in [**sub-**]section 2(1B), deducts from the estimated value of the support of which the plaintiff has been deprived by reason of the death of any person, the value of any benefit which the plaintiff has acquired from the estate of such deceased person no contribution which the said joint wrongdoer may so recover from the estate of the said deceased person shall deprive the plaintiff of the said benefit or any portion thereof.

3.46 Literally interpreted, the paragraph would entitle even an intentional wrongdoer to claim contribution. Whether this is in fact possible, remains unclear.¹⁵² On the one hand, there is no attempt in the Act 'to limit the class of joint wrongdoers who may be joined to such persons whose joint wrongdoing consists of negligent acts as distinct from acts of intentional wrongdoing'.¹⁵³ On the other hand, there is the common law

152 Van der Merwe and Olivier **Onregmatige Daad** 302.

153 Per Mahomed J (as he then was) in **Randbond Investments v FPS (Northern Region) (Pty) Ltd** 1992 2 SA 608 (W)

rule that there can never be any question of contribution between intentional wrongdoers.¹⁵⁴

3.47 Two other aspects deserve attention. The first relates to costs. In **Abrahamse v Danek**¹⁵⁵ Herbstein J held that contribution can be claimed not only in respect of the damages, but also in respect of the costs, which the joint wrongdoer was obliged to pay to the injured party. The Full Bench of the Eastern Cape Division, however, took a different view in **Commercial Union Assurance Co Ltd v Pearl Assurance Co Ltd**.¹⁵⁶ McKerron¹⁵⁷ supports the latter view as it accords better with the wording of the paragraph and is supported by the provisions of subsection (12). He suggests that the position can be rectified by simply inserting in brackets after the words ‘his responsibility for such damage’ the words ‘including the costs incurred in defending the action’.

3.48 The Commission also supports the **Commercial Union Assurance Co Ltd**-decision and believes that a contribution can be claimed not only in respect of the damages, but also in respect of the costs.

3.49 The second aspect concerns breach of a strict or absolute duty. In applying this paragraph of the Act, the court may be faced with a difficulty which does not arise under section 1(1), namely the apportionment of liability between a wrongdoer, D1, whose liability is based on fault and a wrongdoer, D2, whose liability springs from the breach of a strict or absolute duty. It is not easy to see how this difficulty can be got around, since *ex hypothesi* apportionment on the basis of comparative culpability is ruled out.¹⁵⁸ As a solution, McKerron¹⁵⁹ suggests that the court, contrary to the general rule, to have

at 619E - G. See also Burchell **Principles of Delict** 240 - 241.

154 McKerron **Law of Delict** 309. See also Van der Merwe and Olivier **Onregmatige Daad** 302.

155 1962 1 SA 171 (C).

156 1962 3 SA 856 (E).

157 **Law of Delict** 310.

158 McKerron **Law of Delict** 310.

159 **Law of Delict** 310.

regard solely to the extent of D1's departure from the norm of the reasonable man and apportion the liability between D1 and D2 on that basis.

Payments in excess

3.50 Section 2(7) reads as follows:

(7) (a) If judgment is in any action given against one or more joint wrongdoers in respect of the damage suffered by the plaintiff, any joint wrongdoer who in pursuance of such judgment pays to the plaintiff in respect of his responsibility for such damage an amount in excess of the amount (hereinafter referred to as the amount apportioned to the first mentioned joint wrongdoer) which the court deems just and equitable having regard to the degree in which he was at fault in relation to the damage suffered by the plaintiff and to the full amount of the damages awarded to the plaintiff, may, subject to the provisions of paragraph (b) of sub-section (4), recover from any other joint wrongdoer a contribution in respect of the latter's responsibility for such damage of an amount not exceeding so much of the amount which the court deems just and equitable having regard to the degree in which such other joint wrongdoer was at fault in relation to the damage suffered by the plaintiff and to the full amount of the damages awarded to the plaintiff, as has not been paid by such other joint wrongdoer, or so much of the amount paid by the first mentioned joint wrongdoer as exceeds the amount apportioned to him, whichever is less.

(b) The provisions of paragraphs (b) and (c) of sub-section (6) shall apply **mutatis mutandis** to any claim for a contribution under paragraph (a) of this sub-section.

3.51 As regards this section, it suffices to refer to the criticism as expressed by McKerron:¹⁶⁰

The subsection is so clumsily and obscurely worded that it is difficult to determine its purpose. But it would seem to be intended to provide for the case where a joint and several judgement has been given against *two* or more joint wrongdoers ('one' having been used in the first line of paragraph (a) *per incuriam* for 'two'), and an apportionment has then been made between them in terms of subsection (8)(a)(iii). If this is the correct interpretation of the subsection, then it would appear to serve no purpose; for the case is expressly provided for in clear

160 **Law of Delict** 312. See also Van der Merwe and Olivier **Onregmatige Daad** 303 - 304; Kotzé 1956 **THRHR** 193; and Millner 1956 **Annual Survey** 193 - 194 who declares: "But the draftmanship of this portion of the Act is in parts unfortunate. The chief offender is subsection (7)(a) of section 2 which in a single sentence consisting (in the English version) of 223 words, immobilizes the wretched reader in a glutinous jelly of subordinate clauses."

and unambiguous language by subsection (8)(b). It is submitted, therefore, that the subsection should be repealed and all references to it deleted from the Act.

3.52 There are no reported decision dealing with this section and **the Commission supports McKerron's submission that section 2(7) should be repealed.**

Judgment in favour of the plaintiff

3.53 Section 2(8) reads as follows:

- (8) (a) If judgment is in any action given in favour of the plaintiff against two or more joint wrongdoers, the court may-
- (i) order that such joint wrongdoer pay the amount of the damages awarded jointly and severally, the one paying the other to be absolved;
 - (ii) if it is satisfied that all the joint wrongdoers have been joined in the action, apportion the damages awarded against the joint wrongdoers in such proportions as the court may deem just and equitable having regard to the degree in which each joint wrongdoer was at fault in relation to the damage suffered by the plaintiff, and give judgment separately against each joint wrongdoer for the amount so apportioned: Provided that any amount which the plaintiff is unable to recover from any joint wrongdoer under a judgment so given (including any costs incurred by the plaintiff in an attempt to recover the said amount and not recovered from the said joint wrongdoer) whether by reason of the said joint wrongdoer's insolvency or otherwise, may be recovered by the plaintiff from the other joint wrongdoer or, if there are two or more other joint wrongdoers, from those other joint wrongdoers in such proportions as the court may deem just and equitable having regard to the degree in which each of those other joint wrongdoers was at fault in relation to the damage suffered by the plaintiff;
 - (iii) where it gives judgment against the joint wrongdoers jointly and severally as aforesaid, at the request of any one of the joint wrongdoers, apportion, for the purposes of paragraph (b), the damages payable by the joint wrongdoers **inter se**, amongst the joint wrongdoers, in such proportions as the court may deem just and equitable having regard to the degree in which each joint wrongdoer was at fault in relation to the damage suffered by the plaintiff;
 - (iv) make such order as to cost as it may consider just, including an

order that the joint wrongdoers against whom it gives judgment shall pay the plaintiff's cost jointly and severally, the one paying the other to be absolved, and that if one of the unsuccessful joint wrongdoers his **pro rata** share of such excess.

(b) Any joint wrongdoer who pays more than the amount apportioned to him under sub-paragraph (a) may recover from any joint wrongdoer who has paid less than or nothing of the amount so apportioned to him, a contribution of an amount not exceeding so much of the amount so apportioned to the last mentioned joint wrongdoer as has been paid by him, or so much of the amount paid by the first mentioned joint wrongdoer as exceeds the amount so apportioned to him, whichever is less.

(c) The provisions of paragraph (b) of sub-section (6) shall apply **mutatis mutandis** to any claim for a contribution under paragraph (b) of this sub-section.

3.54 At common law the rule was that, except in the case of a claim based on *injuria*, the plaintiff was entitled to an undivided judgement for the whole of his or her loss. Paragraph (a)(ii) of this subsection empowers the court to apportion the damages and give separate judgements against each joint wrongdoer. This the court may only do if it is satisfied that all the joint wrongdoers have been joined in the action.¹⁶¹ If the court exercises the power, the respective liabilities of the parties are determined once and for all in one action and no question of contribution arises. This is therefore the simplest and most satisfactory method of dealing with the problem of joint wrongdoing.

3.55 McKerron¹⁶² submits that since the application of the provision deprives the plaintiff of his or her common law right to an undivided judgement, the court should not exercise the power if there is any likelihood of the plaintiff being prejudiced thereby as, for example, one of the joint wrongdoers being unable to discharge his or her share of the liability. It is true that the proviso to the paragraph affords the plaintiff some measure of protection against this eventuality, but it would be unfair to him or her to give separate judgements in circumstances in which the probabilities are that he will have to institute further proceedings in terms of this proviso.

161 McKerron **Law of Delict** 313.

162 **Law of Delict** 314.

3.56 McKerron¹⁶³ argues that the words ‘in such proportions ... plaintiff’ occurring at the end of the proviso in section 2(8)(a)(ii) appear to be redundant. He suggests that the offending words be deleted and be substituted by the words ‘in such proportions as the damages awarded to the plaintiff were apportioned between them’.

3.57 McKerron¹⁶⁴ also shows that the omission in section 2(8)(c) of a reference to section 2(6)(c) of the Act is clearly a *casus omissus*. For ‘paragraph (b)’ there should therefore be substituted ‘paragraphs (b) and (c)’.

3.58 The Commission would give effect to these recommendations. The proviso to section 2(8)(a)(ii) will be dealt with below¹⁶⁵ when we discuss the effect of the insolvency of a joint wrongdoer on his or her co-joint wrongdoer’s efforts to claim a contribution from the insolvent wrongdoer. It will also be recalled that we recommended¹⁶⁶ section 2(8)(a)(iv) be repealed and be substituted by a general section dealing with cost orders. Our proposal reads as follows:

Words underlined indicate insertions and words in square brackets in bold type [**bold**]

163 **Law of Delict** 314.

164 **Law of Delict** 315.

165 See paragraphs 3.65 *et seq* below.

166 See paragraph 3.37 above.

indicate omissions from the text of the Act.

- (8) (a) If judgment is in any action given in favour of the plaintiff against two or more joint wrongdoers, the court may-
- (i) order that such joint wrongdoer pay the amount of the damages awarded jointly and severally, the one paying the other to be absolved;
 - (ii) if it is satisfied that all the joint wrongdoers have been joined in the action,
 - (aa) apportion the damages awarded against the joint wrongdoers in such proportions as the court may deem just and equitable having regard to the degree in which each joint wrongdoer was at fault in relation to the damage suffered by the plaintiff, and
 - (bb) give judgment separately against each joint wrongdoer for the amount so apportioned: Provided that any amount which the plaintiff is unable to recover from any joint wrongdoer under a judgment so given (including any costs incurred by the plaintiff in an attempt to recover the said amount and not recovered from the said joint wrongdoer) **[whether by reason of the said joint wrongdoer's insolvency or otherwise,]** may be recovered by the plaintiff from the other joint wrongdoer or, if there are two or more other joint wrongdoers, from those other joint wrongdoers in such proportions as damages awarded to the plaintiff were apportioned between them **[the court may deem just and equitable having regard to the degree in which each of those other joint wrongdoers was at fault in relation to the damage suffered by the plaintiff];**

(iii) where it gives judgment against the joint wrongdoers jointly and severally as aforesaid, at the request of any one of the joint wrongdoers, apportion, for the purposes of paragraph (b), the damages payable by the joint wrongdoers **inter se**, amongst the joint wrongdoers, in such proportions as the court may deem just and equitable having regard to the degree in which each joint wrongdoer was at fault in relation to the damage suffered by the plaintiff;

[(iv) make such order as to cost as it may consider just, including an order that the joint wrongdoers against whom it gives judgment shall pay the plaintiff's cost jointly and severally, the one paying the other to be absolved, and that if one of the unsuccessful joint wrongdoers his pro rata share of such excess.]

(b) Any joint wrongdoer who pays more than the amount apportioned to him or her under [**sub-**]paragraph (a) may recover from any joint wrongdoer who has paid less than or nothing of the amount so apportioned to him or her, a contribution of an amount not exceeding so much of the amount so apportioned to the last mentioned joint wrongdoer as has been paid by him or her, or so much of the amount paid by the first mentioned joint wrongdoer as exceeds the amount so apportioned to him or her, whichever is less.

(c) The provisions of paragraph (b) and (c) of [**sub-**]section 2(6) shall apply **mutatis mutandis** to any claim for a contribution under paragraph (b) of this sub-section.

Exemption from or limitation of liability

3.59 Section 2(10) reads 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 therefore 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 sub-section (6) or paragraph (b) of sub-section (7), could have been recovered from the said joint wrongdoer in terms of sub-section (6) or (7) or could have been apportioned to him in terms of sub-paragraph (ii) or (iii) of paragraph (a) of sub-section (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.

3.60 In principle, one wrongdoer should not be permitted to derive any benefit from an agreement between the plaintiff and another wrongdoer. However, from this subsection it would appear as if the legislature apparently considered it necessary to allow him or her to do so in order to achieve what it conceived to be ideal justice between the joint wrongdoers concerned. McKerron¹⁶⁷ submits that this section must be interpreted as applying only to an agreement excluding or limiting liability entered into **before** the damage was caused.¹⁶⁸ McKerron¹⁶⁹ further submits that this is not a 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. There would seem therefore to be no justification for this provision, and it is submitted that the subsection should be repealed.'¹⁷⁰

3.61 The Commission is therefore faced with two options. The first is to retain section 2(10) (albeit in an amended form) to make it clear that it only applies to agreements excluding or limiting liability entered into **before** the damage was caused. This will give effect to McKerron's first submission and appeals to one's sense of fairness. The

167 **Law of Delict** 316.

168 See, however, **Prinsloo v Du Preez NO** 1965 4 SA 300 (W) at 302, where Vieyra J said that, although subsection (10) seemed *prima facie* to refer to an agreement entered into prior to the event causing the damage, he was not prepared to rule that this was necessarily so. See also **Windrum v Neunborn** 1968 4 SA 286 (T).

169 **Law of Delict** 316.

170 McKerron **Law of Delict** 316.

second option is to give effect to McKerron's second submission and repeal the section altogether.

3.62 The Commission therefore suggests the following in the alternative:

Words underlined indicate insertions and words in square brackets in bold type [**bold**] indicate omissions from the text of the Act.

(10) If by reason of the terms of an agreement between a joint wrongdoer and the plaintiff entered into before the damage was caused the former is exempt from liability for the damage suffered by the plaintiff or his or her liability therefore 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 [**sub-**]section 2(6) [**or paragraph (b) of sub-section (7)**], could have been recovered from the said joint wrongdoer in terms of [**sub-**]section 2(6) [**or (7)**] or could have been apportioned to him or her in terms of [**sub-paragraph (ii) or (iii) of paragraph (a) of sub-**]section 2(8)(a)(ii) or (iii), as exceeds the amount, if any, for which he or she is liable in terms of the said agreement, shall not be recoverable by the plaintiff from any other joint wrongdoer.

3.63 The alternative is to repeal the subsection *in toto*.

Contribution in cases of insolvency

3.64 Recovery of contribution - indeed, recovery of damages at all - depends on the availability and solvency of the defendant(s) against whom judgement is given. In its simplest terms, it is of no use to a plaintiff to have a judgement ready for execution if the relevant defendant has no funds to meet it. The question is then how the insolvency or unavailability of one joint wrongdoer should impact on the other joint wrongdoers (each of whom is jointly and severally liable) and on the plaintiff?¹⁷¹

171 See also New Zealand Law Commission **Preliminary Paper 23**.

3.65 The proviso to section 2(8)(a)(ii) and section 2(11) are relevant in this regard. Section 2(11) reads as follows:

(11) (a) Whenever a joint wrongdoer who is entitled under any provision of this section to recover a contribution from another joint wrongdoer, is unable to recover that contribution or any amount thereof from that other joint wrongdoer, whether by reason of the latter's insolvency or otherwise, he may recover from any other wrongdoer such portion of that contribution or that amount thereof as the court may deem just and equitable having regard to the degree in which that other joint wrongdoer was at fault in relation to the damage suffered by the plaintiff and to the full amount of the said contribution or the said amount thereof, as the case may be.

(b) Any cost incurred by a joint wrongdoer in an attempt to recover any contribution from any other joint wrongdoer, and not recovered from that joint wrongdoer, shall for the purpose of paragraph (a), be added to the amount of that contribution.

3.66 In its submission the GCB shows that in Ontario¹⁷² and New Zealand¹⁷³ 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. The GCB argues 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.

3.67 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

172 **Report on Contribution.**

173 **Preliminary Paper.**

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.

3.68 The GCB elucidates its proposition by way of the following example:

Plaintiff (P) takes judgment against first defendant (D1) and second defendant (D2) (each found to be 30% responsible for the loss) and third defendant (D3), held to be 40% responsible. Should D1 establish that a contribution from D3 is unavailable, D1 should be permitted to apply to a court for a re-allocation of the uncollectible 40%. Since D1 and D2 are, *inter se*, equally responsible, the outstanding 40% share will be equally divided between them, leaving each of them 50% responsible. Such application for a re-allocation will only become enforceable once D1 has actually made payment to the plaintiff. The same principle should apply where the plaintiff himself was partly to be blamed for the loss.

3.69 The Common Law Team¹⁷⁴ of the English Law Commission¹⁷⁵ considered the introduction of “full’ proportionate liability” whereby defendants would be liable to plaintiffs only for the amount of damages equal to their proportionate share of the fault in the plaintiff’s loss. Their investigation came down firmly against such a solution, mainly on the grounds that (i) it is unfair for a legally blameless plaintiff to have to bear the risk of a defendant’s insolvency and (ii) it is misleading to say that defendants can currently be called on “to provide 100% of the damages even though they are only 1% at fault” since the principle of joint and several liability is that relative to the plaintiff each defendant is 100% liable for the whole of the plaintiff’s loss.¹⁷⁶

3.70 The Common Law Team went on to look at three forms of a modified proportionate liability. The first would be the reallocation of the share of an insolvent wrongdoer between other wrongdoers and the plaintiff where the latter is contributory negligent.¹⁷⁷ The second would be to apply proportionate liability to a “peripheral

174 Under Professor Andrew Burrows.

175 **Feasibility Investigation.**

176 **Feasibility Investigation** 16 - 23.

177 **Feasibility Investigation** 24 - 30.

wrongdoer”¹⁷⁸ only, i.e. one whose fault is secondary when compared with the other wrongdoers.¹⁷⁹ The third would be to reallocate the uncollected share of the insolvent wrongdoer, but only up to 50% of each defendant’s proportionate share.¹⁸⁰ For reasons of principle or policy the investigation also rejected these three alternatives.

3.71 Also relevant in this regard is the Glanville Williams’ theory.¹⁸¹ According to this theory,¹⁸² where the plaintiff has been contributorily negligent, it is desirable to spread the risk of insolvency by applying proportionate liability. However, simply to apply proportionate liability would be too crude and unfair to the plaintiff in that it would throw the risk of insolvency entirely onto the plaintiff. The solution advocated is for the plaintiff to be given a primary (absolute) judgment based on proportionate liability coupled with a secondary (conditional) judgment for the proportionate share of such sum as the plaintiff fails to collect from the other defendant(s). 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.

3.72 For present purposes the theory can best be examined by developing the example of the GCB. Assume, on an assessment of proportionate liability, that plaintiff (P) is 50% contributory negligent, first defendant (D1) is 25% at fault and second defendant (D2) is also 25% at fault. D2 is insolvent and nothing can be recovered from him or her. P has suffered a loss of R100 000. Applying the principle of joint and several liability, P would be entitled to R50 000 from either D1 or D2, the one paying the other to be absolved. However, if we apply Professor Glanville Williams’ theory, the risk

178 Defined as a wrongdoer who is only trivially blameworthy relative to the fault of other wrongdoers: **Feasibility Investigation** 18.

179 **Feasibility Investigation** 30 - 33.

180 **Feasibility Investigation** 33 - 35.

181 Williams **Joint Torts and Contributory Negligence** 403 - 405.

182 Professor Williams’ views on this question were incorporated (applying his suggested draft bill almost word for word) in the Irish Civil Liability Act 1961. More recently he received support from Professor John Fleming 1976 **California LR** 239 at 250 - 256, 1979 **Hastings LJ** 1465 at 1482 - 1485, 1491 -1494; and by Professor Richard Wright 1992 **Memphis State LR** 45 at 71 - 84. The same approach has also been advocated, while rejecting full proportionate liability, by the New Zealand Law Commission **Preliminary Paper** and the Law Reform Commission of British Columbia **Shared Liability** Chapter III.

of D2's insolvency would be shared between P and D1 in the ratio 2:1. D1 would therefore be liable for R33 333 (i.e. 25%, plus a third of 25%) and P would be left to bear the remaining R66 666 (i.e. 50%, plus two-thirds of 25%).

3.73 One cannot help but being attracted by the impeccable logic of Professor Williams' theory.¹⁸³ That is unless one takes the controversial view¹⁸⁴ that the contributory negligence of a plaintiff is not as blameworthy as the commission of a wrong against another person, and hence that contributory negligence does not justify transferring a share of the risk of insolvency from the defendant(s) to the plaintiff.

3.74 Nevertheless, there remains some doubt¹⁸⁵ as to whether legislative reform to implement the theory of Professor Williams would be justified. For one thing, the Williams theory would be exceedingly complex to apply in practice.¹⁸⁶ Contribution proceedings are difficult enough and a system of secondary judgments based on proportionate shares of the risk of insolvency would be even more complex.

3.75 At this stage the Commission is not in a position to take a definite stand on the issue. We would therefore welcome comment on problems experienced in practice in this regard, and especially on the possibility of making a re-allocation of the apportionment in the event of it becoming impossible to execute against one of the joint wrongdoers in respect of his or her share; the introduction of "full' proportionate liability" whereby defendants would be liable to plaintiffs only

183 Common Law Team **Feasibility Investigation** 26.

184 That view is, however, taken by most of the law reform bodies that have looked at this issue. For example, the Law Reform Commission of New South Wales **Contribution among wrongdoers: Interim report on solidary liability** LRC 65 1990 para 25 says: "It must be recognised that in many cases a plaintiff's fault is different in kind to that of a defendant. A plaintiff's fault need not be negligent in the sense that it exposes others to harm, it might consist merely of a failure to take adequate care to safeguard his or her own interests (for example the failure to wear a seat belt). While some reduction for contributory negligence can still be justified to provide an incentive for accident prevention, it might well be unfair in such a case to equate the plaintiff's conduct with that of a negligent defendant for the purpose of apportioning an insolvent defendant's "share" of liability". See also the Ontario Law Reform Commission's Report **Contribution among wrongdoers and contributory negligence** 1988 47; New Zealand Law Commission **Preliminary Paper** para 169.

185 **Feasibility Investigation** 27.

186 Although, admittedly, this system seems to have worked satisfactory in Ireland since 1961: **Feasibility Investigation** 27, 75.

for the amount of damages equal to their proportionate share of the fault in the plaintiff's loss; whether some form of modified proportional liability should be introduced; and the effectiveness of the present provisions in the Act.

3.76 In order to give focus to the debate, attention is drawn to section 16 of the draft Act prepared by the New Zealand Law Commission.¹⁸⁷

- (1) If
 - (a) contribution is recoverable from a concurrent wrongdoer under this Act, and
 - (b) a court has attributed a proportion of a loss to that concurrent wrongdoer, and
 - (c) the proportionate amount of contribution payable by that concurrent wrongdoer is uncollectible,any other concurrent wrongdoer to whom all or part of that contribution is payable may apply to the court for apportionment of the uncollectible contribution.
- (2) Contribution is uncollectible for the purposes of this section if it cannot be collected because the concurrent wrongdoer by whom it is payable is insolvent, absent from New Zealand or cannot be found.
- (3) If the court is satisfied that contribution payable by a concurrent wrongdoer is uncollectible, it may make an order apportioning the uncollectible contribution among the other concurrent wrongdoers (including the applicant) and any wronged person who has failed to act with due regard for that person's own interest, so that each is liable to pay or to forego a share of the uncollectible contribution that is proportionate to the loss attributable to each.
- (4) An application under this section may be made in a proceeding brought by a wronged person for the recovery of damages or in a proceeding brought by a concurrent wrongdoer for the recovery of contribution or in a separate proceeding, but must be brought within one year after the attribution of a proportion of the loss to the concurrent wrongdoer whose contribution is uncollectible.
- (5) Apportionment of uncollectible contribution under this section does not discharge the concurrent wrongdoer whose contribution is uncollectible from liability to pay contribution.

187 **Preliminary Paper** 53 - 54. For a recent criticism of the New Zealand Law Commission's views, see A-M Simpson "Apportionment or compensation? Joint and several liability reconsidered" 1995 **NZLJ** 407.

3.77 At this stage, it suffices to say that the professional bodies in New Zealand do not see the Law Commission's proposal as going far enough. Their preference is for full proportionate liability in terms of which every defendant is liable only to the extent of that defendant's fault, the risk of the "uncollectible share" resting always on the plaintiff.¹⁸⁸

3.78 Even if all defendants are solvent and available, some particular defences may be available to a claim against them. These defences may be based on matters such as an exemption or limitation on damages in a defendant's contract with the plaintiff or the expiry of the limitation period involved. In these situations it might immediately be said that the plaintiff should be barred from or restricted in recovery, either on the basis that the plaintiff has agreed on the limitation (if it arises under contract) or that good public policy reasons have led to the inclusion of a limitation in a statute.

Payment in full settlement of plaintiff's claim

3.79 Section 2(12) is a most useful provision and reads as follows:

(12) If any joint wrongdoer agrees to pay to the plaintiff a sum of money in full settlement of the plaintiff's claim, the provisions of sub-section (6) shall apply **mutatis mutandis** as if judgment had been given by a competent court against such joint wrongdoer for that sum of money, or, if the court is satisfied that the full amount of the damage actually suffered by the plaintiff is less than that sum of money, for such sum of money as the court determines to be equal to the full amount of the damage actually suffered by the plaintiff, and in the application of the provisions of paragraph (b) of the said sub-section (6), any reference therein to the date of the judgment shall be construed as a reference to the date of the agreement.

3.80 This section enables a joint wrongdoer who does not dispute liability to settle the plaintiff's claim and then claim contribution from the other joint wrongdoers. The effect of the reference to section 2(6) is that contribution cannot be claimed until the sum agreed upon has been paid in full to the plaintiff. It is also to be noted that the period of prescription in respect of the right to claim contribution begins to run from the date of the

agreement and not from the date of payment.¹⁸⁹

3.81 The Commission endorses this subsection.

Discharge from liability

3.82 Section 2(13) reads as follows:

(13) Whenever judgment is in any action given against any joint wrongdoer for the full amount of the damage suffered by the plaintiff, or whenever any joint wrongdoer has agreed to pay to the plaintiff a sum of money in full settlement of the plaintiff's claim, and the judgment debt or the said sum of money has been paid in full, every other joint wrongdoer shall thereby also be discharged from any further liability towards the plaintiff.

3.83 This section would appear to be merely a restatement of the common law rule that payment in full by one co-debtor, or the receipt of a discharge which is intended to operate as a complete discharge of the whole obligation, releases the other(s).¹⁹⁰

3.84 The Commission endorses this section.

Section 3 of the Act

3.85 Section 3 of the Act reads as follows:

3. Application of provisions of section 2 to liability imposed in terms of Act 29 of 1942.-The provisions of section **two** shall apply also in relation to any liability imposed in terms of the Motor Vehicle Insurance Act, 1942 (Act No. 29 of 1942), on the State or any person in respect of loss or damage caused by or arising out of the driving of a motor vehicle.

189 McKerron **Law of Delict** 317. See also **Grindrod Cotts Stevedoring (Pty) Ltd v Brock's Stevedoring Services** 1979 1 SA 239 (D).

190 McKerron **Law of Delict** 318. See also **Prinsloo v Du Preez** NO 1965 4 SA 300 (W).

3.86 In its submission the GCB shows that cognisance should be taken of the provisions of the Motor Vehicle Accidents Act, 1986,¹⁹¹ and the Multilateral Motor Vehicle Accidents Fund Act, 1989, in this section. The Commission agrees with this submission and suggests the following:

Words underlined indicate insertions and words in square brackets in bold type [**bold**] indicate omissions from the text of the Act.

3. Application of provisions of section 2 to liability imposed in terms of Act 93 of 1989 [29 of 1942].-The provisions of section **two** shall apply also in relation to any liability imposed in terms of the Multilateral Motor Vehicle Accidents Fund Act, 1989 (Act No. 93 of 1989) [**Motor Vehicle Insurance Act, 1942 (Act No. 29 of 1942)**], on the State or any person in respect of loss or damage caused by or arising out of the driving of a motor vehicle.

191 In terms of section 3 of the Multilateral Motor Vehicle Accidents Fund Act 93 of 1989 the provisions of the Motor Vehicle Accidents Act 84 of 1986 are suspended. The Motor Vehicle Accidents Act 84 of 1986 is therefore not repealed. But see section 27 of the Road Accident Fund Bill, 1995, published as General Notice 436 of 1995 in the Government Gazette of 26 May 1995.

CHAPTER 4

THE GENERAL PROVISIONS OF THE ACT

Introduction

4.1 Chapter III reads as follows:

CHAPTER III

General

- 4. Savings-**(1) The provisions of this Act shall not-
- (a) apply in respect of any wrongful act committed before the commencement of this Act;
 - (b) operate to defeat any defence arising under a contract;
 - (c) operate to increase the amount of damages beyond any maximum prescribed in any agreement or any law applicable in respect of any claim for damages.
- (2) Nothing in this Act contained shall derogate in any manner from the provisions of any law relating to collisions or accidents at sea, or of any rule of court promulgated before the commencement of this Act under section **one hundred and eight** of the South African Act, 1909, or under section **three** of the Administration of Justice Proclamation, 1919 (Proclamation No. 21 of 1919), of the territory of South-West Africa.
- 5. This Act binds the State.-** This Act binds the State.
- 6. Application of Act to South-West Africa.-** This Act and any amendment thereof shall apply also in the territory of South-West Africa, including the Eastern Caprivi Zipfel.
- 7. Short title.-** This Act shall be called the Apportionment of Damages Act, 1956.

4.2 This Chapter is fortunately shorter and more understandable than the previous chapter. We will mainly look at sections 4, 6 and 7 of the Act as the other provisions of chapter III need not be amended or only require consequential changes.

Section 4(1)(b) of the Act

4.3 It has been argued in the past that the Act applies to damage caused by 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. To support this view, reliance has been placed on section 4(1)(b) of the Act as it is said this subsection indicates a legislative belief that the Act does apply to breaches of contract: otherwise the provision would have been unnecessary.¹⁹²

4.4 The Commission has expressed itself in favour of making the Act applicable to claims for contractual damages.¹⁹³ If that suggestion is followed, then section 4(1)(b) of the Act would make it possible to nullify the operation of the Act by the inclusion of a simple exclusion clause in a contract. This would defeat the whole purpose of making the Act applicable to claims for breach of contract. Even if it is decided that the Act does not apply to breach of contract, then one has to agree with the Natal Bar Council that section 4(1)(b) is incomprehensible.¹⁹⁴ The section should therefore be repealed.

Collisions or accidents at sea

4.5 The Act does not apply to collisions or accidents at sea¹⁹⁵ as these are regulated by Part IV of Chapter V of the Merchant Shipping Act, 1951. According to the Merchant Shipping Act, 1951 the recovery of damages for loss caused by a collision at sea depends on the existence of fault,¹⁹⁶ and the following three situations are possible:

- (a) **Where there is no fault on either side** - that is, where the collision was an inevitable accident. In these circumstances no claim is maintainable by either ship, and the loss in each case lies where it falls.¹⁹⁷

192 Boberg **Law of Delict** 713. See also Van der Merwe and Olivier **Onregmatige Daad** 168.

193 See paragraph 2.29 above.

194 There are to date no reported decisions interpreting this subsection.

195 Section 4(2). See also Van der Merwe and Olivier **Onregmatige Daad** 178, 307.

196 Bamford **Law of Shipping** 62.

197 This is the English law adopted in certain cases in the Cape by Act 8 of 1879. The Roman-Dutch rule (which had itself

- (b) **Where there is fault on one side.** The innocent party is entitled to full compensation for all loss.¹⁹⁸
- (c) **Where both parties are at fault.** Section 255 of the Merchant Shipping Act, 1951 provides that where damage or loss is caused by the fault of two or more ships, the liability to make good the damage or loss shall be in proportion to the degree in which each ship was at fault. If it is not possible to establish different degrees of fault, the liability shall be apportioned equally.¹⁹⁹

4.6 If loss of life or personal injuries is suffered by a person on board a ship owing to the fault of that ship and of any other ship, the liability of the owners of the ships involved shall be joint and several.²⁰⁰ However, the liability of an owner of a ship for any loss or damage of any kind caused without his or her actual fault or privity is limited.²⁰¹

4.7 **The Commission is not convinced that it is necessary to make the Apportionment of Damages Act, 1956 applicable to collisions or accidents at sea. Section 255 of the Merchant Shipping Act, 1951 adequately regulates the apportionment of damages resulting from accidents or collisions at sea relative to the degree in which each ship was at fault. Although it is accepted that the equal division rule could work hardship, this rule only comes into operation in those instances where it is not possible to establish different degrees of fault.**

departed from the Roman law) was that the loss should be equally borne by both ships: **Smith v Davis** (1878) 8 Buch 66 at 71; **Tychsen v Evans** (1880) 1 EDC 28 at 42. The whole matter is exhaustively treated in Voet 9.2.15. See also Huber 3.44.II - 14; Van der Keesel 813 - 815.

198 **Smith v Davis** (1878) 8 Buch 66 at 72. Also see Voet 9.2.15; Van der Linden 4.5.7. In **Trimmel v Williams** 1952 3 SA 786 (C), the skipper of a fishing-boat was held negligent in firing at a seal which had appeared between two boats, the bullet having ricocheted off the seal and killed the skipper of the other boat.

199 This enacts the English rule of apportionment: Grime **Shipping Law** 170-1. The Roman-Dutch law is said to have not been established: **Smith v Davis** (1878) 8 Buch 66 at 72. But see Voet 9.2.15; Van der Linden 4.5.7; Van der Keesel 816. See also Bamford **Law of Shipping** 65 footnote 5. The equal division rule also applies in the United States of America: Baer **Admiralty Law** 221 - 222; Gilmore and Black **Law of Admiralty** 492 - 493.

200 Section 256(1) of the Merchant Shipping Act, 1951.

201 Section 261(1) of the Merchant Shipping Act, 1951.

Section 108 of the South Africa Act, 1909

4.8 The South African Act, 1909 was an Act of the Parliament of the United Kingdom. It provided for the then colonies of the Cape of Good Hope, Natal, the Orange River Colony and the Transvaal to become united in a legislative union under one Government under the name of the Union of South Africa. All of the provisions of that Act have been repealed.²⁰²

4.9 The reference to section 108 of the South Africa Act, 1909 in section 4(2) of the Apportionment of Damages Act, 1956 should therefore be disregarded and the Act can be amended accordingly.

Section 3 of the Administration of Justice Proclamation, 1919 of South-West Africa

4.10 South-West Africa became independent on 21 March 1990 and a new state Namibia was born.

4.11 Section 3(1) of the Administration of Justice Proclamation, 1919 (Proclamation No. 21 of 1919) of South-West Africa created a superior court known as the High Court of South-West Africa for the territory. The rest of section 3 of the Proclamation dealt with the salaries of the judges, the seat of the court, and related matters. Subsections 3(1) - (5), (7), (8), and (10) of the Proclamation were repealed, while subsections (6) and (9) were amended, by the Supreme Court Act, 1959.

4.12 The reference to section 3 of the Administration of Justice Proclamation, 1919 in section 4(2) of the Apportionment of Damages Act, 1956 should therefore likewise be disregarded and the Act can be amended accordingly.

202 By, inter alia, section 120 of Act 32 of 1961, section 1 of Act 26 of 1969, section 1 of Act 43 of 1977, and section 86 of Act 53 of 1979.

Application of Act to South-West Africa

4.13 As was stated above, Namibia (the old South-West Africa) is of course now independent.²⁰³ The whole of this section can therefore be repealed.

The title of the Act

4.14 It seems that the Act was not very aptly named. The court does not apportion damages: What it does is apportion the fault and then reduce the damages.²⁰⁴ The heading and Section 7 of the Act will have to be amended to take this fact into account.

The Commission's recommendation

4.15 In the light of the above, the Commission therefore recommends the following amendments to Chapter III of the Act:

Words underlined indicate insertions and words in square brackets in bold type [**bold**] indicate omissions from the text of the Act.

CHAPTER III

General

4. **Savings-**(1) T[**he provisions of t**]his Act shall not-
- (a) apply in respect of any negligent [**wrongful**] act committed before the commencement of this Act;
 - (b) [**operate to defeat any defence arising under a contract;**
 - (c)] operate to increase the amount of damages beyond any maximum prescribed in any agreement or any law applicable in respect of any claim for damages.

203 This was also submitted by the GCB.

204 Boberg **Law of Delict** 659; Neethling, Potgieter and Visser **Deliktereg** 149.

(2) Nothing in this Act contained shall derogate in any manner from the provisions of any law relating to collisions or accidents at sea[, **or of any rule of court promulgated before the commencement of this Act under section one hundred and eight of the South African Act, 1909, or under section three of the Administration of Justice Proclamation, 1919 (Proclamation No. 21 of 1919), of the territory of South-West Africa**].

5. **This Act binds the State.**- This Act binds the State.

6. **[Application of Act to South-West Africa.- This Act and any amendment thereof shall apply also in the territory of South-West Africa, including the Eastern Caprivi Zipfel.**

7.] **Short title.**- This Act shall be called the Apportionment of Liability **[Damages]** Act, 1956.

CHAPTER 5

THE RULES OF COURT

Introduction

5.1 Most of the submissions dealt with the defective enforcement procedure against third parties in the Magistrate's Courts in that no judgement binding on a third party can be obtained in this way. As the Natal Law Society shows, this problem relates not so much to the Act, but to the problem caused by the lack, in the Magistrate's Court Rules, of third party procedures similar to those in the Supreme Court. In the consequence, even if a finding is made subsequent to the filing of a section 2(2)(b) notice one still has to sue to recover. Further, as is pointed out by the Natal Law Society, even in the Supreme Court the third party is not a co-defendant in the fullest sense.

Rule 13 of the Supreme Court

5.2 In the Supreme Court a joint wrongdoer not sued by a plaintiff may in practice be brought before that court in the same action in one of two ways: Either he or she intervenes voluntarily, or he or she is joined at the instance of the defendant(s). A joint wrongdoer not originally sued, who exceeds to a request to intervene, must bring an application to court on notice to all third parties, which, if successful, renders him or her a **defendant** in the action. On the other hand, a joint wrongdoer, joined at the instigation of an existing defendant becomes a **third party** in terms of Rule 13. Joinder in terms of Rule 13 in the Supreme Court is not by application through motion proceedings, but such a third party is automatically joined after a third party notice is served on him or her together with the relevant particulars of claim and copies of all pleadings filed to date.

5.3 The gist of Rule 13 is contained in subrules (1) and (2) which 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.

5.4 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 defendant;²⁰⁵ 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.²⁰⁶

5.5 Rule 13 is complementary to, but does not supersede, the machinery laid down in section 2 of the Act,²⁰⁷ which section, it has been held,²⁰⁸ contemplated a procedure of the kind regulated by the rule. The difference lies, *inter alia*, in the form of relief which can be sought.²⁰⁹ Where in terms of section 2 of the Act action has been instituted against two or more joint wrongdoers, or where a joint wrongdoer who was not sued by

205 Rule 13(1)(a).

206 Rule 13(1)(b).

207 Erasmus **Superior Court Practice** B1-107. See also **Shield Insurance Co Ltd v Zervoudakis** 1967 4 SA 735 (E); **Swart v Scottish Union & National Insurance Co Ltd** 1971 1 SA 384 (W) at 395H; **Hart v Santam Insurance Co Ltd** 1975 4 SA 275 (E) at 277C.

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

209 Erasmus **Superior Court Practice** B1-107.

the plaintiff initially, intervenes in the action pursuant to a notice having been given to him or her in terms of section 2(2), the court may order such joint wrongdoers to pay any damages awarded to the plaintiff either jointly or severally²¹⁰ or in such proportions as the court may deem just and equitable.²¹¹ On the other hand 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**,²¹² purportedly following **Shield Insurance Co Ltd v Zervoudakis**.²¹³

5.6 The rule makes no provision for a judgment sounding in money in favour of one alleged wrongdoer against the other.²¹⁴ A defendant who issues a notice under the rule against a third party is, accordingly, not entitled to claim a judgment in its favour in a specified sum of money as determined by the court.²¹⁵ This does not, however, mean that a third party can be joined in order to obtain a declaratory order which will be of academic interest only.²¹⁶

5.7 After service of a third party notice such third party becomes a party to the action²¹⁷ and he may thereafter file pleadings²¹⁸ and may himself issue a third party

210 **Grobbelaar v Federated Employers Insurance Co Ltd** 1974 2 SA 225 (A).

211 Section 2(8)(a); **Du Raan v Maritz** 1973 4 SA 39 (SWA).

212 1975 4 SA 275 (ECD).

213 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 Versekering Maatskappy v Van den Berg** 1976 1 SA 602 (A).

214 Erasmus **Superior Court Practice** B1-109.

215 **Hart v Santam Insurance Co Ltd** 1975 4 SA 275 (E) at 277H; **Du Raan v Maritz** 1973 4 SA 39 (SWA) at 41E.

216 **Rabie v Kimberley Munisipaliteit** 19914 SA 243 (NC).

217 Under certain circumstances a party also has the option of consolidating the actions: **Nel v Silicon Smelters (Edms) Bpk** 1981 4 SA 792 (A).

notice.²¹⁹ The court may even make an order of cost against such third party despite the fact that the rule makes no express provision for such an award.²²⁰

5.8 A plaintiff may also issue a third party notice in terms of the rule.²²¹ 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.²²²

5.9 In his submission Mr GM Bernstein of Livingston Leandy Inc recommends the inclusion of the following clause (c) in Rule 13(1) as a solution to the above problem:

“or (c) that the provisions of the Apportionment of Damages Act may be relevant”

5.10 This inclusion would not necessarily open the door for a court to grant a judgement sounding in money in favour of one wrongdoer against another. The solution seems rather to lie in amending the Act. The Commission would welcome proposals in this regard.

Rule 28(2) of the Magistrate’s Court

5.13 The problem under discussion is even more unsatisfactorily entertained in the Magistrate’s Court since the rules contain no provision corresponding with Supreme Court Rule 13, nor is there a rule sanctioning the use of a conditional counter claim. In the Magistrate’s Court the defendant must necessarily therefor 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 allegations in order to

218 Rule 13(5).

219 Rule 13(8).

220 **Robertson v Durban Turf Club** 1970 4 SA 649 (N); **Gross v Commercial Union Assurance Co Ltd** 1974 1 SA 630 (A); **Rondalia Assurance Corporation v Page** 1975 1 SA 708 (A) at 721E.

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

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

affect such a joinder.²²³ Once a joinder has been effected in terms of Magistrate's Court Rule 28(2), the magistrate is then requested either to implement the provisions of section 2(8)(a) of the Act,²²⁴ or to apply section 2(6)(a) of the Act.²²⁵

5.14 Rule 28(2) of the Magistrate's Court 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.

5.15 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.²²⁶ It has been held²²⁷ that the powers conferred upon a magistrate in terms of this subrule 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.

5.16 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 Supreme 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.²²⁸ At best the finding of the

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

224 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".

225 Honey **MVA Practice** 263 argues that a joinder in the Magistrate's 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.

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

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

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

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).²²⁹

5.17 Most submissions dealt with the lack, in the Magistrates' Court rules, of a third party procedure similar to that in the Supreme Court. As the Law Society of the Orange Free State²³⁰ puts it:

(D)aar (is) nie goeie skakeling in Landdroshof-aangeleenthede tussen Wet 34 van 1956 en die Landdroshof-Reëls nie. Daar is naamlik nie 'n Reël wat ooreenstem met Hooggeregshof Reël 13 nie en dit skep 'n groot leemte in Landdroshof-litigasie, veral ten aansien van die voeging van 'n mededader wat nie 'n party tot die aanvanklike geding is nie. Hofreël 28(2) het ernstige tekortkominge en bied ontoereikende skakeling tussen die Wet en die Reëls. Dit is dus noodsaaklik dat 'n Reël wat ooreenstem met Hooggeregshof Reël 13 in die Landdroshof-Reëls ingevoeg word. Dit sal waarskynlik ook voordelig wees indien die Landdroshof-Reëls aangepas word om dit duidelik te stel dat 'n voorwaardelike teeneis in die Landdroshof ontvanklik is.

5.18 It is obvious that this rule is a far cry from the detailed provisions of its counterpart in the Supreme Court.

The Commission's recommendation

5.19 The Commission therefore recommends that the Rules Board should seriously consider introducing a third party procedure similar to that contained in Rule 13 of the Supreme Court for the Magistrates' Court.

CHAPTER 6

THE APPORTIONMENT OF DAMAGES AMENDMENT BILL

Introduction

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

230 The submission was prepared by Dr DP Honey and Mr JJ Maree. The Association of Law Societies associates itself with this submission.

6.1 This Chapter summarises, in the form of an amendment bill, the Commission's recommendations on the Apportionment of Damages Act, 1956. For ease of reference, the words underlined indicate insertions and words in bold type in square brackets indicate omissions from the text of the Act. We keep to the existing numbering of sections as far as possible and suggest, where appropriate, alternatives.

The Commission's proposal

Words underlined indicate insertions and words in square brackets in bold type [**bold**] indicate omissions from the text of the Act.

CHAPTER 1

CONTRIBUTORY NEGLIGENCE

1. **Apportionment of liability in case of contributory negligence.-** (1)(a)

Where any person suffers damage which is caused partly by his or her own negligent conduct [**fault**] and partly by the negligent conduct [**fault**] of any other person, a claim in respect of that damage shall not be defeated by reason of the contributory negligence [**fault**] of the claimant but the damages recoverable in respect thereof shall be reduced by the court to such extent as the court may deem just and equitable having regard to the degree of contributory negligence of [**in which**] the claimant [**was at fault**] in relation to the damage.

(b) Damage shall for the purpose of paragraph (a) be regarded as having been caused by a person's negligent conduct [**fault**] notwithstanding the fact that another person had an opportunity of avoiding the consequences thereof and negligently failed to do so.

(c) Damage shall for the purpose of paragraph (a) include damage caused by

a breach of a term of a contract.

(2) Where in any case to which the provisions of [**sub-**]section 1(1) apply, one of the persons who acted negligently [at fault] avoids liability to any claimant by pleading and proving that the time within which proceedings should have been instituted or notice should have been given in connection with such proceedings in terms of any law, has been exceeded, such person shall not by virtue of the provisions of [**the said sub-**]section 1(1), be entitled to recover damages from that claimant.

(3) For the purposes of this section 'negligent conduct' ["**fault**"] includes any act or omission which would, but for the provisions of this section, have given rise to the defence of contributory negligence.

Alternatively, it is proposed that section 1(3) be repealed.

CHAPTER II

JOINT OR SEVERAL WRONGDOERS

2. Proceedings against and contributions between joint and several wrongdoers.- (1) Two or more joint wrongdoers may be sued in the same action.

(1A) A person shall for the purpose of this section be regarded as a joint wrongdoer

(a) where it is alleged in an action that this person and another or more persons are jointly or severally liable in delict to a third person (hereinafter referred to as the plaintiff) for the same damages;

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

(c) if such person would have been vicariously liable for any act or omission of another wrongdoer;

(d) notwithstanding the fact that another person had an opportunity of avoiding the consequences of his or her wrongful act and negligently failed to do so.

(1B) Subject to the provisions of the second proviso to **[sub-]section 2(6)(a)**, if it is alleged that the plaintiff has suffered damage as a result of any injury to or the death of any person and that such injury or death was caused partly by the fault of such injured or deceased person and partly by the fault of any other person, such injured person or the estate of such deceased person, as the case may be, and such other person shall for purposes of this section be regarded as joint wrongdoers.

(2) Notice of any action may at any time before the close of pleadings in that action be given-

(a) by the plaintiff;

(b) by any joint wrongdoer who is sued in that action

to any joint wrongdoer who is not sued in that action, and such joint wrongdoer may thereupon intervene as a defendant in that action.

(3) The court may on the application of the plaintiff or any joint wrongdoer sued in any action order that separate trials be held, or make such other order in this regard as it may consider just and expedient.

(4) (a) If a joint wrongdoer is not sued in an action instituted against another joint wrongdoer and no notice is given to him or her in terms of **[paragraph (a) of sub-]section 2(2)(a)**, the plaintiff shall not thereafter sue him or her except with the leave of the court on good cause shown as to why notice was not given as aforesaid.

(b) If no notice is under **[paragraph (a) or (b) of sub-]sections 2(2)(a)**

or (b) given to a joint wrongdoer who is not sued by the plaintiff, no proceedings for a contribution shall be instituted against him or her under [**sub-**]sections 2(6) or 2(7) by any joint wrongdoer except with the leave of the court on good cause shown as to why notice was not given to him or her under [**paragraph (b) of sub-**]section 2(2)(b).

(5) The Court may make such order as to costs as shall to it seem to be just: Provided that in any subsequent action against another joint wrongdoer, any amount recovered from any joint wrongdoer in a former action shall be deemed to have been applied towards the payment of the costs awarded in the former action in priority to the liquidation of the damages awarded in that action.

(6) (a) If judgment is in any action given against any joint wrongdoer for the full amount of the damage suffered by the plaintiff, the said joint wrongdoer may, if the judgment debt has been paid in full, subject to the provisions of [**paragraph (b) of sub-**] section 2(4)(b), recover from any other joint wrongdoer a contribution in respect of his or her liability [**responsibility**] for such damage (including the reasonable costs incurred in defending the action) of such an amount as the court may deem just and equitable having regard to the degree in which that other joint wrongdoer was at fault in relation to the damage suffered by the plaintiff[, **and to the damages awarded**]: Provided further that if the court, in determining the full amount of the damage suffered by the plaintiff referred to in [**sub-**]section 2(1B), deducts from the estimated value of the support of which the plaintiff has been deprived by reason of the death of any person, the value of any benefit which the plaintiff has acquired from the estate of such deceased person no contribution which the said joint wrongdoer may so recover from the estate of the said deceased person shall deprive the plaintiff of the said benefit or any portion thereof.

(b) The period of extinctive prescription in respect of a claim for a contribution shall be twelve months calculated from the date of the judgment in respect of which a contribution is claimed or, where an appeal is made against

such judgment, the date of the final judgment on appeal: Provided that if, in the case of any joint wrongdoer, the period of extinctive prescription in relation to any action which may be instituted against him or her by the plaintiff, is governed by a law which prescribes a period of less than twelve months as the period within which legal proceedings shall be instituted against him or within which notice shall be given that proceedings will be instituted against him or her, the provisions of such law shall apply **mutatis mutandis** in relation to any action for a contribution by a joint wrongdoer, the period or periods concerned being calculated from the date of the judgment as aforesaid instead of from the date of the original cause of action.

(c) 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.

(7) It is proposed that this subsection be repealed **in toto**.

(8) (a) If judgment is in any action given in favour of the plaintiff against two or more joint wrongdoers, the court may-

(i) order that such joint wrongdoer pay the amount of the damages awarded jointly and severally, the one paying the other to be absolved;

(ii) if it is satisfied that all the joint wrongdoers have been joined in the action,

(aa) apportion the damages awarded against the joint wrongdoers in such proportions as the court may deem just and equitable having regard to the degree of contributory negligence of [in which] each joint wrongdoer [**was at fault**] in relation to the damage suffered by the plaintiff, and

(bb) give judgment separately against each joint wrongdoer for the amount so apportioned: Provided that any amount

which the plaintiff is unable to recover from any joint wrongdoer under a judgment so given (including any costs incurred by the plaintiff in an attempt to recover the said amount and not recovered from the said joint wrongdoer) **[whether by reason of the said joint wrongdoer's insolvency or otherwise,]** may be recovered by the plaintiff from the other joint wrongdoer or, if there are two or more other joint wrongdoers, from those other joint wrongdoers in such proportions as damages awarded to the plaintiff were apportioned between them **[the court may deem just and equitable having regard to the degree in which each of those other joint wrongdoers was at fault in relation to the damage suffered by the plaintiff];**

- (iii) where it gives judgment against the joint wrongdoers jointly and severally as aforesaid, at the request of any one of the joint wrongdoers, apportion, for the purposes of paragraph (b), the damages payable by the joint wrongdoers **inter se** amongst the joint wrongdoers, in such proportions as the court may deem just and equitable having regard to the degree of contributory negligence of **[in which]** each joint wrongdoer **[was at fault]** in relation to the damage suffered by the plaintiff[;]
- (iv) **make such order as to cost as it may consider just, including an order that the joint wrongdoers against whom it gives judgment shall pay the plaintiff's cost jointly and severally, the one paying the other to be absolved, and that if one of the unsuccessful joint wrongdoers his pro rata share of such excess].**

(b) Any joint wrongdoer who pays more than the amount apportioned to him or her under **[sub-]**paragraph (a) may recover from any joint wrongdoer who has paid less than or nothing of the amount so apportioned to him or her, a contribution of an amount not exceeding so

much of the amount so apportioned to the last mentioned joint wrongdoer as has been paid by him or her, or so much of the amount paid by the first mentioned joint wrongdoer as exceeds the amount so apportioned to him or her, whichever is less.

(c) The provisions of paragraphs (b) and (c) of **[sub-]section 2(6)** shall apply **mutatis mutandis** to any claim for a contribution under paragraph (b) of this sub-section.

(9) It is proposed that this subsection be repealed **in toto**.

(10) If by reason of the terms of an agreement between a joint wrongdoer and the plaintiff entered into before the damage was caused the former is exempt from liability for the damage suffered by the plaintiff or his or her liability therefore 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 sub-]section 2(6)(c) [or paragraph (b) of sub-section (7)]**, could have been recovered from the said joint wrongdoer in terms of **[sub-]section 2(6) [or (7)]** or could have been apportioned to him or her in terms of **[sub-paragraph (ii) or (iii) of paragraph (a) of sub-]section 2(8)(a)(ii) or (iii)**, as exceeds the amount, if any, for which he or she is liable in terms of the said agreement, shall not be recoverable by the plaintiff from any other joint wrongdoer.

Alternatively, it is proposed that section 2(10) be repealed.

(11) (a) Whenever a joint wrongdoer who is entitled under any provision of this section to recover a contribution from another joint wrongdoer, is unable to recover that contribution or any amount thereof from that other joint wrongdoer, whether by reason of the latter's insolvency or otherwise, he or she may recover from any other wrongdoer such portion of that contribution or that amount thereof as the court may deem just and equitable having regard to the degree of contributory negligence of [in which] that other joint wrongdoer **[was at fault]** in

relation to the damage suffered by the plaintiff and to the full amount of the said contribution or the said amount thereof, as the case may be.

(b) Any cost incurred by a joint wrongdoer in an attempt to recover any contribution from any other joint wrongdoer, and not recovered from that joint wrongdoer, shall for the purpose of paragraph (a), be added to the amount of that contribution.

(12) If any joint wrongdoer agrees to pay to the plaintiff a sum of money in full settlement of the plaintiff's claim, the provisions of [~~sub-~~]section 2(6) shall apply **mutatis mutandis** as if judgment had been given by a competent court against such joint wrongdoer for that sum of money, or, if the court is satisfied that the full amount of the damage actually suffered by the plaintiff is less than that sum of money, for such sum of money as the court determines to be equal to the full amount of the damage actually suffered by the plaintiff, and in the application of the provisions of [**paragraph (b) of**] the said [~~sub-~~]section 2(6)(b), any reference therein to the date of the judgment shall be construed as a reference to the date of the agreement.

(13) Whenever judgment is in any action given against any joint wrongdoer for the full amount of the damage suffered by the plaintiff, or whenever any joint wrongdoer has agreed to pay to the plaintiff a sum of money in full settlement of the plaintiff's claim, and the judgment debt or the said sum of money has been paid in full, every other joint wrongdoer shall thereby also be discharged from any further liability towards the plaintiff.

(14) This subsection was reformulated as section 2(1A)(d) above.

3. Application of provisions of section 2 to liability imposed in terms of Act 93 of 1989 [29 of 1942].- The provisions of section **two** shall apply also in relation to any liability imposed in terms of the Multilateral Motor Vehicle Accidents Fund Act, 1989 (Act No. 93 of 1989) [**Motor Vehicle Insurance Act**,

1942 (Act No. 29 of 1942)], on the State or any person in respect of loss or damage caused by or arising out of the driving of a motor vehicle.

CHAPTER III

General

4. **Savings-**(1) T[he provisions of t]his Act shall not-
- (a) apply in respect of any negligent [**wrongful**] act committed before the commencement of this Act;
 - (b) [**operate to defeat any defence arising under a contract;**
 - (c)] operate to increase the amount of damages beyond any maximum prescribed in any agreement or any law applicable in respect of any claim for damages.
- (2) Nothing in this Act contained shall derogate in any manner from the provisions of any law relating to collisions or accidents at sea[, **or of any rule of court promulgated before the commencement of this Act under section one hundred and eight of the South African Act, 1909, or under section three of the Administration of Justice Proclamation, 1919 (Proclamation No. 21 of 1919), of the territory of South-West Africa**].
5. **This Act binds the State.-** This Act binds the State.
6. [**Application of Act to South-West Africa.- This Act and any amendment thereof shall apply also in the territory of South-West Africa, including the Eastern Caprivi Zipfel.**
- 7.] **Short title.-** This Act shall be called the Apportionment of Liability [**Damages**] Act, 1956.

ANNEXURE A**LIST OF CONTRIBUTORS**

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