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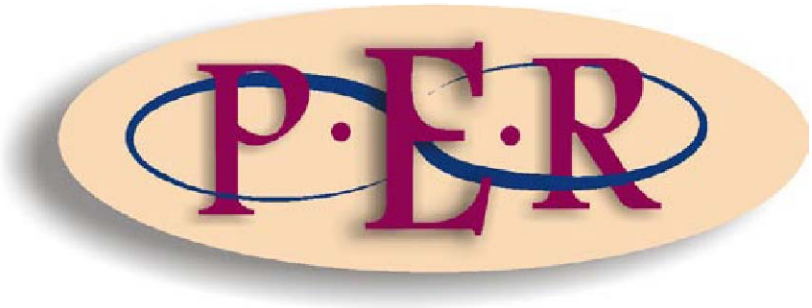

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"CONTRIBUTORY INTENT" AS A DEFENCE LIMITING DELICTUAL LIABILITY

R AHMED*

1 Introduction

Fault refers to the defendant's conduct whereas "contributory fault" (whether in the form of intention or negligence) refers to the conduct of the plaintiff.[1] Contributory intent (a form of contributory fault)[2] can take different forms,[3] but as long as it can be established that the plaintiff acted with intent, contributory intent is present and may result in the limitation of the defendant's liability in terms of the *Apportionment of Damages Act*[4] (hereinafter referred to as the "Act").[5] The Act provides that the defendant's relative fault is taken into account resulting in the plaintiff receiving a reduction in the award of his or her damage. In practice, different scenarios are possible whereby either the plaintiff or the defendant is at fault in the form of intention or negligence.[6] The Act is applicable only to damage caused partly by the fault of the plaintiff and partly by the fault of the defendant. Therefore the Act is not applicable where the defendant is not at fault.[7] The Act is also applicable to cases based on vicarious liability.[8] Even though fault relates to negligence and intention,

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This contribution is based on part of an LLM dissertation completed by the author in 2011 at the University of South Africa under the guidance and supervision of Prof J Neethling. This contribution was written on the advice of one of the examiners of the dissertation, who hoped that it would bring a renewed interest in the forgotten *Apportionment of Loss Bill* 2003.

1 Neethling and Potgieter *Delict* 161; Van der Walt and Midgley *Principles of Delict* 147; Ahmed 2014 *SALJ* 88.

2 Contributory intent is not the same as but is analogous to intent. It is legally impossible for a person to have intent in respect of him- or herself, thus the term "contributory intent" is merely used to establish the fault of the plaintiff. See Ahmed 2012 *Obiter* 419; Ahmed 2014 *SALJ* 89.

3 Direct, indirect and *dolus eventualis* – see in general Loubser *et al Delict* 109-112; Neethling and Potgieter *Delict* 127; Van der Walt and Midgley *Principles of Delict* 157-158.

4 *Apportionment of Damages Act* 34 of 1956.

5 Neethling and Potgieter *Delict* 161.

6 These possible scenarios will be discussed further in para 2.1.3 below.

7 Neethling and Potgieter *Delict* 163-164.

8 Van der Walt and Midgley *Principles of Delict* 240.

our courts[9] have applied the Act mainly to contributory negligence. Nevertheless, the law has evolved and the Act has been applied to practical situations that have arisen in modern times. Our courts have had to deal with contributory intent and intent on the part of the defendant within the context of apportionment of liability and have been trying to find an equitable result in such circumstances where the legislature does not specifically provide for conduct performed intentionally.[10] A Bill[11] has been prepared to replace the current Act, but has not yet been promulgated. In terms of the Bill the defence of "contributory intent" as a defence limiting liability will be applicable.

In this contribution it is illustrated that there is a pressing need for the defence of "contributory intent" limiting liability to be recognised and developed in our law. To begin with, a discussion of the function of "contributory intent" as a defence limiting delictual liability within the ambit of the Act is necessary. A brief discussion of proposed future legislation is provided, as well as an exposition of relevant foreign law. Recommendations are also provided on how to develop and incorporate this defence (which limits delictual liability) in our law.

2 The application of the defence of "contributory intent" within the ambit of the Act

Historically, contributory negligence on the part of the plaintiff was applied in our law as a complete defence, and followed firstly the harsh Roman and Roman-Dutch "all or nothing rule"[12] and thereafter the English "last opportunity rule" (even though there was clear Roman-Dutch law authority for an approach based on relative

9 As well as those of other countries with similar legislation apportioning liability as discussed in para 4 below.

10 See *Greater Johannesburg Transitional Metropolitan Council v ABSA Bank Ltd t/a Volkskas Bank* 1997 2 SA 591 (W).

11 *Apportionment of Loss Bill* 2003.

12 The plaintiff was precluded from claiming any damages from the defendant, even though the defendant was also to blame in respect of causing the damage. See Loubser *et al Delict* 436-437; Neethling and Potgieter *Delict* 161; Burchell *Delict* 107; Van der Walt and Midgley *Principles of Delict* 239.

degrees of fault of the plaintiff and the defendant).[13] In terms of the "last opportunity" rule, whichever party had the last opportunity (a test for causation)[14] of avoiding the accident by acting with reasonable care, that party would be solely responsible for the damage or loss caused.[15] Thus the negligence of one of the parties was considered as the "decisive cause" of the accident.[16] As pointed out by Boberg,[17] the last opportunity rule had several weaknesses.[18] The English legislature later replaced this rule with a more equitable principle of proportional division of damages based on each party's degree of fault in terms of the "Contributory Negligence Act".[19] Since the "last opportunity rule" proved untenable in South Africa also, our legislature followed suit and enacted the *Apportionment of Damages Act*[20] (the "Act"), which changed the common law considerably.[21] The Act is somewhat similar to the English "Contributory Negligence Act" and provides for a more fair and equitable approach of apportionment of damages in accordance with the respective degrees of fault of the parties in relation to the damage.[22]

Contributory fault in South Africa is still regulated by the Act.[23] The purpose of the Act is to ensure that a plaintiff's claim is not extinguished by the fact that he or she was partly to blame for the loss.[24] "Apportioning of damages" in the Act does not

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13 See Burchell *Delict* 107; SALRC *Project 96* 5 para 1.15. As will be shown, this has inevitably led to the reluctance of our courts in acknowledging the defence of contributory intent in the present context. See para 4 below.

14 Boberg *Delict* 657.

15 Van der Walt and Midgley *Principles of Delict* 239; Neethling and Potgieter *Delict* 161-162.

16 If the defendant had the last opportunity, he or she had to compensate the negligent plaintiff to the full extent in respect of the plaintiff's loss, and if the plaintiff had the last opportunity, such plaintiff failed to recover any damages. See *Pierce v Hau Mon* 1944 AD 175; Van der Walt and Midgley *Principles of Delict* 239; Neethling and Potgieter *Delict* 161.

17 Boberg *Delict* 653-654.

18 It was a test for causation not based upon comparative culpability and was almost impossible to apply to modern-day motor collisions. It was then realised that the party who had the last opportunity was generally the more careful party of the two. The rule thereafter acquired an "objective gloss" as the question became "ought the plaintiff to have had a later opportunity of avoiding the accident than the defendant ought to have had?" However, if both parties behaved as they ought to have done, then, as Boberg (*Delict* 653-654) concluded, there would have been no accident!

19 *Contributory Negligence Act* 1945. See Kotze 1956 *THRHR* 186.

20 *Apportionment of Damages Act* 34 of 1956.

21 Neethling and Potgieter *Delict* 161.

22 SALRC *Project 96* 2.

23 *Apportionment of Damages Act* 34 of 1956.

24 See *Minister van Wet en Orde v Ntsane* 1993 1 SA 560 (A) 570; Van der Walt and Midgley *Principles of Delict* 240 n 12.

entail an actual division of damages between the plaintiff and the defendant, but is concerned with the process of reduction of damages received by the plaintiff as a result of the plaintiff's own contributory negligence.[25] Section 1 of the Act deals with the reduction of the award of damages due to the plaintiff's contributory fault, and section 2 deals with the sharing of liability between joint wrongdoers in respect of loss suffered by the plaintiff.[26] These sections are of relevance with regard to the application of the defence of "contributory intent" and therefore require a more detailed discussion.

2.1 Section 1 of the Act

The Act does not specifically give a definition of fault, but section 1(3) provides that "[f]or 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". The provisions contained in this subsection are "obscure"[27] and the Act erroneously construes fault as an act or omission. It is trite law that fault relates to the legal blameworthiness of a person for his wrongful conduct. Therefore it is incorrect to consider fault as a type of conduct and to consider conduct alone. Other factors must be considered in determining fault.[28]

The Act refers to contributory negligence in the long title and the heading of section 1 of the Act, whereas the text of section 1 of the Act refers to the "fault" of the plaintiff and the defendant[29] (fault in general relates to intention and negligence).[30] Section 1(1)*(a)* provides:

> 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

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25 Neethling and Potgieter *Delict* 162-163; Van der Walt and Midgley *Principles of Delict* 240.

26 Loubser *et al Delict* 436.

27 See Kotze 1956 *THRHR* 191, who also submits that the stipulation is strange and makes no sense.

28 Neethling and Potgieter *Delict* 168; Scott 1997 *De Jure* 392.

29 See also s 2(14) of the Act; Van der Walt and Midgley *Principles of Delict* 240 n 9; Neethling and Potgieter *Delict* 162; Loubser *et al Delict* 436.

30 Neethling and Potgieter *Delict* 162; Burchell *Delict* 110; Van der Walt and Midgley *Principles of Delict* 240.

> just and equitable having regard to the degree in which the claimant was at fault in relation to the damage.

Section 1(1)*(b)* provides that "[d]amage 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". It is evident that these sections were enacted with the clear intention of abolishing the "last opportunity rule" and are expressly confined to damage caused partly by the plaintiff's "own fault". This caused confusion and uncertainty as to whether it applied only to negligence or to both the forms of fault (negligence and intention).[31]

2.1.1 Arguments supporting the view that fault in terms of section 1 of the Act excludes intent

In light of statutory interpretation it has been argued that the explicit reference to contributory negligence in the long title of the Act and the heading in section 1, as well as the use of a similar concept of fault with reference to both plaintiff and defendant in section 1, indicate that "fault" bears a restricted meaning of either contributory negligence (on the part of the plaintiff) or negligence (on the part of the defendant).[32] Chapter 1 of the Act is headed "CONTRIBUTORY NEGLIGENCE". Section 1 is headed "Apportionment of liability in case of contributory negligence".[33] Also with regard to the historical background leading to the enactment of the Act it seems that the legislature intended to make provision for the defence of contributory negligence[34] and not "contributory intent".[35]

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31 Pretorius *Medewerkende Opset* 220 *et seq* refers to views that varied considerably.

32 Van der Walt and Midgley *Principles of Delict* 244 n 9 refer to *South British Insurance Co Ltd v Smit* 1962 3 SA 826 (A) 835-836.

33 See *Greater Johannesburg Transitional Metropolitan Council v ABSA Bank Ltd t/a Volkskas Bank* 1996 4 All SA 278 (W) 290-291.

34 *Mabaso v Felix* 1981 3 SA 865 (A); *South British Insurance Co Ltd v Smit* 1962 3 SA 826 (A) 835; *King v Pearl Insurance Co Ltd* 1970 1 SA 462 (W) 467; Kelly 2001 *SA Merc LJ* 514 n 223.

35 Neethling and Potgieter *Delict* 163; Van der Walt and Midgley *Principles of Delict* 211; Boberg *Delict* 656; Kelly 2001 *SA Merc LJ* 514-517.

Kelly[36] refers to a number of cases which support this view. In *South British Insurance Co Ltd v Smit*[37] the court held that "fault" means negligence and "degree of fault" means degree of negligence.[38] The Appellate Division stated *obiter* in *Mabaso v Felix*[39] that it was extremely doubtful whether section 1(1)(a) was applicable where the fault of a defendant was in the form of an intentional wrongdoing.[40] The court also considered the definition of fault in section 1(3) and expressed its doubt whether fault included intentional wrongdoing. In *Netherlands Insurance Co of SA Ltd* v *Van der Vyver*[41] the Appellate Division did not find it necessary to decide upon the issue. But in *Thoroughbred Breeders' Association of South Africa v Price Waterhouse*[42] the Supreme Court of Appeal stated that "fault" must obviously be confined to negligence. Also in *King v Pearl Insurance Co Ltd*[43] the court held that fault as used in section 1 refers exclusively to contributory negligence.[44]

2.1.2 Arguments supporting the view that fault in terms of section 1 of the Act includes intent

In contradistinction to the views expressed above, it has been argued that a wider interpretation of fault should be made so as to include intent in terms of section 1 of the Act. According to this approach it is first of all trite law that "fault" generally includes both intention and negligence. Secondly, "fault" does not have a restricted meaning in the context of section 2 of the Act.[45] Thirdly, in *Greater Johannesburg Transitional Metropolitan Council v ABSA Bank Ltd*[46] Goldstone J[47] rejected the

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36 See Kelly 2001 *SA Merc LJ* 514-517.

37 *South British Insurance Co Ltd v Smit* 1962 3 SA 826 (A) 835.

38 SALRC *Project 96* 13; cf Du Bois *et al Wille's Principles of South African Law* 1148.

39 *Mabaso v Felix* 1981 3 SA 865 (A) 877.

40 Du Bois *et al Wille's Principles of South African Law* 1148.

41 *Netherlands Insurance Co of SA Ltd v Van der Vyver* 1968 1 SA 412 (A) 422.

42 *Thoroughbred Breeders' Association v Price Waterhouse* 2001 4 SA 551 (SCA) 600.

43 *King v Pearl Insurance Co Ltd* 1970 1 SA 462 (W); see also Du Bois *et al Wille's Principles of South African Law* 1148.

44 SALRC *Project 96* 13. See also the views of Potgieter 1998 *THRHR* 731-735; Van der Walt and Midgley *Delict* 211; Boberg *Delict* 657, 743.

45 Van der Walt and Midgley *Principles of Delict* 244-245 n 10; *Randbond Investments (Pty) Ltd v FPS (Northern Region) (Pty) Ltd* 1992 2 SA 608 (W).

46 *Greater Johannesburg Transitional Metropolitan Council v ABSA Bank Ltd t/a Volkskas Bank* 1996 4 All SA 278 (W) 290.

47 *Greater Johannesburg Transitional Metropolitan Council v ABSA Bank Ltd t/a Volkskas Bank* 1996 4 All SA 278 (W) 292; 1997 2 SA 591 (W) 607.

argument that the heading to section 1 indicates that the legislature intended only a restricted meaning for the term "fault". He quoted the dictum of Innes CJ in *Turffontein Estates Ltd v Mining Commissioner, Johannesburg*[48] in which the court laid down the rule that the heading of a section could be invoked as an aid to construction only when the intention of the lawgiver as expressed in any clause is unclear. Goldstein J[49] further submitted that the wording of section 1(1)(a) is quite clear and unambiguous, thus preventing recourse to the heading of section 1.[50]

Fourthly, Kelly[51] refers to the suggestion that the problems relating to intention with regard to section 1(1)*(a)* should be treated as they were in *S v Ngubane*,[52] where it was held that if a person acts intentionally, he simultaneously also acts negligently. This view should be thoroughly scrutinised. Van der Merwe and Olivier's[53] view is that intention and negligence are mutually exclusive concepts in the sense that one cannot be present when the other exists; but there are a number of judgments which support the view that if intent is present, negligence is simultaneously present.[54] In *S v Ngubane*[55] the Appellate Division held that for the purposes of criminal law (relevant to the law of delict) intent and negligence may be present simultaneously. Mahomed J in *Randbond Investments (Pty) Ltd v FPS (Northern Region) (Pty) Ltd*[56] also expressed the view that intention and negligence are not

48 *Turffontein Estates Ltd v Mining Commissioner, Johannesburg* 1917 AD 419 431.

49 *Greater Johannesburg Transitional Metropolitan Council v ABSA Bank Ltd t/a Volkskas Bank* 1997 2 SA 591 (W) 607.

50 See SALRC *Project 96* 20.

51 Kelly 2001 *SA Merc LJ* 515; see also Neethling and Potgieter *Delict* 133-134; cf Van der Walt and Midgley *Principles of Delict* 245; Ahmed 2010 *THRHR* 703.

52 *S v Ngubane* 1985 3 SA 677 (A).

53 Referred to by Neethling and Potgieter *Delict* 133. This view is according to Neethling and Potgieter *Delict* 133 n 66 supported by the following cases: *S v Sigwahla* 1967 4 SA 566 (A); *S v Naidoo* 1974 4 SA 574 (N); *S v Alexander* 1982 4 SA 701 (T); *AA Mutual Insurance Association Ltd v Manjani* 1982 1 SA 790 (A) 796; *Kgaleng v Minister of Safety and Security* 2001 4 SA 854 (W) 874.

54 Neethling and Potgieter *Delict* 133 n 67 refer to *S v September* 1972 3 SA 389 (C); *S v Smith* 1981 4 SA 140 (C); *S v Zoko* 1983 1 SA 871 (N); cf Du Bois *et al Wille's Principles of South African Law* 1149; Ahmed 2010 *THRHR* 703.

55 *S v Ngubane* 1985 3 SA 677 (A).

56 *Randbond Investments (Pty) Ltd v FPS (Northern Region) (Pty) Ltd* 1992 2 SA 608 (W) 621.

mutually exclusive concepts. It is logically possible for both to be present simultaneously.[57]

The view that if intent is present, negligence is simultaneously present is accepted by Burchell,[58] Boberg[59] and Neethling and Potgieter.[60] It may be argued that the intentional causing of harm to another person is contrary to the standard of care which the reasonable person would have exercised and that negligence is thus simultaneously present.[61] If Neethling's suggestion is accepted, that intent simultaneously constitutes negligence and that an intentional act (which may differ depending on the form of intent involved) deviates 100 per cent from the norm of the reasonable person, apportionment can be applied to cases involving "contributory intent" within the ambit of the Act.[62] Similarly, apportionment can be applied between joint wrongdoers using the same yardstick.[63]

Kotze[64] is of the view that fault should be interpreted in a wider sense and that the Act should be applied in instances where both parties acted with intent. He[65] further states that the premise of the entire Act rests on considerations of fairness and justice. This also appears to be the attitude in *General Accident Versekeringsmaatskappy SA Bpk v Uijs,*[66] where Van Heerden JA was in favour of

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57 The interrelationship between *dolus* and *culpa* was aptly described by Thirion J in *S v Zoko* 1983 1 SA 871 (N) 896: "The division between *culpa* and *dolus* in the *lex Aquilia* is not one into mutually exclusive concepts. If one accepts with Mucius (D9.2.31) that *'culpam autem esse quod cum diligente provideri poterit, non esset provisum*' then *culpa* is the blame attaching to the wrongdoer for not having taken the precautions which he could reasonably have taken in the circumstances to prevent harm from resulting from his conduct. That blameworthiness remains, despite the fact that he actually foresaw the possibility of the resultant harm (which he ought reasonably to have foreseen and guarded against) and intentionally brought it about. All that happens in the case where *dolus* is present is that an additional element, namely that of *dolus*, is added. I think therefore that it is correct to say that *culpa* underlies the whole field of liability under the *lex Aquilia*, and that in this part of the law *dolus* is merely a species or a particular form of the blameworthiness which constitutes *culpa*."; SALRC *Project 96* 27.

58 Burchell *Delict* 91, 110-111.

59 Boberg *Delict* 273-274.

60 Neethling and Potgieter *Delict* 133-134; cf Du Bois *et al Wille's Principles of South African Law* 1148-1149.

61 Neethling and Potgieter *Delict* 133.

62 Neethling and Potgieter *Delict* 163 fn 233.

63 Neethling and Potgieter *Delict* 266 fn 6; Neethling 1985 *THRHR* 250; Neethling and Potgieter 1992 *THRHR* 660-661; cf Scott 1997 *De Jure* 393; Ahmed 2010 *THRHR* 703.

64 Kotze 1956 *THRHR* 149.

65 Kotze 1956 *THRHR* 187.

66 *General Accident Versekeringsmaatskappy SA Bpk v Uijs* 1993 4 SA 228 (A).

applying not only fault but also other factors in apportioning liability between the parties. The approach of Van Heerden JA may be justified in light of the principles of fairness and equality. In order to really achieve fairness and equality, a holistic approach must be applied and other relevant factors should be considered besides the extent of the plaintiff's fault.[67]

2.1.3 Questions raised with regard to section 1 of the Act

2.1.3.1 Could a defendant who has intentionally caused damage to the plaintiff raise a plea of contributory negligence?[68]

In terms of common law,[69] *Wapnick v Durban City Garage*[70] and *Minister van Wet en Orde v Ntsane*[71] such a plea could not be sustained. It seems that the Act did not change this principle and that the Act is therefore not applicable to this situation.[72] Booysen J[73] in *Wapnick v Durban City Garage* held that a "[d]efendant who has wrongfully and intentionally caused the [p]laintiff to suffer damages is not entitled to plead contributory negligence". In *Minister van Wet en Orde v Ntsane*, the Appellate Division found that the Defendant's employee intentionally harmed the plaintiff and that the Defendant could not rely on the defence of contributory negligence. The Appellate Division left open the question as to the meaning of fault in section 1(1)(a) of the Act but assumed that "fault" includes both negligence and intention.[74] Be that as it may, as said, there is clear authority in our common law[75] (in addition to

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67 See the criticism of Scott 1995 *TSAR* 132, who submits that the introduction of reasonableness and fairness as a criterion for apportioning damages in terms of s 1 of the Act may result in there being no fixed guidelines in particular circumstances (Neethling and Potgieter *Delict* 166 n 251).

68 See *Minister van Wet en Orde v Ntsane* 1993 1 SA 560 (A); Burchell *Delict* 110; Neethling and Potgieter *Delict* 162; Boberg *Delict* 656.

69 *Pierce v Hau Mon* 1944 AD 175 198; *Minister van Wet en Orde v Ntsane* 1993 1 SA 560 (A) 570; Neethling and Potgieter *Delict* 162 n 228-229; cf Kotze 1956 *THRHR* 149.

70 *Wapnick v Durban City Garage* 1984 2 SA 414 (D).

71 *Minister van Wet en Orde v Ntsane* 1993 1 SA 560 (A).

72 See *Wapnick v Durban City Garage* 1984 2 SA 414 (D) 418; McKerron *Delict* 297; Neethling and Potgieter *Delict* 163; Scott *Huldingsbundel Paul van Warmelo* 176; Du Bois *et al Willes Principles of South African Law* 1148.

73 *Wapnick v Durban City Garage* 1984 2 SA 414 (D) 418.

74 *Minister van Wet en Orde v Ntsane* 1993 1 SA 560 (A) 569. See Kelly 2001 *SA Merc LJ* 516.

75 Van der Walt and Midgley *Principles of Delict* 241 n 16 refer to D 9 2 9 4; *Mabaso v Felix* 1981 3 SA 865 (A) 877; *Wapnick v Durban City Garage* 1984 2 SA 414 (D) 418; *Minister van Wet en Orde v Ntsane* 1993 1 SA 560 (A) 570; Neethling and Potgieter *Delict* 162 fn 228 also refer to *Pierce v Hau Mon* 1944 AD 175 198; cf *Greater Johannesburg Transitional Metropolitan Council v*

Minister van Wet en Orde v Ntsane) which confirms that where the defendant has been guilty of *dolus*, the defence of contributory negligence cannot be raised against the plaintiff. Botha[76] suggests that the courts should determine to what extent the intentional conduct of the defendant made "probable" the harmful consequences, and likewise to what extent the plaintiff's conduct made "probable" the harmful consequences. According to him the intentional conduct of the defendant will in most cases make the harmful consequences so probable that it is certain that he or she would be liable. It is therefore submitted that *Minister van Wet en Orde v Ntsane* was correctly decided, namely that where the defendant's fault is in the form of intent and the plaintiff's fault is in the form of negligence, the defendant cannot rely on the plaintiff's contributory negligence to reduce his or her liability. This should remain the *de lege lata* approach.

2.1.3.2 Could a plaintiff who has intentionally contributed to his or her own loss succeed with a claim against a defendant who acted negligently?[77]

In such instances the plaintiff will have to forfeit his or her claim.[78] Authority for this conclusion may be found in *Columbus Joint Venture v ABSA Bank Ltd*[79] and *Energy Measurements (Pty) Ltd v First National Bank of South Africa Ltd*.[80] In *Columbus Joint Venture v ABSA Bank Ltd*, Malan J[81] did not find it necessary to deal with the plaintiff's contributory fault, but quoted Booysen J's[82] submission in *Wapnick v Durban City Garage*[83] that "a plaintiff who has intentionally contributed to his own damage cannot claim his own damage or part of it from a defendant on the ground

ABSA Bank Ltd t/a Volkskas Bank 1997 2 SA 591 (W) 606; *Netherlands Insurance Co of SA Ltd v Van der Vyver* 1968 1 SA 412 (A) 421-422; Dendy 1998 *THRHR* 516.

76 Botha *Verdeling van Skadedragingslas* 315.

77 See *Wapnick v Durban City Garage* 1984 2 SA 414 (D); *Columbus Joint Venture v ABSA Bank Ltd* 2000 2 SA 491 (W); Boberg *Delict* 656; Neethling and Potgieter *Delict* 162-163; Ahmed 2010 *THRHR* 701.

78 See *Wapnick v Durban City Garage* 1984 2 SA 414 (D) 418; *Columbus Joint Venture v ABSA Bank Ltd* 2000 2 SA 491 (W) 512-513; Neethling and Potgieter *Delict* 163 n 230; cf Du Bois *et al Wille's Principles of South African Law* 1148; Van der Walt and Midgley *Principles of Delict* 244; Boberg *Delict* 656; Malan and Pretorius 1997 *THRHR* 156; Ahmed 2010 *THRHR* 701-702.

79 *Columbus Joint Venture v ABSA Bank Ltd* 2000 2 SA 491 (W).

80 *Energy Measurements (Pty) Ltd v First National Bank of South Africa* 2000 2 All SA 396 (W)

81 *Columbus Joint Venture v ABSA Bank Ltd* 2000 2 SA 491 (W) 513.

82 *Wapnick v Durban City Garage* 1984 (2) SA 414 (D) 418.

83 *Wapnick v Durban City Garage* 1984 (2) SA 414 (D).

of the latter's conduct".[84] The trial court therefore confirmed that in cases where a plaintiff intentionally contributes to his or her own loss, such a plaintiff cannot have a claim against a negligent defendant. In *Energy Measurements (Pty) Ltd v First National Bank of South Africa Ltd*,[85] the plaintiff's employee acted with intent but the court held that the employee was not acting within the course and scope of his employment and that therefore the plaintiff was not "vicariously liable" for the acts of its employee. In this way the court, as in the case of *Columbus Joint Venture v ABSA Bank Ltd,* avoided the application of section 1 of the Act by ascribing a narrow interpretation to "scope of employment".[86]

2.1.3.3 Could a plaintiff who has intentionally contributed to his or her own loss succeed with a claim against a defendant who intentionally caused the plaintiff's loss?[87]

Here the law remained unsettled for a long time,[88] since the Act was applied only to contributory negligence and the courts were never directly confronted with instances where both parties acted intentionally. However, when such a case came before the court,[89] it had no other option but to serve justice, even though the Act did not provide in clear terms for fault in the form of intent. This occurred in *Greater*

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84 *Columbus Joint Venture v ABSA Bank Ltd* 2000 2 SA 491 (W) 513.

85 *Energy Measurements (Pty) Ltd v First National Bank of South Africa* 2000 2 All SA 396 (W).

86 SALRC *Project 96* 20-21.

87 See *Mabaso v Felix* 1981 3 SA 865 (A); *Greater Johannesburg Transitional Metropolitan Council v ABSA Bank Ltd t/a Volkskas Bank* 1996 4 All SA 278 (W); Neethling and Potgieter *Delict* 162-163; Ahmed 2010 *THRHR* 702.

88 It was debatable whether or not a defendant could raise a plea of "contributory intent". See *Minister van Wet en Orde v Ntsane* 1993 1 SA 560 (A) 569; *Wapnick v Durban City Garage* 1984 2 SA 414 (D) 418; *Netherlands Insurance Co of SA Ltd v Van der Vyver* 1968 1 SA 412 (A) 422; Van der Walt and Midgley *Principles of Delict* 244 n 3; Kelly 2001 *SA Merc LJ* 514; Neethling and Potgieter *Delict* 163; Du Bois *et al Wille's Principles of South African Law* 1148; Ahmed 2010 *THRHR* 702.

89 See *Mabaso v Felix* 1981 3 SA 865 (A), where according to the facts it seems that both the plaintiff and defendant acted with intent. The court held (876) held that the defendant (on whom the onus rested) failed in his defence or that there was fault on the part of the plaintiff (877). Goldstein J correctly remarked in *Greater Johannesburg Transitional Metropolitan Council v ABSA Bank Ltd t/a Volkskas Bank* 1997 2 SA 594 (W) 608 that this judgment did not contain an analysis of the evidence and that the *obiter* dictum was intended to apply where the conduct of the plaintiff amounted to negligence. The plaintiff's intentional conduct was not taken into account and the Appellate Division merely stated the rule of common law that an intention to injure negates all defences. See also Scott 1997 *De Jure* 392.

Johannesburg Transitional Metropolitan Council v ABSA Bank Ltd,[90] where it was held that a defence of contributory intent could be raised in instances where the plaintiff and the defendant acted with intention, and that "fault" includes intent. Goldstein J[91] submitted:

> In my view the word 'fault' and its Afrikaans counterpart 'skuld' clearly includes dolus (the Appellate Division left this issue open in *Minister van Wet en Orde en 'n Ander v Ntsane* 1993 (1) SA 560 (A) at 569H). It should be noted that I have to do with a situation of *dolus* on both sides since both the plaintiff's servant, Mr [T], and the defendant's servant [W] intentionally caused the harm which befell the plaintiff. Thus I do not have to consider the case where the plaintiff's fault may be negligence and that of the defendant *dolus*, or where the plaintiff has *dolus* and the defendant is merely negligent ... Where there is *dolus* on both sides there appears to me to be no reason not to give effect to the ordinary meaning of the words 'fault' and 'skuld'. In reaching this conclusion ... I am not unmindful of the references to negligence in the long title of the Act, the headings of Chapter 1 and section 1.

Goldstein J[92] continued that "in the present matter my interpretation leads to no absurdity, inconsistency, hardship or anomaly. The contrary is true. Applying section 1(1)(a) in the present matter produces a result which is fair and which the language of the statutes indicates the legislature must have intended". He[93] referred to the dictum of Mahomed J,[94] who found that "'fault' in section 2 of the Act includes *dolus* ... the legislature would probably have intended the word to mean the same in both section 1 and 2". The plaintiff's claim was reduced in terms of section 1(1)(a) of the Act by 50 per cent.

Scott[95] submits that this judgment offers a sound example of how well-established rules should be applied. He questions how Goldstein J came to a 50/50 per cent apportionment, but commends it as equitable, for both parties are equally to blame. Scott submits that if one were to argue that to act intentionally represents a 100 per

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90 *Greater Johannesburg Transitional Metropolitan Council v ABSA Bank Ltd t/a Volkskas Bank* 1996 4 All SA 278 (W).

91 *Greater Johannesburg Transitional Metropolitan Council v ABSA Bank Ltd t/a Volkskas Bank* 1996 4 All SA 278 (W) 291.

92 *Greater Johannesburg Transitional Metropolitan Council v ABSA Bank Ltd t/a Volkskas Bank* 1996 4 All SA 278 (W) 292.

93 *Greater Johannesburg Transitional Metropolitan Council v ABSA Bank Ltd t/a Volkskas Bank* 1996 4 All SA 278 (W) 294.

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

95 Scott 1997 *De Jure* 393.

cent deviation from the norm of the reasonable man,[96] then in instances where both parties acted intentionally with regard to the plaintiff's loss one can mathematically conclude "100% : 100% = 100:100 = 1:1(2). An apportionment (reduction) of ½ (50%) is thus warranted". Scott predicts that it is merely a matter of time before the courts will be faced with the issue of weighing up different forms of *dolus.*[97] Malan and Pretorius[98] suggest that the conclusion reached by Goldstein J is correct and in accordance with a view that is jurisprudentially justifiable.[99] The express recognition of the existence of the defence of contributory intent is welcomed by them.[100]

This case is the first case that officially recognises the applicability of the defence of contributory intent[101] within the ambit of section 1 of the Act and can be the authority and basis for further future development of the defence by our courts.

2.2 Section 2 of the Act

Section 2 of the Act applies to joint wrongdoers, currently defined as persons who are jointly or severally liable in delict for the same damage to the plaintiff.[102] What is relevant in regard to this section and the defence of "contributory intent" is the practical manner in which the courts apportion damages between intentional wrongdoers or intentional and negligent wrongdoers, as this may be of assistance in apportioning damages in instances where the plaintiff acted intentionally and the defendant negligently, or where both the defendant and the plaintiff acted intentionally.[103]

For the purposes of this contribution it is important to note that section 2 provides for the recognition and regulation of a right of contribution between joint

96 See Neethling and Potgieter *Delict* 163 n 233.
97 Scott 1997 *De Jure* 393-394.
98 Malan and Pretorius 1997 *THRHR* 159.
99 They refer to Neethling, Potgieter and Visser *Delict* 153 fn 170; Pretorius *Medewerkende Opset* 223 n 1.
100 See also Neethling and Potgieter *Delict* 173. Loubser *et al Delict* 439 submits that, presuming both parties acted intentionally, the situation would be no different to the situation where both parties are negligent.
101 SALRC *Project 96* 20.
102 Neethling and Potgieter *Delict* 265.
103 See Ahmed 2010 *THRHR* 702.

wrongdoers who are jointly and severally liable in delict for the same damage.[104] If the court is satisfied that all the joint wrongdoers are before it, it may apportion the damages among them on the basis of their relative degrees of fault, and may give judgment against every wrongdoer for his part of the damages.[105]

Unlike section 1, there is nothing in section 2 which indicates that liability is limited to negligent wrongdoing only.[106] The nature of the joint wrongdoers' fault does not affect liability. So it is irrelevant that one wrongdoer's fault is in the form of intention while the other's is in the form of negligence.[107] Either of the wrongdoers is liable for the full extent of the loss.[108]

The courts (with regard to the application of section 2 of the Act relating to wrongdoers) were faced with instances analogous to those faced with section 1 of the Act, where one wrongdoer acted negligently and the other intentionally,[109] or where both acted intentionally. In *Holscher v ABSA Bank*[110] and *ABSA Bank Ltd v Bond Equipment (Pretoria) (Pty) Ltd*[111] section 2 of the *Act* was not applied; but in *Randbond Investments (Pty) Ltd v FPS (Northern Region) (Pty) Ltd*[112] the court recognised that apportionment of liability could be applied between joint wrongdoers who acted intentionally, and in *Lloyd-Grey Lithographers (Pty) Ltd v Nedcor Bank t/a Nedbank*[113] that apportionment of liability could be applied between joint wrongdoers where one wrongdoer acted intentionally and the other negligently. In *Lloyd-Grey Lithographers (Pty) Ltd v Nedcor Bank t/a Nedbank*, Boruchowitz J[114] held that there is "no reason in principle as to why there cannot be an apportionment of

104 Neethling and Potgieter *Delict* 265; Van der Walt and Midgley *Principles of Delict* 246.
105 Neethling and Potgieter *Delict* 266.
106 See *Randbond Investments (Pty) Ltd v FPS (Northern Region) (Pty) Ltd* 1992 2 SA 608 (W) 619-621; Van der Walt and Midgley *Principles of Delict* 246-247.
107 Kotze1956 *THRHR* 192 also submits that with regard to s 2 of the Act, it should be assumed that joint wrongdoers (for purposes of the Act) are persons who are jointly and severally liable whether their wrongdoing is based on negligence or intent.
108 *ABSA Bank Ltd v Bond Equipment (Pty) Ltd* 2001 1 SA 372 (SCA) para 11; *Nedcor Bank Ltd t/a Nedbank v Lloyd-Gray Lithographers (Pty) Ltd* 2000 4 SA 915 (SCA) para 11; Van der Walt and Midgley *Principles of Delict* 248 n 35.
109 See *Lloyd-Gray Lithographers (Pty) Ltd v Nedcor Bank t/a Nedbank* 1998 2 SA 667 (W).
110 *Holscher v ABSA Bank* 1994 2 SA 667 (T).
111 *ABSA Bank Ltd v Bond Equipment (Pretoria) (Pty) Ltd* 2001 1 SA 372 (SCA).
112 *Randbond Investments (Pty) Ltd v FPS (Northern Region) (Pty) Ltd* 1992 2 SA 608 (W).
113 *Lloyd-Gray Lithographers (Pty) Ltd v Nedcor Bank t/a Nedbank* 1998 2 SA 667 (W).
114 *Lloyd-Gray Lithographers (Pty) Ltd v Nedcor Bank t/a Nedbank* 1998 2 SA 667 (W) 672-673.

liability where one joint wrongdoer has acted intentionally and the other negligently. Intention and negligence are not mutually exclusive concepts. It is logically possible for both to be present simultaneously". He[115] referred to *S v Zoko*[116] where it was held that *dolus* is merely a species or a particular form of blameworthiness which constitutes *culpa*. Boruchowitz J[117] concluded:

> [A]pportioning liability between intentional and negligent wrongdoers is not an impossible task. It is a question of assessing the relative degrees of blameworthiness. In so doing the Court is not required to act with precision or exactitude but to assess the matter in accordance with what it considers to be just and equitable.

Randbond Investments (Pty) Ltd v FPS (Northern Region) (Pty) Ltd,[118] is the *locus classicus* for the view that the Act also applies to intentional, as opposed to negligent, joint wrongdoers. In light of the facts of the case, Mahomed J made some important submissions[119] with regard to section 2 of the Act. He[120] held that "it is clear that a delict may in our law be perpetrated by an intentional act of wrongdoing", and further stated that section "2(1) of the Act refers to delicts in general terms, and nowhere in the Act is there a qualification which limits the contribution which the joint wrongdoer might claim from another wrongdoer to delictual acts performed negligently but not intentionally".[121]

It was submitted on behalf of the third parties in the matter that in the context in which the word "fault" is used in section 2 of the Act, *dolus* must be excluded. In answer to this argument Mahomed J[122] stated:

> Apportioning liability between joint tortfeasors is very often a difficult exercise, but I am not persuaded that the difficulty becomes insuperable merely because the delictual act concerned was intentional. There can be degrees of culpability even between different joint wrongdoers perpetrating an intentional act which attracts delictual liability. There is, for example, a clear difference between the kind of intention which is inferred from *dolus eventualis* on the one hand and *dolus directus* on the other. Even between different wrongdoers whose intention is to be

115 *Lloyd-Grey Lithographers (Pty) Ltd v Nedcor Bank t/a Nedbank* 1998 2 SA 667 (W) 673.
116 *S v Zoko* 1983 1 SA 871 (N) 896.
117 *Lloyd-Gray Lithographers (Pty) Ltd v Nedcor Bank t/a Nedbank* 1998 2 SA 667 (W) 673.
118 *Randbond Investments (Pty) Ltd v FPS (Northern Region) (Pty) Ltd* 1992 2 SA 608 (W).
119 *Randbond Investments (Pty) Ltd v FPS (Northern Region) (Pty) Ltd* 1992 2 SA 608 (W) 622.
120 *Randbond Investments (Pty) Ltd v FPS (Northern Region) (Pty) Ltd* 1992 2 SA 608 (W) 619.
121 *Randbond Investments (Pty) Ltd v FPS (Northern Region) (Pty) Ltd* 1992 2 SA 608 (W) 620.
122 *Randbond Investments (Pty) Ltd v FPS (Northern Region) (Pty) Ltd* 1992 2 SA 608 (W) 620-621.

> inferred from a *dolus eventualis* there are different gradations of culpability. This is one of the reasons why the Legislature probably provided that what the court had eventually to do was to apportion the damages against the joint wrongdoers in such proportions as the court "may deem just and equitable".

The importance of this case is that the court held that section 2 of the Act also applies to intentional, as opposed to only negligent, joint wrongdoers and further that the difficulty in apportioning liability between two joint wrongdoers who acted intentionally could be overcome by taking into account their respective degrees of culpability. This decision is welcomed[123] and no doubt can be of aid to the defence of contributory intent where the defendant also acted intentionally, as the same principles in calculating apportionment between joint wrongdoers can be applied to the plaintiff and the defendant. Of importance, the decision of *Lloyd-Grey Lithographers (Pty) Ltd v Nedcor Bank t/a Nedbank* provides a workable solution to the difficulty of apportioning liability between joint wrongdoers as well as between the plaintiff and the defendant where they have different forms of fault. *Lloyd-Grey Lithographers (Pty) Ltd v Nedcor Bank t/a Nedbank* like *Greater Johannesburg* and *Randbond Investments (Pty) Ltd v FPS (Northern Region) (Pty) Ltd* provide enough fertile ground for the courts to develop the defence of "contributory intent" as a defence limiting liability and to take note of the fact that it is not impossible to apportion damages in instances of intentional wrongdoing.

Neethling[124] argues that although an apportionment of damages in accordance with the blameworthiness of each joint wrongdoer in regard to the damage appears, on the face of it, impossible where the same damage was caused intentionally by one party and negligently by the other party, such apportionment is nevertheless possible if one accepts the view expressed in *S v Ngubane*[125] that if a wrongdoer

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123 Neethling 1998 *THRHR* 519-520 supports the judgment of Mahomed J and submits that the key to the decision was that as the Act radically deviated from the common law and did not limit its application to negligent wrongdoers, the words "liable in delict" in terms of s 2(1) include delicts committed negligently as well intentionally. Potgieter 1998 *THRHR* 732 argues that a case can be made to the effect that an intentional wrongdoer and a negligent wrongdoer causing the same damage to a third party do not qualify as joint wrongdoers for purposes of the Act. He (Potgieter 1998 *THRHR* 740) further submits that the outcome of this decision better satisfies one's sense of justice but still amounts to the incorrect application of the Act. Kelly 2001 *SA Merc LJ* 520 is comfortable with the Act applying to intentional joint wrongdoers.

124 Neethling 1998 *THRHR* 520.

125 *S v Ngubane* 1985 3 SA 677 (A).

acts with intent, negligence on his part will simultaneously also be present. Moreover, if one further accepts that the intentional causing of harm to another would generally amount to a deviation of at least 100 per cent from the norm of the reasonable person, apportionment between joint wrongdoers can also take place on the basis of the criterion for the apportionment of damages in terms of s 1(1)(a) of the Act, as accepted by *Jones v Santam Ltd.*[126] This is done by reflecting the wrongdoers' degree of deviation from the norm of the reasonable person expressed as a percentage.[127] Neethling supports Mahomed J's[128] submission that in determining the ratio of apportionment, the degree of culpability or blameworthiness of the intentional wrongdoer should be taken into account. Mahomed J's submission is logical in the sense that a wrongdoer acting with *dolus eventualis* might probably be less culpable than a wrongdoer acting with *dolus directus*. The blameworthiness of joint wrongdoers with the same form of intent might even differ. This factor will consequently lead to an intentional act not always signifying a 100 per cent deviation from the norm of the reasonable person, with the result that two intentional wrongdoers might in a certain instance be in a ratio of apportionment of 100:120 (*dolus eventualis: dolus directus*), or an intentional (*dolus directus*) and a negligent wrongdoer, for example, in the ratio 120:60.[129]

3 Legal reform

3.1 Report of the South African Law Reform Commission

The South African Law Reform Commission (SALRC) was tasked with the review of the *Apportionment of Damages Act* 34 of 1956 (the "Act") and published a report thereon in July 2003 (hereinafter referred to as the "Report"). In the summary of the Report[130] the following statement is of relevance:

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126 *Jones v Santam Ltd* 1965 2 SA 542 (A).

127 Neethling 1998 *THRHR* 520.

128 *Randbond Investments (Pty) Ltd v FPS (Northern Region) (Pty) Ltd* 1992 2 SA 608 (W) 620.

129 See Neethling 1998 *THRHR* 521. The negligent causing of harm could amount up to a deviation of 100 per cent from the norm of a reasonable person, whereas the intentional causing of harm would amount to a deviation of 100 per cent (or more) from the norm of a reasonable person (depending on the form of intent).

130 SALRC *Project 96* xi-xvi.

> Since the Act was passed, there have been major developments in the law of delict ... These changes in the law of delict were not envisaged by the legislature at the time of the enactment of the Act. The Act has been unable to accommodate these developments and this has led to anomalies in this area of the law ... Under the Act fault is the sole criterion of apportionment. The courts have traditionally interpreted fault in the Act to mean negligence and to exclude intentional wrongdoing. The Commission recommends that so far as fault is used as a basis for or factor in apportionment, it should include both intention and negligence. This is achieved in the draft Bill by using the term 'fault' in section 3(2)(b)(iii) in its ordinary and accepted sense of including both intention and negligence and by expressly referring to intention in the definition of 'wrong' in section 1 ... The Commission advocates a broader basis for apportionment than fault[,] ... fault should be one of a wide range of relevant factors which the courts are to consider in attributing responsibility for the loss suffered ... The court is left with a complete discretion with regard to the method of determining appropriate proportions having regard to all relevant factors. Responsibility means more than fault and will allow the courts to consider a much wider range of factors including the causative potency of the parties' acts.

With regard to the need for reform, the Report pointed out that there have been attempts to apply the Act to areas which were not and could not have been envisaged by the legislature at the time of the enactment of the Act but that in respect of *Randbond Investments (Pty) Ltd v FPS (Northern Region) (Pty) Ltd* and *Lloyd-Gray Lithographers (Pty) Ltd v Nedcor Bank Ltd t/a Nedbank* justice was served.[131] In contrast, "the decisions in the cases which strictly adhered to the correct interpretation of the Act as applying only to negligent conduct did not produce fair or equitable results". But it is "undesirable that the courts must search outside the confines of the Act for grounds for a just and equitable basis for apportionment while they incorrectly assert that the Act justifies their findings".[132]

Fortunately, the Report[133] recommends that "fault" include both intention and negligence and expressly refers to intention in the definition of "wrong" in section 1.

> "Wrong" means:
> an act or omission giving rise to a loss that constitutes-
> (a) a delict;
> (b) a breach of a statutory duty; or
> (c) a breach of a duty of care arising from a contract,
> Whether or not it is intentional.

131 SALRC *Project 96* 26.
132 SALRC *Project 96* 26.
133 SALRC *Project 96* 27.

This seems also to be the trend in other countries.[134] For example, the New Zealand Law Commission[135] with regard to the "*Apportionment of Civil Liability Act*" recommends that the:

> Act is to apply whether or not the act or omission causing the loss was deliberate on the part of the wrongdoer. The fact that the defendant's act was deliberate may sometimes lead the court in its discretion to determine that no contribution shall be ordered in favour of that person. But it would not be an absolute bar. The consequences of the deliberate act may not have been intended. The negligent behaviour of a co-defendant may have played a more significant part in the plaintiff's loss.[136]

Section 5 of the draft *Civil Liability and Contribution Act* similarly states that "the Act applies whether or not the act or omission on which liability is based is intentional, and whether or not such act or omission constitutes a crime".[137] In Canada, the Ontario Law Reform Commission in their report on "contribution among wrongdoers and contributory negligence"[138] also makes it clear that their proposed draft Act by its definition of "fault" includes all torts, whether or not intentional.[139]

It is of great importance that the SALRC advocates not only that contributory intent is also relevant when apportioning damages but, even more significantly, a broader basis for apportionment than fault. Thus other factors may also be taken into account and the court has a discretion with regard to the method of determining appropriate proportions in respect of the "responsibility" of each party for the damages. Van Heerden JA in *General Accident Insurance Company SA Bpk v Uijs*[140] was also in favour of this broader approach when seeking "justice and equity" with regard to the apportionment of liability.[141] Potgieter[142] urges the legislature to act quickly to identify *lacunae* in the law and rectify them. Therefore priority should be

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134 See SALRC *Project 96* 24-25.
135 NZLC *Preliminary Paper 19* 83.
136 SALRC *Project 96* 24-25.
137 As of yet, the Bill has not been promulgated and according to the Government's response the "Minister of Justice does not currently have the resources available to assess" the report (New Zealand Law Commission 1998 http://www.lawcom.govt.nz/project/civil-contribution).
138 Ontario Law Reform Commission *Report on Contribution among Wrongdoers*.
139 SALRC *Project 96* 25.
140 *General Accident Versekeringsmaatskappy SA Bpk v Uijs* 1993 4 SA 228 (A). Also see Neethling and Potgieter 1994 *THRHR* 131.
141 *General Accident Insurance Company SA Bpk v Uijs* 1993 4 SA 228 (A) 229.
142 Potgieter 1998 *THRHR* 518; SALRC *Project 96* 26.

given to the revision of the law in this area. Even though the Bill[143] has been prepared to replace the current *Act*, it has unfortunately not yet been promulgated – just over ten years have passed since the Report of the SALRC was published, and this notwithstanding the current *Act's* shortcomings, *inter alia* as regards intentional wrongdoing.

4 Comparative law

In this paragraph it is intended to ascertain whether and to what extent contributory intent has been recognised as a defence limiting (or excluding) delictual liability in a few foreign legal systems. English and Australian law will be considered as well as a few European legal systems.

4.1 English law

The English law of torts follows a casuistic approach and therefore recognises specific torts with their own rules.[144] Thus a wrongdoer can be liable only if all the requirements for the specific tort are met.[145] For some torts intention is required, but it is possible to commit other torts such as trespass and defamation negligently as well as intentionally. Apportionment with respect to tort law is regulated by the *Contributory Negligence Act*.[146] Wherever an interest is protected by a tort of negligence it is probable that it will also be protected by an intentional tort. For example, with regard to a careless false statement, liability would be based on negligence, and with regard to an intentional false statement, liability would be in deceit. However, an intentional act such as trespass might also result from a careless decision made by the defendant and give rise to liability in both negligence and trespass. Where there is intentional interference with a person's trading relationships under the economic torts, there is no room for negligent liability in respect of such interests.[147]

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143 *Apportionment of Loss Bill* 2003.

144 In our law general principles or requirements regulate delictual liability irrespective of which individual interest is impaired or the manner in which it is impaired (Neethling and Potgieter *Delict* 4).

145 Neethling and Potgieter *Delict* 4.

146 Williams *Joint Torts* 197-198.

147 Clerk and Lindsell *Torts* 382.

It is established that fault in terms of the *Contributory Negligence Act*[148] extends to intentional acts on the part of the plaintiff in those cases where the defendant has a duty to prevent deliberate self-harm by the plaintiff.[149] In *Reeves v Commissioner of Police for the Metropolis,*[150] even though the deceased acted with contributory intent and the defendant with negligence, the court did not hold that there was a break in the causal link thereby excluding damages, but apportioned the damages (the dependants of the deceased were entitled to 50 per cent of their claim).[151]

Section 1 (1) of the *Contributory Negligence Act*[152] states:

> Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimants share in the responsibility for the damage.

According to section 4, "fault means negligence, breach of statutory duty or other act or omission which gives rise to a liability in tort or would, apart from this Act, give rise to a defence of contributory negligence".

The assessment of contribution according to the *Contributory Negligence Act* depends on "an amalgamation of causation" and legal "blameworthiness".[153] The Act itself refers to "share in the responsibility"[154] whereas our *Act* is based only on fault.[155]

Generally in instances where the defendant intentionally caused the plaintiff harm or loss, contributory negligence on the part of the plaintiff cannot be raised (this is also the position in our common law and case law).[156] The exclusion of the defence conforms to public policy in that the defendant's wrongful intention outweighs the

148 *Contributory Negligence Act* 1945.
149 Clerk and Lindsell *Torts* 176.
150 *Reeves v Commissioner of Police for the Metropolis* 2000 1 AC 360.
151 Clerk and Lindsell *Torts* 176.
152 *Contributory Negligence Act* 1945.
153 Rogers in Magnus and Martin-Casals *Contributory Negligence* 61.
154 See s 1 *Contributory Negligence Act* 1945.
155 See s 1 *Apportionment of Damages Act* 34 of 1956.
156 See para 2.1.3.1 above.

plaintiff's negligence so as to cancel any responsibility on the part of the plaintiff.[157] It should be noted, though, that in cases where the defendant's fault is in the form of intention, it does not automatically exclude apportionment in terms of the *Contributory Negligence Act*.[158] A person who willingly participates in a fight may have his or her damages reduced, as may a criminal who is met with excessive force by the victim. But a person who commits fraud cannot raise contributory negligence on the part of the victim who did not take adequate steps to check what he or she was told.[159]

In instances where both parties act intentionally it seems that apportionment is not applicable. For example, in *Standard Chartered Bank v Pakistan National Shipping Corp (No 4)*,[160] Oakprime intended to sell a cargo of bitumen to Vietnamese buyers. Payment was to be confirmed by Standard Chartered Bank (SCB) in the form of a "banker's confirmed credit", which requires strict compliance with regard to shipping documentation. As Oakprime was late in obtaining the cargo, it procured Pakistan National Shipping (PNS) (carriers) to put a false date on the bill of lading. SCB did not know about the false date on the bill of lading but noticed other discrepancies. SCB nevertheless decided to pay and did not notify the issuing bank of the discrepancies. The issuing bank upon receiving the documents noticed other discrepancies and declined to reimburse SCB. The cargo was assigned by the issuing bank to SCB, which subsequently sold it at a substantial loss. SCB sued PNS for fraud as Oakprime had ceased to trade. PNS responded that "[y]es, we knowingly misled you. But you paid us because you intended to get reimbursed by the issuing bank and you had already decided to mislead the issuing bank by concealing other discrepancies. Admittedly you failed in that scheme but the loss you suffered is at least partly your fault." According to a majority decision of the Court of Appeal, it was held that PNS's contention was defeated by the rule that contributory negligence could not apply to a claim of fraud (intentional wrongdoing).[161] This

157 Williams *Joint Torts* 198.
158 *Contributory Negligence Act* 1945.
159 Horton Rogers "Contributary Negligence under English Law" 61-62.
160 *Standard Chartered Bank v Pakistan National Shipping Corp (No 4)* 2002 UKHL 43; 2003 1 AC 959; Horton Rogers "Contributary Negligence under English Law" 62 n 21.
161 Horton Rogers "Contributary Negligence under English Law" 62.

decision conformed to a strict interpretation of the Act applying to contributory negligence only.

In instances where the defendant did play a part in the chain of events which led to the loss but the effective legal cause of the harm was due to the claimants "own folly", such claimants' conduct cannot amount to 100 per cent contributory negligence. Instead a plea of "no cause" is stated.[162]

In the case of mild provocation by the claimant, who is then seriously assaulted by two joint wrongdoers (the defendants), it seems that it is highly unlikely that a court would consider contributory fault on the part of the plaintiff as a defence to limit the joint wrongdoers' liability.[163]

Although contributory intent is not *per se* recognised as a defence in English law, it is recognised by implication. Contributory intent is either subsumed under consent[164] or under contributory negligence. In instances where a plaintiff clearly acts with intent and the defendant allegedly with negligence, apportionment (as opposed to exclusion) is applied as in *Reeves v Commissioner of Police for the Metropolis*. Thus the plaintiff's contributory intent falls within the ambit of contributory negligence thereby limiting liability. In instances where the defendant acts with intention and the plaintiff with negligence, public policy demands that the defendant be solely liable. In instances where both parties act intentionally it seems that apportionment is not applicable, as in *Standard Chartered Bank v Pakistan National Shipping Corp (No 4)*.

4.2 Australian law

Contributory fault in Australia is regulated by common law as well as by statute. The legislation regulating the apportionment of fault in Australia is based on the English *Contributory Negligence Act*.[165] The prescribed criterion is the plaintiff's "share of

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162 Horton Rogers "Contributary Negligence under English Law" 60.

163 See *Surtees v Kingston on Thames* BC 1992 PIQR 101; Horton Rogers "Contributary Negligence under English Law" 71.

164 Williams *Joint Torts* 197-198.

165 *Contributory Negligence Act* 1945; Fleming *Torts* 306.

responsibility" and paramount is the element of fault.[166] A comparison of the plaintiff's and defendant's fault is taken into account in assessing damages awarded to the plaintiff.[167] The degrees of fault may range from trivial inadvertence to the grossest recklessness. For example, deliberate disregard for safety rules will be judged more severely than merely imperfect reaction to a crisis (compare a driver who deliberately cuts a corner to one who merely fails to react promptly to an emergency). Causal responsibility is relevant. For example, the main blame must fall on the person who created the danger or brought to the accident the dangerous subject matter, since he was in a sense responsible for the situation.[168] Although there is authority from the High Court to the effect that a reduction of 100 per cent is not possible,[169] statutes in most jurisdictions now expressly allow this.[170] Generally the plaintiff's contributory fault is calculated with reference to the degree of departure of the plaintiff's action from the standard of the reasonable person and the relative causal contribution of the plaintiff's negligence to the damage.[171] In modern Australian law there is a greater flexibility offered to courts by the apportionment legislation where contributory negligence as opposed to *volenti non fit iniuria* is established, especially now that the plaintiff's damage may in some jurisdictions be reduced by 100 per cent.[172] In cases where the plaintiff acted intentionally (or was not prevented from acting intentionally), a question has been raised: should the plaintiff's loss resulting from the plaintiff's own intentional conduct afford the defendant a defence (based on *ex turpi causa non oritur actio*)? Here a negative answer has been given in cases where prison authorities have negligently failed to prevent a person in their custody from committing suicide.[173]

166 Fleming *Torts* 307-308.
167 Fleming *Torts* 307.
168 Fleming *Torts* 308.
169 *Wynbergen v Hoyts Corporation Pty Ltd* 1997 149 ALR 25.
170 The exceptions are South Australia, Western Australia and the Northern Territory (Trindade, Cane and Lunney *Torts* 689-690 n 75).
171 Trindade, Cane and Lunney *Torts* 690.
172 Trindade, Cane and Lunney *Torts* 697.
173 *Kirkham v Chief Constable of the Greater Manchester Police* 1990 2 QB 283. This decision is echoed in *Reeves v Commissioner of Police for the Metropolis* 2000 1 AC 360, where the patient was found to be of unsound mind (Trindade, Cane and Lunney *Torts* 704 n 173).

In principle even if the defendant were careless, it is possible that the plaintiff's conduct would be held to be the sole cause of the damage, but such a finding is unlikely where both parties have been at fault.[174] As far as the plaintiff's conduct is concerned it must amount to "contributory negligence" for apportionment to apply, although the term "fault" is still used in some jurisdictions. The defendant must commit a "wrong" or be at "fault" before the apportionment provisions apply. Under the original State legislation the definition of fault was limited to torts to which contributory "negligence" had been a defence at common law. In some jurisdictions this remains the position while in others the legislation appears to limit apportionment to claims of "fault"-based torts.[175]

It has been held that the apportionment legislation is not applicable to intentional torts such as assault, battery, conversion and deceit, which suggests that the defence is available only where the liability is based on negligence. The defence of contributory negligence is generally denied where the defendant acted intentionally while the plaintiff acted negligently[176] (as in our law).[177] In Western Australia, apportionment applies to "any claim for damages founded on an allegation of negligence". This probably excludes intentional or strict liability torts.[178] In South Australia the legislation refers to "breaches of duties of care" arising under tort before damages can be apportioned. "Duty of care" refers to the exercise of reasonable care (referring to negligence). In Tasmania and Western Australia, apportionment legislation is applicable even if the negligence of the plaintiff is vicarious.[179]

It seems that Australian law follows English law, in that there is a reluctance to acknowledge contributory intent *per se* as a defence limiting liability. In instances where a defendant acts intentionally and the plaintiff negligently, contributory

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174 *McKew v Holland & Hannen* 1970 171 CLR 506 (Trindade, Cane and Lunney *Torts* 688 n 58).

175 Trindade, Cane and Lunney *Torts* 688 n 61 refer to s 3 *Law Reform (Contributory Negligence and Apportionment Liability) Act* 2001. The Tasmanian legislation applies apportionment for any tortious liability, see s 2 *Wrongs Act* 1954.

176 Williams *Joint Torts* 198; Trindade, Cane and Lunney *Torts* 689 n 66.

177 See para 2.1.3.1 above.

178 S 54(7) *Wrongs Act* 1954; see s 3 of *Law Reform (Contributory Negligence and Tortfeasors' Contribution) Act* 1947; Trindade, Cane and Lunney *Torts* 689 n 69.

179 Trindade, Cane and Lunney *Torts* 689.

negligence cannot apply as a defence. In instances where a plaintiff acts intentionally and the defendant negligently, depending on the circumstances of the case, it is possible that the plaintiff's conduct could either exclude or limit liability.

4.3 Israeli law

Generally, contributory fault constitutes a statutory defence which is incorporated in the *Civil Wrongs Ordinance* (CWO) and applies to reduce the compensation awarded to the plaintiff, but in certain cases the plaintiff's contributory fault may amount to 100 per cent, thereby negating the defendant's liability. In such cases liability may also be extinguished on the ground of lack of causation, namely that the plaintiff's contributory negligent conduct was the decisive causal factor. The defence of contributory negligence operates in favour of the negligent defendant based on objective fault. Where liability is strict or in cases of intentional torts the application of the defence raises both theoretical and practical difficulties.[180]

Section 68[181] of the CWO[182] provides:

> Where any person suffers damage as a result partly of his own fault and partly of the fault of another person, a claim for compensation shall not be defeated by reason of the fault of the person suffering the damage, but compensation recoverable in respect thereof shall be reduced to such extent as the court thinks right and just having regard to the claimant's share in the responsibility for the damage.[183]

With regard to intentional torts, Israeli law recognises the difficulty in allowing a defendant who acts in bad faith to benefit from the defence, especially where the plaintiff merely acts contributorily negligent. In instances where the defendant inflicted the loss intentionally, it is usually unfair and against public policy to apply the defence in his favour. The courts may make use of the test of causation in finding the defendant's fault as the decisive cause in respect of the loss sustained (the defendant's fault negates the causal link between the contributory negligence

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180 Gilead "Contributary Negligence under Israeli Law" 105.

181 This section, for all intents and purposes, is almost identical to s 1 of the English *Contributory negligence Act* 1945.

182 Similar to s 1 of our *Apportionment of Damages Act* 34 of 1956 and almost identical to the English s 1(1) *Contributory Negligence Act* 1945. The English and Israeli Act refer to "share in responsibility", whereas our Act refers to "fault". Australian legislation relating to apportionment is also based on the English Act; see Fleming *Torts* 306.

183 See Gilead "Contributary Negligence under Israeli Law" 106 n 8.

and the loss in terms of section 64 (2) of the CWO). Another alternative used is to determine on the basis of comparing the relative fault of the parties to such an extent that the moral blameworthiness of the defendant may amount to 100 per cent.[184] According to South African law the decisive cause of the damage is no longer (last opportunity rule) taken into account and in terms of our common law and case law a defendant who acts intentionally in respect of the plaintiff's loss cannot raise the plaintiff's contributory fault as a defence.[185]

The CWO defines contributory fault as encompassing two elements, namely carelessness on the claimant's part and loss suffered by the claimant which was caused by the aforementioned carelessness (carelessness and causation).[186] The standard of care applied to the claimant's carelessness differs from the standard applied to the carelessness of the defendant. This is due to policy considerations (based on the view that since the standard for reasonable self-protection may be lower than the standard for the protection of others, it follows that the standard for contributory carelessness may be lower than the standard for carelessness which generates liability towards others) and the conflict between the effect of the defence upon the defendant's liability and the aim behind his liability. Where the defence reduces the defendant's liability in a manner which conflicts with the aim of compensation, or deterrence, or loss spreading and so on, the scope of the defence may be limited by relaxing the standard of care.[187] The effect of relaxing the standard of care is that a plaintiff might not be deemed careless when causing harm to him or herself.[188]

In instances where a claimant intentionally injures him- or herself, two cases of suicide in Israeli law yielded two different conclusions, creating ambiguity. In *Abu Se'ada v the Israeli Police and the Prison Service*,[189] the state was found negligent

184 Gilead "Contributary Negligence under Israeli Law" 110.

185 *Pierce v Hau Mon* 1944 AD 175 198; *Minister van Wet en Orde v Ntsane* 1993 1 SA 560 (A) 570.

186 S 64 of the *Civil Wrongs Ordinance* of 1947 (CWO); Gilead "Contributary Negligence under Israeli Law" 107, 113.

187 Gilead "Contributary Negligence under Israeli Law" 110.

188 *La Nasional Ins CO Ltd v Stanflast Indus 1976 Ltd* 1979 33 1 PD 337 340-341; Gilead "Contributary Negligence under Israeli Law" 111 n 30.

189 *Abu Se'ada v The Israeli Police and the Prison Service* 1997 51 (ii) PD 704; Gilead "Contributary Negligence under Israeli Law" 109 n 24.

for the failure of the Prison Authority to provide proper medical treatment to a prisoner after a failed suicide attempt. As it was unclear whether such proper medical treatment could have prevented the loss or not, the Supreme Court held that the prisoner should incur 50 per cent of his loss on the basis of the "lost chances of healing theory". The court reasoned that the prisoner was contributorily negligent. In *Hadasa v Gilad*[190] a patient who was hospitalised after a failed suicide attempt, committed suicide while still in the hospital. The hospital was found negligent for failure to protect the patient. In this case the Supreme Court denied the defence of contributory negligence on two grounds. Firstly, the court reasoned that as it was the duty of the hospital to protect the patient from himself: it actually assumed the patient's duty of self-care. Secondly, given that the patient was in a state of depression, the element of moral fault on his part was absent.[191] Yet the court acknowledged that suicidal acts may amount to contributory negligence, and that each case should be decided on its merits, taking into consideration the circumstances of the case.[192] Nevertheless, the courts in Israel, Australia and England[193] prefer to apply apportionment, and therefore contributory intent is utilised as a defence limiting liability.

There may be instances of intentional torts where it is justified to reduce compensation within the ambit of contributory negligence, such as where the claimant himself wrongfully and intentionally provokes the defendant. In this regard the CWO confers upon the court the discretion to reduce the percentage of the contribution as the judge may think would be just, where the fault of the defendant was brought about by the conduct of the plaintiff.[194] Thus it seems that in instances where both parties' fault is in the form of intention the court may apportion loss. Other examples are where the claimant acted in a careless manner because he or

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190 *Hadasa v Gilad* 1999 53 (iii) PD 529; Gilead "Contributary Negligence under Israeli Law" 109 n 25.

191 It may be argued that moral fault is not a necessary element of the defence which is based on an objective criterion of self-protection; Gilead "Contributary Negligence under Israeli Law" 109 n 26.

192 The court also denied the defence of assumption of risk, in the absence of free will and the claim that the patient's suicidal act negated legal causation between the hospital's negligence and the ensuing damage; Gilead "Contributary Negligence under Israeli Law" 110 n 27.

193 See para 4.1-4.-3.

194 S 65 of the CWO; Gilead "Contributary Negligence under Israeli Law" 110 n 29.

she unexpectedly relied on a fraudulent misrepresentation that no reasonable person would rely on. While the test applied to defendants is objective, the one applied to claimants is more subjective.[195] The CWO gives the courts a wide discretion regarding the reduction of compensation. With regard to bodily injuries suffered by employees, the courts tend to minimise the employee's share. In cases of pure economic loss suffered by a party who is 'strong' in terms of economic stature and risk control, the claimant's share of loss would be larger. The test applied by the courts to apportion damages is based on moral blameworthiness and relies on the deviation from an objective standard. A second test of apportionment is the causative contribution of each party to the damage suffered, but such determination becomes difficult when both parties' faults are linked in the chain of causation leading to the same loss. Courts rarely use the causation test for apportionment preferring the relative fault test.[196] In the hypothetical case where a plaintiff provokes two defendants (who subsequently become jointly and severally liable), it seems that in principle the plaintiff's provocation may constitute negligence in terms of section 65 of the CWO, but in the case of a severe attack by the joint wrongdoers, their fault seems to be the decisive cause of the damage suffered when compared with the plaintiff's carelessness (mild provocation), so that the defence of contributory negligence according to Israeli law would probably be denied.[197]

Israeli law also seems to recognise contributory intent as a defence limiting liability but unfortunately deals with it under legislation referring to contributory negligence. Israeli law like English law makes use of the test of causation as well as fault in apportioning liability. Israeli law, interestingly enough, tends to use an objective test for the defendant and a more subjective test for the plaintiff. There seems to be an imbalance, and apportionment seems to favour the plaintiff except where the plaintiff is financially sounder than the defendant.

195 Gilead "Contributary Negligence under Israeli Law" 111.
196 Gilead "Contributary Negligence under Israeli Law" 113-114.
197 Gilead "Contributary Negligence under Israeli Law" 117-118.

4.4 German law

German law analyses fault in a highly abstract manner and distinguishes between *dolus directus*, *dolus eventualis*, gross negligence, ordinary negligence and light negligence (recklessness, which is considered as a slightly more serious form of conduct than gross negligence, may even form a separate heading of fault).[198] "Fault of the injured party" includes not only his or her fault in the resulting harm but also his or her failure to minimise the consequences after the harmful result.[199] According to German law, contributory intent as a form of fault falls within the ambit of contributory negligence.[200] Intention is not defined in the *Bürgerliches Gesetzbuch* (*BGB*) but negligence is defined in § 276 II *BGB*. The legislator has left it to the courts and doctrine to explore the meaning of intention (*Vorsatz*).[201] Contributory intent on the part of the plaintiff generally excludes the defendant's liability,[202] but only for those consequences the plaintiff intended to cause or recklessly accepted might happen.[203] § 254 of the *BGB*[204] provides for a distribution of damage according to the degree of responsibility on the side of the tortfeasor (the defendant) and on the side of the injured party (the plaintiff). Although the focus is primarily on the degree of causation (*Verursachung*) a process of balancing is undertaken by having regard to a set of empirical rules developed by the courts, which take into account different possible degrees of fault on both sides (negligence, intent and presumed fault, "*Maß des beiderseitigen Verschuldens*").[205]

Intent on the side of the tortfeasor generally, as in South Africa,[206] excludes the consideration of contributory negligence on the part of the plaintiff, as the damage

198 Markesinis and Unberath *German Law of Torts* 83-84.
199 Markesinis and Unberath *German Law of Torts* 110.
200 "*Mitverschulden*", the legal basis of which forms part of the general rules of the law of obligations of the *Bürgerliches Gesetzbuch* (*BGB*) § 254, dealt with under the chapter concerning compensation of damage in general. See Fedtke and Magnus "Contributary Negligence under German Law" 75.
201 Van Dam *European Tort Law* 801.
202 Fedtke and Magnus "Contributary Negligence under German Law" 84.
203 Van Dam *European Tort Law* 802.
204 *German Civil Code* of 1900.
205 Fedtke and Magnus "Contributary Negligence under German Law" 83.
206 See para 2.1.3.1 above.

itself and not only the behaviour in question was intended.[207] Furthermore, intent on the side of the tortfeasor does not affect the duty of the plaintiff to minimise the damage. Intent can in instances even exclude gross negligence.[208] Where a servant acts with intent a master cannot be held vicariously liable for the conduct of its servant[209] and is therefore not liable.[210] Generally, if the plaintiff acted intentionally by provoking the injury, compensation is excluded.[211] However, in the hypothetical case where the plaintiff's mild provocation of one defendant may have been aggravated by the fact that his friend (second defendant) was present, providing the challenge with some form of publicity, the severe and intentional personal injury inflicted upon the plaintiff seems to outweigh the contributory element on the side of the plaintiff.[212] In instances where both parties acted with either intent or negligence, both parties will be equally liable.[213]

German law fortunately recognises both forms of fault even if it is dealt with under the statute dealing with negligence. The legislator has left it to the courts to determine compensation based on both parties' form of fault. German law offers a fair solution in that in instances where a plaintiff acts with contributory intent the defendant's liability may be excluded or limited depending on the circumstances of the case. In German law contributory intent is therefore recognised as a defence both excluding and limiting liability.

4.5 Swiss law

Swiss law refers to the plaintiff's contributory fault as "autoresponsibility" – thus in the case of contributory negligence it must be viewed as a case of "collision of liabilities". The liability of the wrongdoer collides with the autoresponsibility of the plaintiff.[214] With regard to fault in general, article 2 of the *Swiss Civil Code* (SCC) takes cognisance of "good faith", in that it is abusive to make somebody else

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207 See Fedtke and Magnus "Contributary Negligence under German Law" 84 n 83.
208 See Fedtke and Magnus "Contributary Negligence under German Law" 84 n 84.
209 In terms of § 831of the *BGB*.
210 See Fedtke and Magnus "Contributary Negligence under German Law" 84 n 85.
211 §254 no 53; Fedtke and Magnus "Contributary Negligence under German Law" 84 n 89.
212 Fedtke and Magnus "Contributary Negligence under German Law" 97.
213 §254 no 53, 54; Fedtke and Magnus "Contributary Negligence under German Law" 84 n 90.
214 Widmer "Contributary Negligence under Swiss Law" 209.

responsible for a damage which the injured party (plaintiff) caused himself. With regard to contributory fault there is no definition in Swiss law, but the general idea is that where the plaintiff suffers loss, he or she has to bear the loss or harm him- or herself to the extent to which it cannot be imputed to others.[215] Contributory intent in terms of Swiss law is dealt with under contributory negligence.[216] Article 44 of *the Swiss Code of Obligations* (SCO) states that the "judge may reduce or refuse compensation where the injured person has assented to the injury**,** or where circumstances for which he is responsible have contributed to the occurrence or the aggravation of the loss or have otherwise prejudiced the position of the person liable".[217]

If the plaintiff injures himself intentionally, his contribution will usually be sufficient to break the causal link of imputation between the determining act and damaging event, so as to exclude the defendant's liability.[218] If the defendant's fault is in the form of intent this will normally have the effect that the plaintiff's contributory fault will be partially, at least, neutralised by the higher intensity of the wrongdoer's fault.[219]

In the hypothetical case of provoked assault where the plaintiff acts with "mild provocation" and the defendants as joint wrongdoers thereafter intentionally hurt the plaintiff (according to Swiss law), both defendants would in terms of article 50 of the SCO be jointly and severally liable in full to compensate the plaintiff (provided the defendants' reaction to the mild provocation is clearly excessive, with a slight possible deduction if this was not the case).[220]

Swiss law recognises contributory intent in the form of "autoresponsibility" and takes cognisance of the principle of abuse of right in that it is abusive to make somebody else responsible for a damage which the plaintiff caused himself. The plaintiff's

215 Widmer "Contributary Negligence under Swiss Law" 210.
216 Widmer "Contributary Negligence under Swiss Law" 213.
217 Widmer "Contributary Negligence under Swiss Law" 211.
218 Widmer "Contributary Negligence under Swiss Law" 214.
219 Widmer "Contributary Negligence under Swiss Law" 214.
220 Widmer "Contributary Negligence under Swiss Law" 222.

contributory intent is taken into account in apportioning responsibility and the courts may exercise their discretion with regard to such apportionment.

4.6 Spanish law

Legal doctrine and court decisions in Spanish law refer to contributory fault *inter alia* as "concurrence of faults" and "concurrence of fault of the victim".[221] Contributory fault results in a reduction of the amount of damages that the (tortfeasor) will have to pay. In some instances it can lead to a total exclusion of liability either because the damage can be attributed solely to the plaintiff's fault (*culpa exclusive de la victima*) or that not all the requirements to establish liability of the defendant are met.[222] A definition of "contributory negligence" is found in article 114 of the *Spanish Penal Code* of 1995 which, in relation to tort liability deriving from a crime or a misdemeanour, states that "if the victim had contributed with his conduct to the occurrence of the damage sustained, the judges or the courts will be able to moderate the amount awarded for its reparation or compensation".[223]

A reduction as a result of contributory fault operates in all fields of tortious liability and is a general rule in Spanish tort law.[224] According to Spanish courts and legal doctrine, the wilful and conscious conduct of the victim breaks the causal link between the conduct of the defendant and the damage sustained. In a case[225] where the deceased intentionally threw himself on the railway tracks, it was held that the deceased's wilful conduct broke any causal link between the conduct of the defendant and the death of the deceased, but in the case of the mental patient[226] who committed suicide by burning himself with gasoline, the Supreme Court rejected the defence of the plaintiff's contributory intent. The court reasoned that the deceased had a lack of understanding and free will.[227]

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221 Martin-Casals and Sole "Contributary Negligence under Spanish Law" 173-174.
222 Martin-Casals and Sole "Contributary Negligence under Spanish Law" 174.
223 Martin-Casals and Sole "Contributary Negligence under Spanish Law" 175.
224 Martin-Casals and Sole "Contributary Negligence under Spanish Law" 176.
225 STS 5.2 1992 RJ 828 (Martin-Casals and Sole "Contributary Negligence under Spanish Law" 181).
226 STS 3.4 2001 (Martin-Casals and Sole "Contributary Negligence under Spanish Law" 181).
227 Martin-Casals and Sole "Contributary Negligence under Spanish Law" 181.

In cases where the defendant acts with intent, the contributory negligence of the plaintiff is irrelevant and he or she will be entitled to full compensation (like in South Africa).[228] For example, in one particular case[229] a civil servant of the Spanish Post Office used his position to steal credit cards that some banks had sent to their clients by mail. Once he had the credit cards, the civil servant got in touch with the cardholders and, pretending that he was an employee of the bank, obtained their secret numbers by telling them that the bank had made changes in their computing system. Using this trick he stole considerable amounts of money. The Supreme Court held that the state was vicariously liable in tort and did not accept the assertion that the lack of care of the cardholders when giving their secret numbers amounted to contributory negligence. It was held that although the secret numbers had not been given to anyone, their conduct must not be considered negligent as the postman used a trick that took them by surprise, thus taking advantage of their good faith.[230]

The Supreme Court of Spain held that with regard to intentional crimes, provocation by the victim cannot reduce compensation in tort liability. For example, where the plaintiff had pushed the defendant, starting a fight which did not lead to any personal injury, but his ear was bitten only after the fight was over.[231] But the court may reduce the plaintiff's compensation for provocation where the behaviour of the defendants can be regarded as a logical prolongation of the plaintiff's provocation, and as long as the court regards their behaviour as negligent and not intentional crimes.[232]

In Spanish law contributory intent and contributory negligence fall under the general term fault. Contributory intent is clearly recognised as a defence excluding liability. If the plaintiff acts intentionally while the defendant acts negligently, generally his or her wilful and conscious conduct will break the causal link between the conduct of

228 See para 2.1.3.1 above.
229 STS 8.6 1995 RJ 4563 (Martin-Casals and Sole "Contributary Negligence under Spanish Law" 181).
230 STS 2ª24.9 1966 RJ 6753 (Martin-Casals and Sole "Contributary Negligence under Spanish Law" 181).
231 Martin-Casals and Sole "Contributary Negligence under Spanish Law" 194.
232 Martin-Casals and Sole "Contributary Negligence under Spanish Law" 194.

the defendant and the damage sustained (except in cases of the suicide of mentally ill patients). In instances where the defendant acts intentionally and the plaintiff negligently, the contributory negligence of the plaintiff is considered irrelevant and he or she will be entitled to full compensation. It seems that in instances where both parties act intentionally the plaintiff's compensation will not be easily reduced and depends on the defendant's form of intention.

4.7 Greek law

Article 300 of the *Greek Civil Code* is applicable where the plaintiff has contributed by his own act or omission to the creation or extent of the damage he or she has suffered. In such instances the court may either not award compensation to the plaintiff at all or award a reduced amount.[233] Generally contributory negligence is taken into account where the plaintiff by his or her own conduct caused the damage or in instances where he or she just brought about an increase of damage.[234] Contributory negligence is applicable only if there is liability in respect of compensation. The plaintiff must have been at fault (even in cases involving strict liability) and there must be a causal link between the act or the omission and the damage caused. The grounds on which liability may be based are irrelevant as damages emanating from all contractual and extra-contractual liability can be reduced if contributory negligence arises. If the defendant acts deliberately (intentionally), he or she could be found fully liable.[235] *Vice versa*, where the plaintiff acts with contributory intent, any fault on the part of the defendant may be cancelled due to the plaintiff's fault. If there is liability based on article 300 of the *Greek Civil Code*, the judge may either release the defendant from his liability or reduce it. The courts apportion damage by establishing percentages of contribution with regard to such damage and may take into account several subjective factors such as age, profession, etc.[236]

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233 Kerameus "Contributary Negligence under Greek Law" 99.
234 Kerameus "Contributary Negligence under Greek Law" 99.
235 According to a 300 of the *Greek Civil Code*; Kerameus "Contributary Negligence under Greek Law" 100.
236 Kerameus "Contributary Negligence under Greek Law" 101.

Greek law seems flexible and apportionment applies to all instances of liability. Like most other countries, contributory intent is recognised as a defence excluding and limiting delictual liability but is dealt with under the ambit of contributory negligence.

4.8 Summary of comparative law

As a general rule in all the foreign systems discussed above, in instances where the defendant's fault is in the form of intent and the plaintiff's fault is in the form of contributory negligence, the intent of the defendant cancels the plaintiff's contributory negligence.[237] As pointed out in Israeli law,[238] it would generally be unfair and inconsistent with public policy to allow the defendant to use the contributory negligence of the plaintiff to limit liability. This is also the view in Spanish law.[239] However, it should be noted that intent on the part of the defendant does not automatically result in the cancelling of the plaintiff's neglect under all circumstances.[240] A possible exception to this general rule is, as pointed out in Israeli law, cases where the plaintiff relied on a conduct so obviously fraudulent that no reasonable person would have relied on it.[241]

According to German, Greek, South African, Spanish and Swiss law the plaintiff's intent excludes the liability of the negligent defendant.[242] In terms of Swiss law it would be abusive to make someone else responsible for damage which the plaintiff caused himself. Furthermore, the intent of the plaintiff breaks the causal link between the conduct of the defendant (tortfeasor) and the damage sustained. However, intent on the part of the plaintiff does not always result in the exclusion of liability on the part of the defendant. This is especially true in the suicide cases, where the legal duty of care (negligence) of the police and the hospital is considered

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237 According to German, Greek, South African, Spanish and Swiss law; Magnus and Martin-Casals *Contributory Negligence* 274 n 134.

238 See para 4.3 above.

239 See para 4.6 above with regard to the employee of the Post Office who intentionally appropriated credit cards and obtained the PIN numbers from the Bank's clients to appropriate money from the client's accounts. The negligent conduct of the Bank's clients was not considered (Martin-Casals and Sole "Contributary Negligence under Spanish Law" 181). See also Magnus and Martin-Casals *Contributory Negligence* 274-275.

240 According to English law; Magnus and Martin-Casals *Contributory Negligence* 274 n 135.

241 Magnus and Martin-Casals *Contributory Negligence* 275.

242 See Magnus and Martin-Casals *Contributory Negligence* 275 n 141.

to play a role in preventing prisoners or patients from harming themselves or committing suicide,[243] and the liability of the police and the hospital may therefore be limited and not excluded.

In instances where both parties act intentionally, the fault of both is taken into account to reduce the defendant's liability.[244] In the case of provoked assault where the plaintiff acts with "mild provocation" and the defendants act with intent in respect of severely harming the plaintiff, the majority of the countries hold that the plaintiff's claim would probably not be reduced since the plaintiff's mild conduct cannot justify an intentional attack with severe injuries to the plaintiff.[245]

5 Recommendations

Some foreign systems, such as English, Israeli, Swiss and Spanish law, utilise causation to a greater or lesser extent to deal with the issue of contributory intent. This occurs where the contributory intent of the plaintiff is of such a nature that it breaks the causal link (that is, it constitutes a *novus actus interveniens*) between the defendant's conduct and the consequence.

A brief exposition of causation as an element of delict in South African law is therefore relevant. Causation entails that an act must cause a harmful result.[246] A distinction is drawn between factual and legal causation.[247] The test for factual causation is the *conditio sine qua non* or "but for" test.[248] The crucial question is whether the consequence would have occurred but for the defendant's conduct. Legal causation on the other hand is concerned with the issue of "remoteness" of damage. In this regard the so- called flexible test is nowadays applied. According to

243 Magnus and Martin-Casals *Contributory Negligence* 275 n 145 refers to the English, German and Israeli law. This is also the case in Australian law. See para 4.2 above as well as Spanish law, see para 4.6 above; Magnus and Martin-Casals *Contributory Negligence* 276.

244 According to South African law and German law, see Magnus and Martin-Casals *Contributory Negligence* 276.

245 According to German, English, Greek, Israeli, South African, Spanish and Swiss law (Magnus and Martin-Casals *Contributory Negligence* 290 n 287).

246 Neethling and Potgieter *Delict* 175; Van der Walt and Midgley *Principles of Delict* 197; Loubser *et al Delict* 69.

247 Neethling and Potgieter *Delict* 175, 187-188; Van der Walt and Midgley *Principles of Delict* 197; Loubser *et al Delict* 70.

248 Neethling and Potgieter *Delict* 178; Van der Walt and Midgley *Principles of Delict* 198; Loubser *et al Delict* 71.

this test it must be ascertained whether a sufficiently close relationship exists between the wrongdoer's conduct and the consequence for that consequence to be imputed to the wrongdoer in view of policy considerations based on reasonableness, fairness and justice.[249] For the purposes of this contribution, it is important to ascertain whether the contributorily intentional conduct of the plaintiff can constitute a *novus actus interveniens* which may have an effect on the liability of the defendant. Although a new intervening cause may also influence factual causation, only its influence on legal causation is relevant here. It is noteworthy that a *novus actus* may be brought about by the plaintiff's culpable (intentional) conduct, but only if such conduct was not reasonably foreseeable. If the intervening event was reasonably foreseeable at the moment of the defendant's act or if it reasonably formed part of the risks inherent in the conduct of the defendant, the event may not be considered to be a *novus actus interveniens*.[250] Here mention must be made of *Road Accident Fund v Russell.*[251] Chetty AJP[252] held that even though the deceased's act was deliberate, his "mind was impaired to a material degree by the brain injury and the resultant depression. Consequently his ability to make a balanced decision was deleteriously affected. Hence his act of suicide, though deliberate, did not amount to a *novus actus interveniens*". The court unfortunately followed the English principle[253] that a person not of sound mind has impaired volition in forming a decision to commit suicide and that suicide does not constitute a *novus actus interveniens.*[254] Knobel,[255] however, argues that in light of the fact that the deceased had in actual fact tried to commit suicide twice before he was successful showed that his actions were performed with such a level of premeditation, that they could have been regarded as a *novus actus interveniens*. Knobel states that perhaps the decision could be justified by the rule that "one must take his victim as he finds him" (where one cannot escape liability for harm increased by the weakness of the victim). In this case the deceased most certainly acted with contributory intent while

249 Neethling and Potgieter *Delict* 190; Loubser *et al Delict* 91.
250 See Neethling and Potgieter *Delict* 207-208.
251 *Road Accident Fund v Russell* 2001 2 SA 34 (SCA).
252 *Road Accident Fund v Russell* 2001 2 SA 34 (SCA) 41.
253 Here we need only to refer to *Reeves v Commissioner of Police for the Metropolis* 2000 1 AC 360.
254 Neethling and Potgieter *Delict* 207 n 232.
255 Knobel 2004 *THRHR* 413-414.

the driver acted negligently. On close examination, the plaintiff's conduct was not reasonably foreseeable and could therefore be considered of such a nature that it breaks the legal causal link between the act and the consequence. This approach can therefore be used by our courts to exclude liability by reason of the plaintiff's contributory intent, but was unfortunately not canvassed in *Minister of Safety and Security v Madyibi,*[256] and it is uncertain what the outcome would have been if it had. In any case, as in *Road Accident Fund v Russell,*[257] the question as to contributory intent on the part of the deceased was not raised.

The *Apportionment of Loss Bill* 2003 (hereinafter referred to as the "Bill")[258] makes the basis of apportionment in terms of section 3 much wider than fault alone. Thus the "causative effect" of acts and omissions is one of the factors to be considered in determining proportions. Knobel[259] interestingly refers to the facts of *Mafesa v Parity Versekeringsmaatskappy Bpk*[260] to illustrate how the Bill could apply with regard to a *novus actus interveniens.* In this case the plaintiff had sustained a leg fracture in a car accident. It was set in splints and plasters. He was given crutches and warned upon discharge from the hospital not to put weight on the leg. He then negligently fell on the slippery floor and broke his leg again, which required a second operation. The court held that the plaintiff's careless act was a *novus actus interveniens* and did not hold the insurer of the negligent driver liable for the second fracture. This decision confirms the all-or-nothing approach to the *novus actus interveniens* currently applied in our law, as submitted by Knobel. In light of the Bill there is the possibility that the apportionment of damages with regard to the second fracture could have taken place between the plaintiff and the insurer of the negligent driver. Knobel[261] warns, however, that with the wide discretion given to the courts in terms of the Bill there will be legal uncertainty, as it will be difficult to predict with any measure of accuracy what the ratio of apportionment would be. Nevertheless, he submits that relative certainty of some measure of responsibility with uncertainty as

256 *Minister of Safety and Security v Madyibi* 2010 2 SA 356 (SCA).
257 *Road Accident Fund v Russell* 2001 2 SA 34 (SCA).
258 Discussed above in para 3.
259 Knobel 2004 *THRHR* 420-421.
260 *Mafesa v Parity Versekeringsmaatskappy Bpk* 1968 2 SA 603 (O).
261 Knobel 2004 *THRHR* 420-425.

to the exact proportion compared to other parties involved in the matter is still preferable. Returning to the Bill, it is perhaps possible that a plaintiff's contributory intent may be considered to be of such a nature so as to break the causal link between the conduct of the defendant and the plaintiff's harm.

Botha[262] is also in favour of utilising causation when dealing with instances of contributory intent. According to him, contributory intent is a term invented by academics and is of very little practical value. To a certain extent this is true, since this defence has not been expressly recognised as a complete defence in our law, but it has nevertheless been recognised by implication, for example in cases where the court held that contributory intent cancels negligence on the part of the defendant. Even though contributory intent was recognised by the court in *Greater Johannesburg Transitional Metropolitan Council v ABSA Bank Ltd t/a Volkskas Bank*[263] as a defence limiting liability, this approach has been criticised for applying outside the constraints of the *Apportionment of Damages Act* (the "Act"). Botha submits that far better and more expeditious solutions of matters in which so-called contributory intent features can be reached if they are approached on the basis of public policy rather than on the basis of the application of the apportionment legislation. He is of the opinion that in light of the problems with contributory fault, the emphasis should be on causation. If the courts find it difficult to decide which damage was caused by whose conduct, they should ascertain whose conduct made the specific damage "more probable" and then let that party bear that damage. According to him, fault should not play a role. For example, irrespective of whether the defendant's damage-causing conduct was associated with intent or negligence, the aggrieved party will receive its full damages. If the plaintiff's damage was caused by him- or herself, he or she should not receive any damages. Thus apportionment of damage should be based on the criterion of probability of damage being caused. In this way apportionment could be applied, irrespective of the presence of intent in either party. The court should take into consideration the conduct of both parties and assess to what extent the conduct of the defendant made probable the

262 Botha *Verdeling van Skadedragingslas* 339.

263 *Greater Johannesburg Transitional Metropolitan Council v ABSA Bank Ltd t/a Volkskas Bank* 1997 2 SA 591 (W).

causation of the harmful consequences and likewise to what extent the plaintiff's conduct made probable the causation of the harmful consequences. Thereafter the court should then effect apportionment of the damage-bearing burden according to the respective degrees of probability of damage being caused. In a case where it is not possible to ascertain even the probabilities, the damage should be divided between the parties. In this way the courts would be able to apply the equitable principle of apportionment in a wide range of cases. Botha's suggestion is appealing but I am of the opinion that fault as well as causation should form part of the investigation with regard to apportionment of damages.

The decision in *General Accident Versekeringsmaatskappy SA Bpk v Uijs*[264] also supports the view that not only fault but other factors may be taken into account to reduce damages. This approach may be justified in light of the criteria of "justice and equity". In order to achieve a really just and equitable result, it is not just the degree of the plaintiff's fault that must be considered, but also other relevant factors, such as causation. Interestingly enough, here the court took into account that the plaintiff did not contribute to (caused) the accident concerned.

Another approach which is worthy of consideration in our law is that of the Swiss system, which makes use of the principle of "abuse of right" and regards it as "abusive" to make somebody else responsible for damage caused by the plaintiff him- or herself.[265] Thus it may be argued that where a plaintiff voluntarily and intentionally causes harm to him- or herself, while simultaneously acting consciously unreasonable, it would be "abusive" to make the defendant liable where he or she merely acted negligently. On the other hand, if we look at the situation where both parties intentionally contributed to the plaintiff's loss, it would not be "abusive" to apportion damages.

Perhaps German law provides the fairest solution that could be used in South Africa. This system provides for a distribution of damage according to the degree of responsibility on the part of the defendant and the plaintiff. The courts focus on the

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[264] *General Accident Versekeringsmaatskappy SA Bpk v Uijs* 1993 4 SA 228 (A) 235; see also Neethling and Potgieter 1994 *THRHR* 131.

[265] See para 4.5 above.

degree of causation as well as the different possible degrees of fault of both parties, and take into account negligence, intent and presumed fault.[266]

6 Conclusion

In conclusion, there are three aspects to be considered in order to reach an equitable result with regard to contributory intent:

(1) The causative contribution of the defendant and the plaintiff to the damage: here the courts could take into account which party's conduct was the cause or probable cause of the damage (as suggested by Botha).

(2) The relative degrees of fault of the defendant and the plaintiff: our courts have had experience apportioning liability in terms of negligence and have even apportioned damages between a defendant and plaintiff both of whom acted with intent (as in *Greater Johannesburg Metropolitan Council v ABSA Bank Ltd t/a Volkskas Bank*). Furthermore, our courts have stated that it is possible to apportion liability (of wrongdoers) where they have different forms of intent by taking the degrees of their culpability into account. For example, *dolus directus* may be a more culpable form of fault than *dolus eventualis* and there may even be different gradations of culpability inferred from *dolus eventualis*.[267] It has also been held[268] that liability (of wrongdoers) may be apportioned where one wrongdoer acts intentionally and the other negligently, also based on their relative degrees of blameworthiness. This approach should also be applied to apportionment of damages between a defendant and a plaintiff. Moreover, if one accepts, as Neethling does,[269] that intent simultaneously constitutes negligence, and that an intentional act as a rule amounts to at least a 100% deviation from the norm of the reasonable person, apportionment could also

266 See para 4.4 above.

267 See the discussion above in para 2.2 in respect of *Randbond Investments (Pty) Ltd v FPS (Northern Region) (Pty) Ltd* 1992 2 SA 608 (W) and *Lloyd-Gray Lithographers (Pty) Ltd v Nedcor Bank t/a Nedbank* 1998 2 SA 667 (W).

268 *See Lloyd-Gray Lithographers (Pty) Ltd v Nedcor Bank t/a Nedbank* 1998 2 SA 667 (W) 672-673, also discussed above para 2.2.

269 Neethling 1985 *THRHR* 250.

take place on this basis. A party's degree of culpability or blameworthiness, as expressed by his percentage-deviation from the norm of the reasonable person, should thus play an important part in enabling the court to apportion the damages between the defendant and the plaintiff "in a just and equitable" manner, having regard to the degree of their "fault in relation to the damage". Neethling[270] suggests that in instances where, for example, one party acted negligently and the other with intention, the ratio could be 60:100. In instances where one party acts with *dolus eventualis* and the other with *dolus directus* the ratio of apportionment could be 100:120.

(3) In the final analysis, courts should have the discretion to take into account any other relevant factor (such as the abuse of right in Swiss law) which can assist them at arriving at a just and equitable apportionment of damages, as was suggested in *General Accident Versekeringsmaatskappy SA Bpk v Uijs*. The same approach is supported by the Bill,[271] where it states that "[w]hen apportioning loss the court must attribute responsibility for the loss suffered in proportions that are just and equitable".

The Bill if enacted could provide for an equitable result in cases of contributory intent as, in effect, it allows for apportionment of loss based on the considerations mentioned in (1), (2) and (3) above. Although, as stated before by Knobel,[272] this may result in uncertainty as to the exact ratio of apportionment, our courts would at least have many factors to take into account to provide a fair and equitable result - there is no Act without any challenges arising from it in practical situations. In the meantime, while the courts have only the common law and the *Apportionment of Damages Act* at their disposal the defence of contributory intent should apply as a ground excluding fault in instances where voluntary assumption of risk in the form of consent is invalid.[273] Within the ambit of the *Apportionment of Damages Act*, in instances where the plaintiff's fault is in the form of contributory intent and the defendant's in the form of negligence or *vice versa*, or where both parties acted with

270 Neethling 1998 *THRHR* 521.
271 See s 3(1) of the *Apportionment of Loss Bill* 2003.
272 Knobel 2004 *THRHR* 420-425.
273 See Ahmed 2012 *Obiter* 414ff; Ahmed 2014 *SALJ* 88ff.

intent, there seems to be sufficient scope for the courts to apportion damages in a fair and just manner, taking into account any relevant factor. The foundation for this approach is evident from *General Accident Versekeringsmaatskappy SA Bpk v Uijs*. This approach does not rule out that a court may decide not to reduce the defendant's damages because of the plaintiff's contributory intent, since such a result would be fair and equitable; and *vice versa* where the defendant acted intentionally while the plaintiff was only negligent, that the plaintiff receives his full damages. In conclusion, there are indeed sufficient practical and theoretical grounds which validate the need for the recognition and development of the defence of contributory intent applying either as a ground limiting or excluding liability in terms of common law or within the ambit of apportionment legislation.

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LIST OF ABBREVIATIONS

BGB	Bürgerliches Gesetzbuch
CWO	Civil Wrongs Ordinance (Israel)
NZLC	New Zealand Law Commission
PNS	Pakistan National Shipping
SA Merc LJ	SA Mercantile Law Journal
SALJ	South African Law Journal
SALRC	South African Law Reform Commission
SCB	Standard Chartered Bank
SCC	Swiss Civil Code
SCO	Swiss Code of Obligations
THRHR	Tydskrif vir Hedendaagse Romeins-Hollandse Reg
TSAR	Tydskrif vir die Suid-Afrikaanse Reg

"CONTRIBUTORY INTENT" AS A DEFENCE LIMITING DELICTUAL LIABILITY

R AHMED*

SUMMARY

In terms of delictual liability, the term "fault" generally refers to the defendant's conduct, whereas "contributory fault" refers to the plaintiff's conduct. "Contributory intent" is a form of "contributory fault" and may apply as a defence limiting delictual liability within the ambit of the *Apportionment of Damages Act* 34 of 1956 (hereinafter referred to as the "Act"). In terms of the Act, the extent of the plaintiff's as against the defendant's fault is taken into account, resulting (in certain instances) in a reduction of the award to the plaintiff. The Act currently regulates the apportionment of damages based on fault in South Africa. The Act does not specifically provide for conduct performed intentionally, and this also seems to be the situation in quite a few foreign jurisdictions. Initially our courts applied the Act to instances of "contributory negligence" (the other form of "contributory fault") only, but in recent times they have applied it to instances of "contributory intent". This change has occurred as a result of practical situations that arose unexpectedly, where the courts had in the interest of serving justice to deal with cases of intentional conduct on the part of the plaintiff and the defendant. The effect of "contributory intent" as a defence in terms of delictual liability is uncertain and contentious not only in South Africa but in foreign jurisdictions as well. The South African Law Reform Commission undertook a review of the Act and published a report on its findings. The Commission acknowledged that since the Act was passed there have been major developments in the law of delict which the Act has been unable to accommodate, resulting in anomalies in this area of the law. It acknowledged that it is unsatisfactory for our courts to go beyond the parameters of

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This contribution is based on part of an LLM dissertation completed by the author in 2011 at the University of South Africa under the guidance and supervision of Prof J Neethling. This contribution was written on the advice of one of the examiners of the dissertation, who hoped that it would bring a renewed interest in the forgotten *Apportionment of Loss Bill* 2003.

the Act in order to reach a just and equitable result when dealing with the apportionment of liability. The *Apportionment of Loss Bill* 2003 (hereinafter referred as the "Bill") has been drafted to replace the current Act but has unfortunately not been promulgated. Over ten years have passed since it was drafted. In respect of the Bill, "contributory intent" as a defence limiting delictual liability would be recognised. It is hoped that this contribution will bring about a renewed interest in this forgotten but valuable Bill.

KEYWORDS: *Apportionment of Damages Act* 34 of 1956; *Apportionment of Loss Bill* 2003; contributory fault; contributory intent; contributory negligence; defendant; limitation of delictual liability; plaintiff