

**CONTRIBUTORY INTENT AS A DEFENCE LIMITING OR EXCLUDING
DELICTUAL LIABILITY**

by

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PREFACE

This study would not have been possible without the knowledge, patience and guidance of my supervisor, Prof Johann Neethling. I am truly indebted to him and would like to express my sincerest gratitude.

SUMMARY

“Contributory intent” refers to the situation where, besides the defendant being at fault and causing harm to the plaintiff, the plaintiff also intentionally causes harm to him- or herself. “Contributory intent” can have the effect of either excluding the defendant’s liability (on the ground that the plaintiff’s voluntary assumption of risk or intent completely cancels the defendant’s negligence and therefore liability), or limiting the defendant’s liability (where both parties intentionally cause the plaintiff’s loss thereby resulting in the reduction of the defendant’s liability). Under our law the “contributory intent” of the plaintiff, can either serve as a complete defence in terms of common law or it can serve to limit the defendant’s liability in terms of the Apportionment of Damages Act 34 of 1956. The “Apportionment of Loss Bill 2003” which has been prepared to replace the current Act provides for the applicability of “contributory intent” as a defence limiting liability, but it is yet to be promulgated.

KEY TERMS

Apportionment of Damages Act 34 of 1956

Apportionment of Loss Bill 2003

consent

contra bonos mores

contributory fault

contributory intent

contributory negligence

exclusion of delictual liability

ground excluding fault

ground of justification

limitation of delictual liability

volenti non fit iniuria

voluntary assumption of risk

ABBREVIATIONS

A	Appellate Division
AC	Appeal Cases
AD	Appellate Division
AJA	Acting Judge of Appeal
AJP	Acting Judge President
All ER	All England Reports
All SA	All South African Law Reports (LexisNexis)
ALR	Australian Law Reports
BGB	<i>Bürgerliches Gesetzbuch</i>
C	Cape Provincial Division
CC	Constitutional Court
CJ	Chief Justice
CLR	Commonwealth Law Reports
CPD	Cape of Good Hope Provincial Division
CSAR	Commissioner for South African Revenue
CWO	Civil Wrongs Ordinance (Israel)

D	Durban and Coast Local Division
GNP	North Gauteng High Court, Pretoria
J	Judge
JA	Judge Appeal
KB	King's Bench
N or NPD	Natal Provincial Division
NDLR	North Dakota Law Review
NZLC	New Zealand Law Commission
NZLR	New Zealand Law Reports
O or OPD	Orange Free State Provincial Division
PIQR	Personal Injury and Quantum Reports
QB	Queen's Bench
SA	South African Law Reports (Juta)
SA Merc LJ	SA Mercantile Law Journal
SALJ	South African Law Journal
SALRC	South African Law Reform Commission
SASR	South Australian State Reports

SCA	Supreme Court of Appeal
SCB	Standard Chartered Bank
SCO	Code of Obligations (Swiss)
T	Transvaal Provincial Division
THRHR	Tydskrif vir Hedendaagse Romeins-Hollandse Reg
TS	Transvaal Supreme Court Reports
TSAR	Tydskrif vir die Suid-Afrikaanse Reg
UKHL	United Kingdom House of Lords
VLR	Victorian Law Reports
VR	Victoria Reports
W	Witwatersrand Local Division
WCC	Western Cape High Court, Cape Town
WLR	Weekly Law Reports

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“As has been mentioned, there is little authority for the so-called defence of contributory intent in our law where the defendant acted negligently, and it would appear that our courts are not prepared to recognise it in terms of the Apportionment of Damages Act. Nevertheless, the principle that the conscious taking of an unreasonable risk by the plaintiff cancels fault on the part of the defendant, is a principle of common law and functions independently of the Act.”¹

¹ Neethling and Potgieter *Delict* 171.

Chapter 1

1. Introduction

1.1 Background

This study focuses on contributory intent as a defence limiting or excluding delictual liability. In order to understand the term “contributory intent” it is necessary to put it into perspective within the law of delict as a whole. “*A delict is the act of a person that in a wrongful and culpable way causes harm to another.*”¹ The following five elements, namely, an act, wrongfulness, fault, causation and harm, must be present before the conduct complained of is considered to be a delict.² Fault (*culpa* in the wide sense) is a general requirement for delictual liability.³ Fault in the form of either intention (*dolus*) or negligence (*culpa* in the narrow sense) is sufficient to hold a person legally blameworthy.⁴ In general, fault refers to the defendant’s conduct. On the other hand, “contributory fault”, of which “contributory intent” is a form, refers to a situation where, besides the defendant being at fault and causing harm to the plaintiff, the plaintiff also culpably (intentionally or negligently) causes harm to him- or herself.⁵ In this sense “contributory intent” can have the effect of either excluding the defendant’s liability (on the ground that the plaintiff’s fault completely cancels the defendant’s fault and therefore liability),⁶ or limiting the defendant’s liability (on the ground that the plaintiff’s loss was caused partly by his or her own fault and to this extent reduces the defendant’s liability).⁷ Consequently, the “contributory intent” of the plaintiff can either serve as a complete defence or it can serve to limit the defendant’s liability.⁸

¹ Neethling and Potgieter *Delict* 4.

² Neethling and Potgieter *Delict* 4; Loubser *et al Delict* 21.

³ Burchell *Delict* 85; Neethling and Potgieter *Delict* 123; Van der Walt and Midgley *Delict* 155. However, exceptions do occur and are referred to as “liability without fault” or “strict liability”; see Neethling and Potgieter *Delict* 355-375; Van der Walt and Midgley *Delict* 35-36; Burchell *Delict* 245-254; Loubser *et al Delict* 359-366.

⁴ Neethling and Potgieter *Delict* 124; Van der Walt and Midgley *Delict* 155; Burchell *Delict* 30; McKerron *Delict* 13.

⁵ Van der Walt and Midgley *Delict* 147.

⁶ Neethling and Potgieter *Delict* 104, 171.

⁷ Neethling and Potgieter *Delict* 161.

⁸ See Ahmed 2010 *THRHR* 699.

As will be explained in detail later, contributory intent as a defence excluding delictual liability is often referred to as voluntary assumption of risk, and may in practice manifest itself in two forms. Firstly it may, depending on the circumstances, be embodied in the maxim *volenti non fit iniuria* which refers to consent to the risk of injury as a ground of justification and excludes the wrongfulness of the act. As such, *volenti non fit iniuria* in the form of voluntary assumption of risk can function as a complete defence.⁹ Secondly, where voluntary assumption of risk cannot serve as a ground of justification because it does not meet all the requirements for a valid consent, it may, depending on the circumstances, in the form of “contributory intent” still serve as a ground excluding fault and consequently as a complete defence.¹⁰ This occurs where the plaintiff voluntarily assumes the risk of harm by “intentionally” exposing him- or herself to a risk of harm. In these instances, the plaintiff’s “contributory intent” cancels the fault (negligence) of the defendant.¹¹

As will be illustrated, the distinction between voluntary assumption of risk as a ground cancelling fault (contributory intent) and as a ground of justification is not apparent from case law. On the contrary, the courts have been reluctant to recognise contributory intent as a separate defence.¹² Furthermore, according to leading academics it is unclear whether contributory intent may in principle be used as a separate ground of justification which negates wrongfulness or whether it may serve as a ground excluding fault.¹³

With regard to contributory intent as a defence limiting delictual liability, the main issue is whether contributory intent can in terms of the Apportionment of Damages Act 34 of 1956 (hereinafter referred to as the “Act” or the “Apportionment of Damages Act”) have the effect of reducing the plaintiff’s damages. Apart from one judgment, the courts have been reluctant to recognise that the Act also applies to cases involving contributory intent on the part of the plaintiff. In this regard two situations may arise in practice:

⁹ Van der Walt and Migdley *Delict* 140.

¹⁰ Neethling and Potgieter *Delict* 171.

¹¹ Neethling and Potgieter *Delict* 171.

¹² *Netherlands Insurance Co of SA Ltd v Van der Vyver* 1968 1 SA 412 (A) 422.

¹³ See *infra* chapter 3 par 3.5; cf Ahmed 2010 *THRHR* 700-701.

- (a) where the plaintiff intentionally contributed to his or her own loss and the defendant acted negligently; and
- (b) where the defendant acted with intent and the plaintiff acted with “contributory intent” with regard to the plaintiff’s loss.

As will become clear later, section 2 of the Apportionment of Damages Act which applies to joint wrongdoers, may be relevant with regard to the defence of “contributory intent” because of the practical manner in which the courts apportion damages between intentional wrongdoers or intentional and negligent wrongdoers. This may be of assistance in apportioning damage in instances where the plaintiff acted intentionally and the defendant negligently (situation (a) above), or where the defendant and plaintiff both acted intentionally (situation (b) above).¹⁴

Finally, attention will be given to the Bill¹⁵ that 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.

1.2 Purpose of study

The purpose of this study is to investigate whether “contributory intent” could and should be recognised in our law as a defence excluding or limiting delictual liability. In view of the fact that there is little South African authority on the topic and some reluctance on the part of our courts and the legislature to recognise this defence, the aim is to ascertain whether there are indeed sufficient practical and theoretical grounds that validate the need for this defence to be recognised, developed and incorporated in our law. Moreover, comparative research will be undertaken to determine whether other countries have recognised “contributory intent” as a defence and, if so, to what extent they have done so. Upon completion of this investigation, recommendations can then be made on how to develop and incorporate this defence in our law.

¹⁴ See also Ahmed 2010 *THRHR* 702.

¹⁵ Apportionment of Loss Bill 2003.

1.3 Outline of chapters

“Contributory intent” as a form of “contributory fault” will be defined in chapter 2. Since “contributory intent” may be relevant as a defence limiting (where the Apportionment of Damages Act is applicable) or excluding liability (where the common law is applicable), it is necessary to define it within those contexts and to further differentiate it from the defences of *volenti non fit iniuria* and contributory negligence.

In chapter 3, the role of “voluntary assumption of risk” in the form of “contributory intent” as a complete defence excluding delictual liability (in terms of common law) will be analysed. In this regard the core question is whether “voluntary assumption of risk” can function both as a ground of justification and as a ground excluding fault. In order to answer this question effectively, it is necessary to analyse a variety of different cases involving “voluntary assumption of risk” not only in South Africa but also in foreign jurisdictions.

Chapter 4 will focus on the function of “contributory intent” as a defence limiting delictual liability. In this regard the defence of “contributory intent” within the ambit of the Apportionment of Damages Act will be dealt with as this Act currently regulates apportionment of damages based on fault in South Africa.¹⁶ Once again it is necessary to investigate whether this defence is applicable in foreign jurisdictions and if so to what extent.

To close, chapter 5 will provide a concise summary of the authority relating to contributory intent as a defence limiting or excluding delictual liability, a conclusion and recommendations on how to develop and incorporate this defence in our law.

¹⁶ Neethling and Potgieter *Delict* 161.

Chapter 2

2. Definition of contributory intent

2.1 Fault and contributory fault

Fault as an element of delictual liability refers to the legal blameworthiness or the reprehensible state of mind or conduct of someone who has acted wrongfully.¹⁷ Two main forms of fault (*culpa* in the wide sense) are recognised: intention (*dolus*) and negligence (*culpa* in the narrow sense).¹⁸ Generally for purposes of the *actio legis Aquiliae* and the action for pain and suffering, either intention or negligence is required for liability but for purposes of the *actio iniuriarum* (infringement of personality), intent is required, as negligence is insufficient.¹⁹ As mentioned, fault refers to the defendant's conduct, while contributory fault refers to the plaintiff's conduct.²⁰ The latter can also take two forms: contributory intent and contributory negligence.²¹ Contributory intent refers to the situation where, besides the defendant being at fault and causing harm to the plaintiff, the plaintiff also *intentionally* causes harm to him- or herself.²² As will be explained, the contributory intent of the plaintiff can either serve as a complete defence or it can serve to limit the defendant's liability.²³

Before dealing with the definition of contributory intent it is necessary to focus on fault in general as an element of delict since many of the principles relating to fault are in various respects analogous to or have similar characteristics as those relating to contributory fault. This notwithstanding, as mentioned, authority for the recognition of contributory intent as a defence excluding liability in our law is scarce, and with

¹⁷ Neethling and Potgieter *Delict* 123; Loubser *et al Delict* 99.

¹⁸ Neethling and Potgieter *Delict* 123; Loubser *et al Delict* 99.

¹⁹ Neethling and Potgieter *Delict* 124. However, there are certain types of *iniuria* based on liability without fault (such as wrongful deprivation of liberty and wrongful attachment of property) and negligence (in certain instances of defamation and malicious prosecution); Neethling, Potgieter and Visser *Personality* 57 fn 203, 204.

²⁰ Loubser *et al Delict* 134; Van der Walt and Midgley *Delict* 147; Neethling and Potgieter *Delict* 161.

²¹ Neethling and Potgieter *Delict* 161; cf Schwietering 1957 *THRHR* 141 who refers to contributory fault as “roekelose of onverantwoordelike self-blootstelling aan ‘n bekende gevaar” (*reckless or irresponsible exposure to a well-known danger*).

²² Van der Walt and Midgley *Delict* 147.

²³ Neethling and Potgieter *Delict* 171; Ahmed 2010 *THRHR* 699.

regard to limiting liability the courts have raised doubt as to its existence.²⁴ Furthermore, as will be shown,²⁵ the courts, not only in South Africa but also in other countries, have conflated contributory intent and contributory negligence leading to the suppression of the development of the former defence. Clerk and Lindsell²⁶ also point out that the defence of *volenti non fit iniuria* (in the form of voluntary assumption of risk sometimes analogous to contributory intent) is often raised in conjunction with the defence of contributory negligence and the courts tend to interpret situations in terms of contributory negligence rather than *volenti non fit iniuria*, thereby blurring the distinction between the two defences. For this reason it is necessary to briefly discuss intent and negligence as the two forms of fault and, by analogy, contributory intent and negligence in order to show the difference between them. The English doctrine of “duty of care” which has played a role in our law as well as in other countries will also be discussed. The application of this doctrine has led to the conflation of the two forms of contributory fault and has aided in negating the defence of contributory intent.

2.2 Intention (*dolus*) and contributory intent

2.2.1 Intention

Intent describes a wrongdoer’s will to achieve a specific wrongful consequence and refers to a person’s state of mind or predisposition regarding wrongful conduct leading to a consequence.²⁷ The test for intention is subjective as it involves an evaluation of a person’s state of mind in relation to the consequence and of whether the person actually knew that the conduct and its consequences were wrongful.²⁸

²⁴ See *Netherlands Insurance Co of SA Ltd v Van der Vyver* 1968 1 SA 412 (A) 422; *Mabaso v Felix* 1981 3 SA 865 (A) 876 G; *Wapnick v Durban City Garage* 1984 (2) SA 414 (D) 418; *Minister van Wet en Orde v Ntsane* 1993 1 SA 560 (A) 561, but Goldstein J in *Greater Johannesburg Transitional Metropolitan Council v ABSA Bank Ltd* 1996 4 All SA 278 (W) 291 recognised the defence of contributory intent; cf Neethling and Potgieter *Delict* 171; Ahmed 2010 *THRHR* 702.

²⁵ In chapters 3 and 4.

²⁶ *Torts* 197.

²⁷ Loubser *et al Delict* 99; Van der Walt and Midgley *Delict* 157.

²⁸ Loubser *et al Delict* 99.

Intention has two elements: direction of the will (which refers to the manner in which the will is directed and indicates the form of intention)²⁹ and consciousness of wrongfulness³⁰ (which refers to the wrongdoer's knowledge that the conduct and consequences thereof are prohibited by law or the legal convictions of society).³¹

Direction of the will requires that a person must have aimed to achieve a particular consequence or, at the very least, must have been willing to produce or accept the resulting consequence. Thus a person can direct his will directly (*dolus directus*), indirectly (*dolus indirectus*), or by accepting the possibility of harmful consequences ensuing (*dolus eventualis*).³² With regard to direct intent, the wrongdoer actually desires a particular consequence from his conduct and it does not matter whether he or she is certain of the resulting consequence or whether it appears probable or possible.³³ Indirect intent is present where a wrongdoer directly intends a consequence but, simultaneously, is aware that an additional consequence will unavoidably or inevitably occur. Thus, the second resulting consequence is accompanied by indirect intent.³⁴ *Dolus eventualis* is present where the wrongdoer foresees the possibility that he may cause a particular result (while not desiring it), but reconciles him- or herself to that possible consequence and performs the act which results in the said consequence.³⁵ This form of intent is the most common form of intent referred to with regard to the defence of contributory intent excluding delictual liability. It is also sometimes viewed in a different light which holds that the wrongdoer foresees the possibility of the ensuing harm, but nevertheless "recklessly" continues performing the action.³⁶ As a result there is often confusion between *dolus eventualis* and gross negligence.³⁷ In respect of negligence, the question is whether the result objectively seen was reasonably foreseeable while, in the case of *dolus*

²⁹ Loubser *et al Delict* 106.

³⁰ Neethling and Potgieter *Delict* 126.

³¹ Loubser *et al Delict* 106.

³² Loubser *et al Delict* 105, 107; Neethling and Potgieter *Delict* 127; Van der Walt and Midgley *Delict* 157-158.

³³ Neethling and Potgieter *Delict* 127.

³⁴ Neethling and Potgieter *Delict* 127.

³⁵ For example, in *Le Roux v Dey* 2011 3 SA 274 (CC) 317-318 Brand AJ, with regard to defamation, held that "[a] defendant who foresaw the possibility that his attempt at humour might be defamatory of the plaintiff, but nonetheless proceeds with the attempt, will have *animus iniuriandi* or intent in the form of *dolus eventualis*".

³⁶ Neethling and Potgieter *Delict* 127.

³⁷ Van der Walt and Midgley *Delict* 158.

eventualis, the question is whether the wrongdoer actually subjectively foresaw the possibility of the result. The fact that a particular result was objectively reasonably foreseeable may provide proof of what was actually subjectively foreseen by the wrongdoer. If the wrongdoer alleges that he or she did not foresee a result that was reasonably foreseeable, he or she must demonstrate factual circumstances that make his or her version believable.³⁸ If the wrongdoer can demonstrate this, there may be fault in the form of negligence but not intent.³⁹ On the other hand, if the wrongdoer foresees that a harmful consequence might occur in respect of his or her action but truly believed that it would not happen, *dolus eventualis* would not be present as the wrongdoer did not reconcile him- or herself to that consequence.⁴⁰ However, *luxuria* or conscious negligence may then be present.⁴¹

Although a distinction is made between the different forms of intent it normally does not matter which form is present as there is no specific consequence attached to any one of them.⁴² However, as regards apportionment of liability between joint wrongdoers, Mahomed J in *Ranbond Investments (Pty) Ltd v FPS (Northern Region) (Pty) Ltd*⁴³ pointed out that there can be degrees of culpability with regard to intentional acts and that there is a difference between *dolus eventualis* and *dolus directus*. It is also possible to infer different degrees of culpability even from *dolus eventualis*. Scott⁴⁴ also expressed the view that the time may come for our courts to attach different values to different forms of *dolus*.

Up to the decision of the Supreme Court of Appeal in *Le Roux v Dey*⁴⁵ it was generally accepted, apart from certain well justified exceptions,⁴⁶ that consciousness of wrongfulness is an element of intent. In *Dey* it was held that as far as *iniuria* is concerned, intention to injure (*animus iniuriandi*) as a “requirement generally does

³⁸ See Loubser *et al Delict* 107; Neethling and Potgieter *Delict* 127-128 fn 29 also refer to Van der Merwe and Olivier *Delict* 118.

³⁹ Loubser *et al Delict* 107.

⁴⁰ Neethling and Potgieter *Delict* 128; Loubser *et al Delict* 107.

⁴¹ See comment made in chapter 3 par 3.2.2.3 in respect of *Van Wyk v Thrills Incorporated (Pty) Ltd*.

⁴² Neethling and Potgieter *Delict* 128.

⁴³ 1992 2 SA 608 (W) 620-621; cf chapter 4 par 4.2.2.3.

⁴⁴ 1984 *Huldigingsbundel Paul van Warmelo* 177; cf Scott 1997 *De Jure* 393-394.

⁴⁵ 2010 4 SA 210 (SCA) 219-225.

⁴⁶ See Neethling 2010 *Obiter* 703-706.

not require consciousness of wrongfulness".⁴⁷ However, since this decision was *obiter*, subject to criticism⁴⁸ and in any case not confirmed by the Constitutional Court,⁴⁹ it is submitted that consciousness of wrongfulness is still generally accepted as an element of intention, also in instances of *iniuria*.⁵⁰

Consciousness of wrongfulness requires that in instances where a person directs his or her will towards achieving a particular consequence, such person must also realise or at least foresee the possibility that his or her conduct and the consequences thereof will be wrongful. If such person subjectively believes that he or she is acting in accordance with the law, he or she does not act intentionally.⁵¹ Motive, which is referred to by Loubser *et al*⁵² as the "actuating impulse preceding intention", may also indicate whether consciousness of wrongfulness is present.

2.2.2 Contributory intent

2.2.2.1 Excluding liability

Where the plaintiff is aware of the danger or harm that may ensue from his or her action, but nevertheless wilfully exposes him- or herself to such danger or harm, he or she acts "intentionally". Blame in the form of contributory intent may be imputed to him or her.⁵³ In this regard it must be noted that, technically speaking, a person cannot have intent in respect of him- or herself. Intent can logically only exist when wrongfulness is already present. After all, there can be no question of consciousness

⁴⁷ *Supra* 224.

⁴⁸ See Neethling 2010 *Obiter* 706-714.

⁴⁹ Brand AJ (*supra* 319) held with reference to Harms DP's decision in the SCA regarding consciousness of wrongfulness, that "[i]t was . . . unnecessary for the Supreme Court of Appeal to embark upon the enquiry as to whether our law should still require knowledge of wrongfulness as part of *animus iniuriandi*. Nor do I find it necessary for this court to do so". Thus the CC chose not to clarify whether consciousness of wrongfulness should remain as an element of *animus iniuriandi*; see also Neethling and Potgieter 2011 *Obiter* to be published; cf the cases referred to by Van der Walt and Midgley *Delict* 158-159 fn 20-21.

⁵⁰ Loubser *et al Delict* 108; Neethling and Potgieter *Delict* 128-129; McKerron *Delict* 47.

⁵¹ Loubser *et al Delict* 108 fn 17 refer to *Maisel v Van Naeren* 1960 4 SA 836 (A) and *Dantex Investment Holdings (Pty) Ltd v Brenner* 1989 1 SA 390 (A) 396-397; Neethling and Potgieter *Delict* 128-129 fn 36 in addition, refer to Van der Merwe and Olivier *Die onregmatige daad* 122-125 and *Kgaleng v Minister of Safety and Security* 2001 4 SA 854 (W) 874.

⁵² *Delict* 109-110.

⁵³ Neethling and Potgieter *Delict* 171.

of wrongfulness before wrongfulness is established.⁵⁴ But since a person cannot act wrongfully in respect of him- or herself,⁵⁵ it is legally impossible for him or her to be conscious of the wrongfulness of his or her conduct and therefore to have intent in respect of him- or herself. Contributory intent is thus not the same as intent but a term used to determine the extent of the plaintiff's fault by a method which is analogous to that of determining intent.⁵⁶ As mentioned above⁵⁷ intent can take different forms and intent, even in the form of *dolus eventualis*, is sufficient to hold the plaintiff at fault.⁵⁸ With regard to contributory intent in the form of voluntary assumption of risk, the plaintiff usually has intent in the form of *dolus eventualis*. What must be established, in terms of the plaintiff's "direction of the will" in the form of *dolus eventualis*, is whether the plaintiff foresaw the possibility that he or she may cause the result and reconciled him- or herself to this fact, and thereafter performed the act which brought about the consequence in question.⁵⁹ As said, with regard to the element of consciousness of wrongfulness, it is legally impossible for the plaintiff to be conscious of the wrongfulness of his or her conduct.⁶⁰ To fulfil this element, it has been submitted therefore that such conduct should also be "consciously unreasonable", that is, not directed towards the achievement of a lawful goal.⁶¹ Seen thus, the plaintiff must simultaneously realise that his or her intended conduct is unreasonable and nevertheless accepts the eventuality of harm which later ensues. If the circumstances of the case reveal this on the part of the plaintiff, contributory intent in the form of *dolus eventualis*⁶² is present. Where the plaintiff acts with contributory intent, the fault of the defendant in the form of negligence is cancelled as the plaintiff acts intentionally. The contributory intent (at least in the form of *dolus eventualis*) or assumption of risk by the plaintiff therefore serves to exclude liability. Although this may be criticised as a distorted form of voluntary assumption of risk, it occurs in practice and, for the purposes of this study, contributory intent must be

⁵⁴ Cf Neethling and Potgieter *Delict* 43 fn 55, 123 fn 6.

⁵⁵ See Van der Walt and Midgley *Delict* 241.

⁵⁶ Cf *infra* par 2.3 as to contributory negligence.

⁵⁷ At par 2.2.1.

⁵⁸ Loubser *et al Delict* 99; Van der Walt and Midgley *Delict* 157.

⁵⁹ Neethling and Potgieter *Delict* 127.

⁶⁰ Cf Neethling and Potgieter *Delict* 171 fn 285.

⁶¹ See Neethling and Potgieter *Delict* 171.

⁶² Neethling and Potgieter *Delict* 126.

seen in this light, as submitted by Neethling and Potgieter.⁶³ It is indeed accepted by the courts that under the common law, the conscious undertaking of an unreasonable risk by the plaintiff cancels negligence on the part of the defendant.⁶⁴

2.2.2.2 Limiting liability

Besides applying as a complete defence under the common law, contributory intent is also relevant in limiting the extent of the defendant's liability. As mentioned above, contributory intent can take different forms (direct, indirect and *dolus eventualis*), 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.⁶⁵ In this regard it must also be noted that contributory intent is not the same as, but is analogous to, intent.⁶⁶ 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 are at fault in the form of intention or negligence.⁶⁷ The Act is only applicable 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.⁶⁸ The Act is also applicable to cases based on vicarious liability.⁶⁹

Even though, as pointed out above, fault relates to negligence and intention, our courts⁷⁰ have applied the Apportionment of Damages Act mainly to contributory negligence. Nevertheless, the law has evolved and the Act has been applied to practical situations that arose 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

⁶³ *Delict* 171.

⁶⁴ 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; Van der Walt and Midgley *Delict* 244; Ahmed 2010 *THRHR* 701.

⁶⁵ Neethling and Potgieter *Delict* 161.

⁶⁶ See *supra* par 2.2.2.1; cf *infra* par 2.3 as to contributory negligence.

⁶⁷ These possible scenarios will be discussed further in chapter 4 par 4.2.1.1.

⁶⁸ Neethling and Potgieter *Delict* 163-164.

⁶⁹ Van der Walt and Midgley *Delict* 240.

⁷⁰ As well as other countries with similar legislation apportioning liability as discussed in chapter 4 par 4.4.

circumstances where the legislature does not specifically provide for conduct performed intentionally.⁷¹

2.3 Negligence and contributory negligence

With regard to negligence a person is held legally blameworthy for an attitude or conduct of carelessness, thoughtlessness or imprudence as a result of giving insufficient attention to his or her actions.⁷² Thus, negligence refers to the standard of a person's conduct which society deems appropriate in the circumstances. A person's conduct is evaluated according to the general standard of care as required by law. The test or standard used is the *diligens paterfamilias* or reasonable person. The classic test of the reasonable person, generally accepted by the courts,⁷³ was formulated by Holmes JA in *Kruger v Coetzee*⁷⁴ as follows:

“For the purpose of liability *culpa* arises if-

(a) a *diligens paterfamilias* in the position of the defendant-

(i) would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and

(ii) would take reasonable steps to guard against such occurrence; and

(b) the defendant failed to take such steps.”

The test for negligence involves an objective evaluation of a person's conduct (disregarding his or her state of mind) as compared to a subjective evaluation with regard to intention (which involves an enquiry into a person's state of mind).⁷⁵ It is obvious that, in practice, negligence is normally easier to prove than intention and intention is a more culpable form of fault compared to negligence. With regard to “contributory negligence”, strictly speaking an act can only be negligent where it is also wrongful, and, as said,⁷⁶ a person cannot act wrongfully in respect of him- or herself. Contributory negligence is thus not on par with negligence, but the term is used to determine the extent of the defendant's liability by a method which is

⁷¹ See *Greater Johannesburg Transitional Metropolitan Council v ABSA Bank* 1997 2 SA 591 (W).

⁷² Neethling and Potgieter *Delict* 131.

⁷³ See Neethling and Potgieter *Delict* 131 fn 58 for references.

⁷⁴ 1966 2 SA 428 (A) 430.

⁷⁵ Loubser *et al Delict* 99.

⁷⁶ *Supra* par 2.2.21.

analogous to that of determining negligence.⁷⁷ Technically speaking though, the method does not pertain to negligence *stricto sensu* as wrongfulness cannot play a part.⁷⁸

2.4 Negligence and “duty of care”

On occasion our courts have strayed from applying the test of the reasonable person and have instead followed the English “duty of care” doctrine.⁷⁹ As is evident further on in this study,⁸⁰ English law has in this respect influenced not only South African law but the law of many other countries. A brief summary of the doctrine is therefore appropriate.

According to the doctrine, negligence is only present where it is first established that the defendant owed the plaintiff a duty of care and thereafter in fact breached such a duty. In investigating whether a duty of care is owed, a policy-based value judgment, in which the foreseeability of damage plays no role, is made. With regard to the question of whether there was a breach of the duty, the reasonable person test is applied. Here the plaintiff will have to prove that he or she was a foreseeable plaintiff and that the reasonable person, in contrast to the wrongdoer, would have prevented the damage.⁸¹ The “duty of care” doctrine is foreign to Roman-Dutch law (which forms the basis of our law of delict) and as Neethling and Potgieter⁸² point out, should be rejected as it is unnecessary and merely constitutes a roundabout way of establishing negligence. Furthermore, the doctrine confuses the tests for wrongfulness and negligence, thereby undermining the theoretical foundations of our law of delict and leading to legal uncertainty.⁸³ Nevertheless, in this study, the “duty of care” doctrine used in foreign countries is only analogous to our reasonable person test for negligence.

⁷⁷ Cf Boberg *Delict* 657 who states that “fault” in terms of the Apportionment of Damages Act 34 of 1956 relates to nothing more than common law negligence.

⁷⁸ Neethling and Potgieter *Delict* 167.

⁷⁹ See Neethling and Potgieter *Delict* 152-154.

⁸⁰ In chapters 3 and 4.

⁸¹ Neethling and Potgieter *Delict* 152.

⁸² Neethling and Potgieter *Delict* 152-154.

⁸³ See Neethling and Potgieter *Delict* 153, especially fn 183.

2.5 Consent, contributory intent and contributory negligence

It is important to distinguish between consent, contributory intent and contributory negligence as our courts often confuse these defences.⁸⁴ *Volenti non fit iniuria* is a maxim used to describe two forms of consent, that is, consent to injury and consent to the risk of injury. As said before, voluntary assumption of risk may imply consent to the risk of injury (a ground of justification) or “contributory intent” (a ground excluding fault).⁸⁵ Voluntary assumption of risk in both its forms constitutes a complete defence excluding delictual liability.⁸⁶ The contributory intent or assumption of risk by the plaintiff eliminates the defendant's fault. Neethling and Potgieter⁸⁷ suggest that instead of being blinded by clichés such as *volenti non fit iniuria*, voluntary assumption of risk and consent, one should ascertain from the situation whether wrongfulness was excluded as a result of consent by the injured person, or whether the plaintiff's contributory intent cancelled the defendant's negligence, or whether the plaintiff neither consented to injury or the risk thereof, nor had contributory intent, but was in fact contributorily negligent in respect of his or her damage because he or she acted in a manner different from that of the reasonable person.

⁸⁴ See eg Fagan J's remark in *Lampert v Hefer* 1955 2 SA 507 (A) 514 that voluntary assumption of risk as a form of consent must be distinguished from contributory negligence, but it was also stated that the two defences overlap.

⁸⁵ Neethling and Potgieter *Delict* 104.

⁸⁶ Neethling and Potgieter *Delict* 104 fn 502.

⁸⁷ Neethling and Potgieter *Delict* 104 fn 502; cf Ahmed 2010 *THRHR* 701.

Chapter 3

3. Contributory intent as a complete defence excluding delictual liability

3.1 Introduction

In respect of delictual liability, there are defences which negate wrongfulness and defences which negate fault. Although logically fault can only be present once wrongfulness has been established, according to the Supreme Court of Appeal, there is no hard and fast rule on whether to establish wrongfulness or fault first.⁸⁸ Reference has been made⁸⁹ to the defence of *volenti non fit iniuria* which can take two forms: consent to injury and consent to the risk of injury,⁹⁰ also known as voluntary assumption of risk. As explained,⁹¹ voluntary assumption of risk may manifest itself either in the form of consent to the risk of injury (a ground of justification) or contributory intent (a ground excluding fault).⁹² Currently, the Appeal Court acknowledges that in certain circumstances it is possible to attribute contributory intent to a plaintiff but, in the absence of authority, the Court is reluctant to recognise contributory intent as a separate and distinct defence, either as a ground of justification or as a ground excluding fault.⁹³

In this chapter the investigation will focus on whether voluntary assumption of risk as a form of contributory intent can function both as a ground of justification and as a ground excluding fault.

⁸⁸ See cases cited by Neethling and Potgieter *Delict* 123-124 fn 6; Loubser *et al Delict* 152 refer to *Local Transitional Council of Delmas v Boshoff* 2005 5 SA 514 (SCA) par 20; see also *Hawekwa Youth Camp v Byrne* 2010 6 SA 83 (SCA) 91.

⁸⁹ See chapters 1 and 2.

⁹⁰ The two forms can be explained as follows. "Consent to injury" occurs where a person consents to the removal of his or her tooth and "consent to the risk of injury" where a person consents to the risk that the operation performed on his or her spine could possibly lead to paralysis. See generally *Waring and Gillow Ltd v Sherborne* 1904 TS 344; Neethling and Potgieter *Delict* 103 fn 498; Van der Walt and Midgley *Delict* 140; Boberg *Delict* 724; Burchell *Delict* 68; McKerron *Delict* 67.

⁹¹ See chapters 1 and 2.

⁹² Neethling and Potgieter *Delict* 171; Ahmed 2010 *THRHR* 699.

⁹³ *Netherlands Insurance Co of SA v Van der Vyver* 1968 1 SA 412 (A) 422.

3.2 Voluntary assumption of risk as a ground of justification

3.2.1 Introduction

A ground of justification negates the element of wrongfulness, and thereby renders the defendant's conduct lawful.⁹⁴ The basic test for wrongfulness in our law is the *boni mores* or reasonableness criterion.⁹⁵ A ground of justification is a special instance where a defendant's violation of a plaintiff's interests is not *contra bonos mores* or unreasonable.⁹⁶ Grounds of justification are therefore just an expression of the *boni mores*.⁹⁷ Certain grounds of justification have crystallized over the years with their own rules limiting their scope of application.⁹⁸ These grounds do not constitute a *numerus clauses*⁹⁹ and the courts are at liberty to develop new grounds in accordance with the *boni mores* of our constitutional community.¹⁰⁰ For the purposes of this discussion, the focus will be on *volenti non fit iniuria* in the form of voluntary assumption of risk as a ground of justification.

3.2.2 *Volenti non fit iniuria* (voluntary assumption of risk)

3.2.2.1 Introduction

Generally, consent to injury on the part of the plaintiff is a ground of justification and a complete defence, which excludes wrongfulness and therefore delictual liability on

⁹⁴ See eg *Hattingh v Roux* 2011 5 SA 135 (WCC) 140-141, with reference to Neethling and Potgieter *Delict* 36; see also Van der Walt and Midgley *Delict* 69.

⁹⁵ It is generally accepted that as a practical application of the *boni mores* criterion, wrongfulness is constituted by the infringement of a subjective right or the breach of a legal duty to prevent harm (see Neethling and Potgieter *Delict* 44-46). The recent formulation of one variation of the test for wrongfulness in our law, namely that wrongfulness depends on whether it would be reasonable to hold the defendant liable (see eg *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA* 2006 1 SA 461 (SCA) 468; *Le Roux v Dey* 2011 3 SA 274 (CC) 315; *Hawekwa Youth Camp v Byrne* 2010 6 SA 83 (SCA) 90-91), is controversial, subject to criticism and therefore not acceptable (see Neethling and Potgieter *Delict* 78-82).

⁹⁶ Neethling and Potgieter *Delict* 82.

⁹⁷ See *Hattingh v Roux* 2011 5 SA 135 (WCC) 141; Van der Walt and Midgley *Delict* 125; Neethling and Potgieter *Delict* 82.

⁹⁸ *Clarke v Hurst* 1992 4 SA 630 (D) 650; Neethling and Potgieter *Delict* 83 fn 329; Burchell *Delict* 67; Boberg *Delict* 645; Van der Walt and Midgley *Delict* 126; Loubser *et al Delict* 157- 158.

⁹⁹ *Clarke v Hurst* 1992 4 SA 630 (D) 650; Boberg *Delict* 645; Neethling and Potgieter *Delict* 83; Van der Walt and Midgley *Delict* 126; Burchell *Delict* 67.

¹⁰⁰ Van der Walt and Midgley *Delict* 126.

the part of the defendant.¹⁰¹ As mentioned,¹⁰² this principle is embodied in the maxim *volenti non fit iniuria*. In practice, consent to a specific injury usually does not present any problems where the consent is freely and lawfully given by a person who has the legal capacity to give consent. Such consent justifies the conduct consented to, making the infliction of harm lawful. It is clearly a defence that negates wrongfulness.¹⁰³ It is the application of the second form of consent, consent to the risk of injury or voluntary assumption of risk (contributory intent), which is problematic and which was dealt with by most of the decided cases.¹⁰⁴ Although this defence is recognised in our law, it has been applied with great caution and circumspection.¹⁰⁵ This is evident from the fact that, since 1928, as far as could be ascertained, the defence of *volenti non fit iniuria* as a ground of justification has only been successfully invoked in a very few cases, namely, *Card v Sparg*,¹⁰⁶ *Boshoff v Boshoff*¹⁰⁷ and *Maartens v Pope*.¹⁰⁸ Due to the fact that there is little authority on the application of this maxim, our courts in the past have had regard to foreign law. In the well-known case of *Santam Insurance Co Ltd v Vorster*¹⁰⁹ Ogilvie Thompson CJ mentioned¹¹⁰ that, generally, there seems to be a worldwide trend to decide against the applicant on the *volenti* ground.

¹⁰¹ Loubser *et al Delict* 158.

¹⁰² See chapters 1 and 2.

¹⁰³ Boberg *Delict* 724.

¹⁰⁴ *Santam Insurance Co Ltd v Vorster* 1973 4 SA 764 (A) 775; Boberg *Delict* 724; McKerron *Delict* 67; Loubser *et al Delict* 162; Schreiner JA in *Lampert v Hefer* 1955 2 SA 507 (A) 508 referred to the customary usage of voluntary assumption of risk as a form of consent and stated that these “risk cases” are far more important in practice. The risk may be inherent in the particular circumstance or as a result of the defendant’s dangerous conduct; cf Ahmed 2010 *THRHR* 699.

¹⁰⁵ *Waring and Gillow Ltd v Sherborne* 1904 TS 340, 344; *Santam Insurance Co Ltd v Vorster* 1973 4 SA 764 (A) 764; cf *Van Wyk v Thrills Incorporated (Pty) Ltd* 1978 2 SA 614 (A) 616; *Clark v Welsh* 1975 4 SA 469 (W); Van der Walt and Midgley *Delict* 140.

¹⁰⁶ 1984 4 SA 667 (E).

¹⁰⁷ 1987 2 SA 694 (O).

¹⁰⁸ 1992 4 SA 883 (N). But see also *Castell v De Greef* 1994 4 SA 408 (C) where it seems that by implication the defence of *volenti non fit iniuria* succeeded, at least as far as certain claims were concerned (see *infra* par 3.2.2.3). Van der Walt and Midgley *Delict* 145 fn 4 refer to these three cases as well as *Lampert v Hefer* 1955 2 SA 507 (A), as instances where the defence of *volenti non fit iniuria* has been successfully raised (since 1928). However, as will be demonstrated (*infra* par 3.3.3), in the latter case this defence was rather concerned with contributory intent; cf Ahmed 2010 *THRHR* 700.

¹⁰⁹ 1973 4 SA 764 (A).

¹¹⁰ *Supra* 778 and referred to Williams *Joint torts* 307-308 where it was submitted that in “almost every negligence action of modern times where the defence of *volens* has been raised, it failed. This is because the case in which a person truly consents to run the risk of another’s negligence are altogether exceptional”. Fleming *Torts* 239 submits that *volens* and contributory negligence often overlap and that the courts have tended to impose ever stricter requirements for the defence of *volenti* to the point where it is now successful only rarely. Prosser *Torts* 439, 457 states that the defence of “assumption of risk” is not a favoured defence and is likely to be limited and restricted in future. Furthermore in many cases

It is not intended to give a full exposition of consent to the risk of injury as a ground of justification, but to focus on its requirements since they will be clearly indicative of the borderline between this ground of justification and voluntary assumption of risk as a ground that cancels fault. Before dealing with the requirements, it is appropriate to briefly state the characteristics of consent to (the risk of) injury: It is a unilateral (and therefore may be revoked), manifest legal act by the person who gives consent, express or implied, before the prejudicial conduct.¹¹¹ It is important to note that a communication, agreement, contract or “bargain”¹¹² between the prejudiced person and the actor is not necessary. It must also be emphasised that it is a question of fact whether or not consent is present. If the defendant subjectively thought that consent was present but in actual fact it was not, he or she would have acted wrongfully and cannot rely on a ground of justification.¹¹³ If on the other hand, the defendant thought that the injured person did not consent but in fact did, the defendant did not act wrongfully and could escape liability.¹¹⁴

3.2.2.2 Requirements

The following requirements must be met:¹¹⁵

(a) Consent must be freely given and the risk of harm voluntarily assumed.¹¹⁶ This is a question of fact to be determined in each case. It is generally accepted¹¹⁷ that

it overlaps and coincides with contributory negligence (see *infra* 37-40 for criticism of the view that *volenti non fit iniuria* and contributory negligence can overlap).

¹¹¹ Neethling and Potgieter *Delict* 104-105.

¹¹² In *Santam Insurance Co Ltd v Vorster* 1973 4 SA 764 (A) 780-781, the court rejected Williams *Joint torts* 308 “bargain theory” which requires “an express or implied bargain between the parties” whereby the plaintiff gives up his right of action against the defendant (Boberg *Delict* 726). This theory is favoured by Boberg 1974 *SALJ* 29, who states that the courts instead preferred to acknowledge that the defence of *volenti non fit iniuria* can be based on a “private resolution to undertake physical risk or by ‘recklessness’ in the sense of the facing of a known danger”, which ignores the chain of cases favouring the view that knowledge is not tantamount to consent and that consent in modern law means agreement. Boberg 1974 *SALJ* 31-32 proposes that if the court applies the “bargain theory” it will limit the application of the maxim *volenti non fit iniuria* to those cases in which the plaintiff has freely and deliberately made an advance waiver or abandonment of a legal remedy which he would otherwise have against a party who injures him (whether intentionally or negligently). He proposes that by preserving the “bargain approach” we will preserve the true nature of voluntary assumption of risk (relating to true consent as opposed to *quasi* consent); see also *Hattingh v Roux* 2011 5 SA 135 (WCC) 142.

¹¹³ Neethling and Potgieter *Delict* 105.

¹¹⁴ Neethling and Potgieter *Delict* 105-106 fn 520 refer to *R v K* 1958 3 SA 420 (A) and Snyman *Criminal law* 124.

¹¹⁵ See *Hattingh v Roux* 2011 5 SA 135 (WCC) 141.

moral, social and economic pressures restrict the plaintiff's freedom of choice. For example, fear of unemployment or dismissal from employment is a powerful pressure which negates voluntary conduct by the employee.

(b) The person giving the consent must be capable of volition, that is he or she must be intellectually mature enough to appreciate the implications of his or her acts.¹¹⁸ Majority or full legal capacity is not necessarily required for consent.¹¹⁹ The courts will take into account all the circumstances of the case in order to determine whether the necessary capacity existed, including the nature and value of the interest affected, the age, intelligence, knowledge and experience of the person who is alleged to have consented.¹²⁰

(c) The consenting person must have full knowledge of the harm or risk involved as well as the extent thereof.¹²¹ This is sometimes referred to as informed consent.¹²² Our courts have applied this requirement strictly to mean that a plaintiff should have knowledge of the particular risk in order to establish voluntary assumption of that risk and the plaintiff should actually have foreseen that risk.¹²³ For example, with regard to medical treatment, before a patient can validly consent to a medical procedure, he or she must have been adequately informed¹²⁴ of the risks and benefits of, and the

¹¹⁶ Neethling and Potgieter *Delict* 106 fn 522 refer to *R v Mcoy* 1953 2 SA 4 (SR); see also Van der Walt and Midgley *Delict* 142.

¹¹⁷ See McKerron *Delict* 69; Van der Walt and Midgley *Delict* 143; Loubser *et al Delict* 160.

¹¹⁸ Neethling and Potgieter *Delict* 106; Van der Walt and Midgley *Delict* 144.

¹¹⁹ Loubser *et al Delict* 160; Van der Walt and Midgley *Delict* 144.

¹²⁰ Loubser *et al Delict* 160.

¹²¹ *Castell v De Greef* 1994 4 SA 408 (C) 425; Neethling and Potgieter *Delict* 106; Loubser *et al Delict* 160-161; Van der Walt and Midgley *Delict* 141.

¹²² Van der Walt and Midgley *Delict* 141.

¹²³ *Santam Insurance Co Ltd v Vorster* 1973 4 SA 764 (A).

¹²⁴ In *Lymbery v Jefferies* 1925 AD 236 the plaintiff while undergoing X-ray treatment was burnt as a result of some idiosyncrasy on her part which could not be foretold (the evidence showed that burns were rare). She instituted an action for damages against the medical practitioner (defendant) who had referred her to an X-ray operator, on the ground that he was negligent in sending her to such an unqualified X-ray operator. Although the X-ray operator was unqualified, a great number of doctors sent their patients to be treated by him. He was in charge of the Pretoria Hospital X-ray department and relied on other staff members to perform the actual treatment. After the patient suffered from the burns, she was treated by the medical practitioner whereby the problem was mitigated by skin grafting. The patient alleged *inter alia* that the defendant had not informed her that the treatment was a dangerous one but the court *a quo* dismissed her claim. On appeal Wessels JA (*supra* par 240) held: "It may well be the duty of a surgeon before operating to tell the patient that the operation is dangerous and may end in death ... [H]owever, all the surgeon is called upon to do is to give some general idea of the consequences. There is no necessity to point out meticulously all the complications that may arise." Wessels JA (*supra* par 240) found that there was no duty upon the X-ray operator to point out the possibility of burns as a result of X-ray treatment, as burning was rare. He (*supra* par 245) further

alternatives to, the proposed procedure.¹²⁵ Such informed consent is based on the rule that “every human being of adult years and sound mind has a right to determine what shall be done with his own body: and a surgeon who performs an operation without his patient’s consent commits an assault, for which he is liable in damages”.¹²⁶

(d) The consenting party must realise or fully appreciate the nature and extent of the ensuing harm.¹²⁷ A plaintiff who exposes him- or herself to dangerous or negligent conduct does not necessarily assume all the risks attached to it.¹²⁸ The question of whether there was an assumption of risk depends on whether the person could have foreseen the harm that eventually occurred and accepted it as falling within the ambit

found that the defendant was not negligent as the X-ray operator was qualified to administer the X-ray treatment, and confirmed the decision of the court *a quo*. In *Richter v Estate Hamman* 1976 3 SA 226 (C) the plaintiff had injured her coccyx on two separate occasions. First when she fell in a gymnasium when she was younger and then on the sharp edge of a chair. At first she was treated conservatively but was not satisfied with the treatment prescribed by her family doctor. Thereafter she contacted the defendant (Dr Hamman) who suggested an epidural block, which when administered did not relieve the tenderness she felt. The defendant thereafter administered a phenol block of the plaintiff’s lower sacral nerves which relieved the coccygeal pain but also resulted in loss of control of the bladder and bowel, loss of sexual feeling, and loss of power in the right leg and foot. The plaintiff subsequently sued the defendant alleging *inter alia* that he was negligent in advising her to undergo a phenol block and failed to warn her of the dangers inherent in the procedure (*supra* 227). She alleged that if she had known of the risks of the procedure she would not have consented to undergo the operation. Watermeyer J (*supra* 232) opined that the present action was not one relating to assault, and continued (*supra* 232) that “[i]t may well be that in certain circumstances a doctor is negligent if he fails to warn a patient, and, if that is so, it seems to me in principle that his conduct should be tested by the standard of the reasonable doctor faced with the particular problem”. Watermeyer J (*supra* 235) reasoned that since all the expert witnesses held that the consequences were remote, it was not necessary for the defendant to warn the plaintiff of the possibility of complications. He (*supra* 226) dismissed the claim for lack of negligence on the side of the defendant (this approach was not followed in *Castell v De Greef* 1994 4 SA 408 (C) 426 where the focus was placed on patient autonomy rather than on the views of medical practitioners; cf also Yekiso J’s criticism in *Oldwage v Louwrens* 2004 1 All SA 532 (C) 556). In both *Lymbery* and *Richter* the court was not called upon to decide whether the plaintiffs consented to the risk of injury. If that had been the case, it is clear that consent would in any event have been invalid as the plaintiffs did not realise or fully appreciate the nature and extent of the ensuing harm. Furthermore it is unlikely that voluntary assumption of risk in the form of contributory intent would have been applicable as a defence either since it seems that the plaintiffs did not have *dolus eventualis* in respect of their harm (see *infra* par 3.3 as to this defence).

¹²⁵ *Castell v De Greef* 1994 4 SA 408 (C) 426; see also *Esterhuizen v Administrator, Transvaal* 1957 3 SA 710 (T); *Lymbery v Jefferies* 1925 AD 236; *Oldwage v Louwrens* 2004 1 All SA 532 (C); *Richter v Estate Hamman* 1976 3 SA 226 (C).

¹²⁶ Richart 1979 NDLR 244; cf *Esterhuizen v Administrator, Transvaal* 1957 3 SA 710 (T) 722,726; *Oldwage v Louwrens* 2004 1 All SA 532 (C).

¹²⁷ See *Esterhuizen v Administrator, Transvaal* 1957 3 SA 710 (T); *Lampert v Hefer* 1955 2 SA 507 (A) 508; Neethling and Potgieter *Delict* 107; Van der Walt and Midgley *Delict* 142.

¹²⁸ *Esterhuizen v Administrator, Transvaal* 1957 3 SA 710 (T) 719; Van der Walt and Midgley *Delict* 143.

of the risk. The enquiry is therefore subjective and possible foresight of the harm is essential.¹²⁹

(e) The person consenting must in fact subjectively consent to the prejudicial act.¹³⁰ Practical difficulties are obviously often experienced with this requirement.¹³¹

(f) The consent must be legally permitted, in other words, it must not be *contra bonos mores*.¹³² This particular requirement is of great importance and the courts at times have overlooked its significance. Similarly if consent in the form of voluntary assumption of risk is *contra bonos mores*, it cannot apply as a ground of justification but what may be relevant is to enquire and establish whether contributory intent may apply as a ground excluding fault.

Strauss¹³³ correctly submits that “whether or not consent operates as a defence should be judged by the broad standard of ‘public policy’. ‘Public policy’ in this context embraces the moral, social and economic interests of the community”. Thus in regard to establishing the limits of consent as a defence, one should resort to the *boni mores* standard or the prevailing views of society in respect of which conduct is lawful or unlawful. In determining whether consent is *contra bonos mores*, factors which need to be taken into account are the motives of the perpetrator and the injured party, the nature and seriousness of the injury as well as the nature of the object infringed. Thus the more valuable the object infringed, for example, life, liberty, bodily integrity, etcetera, the more likely it is that the transgression will be deemed to be *contra bonos mores*.¹³⁴ Seen in this light, consent to serious bodily injury and murder is *contra bonos mores*¹³⁵ but consent to bodily injury or to the risk of injury is usually not *contra bonos mores* in cases of medical treatment,

¹²⁹ Loubser *et al Delict* 162.

¹³⁰ *Esterhuizen v Administrator, Transvaal* 1957 3 SA 710 (T) 719; *Lampert v Hefer* 1955 2 SA 507 (A) 508; Neethling and Potgieter *Delict* 107; Van der Walt and Midgley *Delict* 142; Loubser *et al Delict* 159.

¹³¹ See *Santam Insurance Co Ltd v Vorster* 1973 4 SA 764 (A) 780-781.

¹³² Neethling and Potgieter *Delict* 108; Loubser *et al Delict* 161-162.

¹³³ 1964 *SALJ* 181.

¹³⁴ Strauss 1964 *SALJ* 183-184.

¹³⁵ Van der Walt and Midgley *Delict* 143.

participation in lawful sport,¹³⁶ or instances where the injury is minor.¹³⁷ As this requirement is very important in considering whether voluntary assumption of risk will apply as a ground of justification, failing which the enquiry as to whether it can apply as a ground excluding fault becomes relevant, it warrants a more detailed study with reference to relevant case law.

(i) Medical treatment

There are two types of treatment: therapeutic and non-therapeutic treatment.¹³⁸ With regard to therapeutic treatment, consent is required but that does not necessarily mean that if consent is not given the treatment rendered is unlawful.¹³⁹ The *boni mores* requires that treatment should be in accordance with the principles of medical science or generally accepted rules of ordinary hygiene. Consent to reckless (or rather unreasonable) experimentation would obviously be considered *contra bonos mores*.¹⁴⁰ With regard to non-therapeutic treatment an operation may be performed on a healthy person with the aim of curing another person, or an operation may be performed without any curative purpose. For example, blood transfusions and the grafting of organs, skin or limbs of a healthy person upon an ailing person which does not affect the life or health of the donor is not considered *contra bonos mores*.¹⁴¹ Consent to a cosmetic procedure will also not be *contra bonos mores* unless the procedure constitutes a threat to a patient's life or health.¹⁴²

¹³⁶ *Hattingh v Roux* 2011 5 SA 135 (WCC) 141; see also discussion of *Boshoff v Boshoff* 1987 2 SA 694 (O) and *Clark v Welsh* 1976 3 SA 484 (A) *infra* par 3.2.2.3.

¹³⁷ Neethling and Potgieter *Delict* 108.

¹³⁸ Therapeutic treatment is aimed at healing and curing a person, whereas non-therapeutic treatment is treatment given for some or other reason to a healthy person in accordance with the principles of medical science (Strauss 1964 *SALJ* 185).

¹³⁹ For example, where a person is operated on while incapable of volition as a result of intoxication or unconsciousness, such operation may still be justified on grounds of necessity or *negotiorum gestio* (Strauss 1964 *SALJ* 186 fn 53). In *Stoffberg v Elliott* 1923 (CPD) 148, 150 a patient's penis was cut off without his consent as a result of it becoming cancerous. The medical practitioner who performed the emergency operation without the patient's consent was found not to have committed a wrong as the operation was necessary for the patient's survival. It transpired though that consent should have been obtained but was not as a result of some oversight in the hospital (*supra* 150). But Watermeyer J stated that "any bodily interference with or restraint of a man's person which is not justified in law, or excused in law, or consented to, is a wrong" and a patient "by entering a hospital, does not submit himself to such surgical treatment as the doctors in attendance upon him may think necessary" (*supra* 148-149).

¹⁴⁰ Strauss 1964 *SALJ* 187-188.

¹⁴¹ Strauss 1964 *SALJ* 189.

¹⁴² Strauss 1964 *SALJ* 189.

Schwietering¹⁴³ refers to the example of a patient intending to have an operation to correct her posture. Obviously there is a possibility of serious risk of injury during this type of operation. If the danger is foreseeable, the surgeon should according to Schwietering not operate even if the patient insists after she has been informed of the risks involved. If the surgeon still continues to operate and serious injury occurs, then despite the patient's consent the surgeon acted unlawfully.¹⁴⁴ Where there is an emergency situation and an operation needs to be performed immediately and there is no competent person available, a less qualified person may perform the operation with consent. Where there is no emergency situation and an unqualified person performs an operation which goes wrong, then the act is *contra bonos mores*.¹⁴⁵ *Volenti non fit iniuria* (voluntary assumption of risk) cannot apply to unlawful operations or unlawful incidents in lawful operations.¹⁴⁶ A person cannot consent to a serious infringement of his or her life or limb, unless it is socially acceptable. Where all the requirements of consent are not present including the fundamental requirement that such consent must not be *contra bonos mores*, then the consent is considered invalid and the act remains unlawful. However, in these instances where the consent is invalid,¹⁴⁷ contributory intent in particular becomes relevant. Thus voluntary assumption of risk as a ground of justification cannot be applicable but voluntary assumption of risk as a ground excluding fault may be relevant.

(ii) Participation in sport

There is no doubt of the risk of injury inherent in sport, and all participants such as players, coaches, referees, supervisors, managers or spectators are at risk. In the case of sports injuries which occur in the ordinary course of the practice of sport, delictual liability is often excluded as a result of voluntary assumption of risk.¹⁴⁸ Some types of sport have a higher risk of injury than others (for example, mountain climbing or boxing). Once again all the requirements for consent must be present, including the requirement that the consent must not be *contra bonos mores*.

¹⁴³ 1957 *THRHR* 140-141.

¹⁴⁴ Whether this view is still tenable today, is questionable.

¹⁴⁵ Schwietering 1957 *THRHR* 140.

¹⁴⁶ Strauss 1964 *SALJ* 186.

¹⁴⁷ Schwietering 1957 *THRHR* 141.

¹⁴⁸ Prinsloo 1991 *TSAR* 42-43; *Stoffberg v Elliott* 1923 (CPD) 148-149.

Prinsloo¹⁴⁹ is of the view that a participant only consents to the risk of injury or other harm which may occur in the normal course of play. A participant who acts according to the rules of the game cannot behave unlawfully. Consent is only valid with respect to injuries which result from such reasonable sports conduct.¹⁵⁰ The criterion of unlawfulness involves the reasonableness of the conduct in the particular circumstances.

As illustrated above the requirement that consent must not be *contra bonos mores* is an important requirement as it is in many cases the dividing line between consent and contributory intent. Only in instances where consent is rendered invalid does contributory intent become relevant.

(g) The impairment must fall within the limits of the consent¹⁵¹

Lastly, it is important to note that the onus of establishing this defence rests upon the defendant.¹⁵² Only where the defendant can prove that the plaintiff's voluntary assumption of risk complies with these requirements will it exclude wrongfulness.

3.2.2.3 Examples from case law

As said, as far as could be determined the defence of consent to the risk of injury as a ground of justification has been successfully raised in only three cases, namely, *Boshoff v Boshoff*, *Card v Sparg* and *Maartens v Pope*, but, as will be shown, even in *Maartens* this defence should have failed.

Boshoff v Boshoff¹⁵³ The plaintiff, an advocate, took part in a squash game where he was hit by his opponent's (his own brother) racket and injured. As a result of the

¹⁴⁹ 1991 TSAR 43.

¹⁵⁰ See *Boshoff v Boshoff* 1987 2 SA 694 (O) 695; see also *Hattingh v Roux* 2011 5 SA 135 (WCC) 141, 142-143.

¹⁵¹ Van der Walt and Midgley *Delict* 142. In *Santam Insurance Co Ltd v Vorster* 1973 4 SA 764 (A) the court held that although the plaintiff had consented to the risks inherent in motor racing, such as a burst tyre, the plaintiff had not consented to gross negligence on the part of the driver. Thus the violation must not exceed the limits of the plaintiff's consent (Neethling and Potgieter *Delict* 108 fn 539).

¹⁵² *Santam Insurance Co Ltd v Vorster* 1973 4 SA 764 (A) 779; *Netherlands Insurance Co of SA Ltd v Van der Vyver* 1968 1 SA 412 (A) 421; *Waring and Gillow Ltd v Sherborne* 1904 TS 340, 344; *Malherbe v Eskom* 2002 4 SA 497 (O) 498; *Hattingh v Roux* 2011 5 SA 135 (WCC) 142.

¹⁵³ 1987 2 SA 694 (O).

injuries sustained, the plaintiff sued the opponent. The defence of consent was raised.¹⁵⁴

The court held¹⁵⁵ that it was not *contra bonos mores* for a person capable of forming an “intention to consent” during lawful sport or physical recreation, to sustain reasonable physical injuries or to run the risk of sustaining injuries as long as the conduct of the fellow players is reasonable. Such injuries are reasonably to be expected in a social game of squash between amateurs, and the general standard of reasonableness would not require such a consequence to be regarded as a delict. Although the plaintiff had not expressly admitted that he had accepted the risk of injury, the court found that, had the plaintiff been asked before the game whether he consented to the risk of injury, he would have answered in the affirmative. It was further held that it was the “will” of the plaintiff to run the risk of injury. In this regard, the concept of “will” refers to “legal will” or acceptance of injury or the risk of injury. Thus a *bona fide* sportsman who causes injury to a fellow player in a reasonable manner in the normal course of a game, may rely on the defence of consent. The defence is based on the fact that the players know and accept, and consent to the risk of injury in the normal course of the game. However, Kotze J mentioned¹⁵⁶ that if the injury was deliberately intended by the defendant, or if he was reckless and acted in disregard of all safety of others so that it is a departure from the standards which might reasonably be expected in anyone pursuing the competition or game, then the performer might well be held liable for any injury his act caused.

This case is a classic example of where voluntary assumption of risk as a ground of justification is applicable, as all the requirements of a valid consent have been met including the requirement that the consent must not be *contra bonos mores*. Whether the voluntary assumption of risk is considered “reasonable” in the normal course of the game as stated by Kotze J or an acceptable inherent risk of injury in a particular game as stated by Prinsloo,¹⁵⁷ it still falls under the umbrella of what is acceptable according to the *boni mores* yardstick as submitted by Strauss.¹⁵⁸

¹⁵⁴ *Supra* 695.

¹⁵⁵ *Supra* 695.

¹⁵⁶ *Supra* 702.

¹⁵⁷ 1991 *TSAR* 43.

¹⁵⁸ 1964 *SALJ* 183-184.

Card v Sparg¹⁵⁹ The plaintiff, a minor spinster alleged that she was seduced by the defendant during April 1982, as a result of which she became pregnant and gave birth to a child on 11 January 1983. The plaintiff at the time of the sexual act was not a virgin and did have sexual relations with other men, but was sure that the defendant was the father of the child. She did not claim damages for the seduction, but claimed damages in respect of medical and hospital expenses related to the pregnancy and birth of her child, maternity wear, toiletries for herself and the child, articles of a permanent nature required for the child (such as a pram, cot, car seat and bath), loss of earnings or alternatively maintenance for six months as well as future maintenance for the child.¹⁶⁰

Zietsman J¹⁶¹ found that seduction had not taken place in this case but that *volenti non fit iniuria* was applicable:

“Where the plaintiff has not been seduced there seems to be no reason why the principles applicable in seduction cases should apply, and in particular why the *volenti non fit iniuria* rule should be excluded. The plaintiff, being a consenting party to the act of sexual intercourse, with full knowledge that this could lead to pregnancy and the birth of a child, is not entitled to claim damages as such and there seems to be no logical reason why she should be entitled to claim from the defendant a refund of the expenses she has incurred in respect of her own person.”

But with regard to the child Zietsman J held¹⁶² that each parent was liable to support the child in accordance with their means. The plaintiff was entitled to recover two thirds of the expenses incurred related to the birth and maintenance of the child.¹⁶³

In this case it is evident that the plaintiff did comply with the requirements of a valid consent. However, in instances of seduction (which applies only to female virgins), Neethling and Potgieter¹⁶⁴ opine that generally the consent of a girl is invalid not because of her “weakness” or the seductive conduct of the man, but because the consent is *contra bonos mores*. They nevertheless submit¹⁶⁵ that the consent may be valid and not *contra bonos mores* in light of the Constitution¹⁶⁶ and the changing views of the community. Therefore the maxim *volenti non fit iniuria* as a ground of

¹⁵⁹ 1984 4 SA 667 (E).

¹⁶⁰ *Supra* 668-669.

¹⁶¹ *Supra* 671.

¹⁶² *Supra* 671.

¹⁶³ *Supra* 671-672.

¹⁶⁴ *Delict* 329-330.

¹⁶⁵ Neethling and Potgieter *Delict* 328 fn 82 refer to Neethling, Potgieter and Visser *Personality* 100-102.

¹⁶⁶ 1996 s 12(2)(b).

justification may be applicable. But should the consent be invalid, it may then be argued that the plaintiff acted with contributory intent in that she had intentionally and voluntarily assumed the risk of falling pregnant and reconciled herself to such consequence (*dolus eventualis*). Therefore her contributory intent could serve to cancel the defendant's fault.¹⁶⁷ Thus the defendant would not be liable in respect of the plaintiff's personal expenses incurred.

Maartens v Pope¹⁶⁸ The plaintiff, a plumber, had been requested to call at the defendant's house to inspect a soak pit. He was told to let the defendant's wife know when he intended calling at the house as there was a dog (a bull terrier) on the premises which had previously bitten two people. The plaintiff decided to call at the house unannounced and he saw clearly marked warning signs in regard to the dog's presence but nevertheless decided to enter. The dog bit him and he was severely injured whereupon he sued the defendant for the injuries sustained. The plaintiff invoked two causes of action, namely *actio de pauperie* (strict liability) and negligence on the defendant's part (owner of the dog). In the court *a quo* both parties were held to be at fault and the plaintiff was awarded seventy per cent of his damages. The defendant appealed against the decision.¹⁶⁹

The court had to decide whether the plaintiff had voluntarily assumed the risk of harm or perhaps whether his "substantial imprudence"¹⁷⁰ contributed to the injury he sustained.¹⁷¹ Didcott J referred to the distinction between the defence of voluntary assumption of risk and contributory negligence as well as the view that they overlap,¹⁷² which can be equated to "substantial imprudence".¹⁷³ He also referred to

¹⁶⁷ According to the judgment it is not clear whether the defendant acted negligently or intentionally.

¹⁶⁸ 1992 4 SA 883 (N); In *Joubert v Combrinck* 1980 3 SA 680 (T) 680 it was confirmed that the defence of *volenti non fit iniuria* (voluntary assumption of risk) as a ground of justification "applies to a claim under the *actio de pauperie*. Thus a defendant sued under the *actio de pauperie* will not be liable for damage done to a plaintiff where the plaintiff, with full knowledge of the risk of sustaining damage, voluntarily accepts it. But the burden of proving this defence obviously rests on the defendant and a plaintiff's awareness of the degree of danger to which she is exposing herself is a necessary fact in the subjective enquiry concerning the plaintiff's understanding and acceptance of the risk to which she exposes herself"; cf Knobel 1993 *THRHR* 304.

¹⁶⁹ *Supra* 883-885.

¹⁷⁰ *Supra* 886. Didcott J refers to *O'Callaghan v Chaplin* 1927 AD 310, 329 where it was submitted that "substantial imprudence" may be a good defence to the *actio de pauperie*.

¹⁷¹ *Supra* 886.

¹⁷² See also *Lampert v Hefer* 1955 2 SA 507 (A) 514; *Santam Insurance Co Ltd v Vorster* 1973 (4) SA 764 (A) 778. See *infra* 36-39 for the criticism of the view that *volenti non fit iniuria* and contributory negligence can overlap.

the judgment of *Waring and Gillow Ltd v Sherborne*¹⁷⁴ as well as the practical guide to establishing consent as set out in the leading case of *Santam Insurance Co Ltd v Vorster*.¹⁷⁵ The court held, in respect of the first leg of the enquiry, that the plaintiff did have knowledge and appreciation of the danger:¹⁷⁶ “The sign informed the plaintiff that a dog inhabited the property. It warned him of the need to be wary of the dog.”

In respect of the second leg of the enquiry, that is, the “plaintiff’s assent to the risk that he might be injured if he exposed himself to the danger of which he was thus apprised”,¹⁷⁷ Didcott J found that the plaintiff must have and did indeed foresee the possibility that the dog would attack him and he thus “ran the risk deliberately, assenting to it tacitly”:¹⁷⁸

“The reaction of the plaintiff was to rely on his experience and understanding of dogs. He took a chance all the same. For the possibility that the dog would attack him remained inherent in the situation which he proceeded to create by entering the property unexpectedly...He must have foreseen that possibility. Indeed, he did foresee it. His own evidence confirmed that.”

The plaintiff was found to have “voluntarily assumed the risk of harm done to him” and the enquiry into the plaintiff’s “substantial imprudence” was unnecessary. Judgment was awarded in favour of the defendant.¹⁷⁹

Knobel¹⁸⁰ submits that the requirement that the plaintiff must subjectively foresee and accept the risk, are requirements relevant to both consent as a ground of justification and contributory intent as a ground excluding fault. Consent to the risk of serious bodily injury with regard to the *actio de pauperie* will however not always be *contra bonos mores*. Knobel¹⁸¹ provides two examples from case law to illustrate this. If a person hires a horse for his own relaxation, it is not necessarily against

¹⁷³ See Knobel 1993 *THRHR* 302.

¹⁷⁴ 1904 TS 340.

¹⁷⁵ 1973 (4) SA 764 (A) 781.

¹⁷⁶ *Maartens v Pope* 1992 4 SA 883 (N) 888.

¹⁷⁷ *Supra* 888.

¹⁷⁸ *Supra* 889.

¹⁷⁹ *Supra* 889-890.

¹⁸⁰ 1993 *THRHR* 304.

¹⁸¹ Knobel 1993 *THRHR* 304.

public policy if he consents to the risk that his horse may act *contra naturam* and injure him as in the case of *Lawrence v Kondotel Inns (Pty) Ltd.*¹⁸² Similarly it does not have to be *contra bonos mores* where a lessee of a garden flat consents to the risk of being bitten by the lessor's dogs, according to *Joubert v Combrinck*.¹⁸³ Knobel¹⁸⁴ is of the view that in *Maartens* the court should have found the plaintiff's consent *contra bonos mores* because a person cannot consent to serious bodily injury as such consent is unlawful and invalid. The court should have found the plaintiff at fault in the form of contributory intent.¹⁸⁵

No doubt Knobel's views are correct. The court overlooked the requirement that consent must not be *contra bonos mores*. It is important to use theoretically correct approaches and apply them to the facts of each case. Thus if formulated and applied correctly the defence of "contributory intent" as a ground excluding fault could prove tenable.

The following cases are examples, many of which relate to medical treatment and participation in sports, where the defence of consent to the risk of injury as a ground of justification has been unsuccessfully raised. With regard to each of these cases the question is asked whether the defence of voluntary assumption of risk in the form of contributory intent could have been appropriate.

Esterhuizen v Administrator, Transvaal¹⁸⁶ The plaintiff suffered from "Kaposi haemangiosarcoma" (malignant tumours), a progressive disease with an average life expectation of five to ten years. She received superficial ongoing X-ray treatment at Johannesburg General Hospital by means of a "Chaoul Unit" from 1945-1949.¹⁸⁷ During 1-5 November 1949, the plaintiff was seen by Dr Cohen who decided to treat her with deep therapy treatment under the "Maximar Unit" knowing that she would suffer severe irradiation of the tissues in the treated areas, the possibility of disfigurement, shortening of limbs, permanent visible damage to the skin, pigmentation and further that she could run the risk of amputation of the treated

¹⁸² 1989 1 SA 44 (D).

¹⁸³ 1980 3 SA 680 (T).

¹⁸⁴ 1993 *THRHR* 303-304.

¹⁸⁵ Neethling and Potgieter *Delict* 173 fn 293; Knobel 1993 *THRHR* 303-304.

¹⁸⁶ 1957 3 SA 710 (T).

¹⁸⁷ *Supra* 714-715.

limbs. These consequences and risks were known only by Dr Cohen and no one else. The plaintiff who was 14 years old at the time enquired what would happen to her but was told not to worry by another doctor.¹⁸⁸ According to the evidence the treatment was not urgent and there was ample time to obtain consent from the plaintiff's guardian. After the treatment by Dr Cohen blisters formed on the plaintiff's treated areas and her right and left legs, her right hand and two fingers on her left hand were amputated. In time her whole left hand would have to be amputated. The evidence confirmed that the immediate cause of the condition of the limbs was a reaction to the radiation and necrosis which necessitated the eventual amputation of the limbs.¹⁸⁹ The plaintiff alleged that she was wrongfully, unlawfully and intentionally assaulted by the servants of the defendant (hospital) in that they subjected her to radium treatment which caused serious injuries and, in the alternative, that the servants of the defendant were unskilled or negligent in the application of her treatment. The defence of implied consent was raised.¹⁹⁰

It transpired that Dr Cohen was aware that the plaintiff would suffer serious consequences and be subjected to risks, not by virtue of the X-ray treatment as such, but rather because of the dosage he had decided upon and the technique he intended employing to administer that dosage to the plaintiff. He alone was also aware that the treatment he intended employing was essentially a different form of treatment than that which the plaintiff had previously received.¹⁹¹ Bekker J¹⁹² held that "mere consent to undergo X-ray treatment in the belief that it is harmless or being unaware of the risks it carries, cannot in my view amount to effective consent to undergo the risk or the consent of harm". He further¹⁹³ held that:

"a therapist, not called upon to act in an emergency involving a matter of life or death, who decides to administer a dosage of such an order and to employ a particular technique for that purpose, which he knows beforehand will cause disfigurement, cosmetic changes and result in severe irradiation of the tissues to an extent that the possibility of necrosis and a risk of amputation of the limbs cannot be excluded, must explain the situation and resultant dangers to the patient - no matter how laudable his motives might be - and should he act without

¹⁸⁸ *Supra* 716-717.

¹⁸⁹ *Supra* 717.

¹⁹⁰ *Supra* 713.

¹⁹¹ *Supra* 720.

¹⁹² *Supra* 719.

¹⁹³ *Supra* 721.

having done so and without having secured the patient's consent, he does so at his own peril".

Dr Cohen was correctly found to be negligent and the defendant was held liable for the assault committed on the plaintiff.¹⁹⁴ Consent in this case was defective and invalid. Furthermore it seems unlikely that the plaintiff at the time of the X-ray treatment foresaw the possibility of the consequences of the treatment, in particular the amputation of her limbs and reconciled herself with that possibility (while simultaneously acting consciously unreasonable). Therefore contributory intent would not be applicable either, as *dolus eventualis* was not present.¹⁹⁵

Castell v De Greef¹⁹⁶ The plaintiff had a family history of breast cancer, and had undergone surgery to remove lumps found in her breasts in 1982. In 1989 further lumps were found, whereafter her gynaecologist recommended a mastectomy as a prophylaxis and referred her to a plastic surgeon (the defendant). On 7 August 1989, the plaintiff underwent a "subcutaneous mastectomy" performed by the defendant. It is common cause that the operation has a high risk of complications, the main one being necrosis of the skin and underlying tissue. After the operation the plaintiff did sustain necrosis in the breasts as well as post-operative sepsis. The plaintiff then underwent a number of operations performed by another plastic surgeon till the plaintiff was satisfied with the results and did not require further surgery.¹⁹⁷

The plaintiff subsequently sued the defendant for damages alleging negligent conduct. In the court *a quo* Scott J dismissed the plaintiff's claim. On appeal the plaintiff alleged that the defendant was negligent in that he failed to warn the plaintiff of the material risks of the operation or to propose alternative procedures; to prevent the onset of or limit the necrosis in the plaintiff's breasts; and to treat post-operative sepsis which developed in the plaintiff's breasts.¹⁹⁸ Ackermann J¹⁹⁹ confirmed that "consent by a patient to medical treatment is regarded as falling under the defence of *volenti non fit injuria*, which would justify an otherwise wrongful delictual act". He

¹⁹⁴ *Supra* 722, 726.

¹⁹⁵ See *supra* chapter 2 par 2.2.2.1.

¹⁹⁶ 1994 4 SA 408 (C) 426.

¹⁹⁷ *Supra* 410-413.

¹⁹⁸ *Supra* 414-415.

¹⁹⁹ *Supra* 420.

further stated that our law should favour the fundamental right of individual autonomy and self-determination and that for:

“a patient’s consent to constitute a justification that excludes the wrongfulness of medical treatment and its consequences, the doctor is obliged to warn a patient so consenting of a material risk inherent in the proposed treatment; a risk being material if, in the circumstances of the particular case:

(a) a reasonable person in the patient’s position, if warned of the risks, would be likely to attach significance to it; or

(b) a medical practitioner is, or should reasonably be aware that a particular patient, if warned of the risk, would be likely to attach significance to it”.²⁰⁰

But Ackermann J²⁰¹ continued that this obligation is subject to so-called “therapeutic privilege” which allows medical practitioners to withhold disclosures which in their opinion would be detrimental to the patient. The court essentially found that the plaintiff was aware of the risks involved in the operation²⁰² (and by implication therefore assumed them, excluding wrongfulness on the part of the surgeon).²⁰³ It was further held that the defendant did not fail to prevent or limit the onset of necrosis²⁰⁴ but the defendant was found negligent in failing to adequately or timeously treat the post-operative sepsis.²⁰⁵

Although the court did not expressly say so, it seems that the plaintiff’s consent to the risks involved was valid, *inter alia* because she was fully informed of them, but the consent could not be extended so as to nullify the negligent conduct on the part of the defendant with regard to post-operative treatment. Because of the valid consent in respect of the risks, the question of contributory intent on the part of the plaintiff was irrelevant.

Oldwage v Louwrens²⁰⁶ The plaintiff had been referred to the defendant because he was experiencing back pain. Upon examination (by means of an

²⁰⁰ *Supra* 426.

²⁰¹ *Supra* 426.

²⁰² *Supra* 429-430.

²⁰³ Ackermann J *supra* 428 (with regard to the plaintiff’s consultation with the defendant) stated that it is “neither surprising, nor suspicious, that a patient contemplating major surgery has little recall of such a consultation. It does, however, necessitate great caution in accepting any evidence by plaintiff that something was said or explained to her where there is so much of the consultation that she simply cannot remember”.

²⁰⁴ *Supra* 434.

²⁰⁵ *Supra* 440.

²⁰⁶ 2004 1 All SA 532 (C).

electrocardiogram and angiogram), the defendant concluded that the plaintiff had a vascular problem and required a by-pass operation to relieve him of his pain. The operation was performed but the plaintiff still experienced pain. The plaintiff subsequently saw a neurosurgeon who noted that after the vascular surgery the plaintiff “claudicates”, his left foot was cold to the touch, and the pulses in his left leg were negative. The neurosurgeon diagnosed a prolapsed disc and performed a laminectomy whereafter the plaintiff no longer suffered any back pain. The plaintiff then sued the defendant and averred *inter alia* that he only consented to undergo vascular surgery as a result of false or negligent misrepresentation by the defendant thereby acting to his detriment.²⁰⁷

In considering whether the plaintiff had consented to the procedure performed, the court applied the doctrine of “informed consent”. Yekiso J²⁰⁸ explained: “In terms of this doctrine, for a medical practitioner to be able to rely on a patient’s consent, it had to be shown that the patient not only consented to the injury and the medical intervention proposed, but also to the risks and consequences upon such medical treatment”. The judge²⁰⁹ followed the test set out in *Castell v De Greef*²¹⁰ (as opposed to the decision of *Richter v Estate Hamman*)²¹¹ and could not find that the plaintiff was “properly counseled before the vascular operation was performed, that other options, other than the procedure performed, were properly discussed with him, in particular that he did not need to undergo the vascular operation immediately, that he was advised of the other material risks attendant on such operation”. The defendant was found negligent and further that he had committed an assault upon the plaintiff.²¹²

Voluntary assumption of risk as a ground of justification failed in this case as “informed consent” was lacking. Furthermore, it would also be difficult to establish voluntary assumption of risk in the form of contributory intent as it is unlikely that the

²⁰⁷ *Supra* 532-533.
²⁰⁸ *Supra* 533.
²⁰⁹ *Supra* 557, 533-534.
²¹⁰ 1994 4 SA 408 (C).
²¹¹ 1976 3 SA 226 (C).
²¹² 2004 1 All SA 532 (C) 533-534.

plaintiff had *dolus eventualis* with regard to the consequences of the vascular surgery (“claudicating” of the left leg).

Santam Insurance Co Ltd v Vorster²¹³ In this case the plaintiff was a passenger in a motor vehicle (a Fiat), which collided with another motor vehicle (a Vauxhall). The drivers of the two motor vehicles and the plaintiff had willingly taken part in a dicing contest on a public road for a stake of R10. The Vauxhall struck the Fiat at a bend in the road. The Fiat went off the road, through a veld, a farm gate and eventually hit a transformer station of brick and concrete. The plaintiff was severely injured and permanently paralysed.

The plaintiff sued the driver of the Fiat as well as the driver of the Vauxhall (statutory third party insurer). The defences of voluntary assumption of risk and contributory negligence were raised. The trial court rejected the defence of voluntary assumption of risk of injury by the plaintiff who willingly took part in the dicing contest and held that all three participants were equally negligent thereby apportioning the damage.²¹⁴

The defendant appealed against the trial court’s decision and advanced that the defence of voluntary assumption of risk should have been upheld, resulting in the “total rejection of the plaintiff’s claim”²¹⁵ or, in the alternative, in a reduction of the plaintiff’s claim because his voluntary assumption of risk falls within the concept of “fault” as used in section 1 of the Apportionment of Damages Act. The plaintiff cross appealed against the part of the judgment finding him equally to blame with the drivers of the vehicles seeking an increase in the amount awarded.²¹⁶

The Appellate Division confirmed the decision of the trial court that the plaintiff had been contributorily negligent and that the defence of voluntary assumption of risk had not been proved.²¹⁷ The court held that the defence of *volenti non fit iniuria* in the form of voluntary assumption of risk is available as a defence in our law “provided always that the facts sufficiently establish the requisites of that defence, and provided further that the *volenti* defence is always applied with caution and

²¹³ 1973 4 SA 764 (A).

²¹⁴ *Supra* 764-765, 771-773.

²¹⁵ *Supra* 774.

²¹⁶ *Supra* 774.

²¹⁷ *Supra* 783.

circumspection”.²¹⁸ Ogilvie Thompson CJ²¹⁹ opined that the “plaintiff must be held to have been *volens* in relation to the risks ordinarily inherent in ‘dicing’ ... On the other hand, it is ... clear that, merely by participating in the ‘race’, plaintiff cannot be held to have assumed the risk of injury resulting from grossly negligent behaviour on the part of one of the drivers”.

The Chief Justice²²⁰ acknowledged that consent is the most difficult to prove but if “in addition to knowledge and appreciation of the danger, the claimant foresaw the risk of injury to himself, that will ordinarily suffice to establish ‘consent’ required to render him *volens*”. He²²¹ further provided a practical guide to establishing consent and stated that although it entails a subjective inquiry, courts must:

“resort first to an objective assessment of the relevant facts in order to determine what, in the premises, may fairly be said to have been the inherent risks of the particular hazardous activity under consideration. Thereafter the Court must proceed to make a factual finding upon the vital question as to whether or not the claimant must, despite his probable protestations to the contrary, have foreseen the particular risk which later eventuated and caused his injuries, and is accordingly to be held to have consented thereto”.

The evidence of the plaintiff himself carries little weight.²²²

The decision elicited various comments. First of all Ogilvie Thompson CJ²²³ acknowledged that the defences of “*volenti non fit iniuria*” and “contributory negligence” are separate and distinct in that they are theoretically radically different. The former entails a subjective enquiry related to the particular plaintiff, while the latter calls for an objective enquiry in conformity with the standard of the *bonus paterfamilias*. However, even though the Chief Justice differentiated between the two defences he conflated them by stating that the defence of *volenti non fit iniuria* may sometimes overlap with the defence of contributory negligence.²²⁴

Gauntlett²²⁵ opines that the court did come to a fair ruling, but in an incorrect manner. He submits that this case dealt with contributory negligence as under no

²¹⁸ *Supra* 764.

²¹⁹ *Supra* 782.

²²⁰ *Supra* 781.

²²¹ *Supra* 781.

²²² Loubser *et al Delict* 163; *Santam Insurance Co Ltd v Vorster* 1973 4 SA 764 (A) 764, 781.

²²³ *Supra* 778.

²²⁴ *Santam Insurance Co Ltd v Vorster* 1973 4 SA 764 (A) 764, 778; see also *Lampert v Hefer* 1955 2 SA 507 (A) 514.

²²⁵ Gauntlett 1974 *THRHR* 195.

circumstances could a defence of *volens* succeed in respect of dicing, nor could assumption of risk be tenable since there was “no direct intention” by the plaintiff to sustain injuries, nor was it found that the plaintiff “knew it was possible that the defendant would commit a wrongful act”, thereby reconciling himself with its occurrence.²²⁶ Gauntlett also criticises the court’s finding with regard to the overlapping of *volenti non fit iniuria* and contributory negligence, and remarks that consent excludes wrongfulness, voluntary assumption of risk could exclude a claim and contributory negligence operates to reduce a claim. While the *voluntas* element in assumption of risk presupposes of knowledge of danger and intention (in the form of *dolus eventualis*), “negligence involves either unawareness of the danger or awareness coupled with failure to reconcile oneself with its occurrence”.²²⁷ Gauntlett further states that consent is the outward manifestation of intention²²⁸ and criticises the substitution of an objective assessment by the court for a subjective inquiry into the foresight of risk.²²⁹ He states that mere foresight is irreconcilable with the true meaning of *volens* (intending or purposing).

It has also been argued by Burchell²³⁰ and Van der Walt and Midgley,²³¹ that the real reason for the failure of the defence of voluntary assumption of risk as a ground of justification in this particular case is the fact that dicing on a public highway is unlawful and contrary to public policy.²³² Van der Walt and Midgley²³³ further submit that the court applied an unrealistically strict approach to the defence of *volenti non fit iniuria* in that a plaintiff is expected to have foresight of the exact events during such a dangerous activity involving *inter alia* skidding and a collision which amount to “almost prophetic vision of a plaintiff”.

²²⁶ Gauntlett 1974 *THRHR* 200.

²²⁷ Gauntlett 1974 *THRHR* 198 states that before the enactment of the Apportionment of Damages Act 34 of 1956 the defence of consent and contributory intent if successful resulted in the complete exclusion of the plaintiff’s claim. Therefore at the time of the decision of *Lampert v Hefer* 1955 2 SA 507 (A) it was understandable to misconceive that the two defences overlap.

²²⁸ Gauntlett 1974 *THRHR* 199.

²²⁹ Gauntlett 1974 *THRHR* 200.

²³⁰ *Delict* 72.

²³¹ *Delict* 144.

²³² Burchell *Delict* 71-72.

²³³ *Delict* 146 fn 37.

Boberg²³⁴ remarks that this decision has been criticised mainly for the court's formulation of the test of "implied consent", its application to the facts of the case and at the court's "failure to require that a valid consent be reasonable". He argues that it is important to distinguish between physical and legal assumption of risk,²³⁵ instead of equating the two, otherwise "every deliberate exposure to risk is to be construed as a forfeiture of legal remedies for consequential injuries", and that this was not done by the court in this case. He says that it is a subjective test of "foresight" and not "consent", which when established "is deemed objectively to amount to consent". If it is established that the plaintiff foresaw the risk that he took then it may be said that he had consented to it. Boberg like the other authors above submits that the court achieved an equitable result,²³⁶ but one with questionable reasoning.

Prinsloo²³⁷ comments that the court decided that the plaintiff had only run the risk of injury in a motor race, such as the results of a mechanical failure or burst tyre and did not consent to the risk of injury as a result of the two drivers' culpability. It was further held that the accident was caused by the driver who negligently accelerated

²³⁴ *Delict* 768-771.

²³⁵ Boberg 1974 *SALJ* 29 supports the view of Williams *Joint torts* 308-309 that the key to understating the defence of *volenti non fit iniuria* lies in drawing the distinction between physical and legal risk: "Physical risk is the risk of damage in fact, and legal risk is the risk of damage in fact for which there will be no redress in law. For example, a person who has just been reading the statistics of road accidents may weigh to himself the chances of being knocked down if he goes for a walk, and may decide in his own mind to incur the risk rather than to stay at home. In a sense he consents to running the physical risk; but does not consent to bearing the legal risk ... [T]he defence of *volens* does not apply where as a result of a mental process the plaintiff decides to take a chance but there is nothing in his conduct to show a waiver of the right of action communicated to the other party. To constitute a defence, there must have been an express or implied bargain between the parties whereby the plaintiff gave up his right of action for negligence. The circumstances in which consent to run the legal risk may properly be inferred may be illustrated by an example. A wishes to cross the Channel by air. A charter company informs him that the only machine that it has available is one in poor condition which it cannot guarantee as airworthy. A, however, is in a hurry and insists upon being flown in this machine. If there is an accident resulting from the condition of the aeroplane A can be met by the plea of *volens* ... Now suppose by way of contrast, that A wishes to cross the Channel by a regular air service. Before the start he perceives that the aeroplane is defective, and having knowledge of these things realizes that it will be risky to travel in it; however being anxious to go, he says nothing and boards the aeroplane. In this case the plea of *volens* will not avail the air company, for A merely has knowledge of the risk which is not equivalent to consent. Even if A can be said to have assumed the physical risk of injury (from which no legal action can protect him), there is no transaction between the parties from which it can be inferred that he has given up his right of action for negligence. Although he did decide to run the risk physically, he did not agree to run the risk legally. A one sided secret determination to run the risk is not enough; there must be evidence of a bargain." Boberg 1974 *SALJ* 29 submits that the court in *Santam Insurance Co Ltd v Vorster* equated physical and legal risk.

²³⁶ See also Neethling and Potgieter *Delict* 168-169 fn 267.

²³⁷ 1991 *TSAR* 45-46.

his vehicle on a bend in the road. For this reason the defendant's defence, based on the plaintiff's consent to the risk of harm, failed.

It is submitted that the views of Burchell and Van der Walt and Midgley are correct, namely that the defence of *volenti non fit iniuria* as a ground of justification was correctly dismissed, mainly for the reason that such consent to the risk of injury would be *contra bonos mores* in light of the fact that dicing is not recognised as a lawful sport but an illegal activity. On closer examination of the facts it is obvious that "dicing is a hazardous undertaking"²³⁸ and against public policy thereby rendering the conduct unlawful as submitted by Burchell and Van der Walt. Furthermore, the plaintiff had on previous occasions taken part in dicing, "[h]e was aware of the chosen 'race track'... and he knew of the existence of the bend in the Rondebult Road" where the accident occurred.²³⁹ He was aware of the risks ordinarily inherent in dicing.²⁴⁰ Ogilvie Thompson CJ held²⁴¹ that the "[p]laintiff was undoubtedly at fault in exposing himself to risk by participating in the 'dicing' contest". Therefore it may be argued that the plaintiff acted intentionally and voluntarily assumed the risk of harm. Thus what should have been questioned is whether the plaintiff actually subjectively foresaw the possibility that an accident may occur as a result of participating and being a part of dicing, and whether he reconciled himself with that possibility while simultaneously acting consciously unreasonable (ultimately the question is whether he had intention in the form of *dolus eventualis*).²⁴² The court should have considered the defence of voluntary assumption of risk albeit in the form of contributory intent,²⁴³ which cancels the defendant's fault as correctly submitted by Neethling and Potgieter,²⁴⁴ instead of stating that it was the "negligent driving around the bend that was the real cause of his injuries".

The defences of voluntary assumption of risk and contributory negligence result in different outcomes. Voluntary assumption of risk as a ground of justification, or in the form of contributory intent as a ground excluding fault could apply as complete

²³⁸ *Santam Insurance Co Ltd v Vorster* 1973 4 SA 764 (A) 781.

²³⁹ *Supra* 781.

²⁴⁰ *Supra* 782.

²⁴¹ *Supra* 783-784.

²⁴² See Neethling and Potgieter *Delict* 127; see also *supra* chapter 2 par 2.2.2.1.

²⁴³ See Knobel 1993 *THRHR* 303-304.

²⁴⁴ *Delict* 173 fn 296.

defences. In contradistinction, contributory negligence, as Gauntlet pointed out, reduces a claim. It is no doubt easier to prove negligence.

Madelbaum v Bekker²⁴⁵ In this early case the plaintiff and defendant participated in a mock battle. During the mock attack the defendant approached the plaintiff and deliberately shot a blank cartridge at him, which resulted in an injury to the plaintiff's eye and face. The court decided in favour of the plaintiff on the grounds that the voluntary assumption of risk by the plaintiff did not cover the risk of being shot with a gun loaded with a blank cartridge.²⁴⁶ Apart from this, voluntary assumption of risk as a ground of justification would in any event fail, as consent to the risk of such serious bodily injury would have been *contra bonos mores*. However, contributory intent as a ground excluding fault on the part of the defendant could be applicable if it could be proved that the plaintiff voluntarily assumed the risk of harm by intentionally exposing himself to such risk of harm inherent in mock battles knowing full well the consequences of doing so and simultaneously acting consciously unreasonable.²⁴⁷

Broom v Administrator, Natal²⁴⁸ In this case the first plaintiff, a 16 year old school boy had taken part in a game of baseball (rounders or softball). The game was supervised by an assistant master of a school. An old cricket stump without a metal tip was used as a bat. At the time of the incident the first plaintiff was fourth in the queue of an informal line approximately twenty feet away from the batsman. When the batsman hit the ball, the stump left his hand, travelled through the air and then hit the first plaintiff's head behind his right ear injuring him.²⁴⁹ A claim was instituted against the Administrator (the assistant master's employer) on the ground of the latter's alleged negligence. The defences of contributory negligence, voluntary assumption of risk and a denial in respect of negligence were initially pleaded, but later the defences of contributory negligence and voluntary assumption of risk were

²⁴⁵ 1927 CPD 375.

²⁴⁶ Prinsloo 1991 *TSAR* 45. Prinsloo cites this case as an example where the courts correctly illustrate that consent is only valid for the risks of injuries inherent in a particular game.

²⁴⁷ See Neethling and Potgieter *Delict* 171.

²⁴⁸ 1966 3 SA 505 (D).

²⁴⁹ *Supra* 505.

abandoned.²⁵⁰ As a result of this Harcourt J only had to establish whether the assistant master was negligent and found that he was not.²⁵¹

Due to the fact that the batsman deliberately let go of the bat, in the manner that he did, it is unlikely that the game was played according to the rules. Consent to the risk of injury is only valid if a participant acts according to the rules of the game and if the injuries sustained by a participant result from reasonable sports conduct.²⁵² Nevertheless, if consent to the risk of injury is rendered invalid, voluntary assumption of risk as a form of intent may be relevant as a ground excluding fault.

Rousseau v Viljoen²⁵³ The plaintiff, a flag marshal on a midget car race track was injured when the defendant's midget car left the track for no apparent reason (while it was under his control and while he was in a position to bring the car to a stop), headed towards the plaintiff and injured him. The defendant alleged that the plaintiff by "standing in the position in which he was while acting as a flag marshal, voluntarily and knowingly accepted the risk of injury and accordingly could not recover damages".²⁵⁴ The court held that even though the plaintiff was a flag marshal it did not relieve the defendant of the duty of care in relation to him and that the defendant was therefore negligent. In regard to the defence of voluntary assumption of risk, the court held, in light of the evidence that while the sport did involve some risk, it was not one particularly dangerous to life and limb and that therefore the defence was not applicable.²⁵⁵

Van Winsen J held²⁵⁶ that the defendant must prove that the "plaintiff understood that there was a chance (i.e., a risk) of occurrence of those events which occasioned him the injury of which he complains and that he accepted that risk", and further stated that "there is clearly also some risk involved to officials who, by the assistance they give to competitors, can also be said to be indirectly participating in midget car racing ... [T]he sport of midget car racing while it does involve some risk, is not one particularly dangerous to life or limb".

²⁵⁰ *Supra* 507-508.

²⁵¹ *Supra* 525.

²⁵² Prinsloo 1991 *TSAR* 43.

²⁵³ 1970 3 SA 413 (C).

²⁵⁴ *Supra* 414.

²⁵⁵ *Supra* 413.

²⁵⁶ *Supra* 417-419.

Van Winsen J²⁵⁷ concluded:

“[A] flag marshal standing at approximately point 3 is exposed to some risks of cars unavoidably coming off the track infield because of, for instance, a collision between one or more cars, or in the execution of a manoeuvre in an endeavour to evade such a collision.

The risk of [the events giving rise to the plaintiff’s injury] ... clearly falls without the ambit of the risk [described in the previous paragraph] ... There is no evidence that conduct of this nature occurs - even exceptionally - in the conduct of midget car racing ... On this ground alone I think the doctrine of voluntary acceptance of risk affords no shield to a defendant against the usual legal consequences of his negligence.”

Van Winsen J no doubt was correct in concluding that voluntary assumption of risk as a ground of justification was not applicable in this case, especially when tested against the *boni mores* requirement, but contributory intent as a ground excluding fault may have been applicable if the plaintiff subjectively foresaw the possibility of being hit by a midget racing car and reconciled himself with that possibility while simultaneously acting consciously unreasonable. Unfortunately this is an example of one of the cases where our courts have referred to the doctrine of “duty of care” which should be disregarded in our law.²⁵⁸

Clark v Welsh²⁵⁹ During a game of golf, the plaintiff (Mrs Clark) was struck in the eye by a golf ball hit at a wide angle by the defendant. As a result of the serious injury to her eye it had to be removed. It was alleged that the injury was caused by the negligence of the defendant who teed off at right angles and failed to warn the plaintiff not to stand in the line of her shot. One of the defences raised by the defendant was *volenti non fit iniuria*. Van Reenen AJ²⁶⁰ however stated that the defence was not applicable in this case for the reason that the defendant did not establish “the concluding, as between himself and the plaintiff, of a ‘bargain whereby the plaintiff gave up his right of action for negligence’”.

Van Reenen AJ referred to the judgment of *Santam Insurance Co Ltd v Vorster*²⁶¹ that “a bargain could be inferred from the evidence” and that it was important to establish the plaintiff’s foresight of the risk of injury, but rejected this approach and preferred to look for the solution in British, Canadian and Australian cases.²⁶² She

²⁵⁷ *Supra* 420-421.

²⁵⁸ See *supra* chapter 2 par 2.4.

²⁵⁹ 1975 4 All SA 124 (W).

²⁶⁰ *Supra* 125.

²⁶¹ 1973 4 SA 764 (A).

²⁶² *Clark v Welsh* 1975 4 All SA 124 (W) 126.

referred at length to the well-known English case of *Wooldridge v Sumner*,²⁶³ and held that in this case the correct approach was to decide whether or not the defendant was negligent and concluded that she did not act negligently.

Loubser *et al* are of the view that the Court could “also have argued that the injury was caused lawfully because it was reasonable to cause such injury in the normal course of the game”.²⁶⁴ It is submitted that the theoretically correct approach in this case should have been to consider voluntary assumption of risk as a ground of justification as it seems that all the requirements would have been met including the requirement that such consent must not be *contra bonos mores*. There is no reason why the defence should not have succeeded in this case as it did in the case of *Boshoff v Boshoff*.²⁶⁵ It was not necessary for the court to consider negligence and in any case, the “bargain theory” used in English Law as mentioned by Van Reenen AJ above was rejected by Ogilvie Thompson CJ in *Santam Insurance Co Ltd v Vorster*.²⁶⁶ Therefore there was no valid reason why the defence of *volenti non fit iniuria* should not have been applicable.

Van Wyk v Thrills Incorporated (Pty) Ltd²⁶⁷ In this case the plaintiff (deceased’s widow) sued the promoter of a “hot rod” motor race for damages on the ground that the promoter failed to provide proper protection for the safety of members of the public who attended the race meeting. Her husband, a spectator, was killed instantly when the entrance gate used for cars sprang open and hit him. The court *a quo* found on the evidence that the promoter had not failed to take the necessary precautions as far as safety of the public was concerned and that the widow had failed to discharge the *onus* on her proving that the respondent had been negligent. The widow then appealed. On appeal the parties in a pre-trial conference had agreed on the following issues that had to be decided upon: (i) whether the promoter was negligent in relation to persons in the position of the deceased at the time of the accident; and (ii) whether the deceased had voluntarily assumed the risk of harm

²⁶³ 1962 2 All ER 978 (CA) *supra* 125; see *infra* par 3.6.1 for a discussion of this case.

²⁶⁴ Loubser *et al Delict* 164.

²⁶⁵ 1987 2 SA 694 (O).

²⁶⁶ 1973 4 SA 764 (A) 780-881.

²⁶⁷ 1978 2 SA 614 (A).

which exempted the promoter from any liability flowing from any duty of care owed by the defendant to the deceased.²⁶⁸

According to the evidence the track was adequately protected, but there was a gate (which enabled participants to drive in and out) at which a couple of accidents had occurred. As a result of the prior accidents steps were taken to strengthen the gate with a welded flange. Evidence was also led that the gate was mechanically reinforced so that it would not spring open in the event of a collision. Nevertheless, on this occasion the gate sprang open for inexplicable reasons when it was hit by a car.²⁶⁹

Klopper AJA²⁷⁰ acknowledged that “hot rod” racing is a dangerous sport which draws tremendous crowds and stated that:

“It is also clear from the evidence that the deceased regularly attended these ‘hot rod’ races and on the day in question he took it upon himself to assist two Black employees who attended to the gate, to open and close the gate. In fact he was making a nuisance of himself to such an extent that one of the Black employees went to the witness Samons, one of the officials, to request him to tell the deceased to go away from the gate as he was hindering them. Samons thereupon went up to the deceased and asked him please to come away from the gate as it was dangerous and that he had seen many accidents. Deceased merely replied ‘What me, I’ll never die.’ Samons then shrugged his shoulders and walked away.”²⁷¹

Just after the deceased had uttered these words one of the cars came crashing over the railings which resulted in a pile up, and another car involved in the pile up angled out and crashed into the gate. It apparently hit the hinge post and flung the gate open towards the outside where the deceased was standing and he was killed instantaneously.²⁷²

The court also pointed out that in addition to the precautions at the gate, several warnings were given to spectators that “hot rod” racing is a dangerous sport. They were informed that they attend these races at their own risk. These warnings were issued in several forms, for instance, on a large warning sign at the entrance to the stadium, on the admission ticket, on the programme, on notice boards and verbally over the loudspeaker system.

²⁶⁸ *Supra* 619.

²⁶⁹ *Supra* 615.

²⁷⁰ *Supra* 619.

²⁷¹ *Supra* 620.

²⁷² *Supra* 620.

Klopper AJA²⁷³ held (upon lack of expert evidence led on what effect a collision with the hinge post on the flange, even when strongly welded, could have had) that it was impossible to determine why the flange came off or the reason for the gate opening on this occasion while it had withstood repeated knocks over the past seven years.

He²⁷⁴ further stated:

“The necessity for not cordoning off the gate was influenced by the fact that the ordinary spectator would not venture close to the barrier or the gate because, not only was it dangerous to do so, but according to the evidence, the closer one gets to the barrier gate the less one is able to see the race. In any event it is obvious that no such barrier would have prevented the deceased from going up to the gate.”

The court concluded²⁷⁵ that the promoter did not fail to take the necessary precautions as far as the safety of the public was concerned and that the widow had failed to discharge the *onus* resting upon her of proving that the respondent was negligent. Therefore the court found it unnecessary to decide the issues raised by the plea of *volenti non fit iniuria*. The appeal was dismissed.

In this case voluntary assumption of risk as a ground of justification would have failed due to the requirement that the consent must not be *contra bonos mores*, as one cannot consent to serious bodily injury or death. It has however been suggested by Prinsloo²⁷⁶ that in this instance any possible negligence on the part of the promoter would be cancelled by the contributory intent of the deceased. The deceased spectator was aware of the danger of standing near the gate and was further warned of the danger, but deliberately and voluntarily exposed himself to the risk of harm. Nevertheless, it is questionable whether contributory intent would have been applicable. *Dolus eventualis* was probably not present since the deceased did state that “I’ll never die”.²⁷⁷ Therefore in all probability he did not subjectively foresee such a possibility and did not reconcile himself with it. Rather *luxuria* or conscious negligence could have been present.²⁷⁸

²⁷³ *Supra* 622.

²⁷⁴ *Supra* 623.

²⁷⁵ *Supra* 623-624.

²⁷⁶ 1991 TSAR 52.

²⁷⁷ *Van Wyk v Thrills Incorporated (Pty) Ltd* 1978 2 SA 614 (A) 620.

²⁷⁸ See Neethling and Potgieter *Delict* 128.

Hattingh v Roux²⁷⁹ R, a former school rugby player was severely injured by his opponent, A, during a scrum. It was alleged *inter alia* that A, “[i]n accordance with an illegal and highly dangerous manoeuvre, apparently coded ‘jack-knife’ by the Stellenbosch team, forcibly placed his head in the incorrect channel of the scrum, as a result of which [A]’s head impacted directly and with force onto [R]’s neck, thereby causing the fracture of his neck”.²⁸⁰ The defence of voluntary assumption of risk as a ground of justification was raised alleging that R assumed the risk of injury involved in participating as a hooker in the rugby match.²⁸¹

The court was faced with two mutually destructive versions of R and his expert, on the one hand, and A and his experts on the other. R therefore had to prove, on a balance of probabilities, that his version was the more plausible one.²⁸² Medical reports as well as three rugby experts (who testified at the hearing of the matter) confirmed that R’s injury was sustained upon engagement, but according to Dr Coetzee may have been worsened by the scrum thereafter collapsing on R.²⁸³

Fourie J²⁸⁴ took note of the argument that the execution of the alleged manoeuvre would not benefit A’s team, “as it would only cause the scrum to collapse and may expose [A] to the risk of serious injury” but opined that the manoeuvre was most likely used in the scrum (the “main arena where sixteen forwards of two teams meet head-on in a contest of brute physical strength”) to show dominance. He²⁸⁵ found that A did execute the illegal and dangerous manoeuvre coded “jack-knife” which according to the experts and players is rarely encountered, dangerous and contrary to the laws and conventions of the game of rugby. He²⁸⁶ further found A’s actions unlawful and intentional. Judgment was therefore given in favour of R.²⁸⁷

With regard to the defence of consent to the risk of injury, Fourie J²⁸⁸ referred to the requirements of consent as set out by Neethling and Potgieter²⁸⁹ and confirmed that

²⁷⁹ 2011 5 SA 135 (WCC).

²⁸⁰ *Supra* 137.

²⁸¹ *Supra* 137.

²⁸² *Supra* 146.

²⁸³ *Supra* 146-148.

²⁸⁴ *Supra* 153.

²⁸⁵ *Supra* 155-157.

²⁸⁶ *Supra* 157.

²⁸⁷ *Supra* 157.

²⁸⁸ *Supra* 141.

wrongfulness may be excluded in cases of lawful sport.²⁹⁰ He²⁹¹ also cited *Boshoff v Boshoff*²⁹² as an example (the classic case of voluntary assumption of risk in lawful sport which was not *contra bonos mores*).

Fourie J²⁹³ stated:

“Rugby is a high-speed contact sport, so there will always be the risk of injury. The participants in a rugby game can expect to sustain injuries, even serious injuries, in the normal course of a game ... and in particular the hookers ... find themselves in the most dangerous position when engaging in a scrum. It is well-known in the rugby world that serious injuries are frequently sustained by hookers while scrumming ... Notwithstanding this widely accepted inherent risk of injury, it would be legally offensive to deny an injured player a legal remedy in appropriate circumstances, merely because his injury has been sustained in a sporting contest such as a rugby game.”

The judge concluded:²⁹⁴

“In view of the evidence as to the unexpected and dangerous nature of a manoeuvre of this kind, it will be immediately apparent that this defence cannot succeed ... It can therefore not be said that [R] participated in this game with full knowledge of the nature and extent of the risk of being injured by [A]’s execution of the "jack-knife" manoeuvre. This is not the normal type of risk that a participant in a scrum would have consented to.”

Fourie J²⁹⁵ found that the manoeuvre was extremely dangerous, unexpected and therefore unlawful with regard to the “rules and conventions of the sport concerned and to the particular circumstances in which the injury occurred”.²⁹⁶

In casu the finding was correct in that the consent was invalid, not only due to the absence of the requirement of knowledge of the nature and extent of the risk of being injured by the unexpected "jack-knife" manoeuvre, but also due to the fact that a participant cannot consent to or run the risk of sustaining serious injuries where the conduct of the fellow players is unlawful. Such consent would be *contra bonos mores*, unlawful and therefore invalid. Voluntary assumption of risk as a form of contributory intent, applying as a ground excluding fault would also not be applicable as *in casu* the defendant’s actions were found to be intentional and not merely negligent. Contributory intent is applicable as a ground cancelling negligence.²⁹⁷ As

²⁸⁹ *Supra* 141 Fourie J referred to the earlier edition of Neethling, Potgieter and Visser *Delict* 92-94.

²⁹⁰ *Supra* 141.

²⁹¹ *Supra* 141.

²⁹² 1987 2 SA 694 (O).

²⁹³ *Hattingh v Roux* 2011 5 SA 135 (WCC) 139.

²⁹⁴ *Supra* 157.

²⁹⁵ *Supra* 154.

²⁹⁶ *Supra* 142-143.

²⁹⁷ See Neethling and Potgieter *Delict* 171.

was correctly stated in *Boshoff v Boshoff*²⁹⁸ a *bona fide* sportsman, who causes injury to a fellow player in a reasonable manner during the course of a game, can raise the defence of consent, but if the injury was deliberately intended by the defendant, or if he is reckless and in disregard of all safety of others so that his behaviour is a departure from the standards which might reasonably be expected in anyone pursuing the competition or game, then the performer might well be held liable for any injury his act caused. This case has been hailed as a landmark ruling that could open the floodgates for civil claims against participants in any sport in instances of intentional conduct.²⁹⁹

Fourie v Naranjo³⁰⁰ The appellant's dog (Bruno) had attacked and savaged the domestic worker in the employ of the appellant (F). The first respondent (Naranjo) hastened to the domestic worker's aid and succeeded in distracting the dog but was also attacked and bitten first by Bruno and then by another dog on the premises (Cindy) owned by N. Cindy was on the premises for the purposes of mating with Bruno. Naranjo and his wife sued F and N in the magistrate's court with the *actio de pauperie* and in the alternative that F and N had acted negligently with respect to the control over their dogs. F and N submitted that Naranjo was aware that there was a dog or other dogs on the premises and that there was a possibility of risk of harm upon entering the premises. They alleged that Naranjo had freely and voluntarily assumed the risk of harm by entering the property in spite of that knowledge and in the alternative pleaded that Naranjo had trespassed and acted negligently by entering the premises. Therefore the injuries sustained by him were due to his own negligence. Naranjo sought compensation for pain and suffering, medical expenses as well as loss of clothing. Naranjo's wife claimed compensation for emotional shock as a result of her witnessing the incident as well as for medical expenses. The Naranjos succeeded with the *actio de pauperie* in the court *a quo* and the alternative pleas were not dealt with.³⁰¹ On appeal it was established that the Naranjos knew Bruno since he was a puppy. Naranjo's wife was apprehensive about Bruno and had been for quite some time. She regarded the dog as dangerous while Naranjo had no

²⁹⁸ 1987 2 SA 694 (O) 702.

²⁹⁹ See Nicholson Z "Shock rugby injury ruling" <http://www.iol.co.za/news/crime-courts/shock-rugby-injury-ruling> (accessed 05 July 2011).

³⁰⁰ 2007 4 All SA 1152 (C).

³⁰¹ *Supra* 1153-1154.

fear of Bruno. Naranjo pleaded that he did not anticipate being attacked by Bruno, he believed that he would be able to control Bruno and felt he had a duty to save the domestic worker.³⁰² Cleaver J referred to the three requirements in respect of the defence of *volenti non fit iniuria* as encapsulated in the dictum of Innes CJ in *Waring and Gillow Ltd v Sherborne*.³⁰³ He further referred to the judgments of *Santam Insurance Co Ltd v Vorster*,³⁰⁴ *Lampert v Hefer*,³⁰⁵ *Rousseau v Viljoen*,³⁰⁶ and *Lawrence v Kondotel Inns (Pty) Ltd*³⁰⁷ in respect of the subjective inquiry as to whether Naranjo must have known and appreciated the risk of harm to which he was exposing himself and found³⁰⁸ that:

“it is ... clear from Naranjo’s evidence that he was not afraid and foresaw no risk when he entered the premises because Bruno had always obeyed him and expected him to do so again. Because of this, the issue of his own safety never came to mind and in the result the defence cannot succeed”.

In respect of the alleged contributory negligence Cleaver J³⁰⁹ held:

“In my view this defence must fail for the same reason that the defence of *volenti non fit iniuria* fails ... Naranjo did not see Bruno as a danger ... [H]e had no reason to expect that Bruno would not recognise his authority when he entered [F’s] property. Judged as to how a *diligens paterfamilias*, having the knowledge which Naranjo had, would behave in the circumstances, it is my view that Naranjo was not negligent in going to the aid of [the domestic worker].”

Cleaver J found that the magistrate was correct in finding that the dogs had acted contrary to the nature of their class, thereby upholding the magistrate’s finding in terms of the *actio de pauperie* and dismissed the appeal.³¹⁰

The defence of voluntary assumption of risk would obviously fail as a ground of justification as one cannot consent to the risk of serious bodily injury as a result of being bitten by a dog because it would be *contra bonos mores*. Moreover, Naranjo did not consent to being bitten. Turning to the question of whether Naranjo acted with contributory intent (as a ground excluding fault) it would have to be proven that he foresaw the possibility of the risk of being bitten and reconciled himself with that

³⁰² *Supra* 1155-1156.

³⁰³ *Supra* par 16.

³⁰⁴ 1973 4 SA 764 (A).

³⁰⁵ 1955 2 SA 507 (A).

³⁰⁶ 1970 3 SA 413 (C).

³⁰⁷ 1989 1 SA 44 (D).

³⁰⁸ *Supra* 1158-1159.

³⁰⁹ *Supra* 1159.

³¹⁰ *Supra* 1156- 116.

possibility while simultaneously acting consciously unreasonable. It seems unlikely that contributory intent as a ground excluding fault would be applicable. In regard to the question of contributory negligence, Naranjo's actions would have to be judged objectively using the test of the reasonable person in Naranjo's position. A reasonable person would have tried to come to the aid of the domestic worker and therefore there is no negligence.

Green v Naidoo³¹¹ The plaintiff's four year old daughter was bitten on her face by a Chow dog named Taz after she had pulled the dog's nose while it was eating. The plaintiff sued the owners of the dog with the *actio de pauperie* and in the alternative, the Aquilian action. The defendants raised the defences of trespass, *volenti non fit iniuria*, provocation by the daughter as well as negligence on the part of the plaintiff.³¹²

Satchwell J³¹³ dealt with the defences of *volenti non fit iniuria* and negligence together. The defendants argued that the plaintiff was negligent and voluntarily assumed the risk of harm by allowing his four year old daughter to spend the afternoon at the defendant's house where he knew the Chow dogs were on the premises and that there was a possibility that she might get bitten.³¹⁴ The plaintiff argued that he could not foresee that the dog would bite his child. Satchwell J³¹⁵ stated:

"The question is whether [the plaintiff] 'must have foreseen the risk and therefore in fact foresaw it'. The risk to which the plaintiff must have assented must therefore be a 'real one inherent in the situation and not merely a fanciful or abstract risk'. The consent given must be to the 'whole risk'. The test is a subjective one."

After considering the evidence she³¹⁶ held that the plaintiff:

"had been given to understand that the Chow dogs were friendly, playful and safe with children. He knew that his daughters had been in contact with these dogs previously. [I]t is unlikely that he foresaw that his daughter would be bitten ... [I]t is unlikely that he could or did anticipate that [his daughter] would approach Taz while Taz was eating ... [or] that Taz would have a scab or tender place on his nose which C would touch or pull. Certainly, if he foresaw

³¹¹ 2007 6 SA 372 (W).

³¹² *Supra* 372.

³¹³ *Supra* 384-389.

³¹⁴ *Supra* 385.

³¹⁵ *Supra* 388.

³¹⁶ *Supra* 388.

the risk of danger to which [his daughter] was exposed ... [he] did not explicitly assent to any injury to his daughter”.

Satchwell J³¹⁷ correctly found that voluntary assumption of risk as a ground of justification was not applicable. Be that as it may, she further found that the plaintiff had failed to prove any negligence on the part of the defendants in respect of control over their dog, since it could not be expected from the defendants to foresee the reasonable possibility of harm. The plaintiff’s claim based on the *actio de pauperie* failed as a result of the provocation by his daughter, and that based on the *actio legis Aquiliae*, as a result of the absence of negligence on the defendant’s side.

The defence of *volenti non fit iniuria* failed in this case as a father may not consent to the risk of harm to his own daughter, such consent to being bitten by a dog is *contra bonos mores*. Voluntary assumption of risk in the form of contributory intent would probably also not have been applicable as according to the evidence it was unlikely that the plaintiff had *dolus eventualis*. The daughter had been to the defendant’s house before and the dogs were friendly. It is unlikely that the plaintiff foresaw the possibility of risk of harm to his daughter and reconciled himself with that possibility while simultaneously acting consciously unreasonable. At the very most perhaps the plaintiff could have been found contributorily negligent.

Waring and Gillow Ltd v Sherborne³¹⁸ Sherborne (deceased) was in the employ of the defendant at the time of his death and was in the process of assisting co-workers to remove a crane at a construction site. Unfortunately an accident occurred as a result of the negligence of his co-worker and the deceased was knocked down from the platform and killed. The deceased’s widow succeeded in claiming damages from the employer in the court *a quo*. The employer appealed and alleged that the accident was caused by the deceased’s own negligence and that he had voluntarily assumed the risk of harm. According to the defendant, the deceased was “an expert rigger, and his knowledge must have shown him that the whole affair was dangerous and that he was encountering a risk”.³¹⁹

³¹⁷ *Supra* 389.

³¹⁸ 1904 TS 340.

³¹⁹ *Supra* 341.

In respect of the defence of *volenti non fit iniuria* Innes CJ³²⁰ held that:

“in order to render the maxim applicable it must be clearly shown that the risk was known, that it was realized, and that it was voluntarily undertaken. Knowledge, appreciation, consent - these are the essential elements; but knowledge does not invariably imply appreciation and both together are not necessarily equivalent to consent ... In the present instance nothing was said by the deceased man from which any inference can be drawn either as to his knowledge of the danger or his willingness to encounter the risk. We are asked to infer from his conduct, his experience, and from his surrounding circumstances”.³²¹

The court turned to the facts and stated that neither knowledge nor appreciation of the risk had been satisfactorily established, the “deceased received a command from the foreman. [H]e had to decide at once whether to take the consequences of disobeying the orders of his superior, or to occupy the post of danger. The mere fact that he did what he was told cannot possibly prove that he willingly took the risk upon himself”. Innes CJ held that *volenti non fit iniuria* was not applicable as a defence and further that the deceased was not contributorily negligent.³²²

Apart from the reasons stated by the court, the defence of voluntary assumption of risk as a ground of justification would certainly also fail because of the *boni mores* requirement, but voluntary assumption of risk in the form of contributory intent as a ground excluding fault could apply if it could be shown that the deceased foresaw the risk of serious injury and reconciled himself with such consequence, while simultaneously acting consciously unreasonable. If it cannot be ascertained that the deceased acted with contributory intent then perhaps negligence could be imputed to him. According to the facts though, it seems that negligence could not be proven. It is important to test each defence against the facts of the case.

3.2.2.4 Voluntary assumption of risk as a defence in the case, and action, of dependants

Examples are often encountered in practice where the breadwinner voluntarily assumes the risk of harm and in principle, depending on the circumstances of the case, either the defence of consent or contributory intent may be applicable with respect to the dependants' claim.

³²⁰ *Supra* 344.

³²¹ *Supra* 344-345.

³²² *Supra* 347-348.

Neethling and Potgieter³²³ refer to two approaches with regard to the legal basis of the dependants' action. The first approach (hereinafter referred to as the "positive law approach") is based on the premise that the delict is committed against the breadwinner,³²⁴ while the second approach, which is the preferred approach,³²⁵ (hereinafter referred to as the "theoretically correct approach") is based on the premise that the delict is committed against the dependant. For purposes of this study the basic question is whether the dependants can succeed with their claim for loss of support in instances where the breadwinner consents to the risk of death, or agrees to exclude liability (in respect of him or herself and his or her dependants), or acts with contributory intent with regard to the said risk.

Where there is valid consent (a ground of justification) the result of both approaches is the same, that is, the defendant's act will not be wrongful either against the breadwinner or the dependant. Against the breadwinner, valid consent excludes wrongfulness and against the dependant (even though the consent would be *res inter alios acta* in respect of such dependant) the infringement of the dependant's loss of support is regarded as reasonable, not *contra bonos mores* and therefore lawful.³²⁶ If the deceased's consent is rendered invalid (for example, due to the fact that such consent is *contra bonos mores*),³²⁷ then contributory intent may be applicable, such as in the cases of suicide³²⁸ which will be discussed next.

With regard to contributory intent (applicable in instances where the consent is rendered invalid) where, for example, the breadwinner intentionally and voluntarily assumes the risk of harm while aware that his or her actions are not directed towards the achievement of a lawful goal (such as in cases of suicide), the two approaches will have different outcomes. If the positive law approach is followed, contributory intent could apply as a complete defence against the actions of the dependants (as the breadwinner's intent cancels the negligence of the wrongdoer).³²⁹ On the other

³²³ *Delict* 282.

³²⁴ This approach is supported by McKerron *Delict* 70-71.

³²⁵ This approach is supported by Neethling and Potgieter *Delict* 282-284 as well as Burchell *Delict* 72-73. Cf Van der Walt and Midgley *Delict* 108-109.

³²⁶ Neethling and Potgieter *Delict* 282-283. Cf *Maimela v Makhado Municipality* 2011-5-20 case no 269/10 (SCA) with regard to the killing of the breadwinner in necessity.

³²⁷ Neethling and Potgieter *Delict* 283.

³²⁸ See Kok 2001 *Stell LR* 157-163.

³²⁹ Neethling and Potgieter *Delict* 283.

hand, if the theoretically correct approach is followed, contributory intent cannot be raised against the dependants (as it would be *res inter alios acta* in respect of them). Interestingly enough, this was the result of the approach in two cases where in spite of the fact that the action of the dependants was based on a delict against the breadwinner, the breadwinner's suicide ("intentional" conduct in respect of his own death) was completely ignored.³³⁰ In *Minister of Safety and Security v Madyibi*³³¹ the deceased, a policeman, committed suicide with his own firearm. The station commander was made aware of the deceased's violent and suicidal tendencies by the deceased's wife and fellow members of the police service. It was alleged that the station commander and other members of the police service had a statutory duty to declare the deceased unfit to possess a firearm and, in fact, should have taken the firearm away from him. As a result of their negligent omission, the deceased's dependants sustained loss of support. The Supreme Court of Appeal found in favour of the dependants who were entitled to claim. The contributory intent on the part of the deceased was not raised as a defence and therefore was not addressed by the court.

If it is accepted that in a case like *Madyibi's* the conduct of the police is wrongful *vis-à-vis* the dependants, then causation (meaning that the omission was the factual and legal cause of the dependant's loss of support) needs to be present for a delictual action to succeed. In this regard the core question is whether the suicide constitutes a *novus actus interveniens*. The decision in *Road Accident Fund v Russell*³³² should be mentioned here. The deceased sustained brain damage in a motor car accident, and some months later he committed suicide as a result of severe depression. His wife *inter alia* instituted an action on behalf of their minor children for loss of support. It appeared from the evidence that the type of brain lesion suffered by the deceased does very often lead to severe depression. The central issue was whether the death of the deceased had arisen as a result of the injuries sustained in the accident and whether, in the circumstances, the suicide constituted a *novus actus interveniens* which served to break the chain of causation resulting from the negligence of the

³³⁰ See *Minister of Safety and Security v Madyibi* 2010 2 SA 356 (SCA) and *Road Accident Fund v Russell* 2001 2 SA 34 (SCA).

³³¹ 2010 2 SA 356 (SCA).

³³² 2001 2 SA 34 (SCA).

driver. The court³³³ held that if a person not of sound mind deliberately commits suicide (which was in fact the case with the deceased *in casu*), the suicide does not constitute a *novus actus interveniens*; but *vice versa*, a person's deliberate act of suicide, when of sound mind, does establish a new intervening cause.³³⁴ The plaintiff consequently succeeded with her claim for loss of support. This important principle was not canvassed in *Madyibi* and it is uncertain what the outcome would have been if it had. In any case, as in *Madyibi*, the question as to contributory intent on the part of the deceased was not raised.

Neethling and Potgieter³³⁵ point out that the Apportionment of Damages Act endorses the theoretically correct approach as the defendant and breadwinner are treated as joint wrongdoers in respect of the dependants' claim. According to the circumstances of the case, the court could then apportion the damages (loss of support) where two or more joint wrongdoers are culpable. The respective degrees of culpability or blameworthiness of the parties will be taken into account.³³⁶ This should have been the approach in both *Madyibi* and *Russell*. In suicide cases the deceased and the defendant should be regarded as joint wrongdoers because both are, in principle, liable in delict for the dependants' loss of support; the deceased, because he or she "intentionally" killed him- or herself, and the defendant because he or she negligently contributed to the deceased's death.³³⁷

Where a breadwinner concludes a *pactum de non petendo in anticipando* (a contractual undertaking not to institute an action against the actor who committed a delict against the deceased) again the outcome of the two approaches would be different. If the positive law approach is followed, the *pactum* would apply as a complete defence against any claims from the dependants. If the theoretically correct approach is applied then the *pactum* (which is *res inter alios acta* with regard to the dependant's action) would not affect the dependants' claim. This approach was

³³³ *Supra* 40-41.

³³⁴ See also the discussion of *Reeves v Commissioner of Police of the Metropolis* 2000 1 AC 360 under English law (*infra* par 3.6.1), the cases encountered in Spanish law (*infra* par 3.6.6) as well as a more detailed discussion of *Road Accident Fund v Russell* 2001 2 SA 34 (SCA) in chapter 5 par 5.3.

³³⁵ *Delict* 283.

³³⁶ See *Lloyd-Gray Lithographers (Pty) Ltd v Nedcor Bank Ltd t/a Nedbank* 1998 2 SA 667 (W) 672-673 referred to by Neethling and Potgieter *Delict* 266 fn 6 as well as other cases discussed in chapter 4 par 4.2.2.3 as to how apportionment could be applied depending on the parties different forms of fault.

³³⁷ See *infra* chapter 4 par 4.2.2.1 for the relevance of apportionment in these cases between joint wrongdoers for the defence of contributory intent.

applied in *Jameson's Minors v CSAR*³³⁸ where it was held that an agreement by a breadwinner to exclude a claim in the event of his injury or death (binding his estate and dependants) did not affect the dependants' right to claim for loss of support. *Jameson's Minors v CSAR*³³⁹ has spawned the argument that the consent of the deceased has the effect of rendering the defendant's conduct lawful and the dependants have no action due to the deceased's consent.³⁴⁰

3.3 Voluntary assumption of risk (contributory intent) as a ground excluding fault

3.3.1 Introduction

Having dealt with consent to injury and consent to the risk of injury (voluntary assumption of risk) as a ground of justification whereby wrongfulness is excluded,³⁴¹ attention must now be given to voluntary assumption of risk in the form of contributory intent. In instances where the plaintiff voluntarily assumes the risk of harm by "intentionally" exposing him- or herself to a harm or risk of harm knowing full well the consequences of doing so and simultaneously acts unreasonably (not towards the achievement of a lawful goal),³⁴² and where his conduct does not comply with the requirements for valid consent, such plaintiff's contributory intent could, depending on the circumstances, cancel the defendant's fault in the form of negligence.³⁴³ The contributory intent or at the very least *dolus eventualis* (reconciliation with a foreseen possibility)³⁴⁴ or assumption of risk by the plaintiff cancels the fault of the defendant because he or she willingly and intentionally assumes the risk of the foreseen harm and reconciles him- or herself with the possibility of harm. In this way the plaintiff's contributory intent may lead to the exclusion of his or her claim.³⁴⁵ In light of the fact that our courts³⁴⁶ have explicitly

³³⁸ 1908 TS 575.

³³⁹ 1908 TS 575, 585.

³⁴⁰ *Boberg Delict 728-729*; cf *Burchell Delict 72-73*.

³⁴¹ See *supra* par 3.2.

³⁴² Eg, where a person willfully exposes him- or herself to personal danger in order to save a person's life, he or she does not necessarily act consciously unreasonable and therefore he or she may not be found to have acted with contributory intent. Strictly speaking he or she cannot have consciousness of wrongfulness in respect of the harm he or she causes him- or herself, since causing such harm is not wrongful; *Neethling and Potgieter Delict 171*.

³⁴³ *Neethling and Potgieter Delict 171*.

³⁴⁴ See *supra* chapter 2 par 2.2.2.1.

³⁴⁵ *Neethling and Potgieter Delict 171*.

stated that a plaintiff who has intentionally contributed to his or her own damage cannot claim his or her own damage or part of it from a defendant on the ground of the latter's negligent conduct, there seems to be no reason why this defence should in principle not also apply to *dolus eventualis* in the present field.³⁴⁷

3.3.2 Rescue cases

Voluntary assumption of risk or the "contributory intent" of plaintiffs in the so-called "rescue cases" could in principle serve as a defence excluding delictual liability.³⁴⁸ Neethling and Potgieter³⁴⁹ refer to the example where the defendant negligently sets a house on fire and the plaintiff runs into the burning house to recover his jacket, and in so doing is subsequently injured by the flames. In this scenario the plaintiff's contributory intent will exclude the defendant's negligence since his exposure to the flames to save a jacket can be regarded as consciously unreasonable. However, if the plaintiff voluntarily exposed himself to such a risk of harm in order to save a baby, a different picture emerges because the plaintiff's exposure to the risk was then consciously reasonable (acting towards a lawful goal) and he therefore lacked contributory intent. The defendant might be liable because he should have foreseen that someone might go into the house to save the baby. In rescue cases the plaintiff's contributory fault could also take the form of contributory negligence, in that the reasonable person would not have acted in that manner, wherein apportionment of damages may be applicable. However, in the baby scenario there will also not be contributory negligence since the plaintiff acted like a reasonable person in saving the baby. For example, in *Miller v Road Accident Fund*³⁵⁰ the plaintiff acted consciously reasonable when he sustained injuries whilst endeavouring to rescue passengers from a car which spun off the road. The plaintiff instituted a claim against the Road Accident Fund on the basis that the driver had acted negligently and was responsible for having caused or created the dangerous situation. The court held

³⁴⁶ See *Wapnick v Durban City Garage* 1984 2 SA 414 (D) and *Columbus Joint Venture v ABSA Bank Ltd* 2000 2 SA 491 (W) discussed in detail in chapter 4 par 4.2.1.1.

³⁴⁷ Contributory intent as a complete defence is also applicable to claims under the *actio de pauperie* and the *actio de pastu*; see Neethling and Potgieter *Delict* 359, 361; Moreover it is also recognised as a defence in s 30(6) of the National Nuclear Regulator Act 47 of 1999; Neethling and Potgieter *Delict* 373.

³⁴⁸ Neethling and Potgieter *Delict* 174.

³⁴⁹ *Delict* 174.

³⁵⁰ 1999 4 All SA 560 (W).

that it was fair and reasonable to find that the negligent driving of the insured car was the factual and legal cause of the plaintiff's injury. Furthermore it was held that the law is wide enough to recognise the claim of a rescuer and that policy considerations demand the recognition of a rescuer's claim.

The moral or social pressures which induce a person to expose him- or herself to a risk in an effort to rescue another from a danger created by the defendant's negligent conduct is sufficient to negate voluntary assumption of risk. Where, however, the danger is so extreme as to be out of proportion to the value of the interest protected, the rescue operation is unreasonable and may constitute contributory intent³⁵¹ or negligence³⁵² on the part of the rescuer.

All commentators agree that a rescuer as a rule lacks contributory fault. Schwietering³⁵³ supports the view that in the rescue cases, a person who voluntarily exposes him- or herself to a risk of harm to free another in case of emergency acts reasonably and cannot be found to have contributory fault. Strauss³⁵⁴ also opines that where a rescuer puts him- or herself in danger in order to free another, he or she performs an act in an emergency situation, which is *prima facie* in the nature of a social good and the law must take cognisance of this. As long as his or her exposure to the risk of harm was reasonable, taking into consideration all the circumstances of the case, no contributory fault may be attributed to him. Boberg³⁵⁵ suggests that it is generally accepted that a rescuer is deemed not to have been *volens*³⁵⁶ to injury resulting from his efforts to rescue, for to hold him or her so would be "inimical to the policy of encouraging altruism".

In conclusion it can be stated that where the rescuer exposes him- or herself to a risk of harm which is reasonable according to the *boni mores*, then the defence of voluntary assumption of risk (*volenti non fit iniuria*) is not applicable and fault may also not be imputed to him or her, unless he or she acts unreasonably (*contra bonos mores*) or his or her intent is not directed towards a lawful aim.

³⁵¹ Burchell *Delict* 72.

³⁵² Van der Walt and Midgley *Delict* 143.

³⁵³ 1957 *THRHR* 141-142.

³⁵⁴ 1964 *SALJ* 179.

³⁵⁵ Boberg *Delict* 743.

³⁵⁶ As long as his or her conduct is reasonable under the circumstances.

3.3.3 Case law

As indicated,³⁵⁷ in many of the cases where the defence of consent to the risk of injury as a ground of justification has been unsuccessfully raised, the defence of voluntary assumption of risk in the form of contributory intent could have been appropriate. Here the focus will be on the cases where the latter defence, albeit not *eo nomine*, has been successful (namely *Lampert v Hefer* and *Malherbe v Eskom*), as well as the case where this defence was dismissed as not forming part of our law, namely, *Netherlands Insurance Co of SA v Van der Vyver*.

Lampert v Hefer³⁵⁸ In this case the plaintiff voluntarily took a seat in the sidecar of a motorcycle driven by the defendant who was in a high state of intoxication. The plaintiff knew that the defendant was intoxicated and incapable of exercising reasonable care and control over the vehicle. An accident occurred wherein the driver of the motorcycle, Hefer, died and the plaintiff sustained severe injuries. The plaintiff sued the defendant (the executrix of Hefer's estate) for damages as a result of injuries sustained from the accident on the grounds of negligence, in that Hefer drove the motorcycle while under the influence of alcohol and in consequence "failed to exercise proper care". The defendant pleaded that the plaintiff had realised and appreciated the risk to which she was exposing herself, but nevertheless voluntarily undertook the risk and consented to being a passenger in the sidecar of the motorcycle.³⁵⁹ The court *a quo* held that *volenti non fit iniuria* (voluntary assumption of risk) was a good defence and that the evidence supported the allegations, thereby giving judgment in favour of the defendant.³⁶⁰ The plaintiff appealed.

The Appellate Division refused the plaintiff's application for leave to appeal *in forma pauperis* on grounds that the appeal had no reasonable prospects of success.³⁶¹ Fagan JA³⁶² submitted that the defendant's plea of voluntary assumption of risk on the part of the plaintiff "disclosed a good defence. The evidence showed that the plaintiff voluntarily took her seat in the side-car; there was no suggestion that she

³⁵⁷ *Supra* par 3.2.2.3.
³⁵⁸ 1955 2 SA 507 (A).
³⁵⁹ *Supra* 509.
³⁶⁰ *Supra* 510.
³⁶¹ *Supra* 515.
³⁶² *Supra* 514.

was compelled by necessity or otherwise to do so". He³⁶³ agreed with the finding of the court *a quo*, in that the plaintiff:

"knew that Hefer was intoxicated to the degree he had indicated ... [S]he had often driven with him before when he was intoxicated and there had been no accident. But serious intoxication in the driver of a motor vehicle must always involve a risk of accident, and she must have or should have appreciated that risk even though he and she had been lucky before".

The court found that Hefer's intoxication was the cause of the accident.³⁶⁴ The appeal court consisting of Greenburg JA, Schreiner JA and Fagan JA confirmed the judgment of the court *a quo*.

In this case the court overlooked the important requirement that consent must not be *contra bonos mores*. Indeed, it is against public policy to assume voluntarily the risk of serious bodily harm. Thus if the consent is rendered invalid it may be argued that the plaintiff acted with "contributory intent" as she was aware of the danger and possibility of harm, but nevertheless exposed herself to the risk of harm. Fagan JA³⁶⁵ considered voluntary assumption of risk (contributory intent) and unfortunately stated that voluntary assumption of risk and contributory negligence may overlap. Neethling and Potgieter³⁶⁶ disagree and convincingly argue that where the plaintiff is aware of the danger but nevertheless exposes him- or herself to such risk of harm, such plaintiff acts with intention and not negligence. Where however the plaintiff should have been aware of the danger (as a reasonable person) but was not, then such a plaintiff acts with contributory negligence. Thus the two defences can be distinguished. Neethling and Potgieter³⁶⁷ correctly state that if the injured "should have realised" that Hefer was unable to control the motorcycle properly, it follows that she was guilty of contributory negligence. The remark by Fagan JA – that she "must have or should have appreciated that risk" – confuses the issue, for either she did appreciate it (must have) in which case there is an assumption of the risk, or, she ought to have appreciated the risk (should have), in which case there is contributory negligence. Although Schreiner JA³⁶⁸ did distinguish between voluntary assumption

³⁶³ *Supra* 514.

³⁶⁴ *Supra* 514.

³⁶⁵ *Supra* 513-514.

³⁶⁶ *Delict* 172.

³⁶⁷ *Delict* 172 fn 291.

³⁶⁸ *Lampert v Hefer* 1955 2 SA 507 (A) 508.

of risk and contributory negligence, he did not regard assumption of risk as a separate defence “over and above consent as a ground of justification”.³⁶⁹

Schwietering³⁷⁰ points out that this judgment shows a marked uncertainty regarding the nature of this defence and that this case deals not with consent but with contributory fault which the courts, in terms of the Apportionment of Damages Act, should be called upon either to reduce the plaintiff’s claim by means of apportionment or by completely excluding the claim.³⁷¹ Schwietering³⁷² also correctly submits that consent in the true sense can apply as a ground of justification as long as the consent is within the power of disposal of the person consenting and welcomes Von Thur and Siegwart’s³⁷³ submission that “valid” consent which is *contra bonos mores* cannot apply as a ground of justification but that in terms of an invalid consent (voluntary assumption of risk) contributory fault may play a role. Consequently Schwietering³⁷⁴ submits, like Neethling and Potgieter,³⁷⁵ that *in casu* the plaintiff’s action failed not because of a ground of justification (as one cannot consent in circumstances when it is *contra bonos mores*) but on the ground of contributory intent.

Strauss³⁷⁶ also opines that the plaintiff’s consent in this case was *contra bonos mores* and that perhaps the underlying principle of the defence of voluntary assumption of risk in this type of case is not consent but a form of contributory fault, namely contributory intent or “reckless exposure to a known risk”. As mentioned before, the use of the word reckless may be misinterpreted and associated with gross negligence. Therefore it is better to refer to unreasonable exposure to a known risk.³⁷⁷

It is submitted that Strauss, Schwietering, Neethling and Potgieter, above, hold the correct view, as in this case voluntary assumption of risk as a ground of justification

³⁶⁹ Neethling and Potgieter *Delict* 172 fn 291.

³⁷⁰ 1957 *THRHR* 138.

³⁷¹ *Supra* 138.

³⁷² *Supra* 142.

³⁷³ *Allgemeiner teil des Schweizerischen obligationenrechts*, Erster Halbband, bl. 359 ; Schwietering 1957 *THRHR* 142.

³⁷⁴ Schwietering 1957 *THRHR* 144.

³⁷⁵ *Delict* 172.

³⁷⁶ 1964 *SALJ* 332, 344; Boberg *Delict* 759.

³⁷⁷ See chapter 2 par 2.2.1.

should have failed, but voluntary assumption of risk in the form of contributory intent as a ground excluding fault should have been applicable.

Malherbe v Eskom³⁷⁸ The plaintiff, an engineer, was injured when he worked on the defendant's electrical distribution box. The circuit breaker which served as a safety mechanism was removed from the electrical distribution box. A short circuit took place, and the plaintiff was injured.³⁷⁹

Van Rooyen AJ³⁸⁰ held:

"The plaintiff was a qualified engineer and also had training and experience with electricity. Although the defendant's employee had not informed the plaintiff that he had removed the circuit breaker the plaintiff knew about it and he was aware of the risk if he were to work on the box. Under these circumstances it was held that the plaintiff had accepted the risk voluntarily and he could not rely on the unlawful act of the employee. As a result of a rule of fairness that arose and was accepted by the Courts, the negligence of the defendant was extinguished by the plaintiff's voluntary acceptance of risk."

The court recognised that voluntary assumption of risk by the plaintiff cancels negligence and excludes liability, but unfortunately seemed to confuse it with consent to the risk of injury which excludes wrongfulness.³⁸¹ As reiterated before, a person cannot consent to the risk of injury as it is unlawful and therefore *contra bonos mores*. The court should expressly have considered the defence of contributory fault (intent) in the form of *dolus eventualis*. *In casu* the court's decision resulted in a fair outcome as the plaintiff's fault was in the form of contributory intent and led to the exclusion of liability by cancelling the defendant's fault. Notwithstanding the court's confusion of consent to the risk of injury with contributory intent, the judge clearly accepted voluntary assumption of risk as a ground cancelling fault:

"In respect of him who consents no wrong is committed or, differently expressed, consent to the injury excludes wrong (*volenti non fit iniuria*). Such consent to injury, or consent to the risk of injury, excludes wrongfulness. Closely related to this ... rule is that voluntary assumption of risk, where the plaintiff, well knowing of danger of risk of harm, deliberately exposes himself to the danger or risk, and thereupon suffers damage. Such conduct could have the result that he forfeits his right to claim damages from the person who caused the danger or risk of injury."³⁸²

³⁷⁸ 2002 4 SA 497 (O).

³⁷⁹ *Supra* 507.

³⁸⁰ *Supra* 498, 507.

³⁸¹ See *supra* 507; Neethling and Potgieter *Delict* 173 fn 296.

³⁸² *Supra* 498.

Netherlands Insurance Co of SA v Van der Vyver³⁸³ In this case Ozen's wife suspected him of infidelity and she hired the respondent as a private investigator. The respondent followed Ozen in his vehicle to a deserted veld close to a road. Ozen had a woman in the car. While Ozen was behind the wheel of his slow moving vehicle the respondent hurled himself onto the bonnet in the hope of trying to stop Ozen so that he could converse with him. Unfortunately Ozen only accelerated and swerved the vehicle from side to side with the intention of dislodging the respondent, who was clinging onto the vehicle as best he could, till he eventually fell off.³⁸⁴

The respondent sustained injuries and claimed compensation from the insurer of Ozen's motor vehicle. The respondent alleged that Ozen had deliberately driven the vehicle in such a manner so as to dislodge him from the bonnet or alternatively that he fell off the bonnet due to Ozen's negligent driving. Ozen alleged that the respondent had voluntarily accepted the risk of harm. In the court *a quo*, it was held that both Ozen and the respondent were 50 per cent negligent.³⁸⁵

On appeal it was held that Ozen had acted with intent and not only negligence. The court rejected Ozen's defence that the respondent had voluntarily accepted the risk of injury (as a ground of justification).³⁸⁶ In order to succeed with this defence, the respondent must have realised the nature and extent of the risk and must have voluntarily consented to it. The court found that when the respondent leapt onto the bonnet, he assumed that Ozen would stop and was not sure whether he would continue driving. In light of this there was no consent on the part of the respondent.³⁸⁷

In this case the court had an opportunity to consider the two forms of *volenti non fit iniuria*, that is, consent to the risk of injury as a ground of justification and contributory intent or voluntary assumption of the risk as a ground which cancels fault.³⁸⁸ The court³⁸⁹ considered Ozen's defence that the respondent had contributory intent and indeed Milne JA³⁹⁰ pointed out that the:

³⁸³ 1968 1 SA 412 (A).

³⁸⁴ *Supra* 412.

³⁸⁵ *Supra* 412-413.

³⁸⁶ *Supra* 413.

³⁸⁷ Neethling and Potgieter *Delict* 172-173 fn 293.

³⁸⁸ Neethling and Potgieter *Delict* 172.

“respondent was under no legal or moral compulsion to adopt the course he did and, that he realised that what might happen to him in doing what he did, is clear from his evidence ... Ozen was trying to dislodge the respondent ... and the risk which the respondent knew he was taking became an actuality ... [W]hen the vehicle was on the main road and travelling at a high speed, it was out of the respondent’s power to jump off it with safety to himself but his evidence shows that he was, in any event, determined to remain upon it, if he could, until he could achieve his purpose of bringing about a confrontation between Ozen and himself”.

Milne JA³⁹¹ in effect pointed out that the respondent had clearly acted intentionally (in the form of *dolus eventualis*) and voluntarily assumed the risk of harm. He said that, “I regard it as established that, entirely of his own free will (and certainly against Ozen’s will) he assumed the risk of just ‘the kind of harm’ as actually happened to him”.

However, in absence of direct authority, Van Blerk JA³⁹² stated that “[n]o authority from our case law was cited for the statement that contributory intent is an independent defence, nor was reference made to any of the authoritative sources of our law recognising it”. Thus the court was not prepared to acknowledge contributory intent as a separate defence.³⁹³

Van der Vyver³⁹⁴ points out that in the court *a quo* Boshoff J easily attributed negligence to both parties and sidestepped the possibility of contributory intent, even though according to the facts it had been shown that such intent was present. On appeal, the court was also able to hold that Ozen had acted with intent but not the respondent (the question of whether the respondent was negligent was not even considered). Van der Vyver³⁹⁵ submits that the court in this case should have considered contributory intent within the ambit of the Apportionment of Damages Act, which would have led to a reduction of damages.³⁹⁶

Boberg³⁹⁷ submits that the decision bears out Williams’ view that even if contributory intent were to exist as a separate defence in theory, in practice the facts would

³⁸⁹ *Netherlands Insurance Co of SA Ltd v Van der Vyver* 1968 1 SA 412 (A) 422.

³⁹⁰ *Supra* 424.

³⁹¹ *Supra* 425-426.

³⁹² *Supra* 422; Neethling and Potgieter *Delict* 173 translation.

³⁹³ *Netherlands Insurance Co of SA Ltd v Van der Vyver* 1968 1 SA 412 (A) 422; cf Van der Walt and Midgley *Delict* 147; Neethling and Potgieter *Delict* 173.

³⁹⁴ 1968 *THRHR* 296.

³⁹⁵ 1968 *THRHR* 297.

³⁹⁶ Contributory fault as a defence limiting delictual liability will be discussed in detail in chapter 4.

³⁹⁷ *Delict* 703.

generally be “subsumed under consent or causation”.³⁹⁸ The court held that there was no causal connection between the respondent’s intentional act of flinging himself onto the bonnet of the vehicle and his subsequent injuries. Thus Ozen intended to jump onto the bonnet of the vehicle but did not intend the consequential injuries. Intention must be linked with the consequence (the court held that the respondent’s injuries were caused by Ozen’s intentional and negligent acts). Boberg³⁹⁹ refers to Van der Merwe and Olivier⁴⁰⁰ who reject the view that the respondent’s act did not cause his injuries, based on the *conditio sine qua non* test. The latter authors conclude that the respondent did have contributory intent (“medewerkende opset” in the sense of an unreasonable consent to the infliction of harm) and that section 1(1)(a) of the Apportionment of Damages Act 34 of 1956 should have been applied to reduce the respondent’s claim by half.

In this case the court was correct in holding that *volenti non fit iniuria* in the form of consent to the risk of injury as a ground of justification was not tenable since even if the respondent would have consented to risk of injury, such consent would have been *contra bonos mores*.⁴⁰¹ Thus contributory intent as a ground excluding fault would have been relevant and applicable in this case. Milne AJ⁴⁰² clearly acknowledged that the respondent had acted intentionally (in the form of *dolus eventualis*) as did the plaintiff in the case of *Lampert v Hefer*:

“I do not think there can be any doubt that the respondent elected to encounter the risk of the kind of damage that actually happened to him, at least as fully as the plaintiff elected to encounter the corresponding risk in the *Lampert* case.”

Even if there was an absence of authority in support of contributory intent as a defence excluding delictual liability at the time this case was decided, the courts in the case of *Wapnick v Durban City Garage*⁴⁰³ and *Columbus Joint Ventures v ABSA Bank Ltd*⁴⁰⁴ in effect held⁴⁰⁵ that the plaintiff’s contributory intent cancelled the fault

³⁹⁸ Boberg *Delict* 703 states that the court’s finding that causation was lacking renders *obiter* its doubts about recognising contributory intent as a defence in our law and refers to *Mabaso v Felix* 1981 3 SA 865 (A) 876-877 and *Wapnick v Durban City Garage* 1984 2 SA 414 (D) 418 (these cases will be discussed further in chapter 4 at par 4.2.1.1)

³⁹⁹ *Delict* 703.

⁴⁰⁰ *Die onregmatige daad* 174-179; see also Van der Merwe 1967 *THRHR* 287.

⁴⁰¹ Neethling and Potgieter *Delict* 172-173 fn 293.

⁴⁰² *Netherlands Insurance Co of SA Ltd v Van der Vyver* 1968 1 SA 412 (A) 426.

⁴⁰³ 1984 2 SA 414 (D).

⁴⁰⁴ 2001 1 SA 90 (SCA).

⁴⁰⁵ To be discussed in detail in chapter 4 par 4.2.1.1.

of the defendant. Therefore there seems to be no reason why judges should not build on this common law basis in developing and applying the defence of contributory intent *eo nomine* to its full extent.

3.4 Conclusion

The overall conclusion which emerges from the cases discussed above is that voluntary assumption of risk as a ground of justification is only applicable when all the requirements relating to consent are met. With regard to *volenti non fit iniuria* (in the form of voluntary assumption of risk) many judges test the facts of the case strictly against the three essential requirements as laid out in *Waring and Gillow Ltd v Sherborne*.⁴⁰⁶ They tend to overlook the rest of the requirements, especially the requirement that such consent should not be *contra bonos mores*. Only in instances where the consent is rendered invalid does the defence of voluntary assumption of risk in the form of contributory intent become relevant. As Knobel⁴⁰⁷ points out, the requirements that the plaintiff must foresee and accept the risk are relevant to both consent as a ground of justification and contributory intent as a ground excluding fault. The dividing line is mainly that consent must not be *contra bonos mores*. Contributory intent may be relevant and applicable in a wide variety of circumstances, as shown above. It cannot be stressed enough that each case must be judged on its own merits. *Volenti non fit iniuria* is still a part of our common law and is often raised with negligence. Voluntary assumption of risk as a form of fault is also present in practice but unfortunately the courts are reluctant, mainly due to the absence of authority in our country as well as from other countries, to recognise it *eo nomine* as a defence.

3.5 Dogmatic views

According to leading academics it is unclear whether “contributory intent” may in principle be used as a separate ground of justification, which negates wrongfulness

⁴⁰⁶ 1904 TS 340.

⁴⁰⁷ 1993 *THRHR* 304.

or whether it can only serve as a ground excluding fault.⁴⁰⁸ A closer examination of their views is therefore required.

Schwietering⁴⁰⁹ states that a person cannot lawfully consent to serious infringement of his life or limb, unless it is socially acceptable. Where the consent is not justified by the purpose, the act remains unlawful for purposes of criminal and civil law. The defective consent cannot succeed in excluding the unlawfulness of the act, but contributory fault may play a role in reducing or excluding delictual liability. In cases where consent is defective and where no ground of justification has been raised, it should not be regarded as *volenti non fit iniuria* or assumption of risk but rather as a form of contributory fault, namely, “reckless or irresponsible imposition of an acknowledged danger” (translation). In these cases the plaintiff, with open eyes and without any good reason, exposed himself to an unreasonable risk. Schwietering suggests that the courts should deal with such cases within the ambit of the Apportionment of Damages Act.

Pretorius in his unpublished dissertation⁴¹⁰ submits that the requirement of reasonableness offers a fairer and jurisprudentially sounder basis for the limitation of *volenti non fit iniuria* as compared to the “bargain theory” of consent. Where there is unreasonable and therefore invalid consent, not negating wrongfulness, contributory fault may play a role. Though *dolus eventualis* will be sufficient, care must be taken not to equate presumptive knowledge with actual knowledge. A certain obvious consequence may be relevant in establishing that the plaintiff foresaw such consequence, but the inference is not inevitable. Each case must be decided on its own merits and the test must remain subjective. The plaintiff’s consciousness of wrongfulness (against oneself, a requirement of intention) must be determined subjectively. In certain circumstances contributory intent may lead to the exclusion of a claim.

Boberg⁴¹¹ prefers the traditional view that *volenti non fit iniuria* negates wrongfulness.⁴¹² Like Anderson⁴¹³ he refers to voluntary assumption of risk as *quasi*

⁴⁰⁸ Ahmed 2010 *THRHR* 700.

⁴⁰⁹ 1957 *THRHR* 141.

⁴¹⁰ See Boberg *Delict* 741 who refers to Pretorius *Medewerkende opset* 135.

⁴¹¹ *Delict* 741-742.

⁴¹² See Boberg *Delict* 728-729.

consent and questions why such consent which is objectively imputed to an individual, should be allowed to have the same effect as true consent, especially where the same actions of the plaintiff may give rise to contributory negligence. He further questions in the alternative, that if the plaintiff's actions do not amount to contributory negligence, then why should the plaintiff nevertheless run the risk of a claim being totally excluded merely because objectively seen, his actions amounted to a waiver of any right of redress. Boberg prefers the English "bargain theory" with regard to consent (also associated with Williams), as the only way to avoid equating factual and legal assumption of risk.⁴¹⁴ This approach inevitably leads to the conclusion that *quasi* consent is indistinguishable from waiver, an agreement not to sue that has no effect at all upon the wrongfulness of an act.⁴¹⁵

However, Boberg⁴¹⁶ acknowledges that there are strong academic arguments in support of the view that where it is objectively unreasonable (according to the prevailing legal convictions of the community) to inflict harm in spite of the plaintiff's consent, such consent is deemed *contra bonos mores* and invalid. Thus, if the defence of *volenti* is not applicable, the plaintiff's conduct (voluntary assumption of risk) may amount to contributory intent ("medewerkende opset") and result in the dismissal or reduction of the plaintiff's claim depending on whether the defendant acted negligently or intentionally.

Boberg⁴¹⁷ also states that sometimes there is confusion between voluntary assumption of risk and absence of negligence. Voluntary assumption of risk presupposes knowledge of the risk, and such knowledge is often obtained from information supplied by the defendant. A practical example may give rise to two interpretations. In (a) the defendant informs the plaintiff of the hazard, and the plaintiff nevertheless elects to encounter it. Here the plaintiff has *volens* to the risk of harm. In (b) the fact that the defendant informs the plaintiff of the hazard means that

⁴¹³ 1978 (March) *De Rebus* 127-128.

⁴¹⁴ Boberg 1974 *SALJ* 29; see *supra* 37 fn 235.

⁴¹⁵ Boberg *Delict* 740.

⁴¹⁶ *Delict* 729. See also Boberg *Delict* 740 who refers to the writers who support the view that where consent is given unreasonably, the defence of *volenti non fit iniuria* is not applicable but contributory intent or contributory negligence may be. Apparently this view was first started by Schwietering 1957 *THRHR* 140-142, thereafter it was supported by Strauss 1964 *SALJ* 182-184, Van der Merwe and Olivier *Die onregmatige daad* 96, 101, 170-180, Van der Vyver 1968 *THRHR* 297, Gauntlett 1974 *THRHR* 198, Scott 1976 *De Jure* 218 and Van der Walt *Delict* 34.

⁴¹⁷ *Delict* 736.

the defendant is not negligent, therefore he is discharged of his “duty of care” in respect of the plaintiff. On both interpretations the plaintiff’s action fails, but the reason for the failure in each case is different. In (a) it is because the defence of voluntary assumption of risk succeeds, whereas in (b) it is because the defendant is simply not negligent⁴¹⁸ and there is no need to raise *volenti* because there is no *prima facie* initial liability. This argument presupposes that assumption of risk can only arise after it has been established that the defendant was negligent.⁴¹⁹ Boberg⁴²⁰ does however refer to the reasoning of Van der Merwe and Olivier⁴²¹ and Scott⁴²² that fault cannot exist without wrongfulness and *volenti* may exclude wrongfulness. Therefore one must first determine *volenti* before it can be said that there is fault. However, this goes against the practice of requiring the plaintiff to prove all the elements of a *prima facie* case (including wrongfulness and fault) before calling upon the defendant for a defence. If one accepts the traditional view that *volenti* does not arise unless it is first established that the defendant was at fault, this may then lead to confusion between voluntary assumption of risk and absence of negligence.

Boberg⁴²³ furthermore suggests that the defence of contributory negligence should not subsume the defence of voluntary assumption of risk so that it disappears as a defence and instead submits that the “bargain approach” should be adopted thereby limiting *volenti non fit iniuria* to those circumstances in which it can fairly and realistically be said that the plaintiff voluntarily, consciously and deliberately gave up a right of action which he would otherwise have had. Where this requirement is not met, the case is at most one of contributory negligence. If this approach leads to the conclusion that there is no defence of voluntary assumption of risk but only “implied waiver” and “contributory negligence”, it may be because there never was such a defence in the first place, but only cases of no negligence masqueraded as it.

⁴¹⁸ Boberg *Delict* 737 refers to Oelofse 1979 *De Jure* 13 fn 51, who avers that voluntary assumption of risk relates to fault and not wrongfulness and that if fault is absent it is not because the plaintiff voluntarily assumed the risk of harm, but because in all the circumstances (including the plaintiff’s knowledge of danger) the defendant was not negligent.

⁴¹⁹ The traditional view supported by Boberg.

⁴²⁰ *Delict* 737.

⁴²¹ *Die onregmatige daad* 107-108.

⁴²² 1976 *De Jure* 222.

⁴²³ 1974 *SALJ* 39.

Burchell⁴²⁴ does consider contributory intent as a defence limiting liability, but within the scope of apportionment and refers to the Apportionment of Damages Act. He⁴²⁵ regards voluntary assumption of risk as a variety of consent operating as a defence excluding wrongfulness and submits that for consent or voluntary assumption of risk to be valid it must be reasonable.⁴²⁶

Van der Walt and Midgley⁴²⁷ opine that grounds of justification apply to *volenti non fit iniuria* and “contributory intent”, but view “contributory intent” and *volenti non fit iniuria* as two separate and distinct concepts.⁴²⁸ These two authors differ on whether or not contributory intent ought to apply as a defence excluding wrongfulness.

Van der Walt⁴²⁹ believes that a plaintiff’s contributory intent cannot render the defendant’s conduct lawful and that it is better to look for a solution in the “causation element, as the implication is that in such cases the harm was caused by the defendant, and not the plaintiff. So, in view of the causal potency of the intentional conduct to harm oneself, the defendant’s conduct should, despite any fault on the plaintiff’s part, be considered as the sole cause of the plaintiff’s harm”. This argument cannot be tenable for the simple reason that it acknowledges factual causation but does not take into account legal causation. In respect of legal causation the question is whether a sufficiently close relationship exists between the defendant’s conduct and the consequence (for that consequence to be imputed to the defendant) in view of policy considerations based on reasonableness, fairness and justice (in terms of the flexible test).⁴³⁰ Take the following example: a bus driver is negligent in not ensuring the doors of the bus are closed. X’s poodle jumps off the moving bus and X thereafter also jumps off the moving bus (in an endeavour to rescue her pet). X is severely injured. In this scenario, even though the bus driver’s action factually caused X’s injuries (the “but for” test), one cannot ignore the fact that his action was not necessarily also the legal cause of the plaintiff’s injuries. In this respect, particularly, Van der Walt’s theory does not accommodate the possibility of a *novus*

⁴²⁴ *Delict* 110-111.

⁴²⁵ *Delict* 69-73.

⁴²⁶ Burchell *Delict* 72.

⁴²⁷ *Delict* 125-126.

⁴²⁸ Van der Walt and Midgley *Delict* 147.

⁴²⁹ Van der Walt and Midgley *Delict* 147; Ahmed 2010 *THRHR* 700.

⁴³⁰ See Neethling and Potgieter *Delict* 190-193.

actus interveniens on the part of the plaintiff which can break the legal causal chain of events (a broken link in the legal causal chain would be present, for example, where the event was not reasonably foreseeable).⁴³¹ Some countries such as England, Israel, Switzerland and Spain⁴³² hold the view that in certain instances the contributory intent of the plaintiff can indeed be of such a nature that it breaks the causal link between the act of the defendant and the consequence.⁴³³

Midgley⁴³⁴ on the other hand argues that contributory intent in principle can serve as a ground of justification. He submits that the underlying difficulty is that defences have not been separated from cases involving reduction and apportionment. Contributory intent should be regarded as a separate defence but *not* within the context of apportionment. Even though the courts have not yet recognised contributory intent as a defence, according to Midgley, the case of *Wapnick v Durban City Garage*⁴³⁵ provides authority for the view that in instances where the plaintiff has intentionally contributed to his or her own loss, he or she may not claim damages for that loss (or part of it) from a negligent defendant. Although the context was one of apportionment, Midgley submits that, in effect, the court stated that contributory intent is a defence to a claim. Midgley suggests this decision is a matter of public policy, as “society does not consider it reasonable for someone to claim compensation from another where the harm was in fact one’s desired outcome. It is an application of the general criterion of reasonableness”.⁴³⁶ In short, Midgley seems to base the operation of the defence upon public policy. Once again referring to the above example of X intentionally jumping off the moving bus to save her poodle (where it is accepted that there is contributory intent on the part of X), according to Midgley’s theory it may be unreasonable for X to claim compensation from the bus driver. It is however incomprehensible and therefore questionable how contributory intent on the part of X can, as a so-called ground of justification, have the effect of rendering the defendant’s conduct lawful, thereby justifying, in effect, the infringement of the plaintiff’s physical integrity.

⁴³¹ See Neethling and Potgieter *Delict* 206-207.

⁴³² Discussed *infra* par 3.6

⁴³³ See also chapter 5 par 5.3 “Recommendations”.

⁴³⁴ Van der Walt and Midgley *Delict* 147.

⁴³⁵ 1984 2 SA 414 (D); Van der Walt and Midgley *Delict* 147 fn 3. This case will be discussed in detail in chapter 4 par 4.2.1.1.

⁴³⁶ Van der Walt and Midgley *Delict* 147; cf Ahmed 2010 *THRHR* 701.

Knobel⁴³⁷ submits that there are two interpretations to voluntary assumption of risk. It may be regarded as a ground of justification thereby excluding wrongfulness, or under certain circumstances as in the case of *Maartens v Pope* where the voluntary assumption of risk may be regarded as *contra bonos mores*, contributory fault may be applicable (as the injured directed his will to his own loss, in the sense that he foresaw the possibility and reconciled himself to it and on top of that was aware of the irrationality thereof). Therefore, the “voluntary assumption of risk” by the plaintiff amounts to contributory intent.

Neethling and Potgieter⁴³⁸ are of the view that voluntary assumption of risk may amount to contributory intent as a ground which cancels fault in instances where such voluntary assumption of risk is *contra bonos mores* and invalid.⁴³⁹ The contributory intent of the plaintiff thus cancels the defendant's negligence. They suggest that one should ascertain from the situation whether wrongfulness was excluded as a result of consent by the injured person, or whether the plaintiff's contributory intent cancelled the defendant's negligence, or whether the plaintiff neither consented to injury or the risk thereof, nor had contributory intent, but was in fact contributorily negligent in respect of his damage because he acted in a manner different from that of the reasonable person.⁴⁴⁰ They submit that even though our courts are reluctant to acknowledge contributory intent as a separate defence⁴⁴¹ and are uncertain of its application in terms of the Apportionment of Damages Act, contributory intent is a concept which has been developed in our law to explain a form of *volenti non fit iniuria*. Therefore the Appellate Division's denial of the existence of the defence is open to debate.⁴⁴²

With reference to the above-mentioned dogmatic views of authors, the following comments can be made. Boberg prefers the “bargain theory” used in English law as a characteristic of consent. This requirement no doubt severely restricts the application of the defence of voluntary assumption of risk to instances where the plaintiff, according to him voluntarily, consciously and deliberately gives up his right

⁴³⁷ 1993 *THRHR* 303-304.

⁴³⁸ *Delict* 171.

⁴³⁹ Neethling and Potgieter *Delict* 171.

⁴⁴⁰ Neethling and Potgieter *Delict* 104 fn 502.

⁴⁴¹ *Netherlands Insurance Co of SA Ltd v Van der Vyver* 1968 1 SA 412 (A) 422.

⁴⁴² See Ahmed 2010 *THRHR* 701.

of action and may amount to “implied waiver”. The “bargain theory” has been discarded by our courts.⁴⁴³ Boberg however correctly points out the confusion that often occurs between voluntary assumption of risk and the absence of negligence. It is simple enough to reach a conclusion that if there is no negligence on the part of the defendant then there is no need to even raise voluntary assumption of risk, but if there is negligence on the part of the defendant then the defence may be raised. In terms of procedural practice the plaintiff must prove its case before the defendant can raise the defence of voluntary assumption of risk and if proved can no doubt result in a complete exclusion of liability. Due to the history of the harsh application of the maxim *volenti non fit iniuria*, adjudicators certainly do not favour contributory intent as a defence and are extremely reluctant to uphold the defence. They are inclined to sidestep the enquiry, apply the defence incorrectly or take the safer route of equating the plaintiff’s voluntary assumption of risk with contributory negligence. Boberg’s views are supported by such legal systems as England and Israel.⁴⁴⁴

Van der Walt and Midgley both recognise contributory intent as a separate defence, but Van der Walt’s theory although emphasising causation, falls short due to not fully taking cognisance of legal causation on the part of the plaintiff and especially not accommodating the possibility of a *novus actus interveniens*. Midgley on the other hand recognises contributory intent as a complete defence but his view that it constitutes a ground of justification excluding wrongfulness cannot be accepted.

Schwietering, Neethling and Potgieter, Knobel and Pretorius all acknowledge the preferred approach of taking special cognisance of the important requirement that consent must not be *contra bonos mores*, and point out that if the consent is rendered invalid due to the *boni mores* requirement then contributory intent as a form of fault may be relevant. This will be the case where the plaintiff foresaw the possibility of harm and reconciled himself with such possibility while simultaneously acting consciously unreasonable. Neethling and Potgieter provide the correct (practical) approach almost by a process of elimination. They state that instead of being confused with all the terminology, the courts should establish whether a

⁴⁴³ See *Santam Insurance Co Ltd v Vorster* 1973 4 SA 764 (A) 780-781.

⁴⁴⁴ See *infra* par 3.6.1 and 3.6.3.

ground of justification is applicable where wrongfulness is excluded, if not whether contributory intent of the plaintiff (as a form of fault) cancels the defendant's negligence, and if no ground of justification is applicable, or if contributory intent (as a form of fault) cannot be imputed to the plaintiff, then contributory negligence may be applicable.

3.6 Comparative law

In this section it will be ascertained whether and to what extent voluntary assumption of risk in the form of contributory intent has been recognised as a defence excluding delictual liability in a few foreign legal systems.

3.6.1 English law

Consent on the part of the claimant, negating liability in tort may take two forms: consent to harm and consent to the risk of harm (voluntary assumption of risk). As in our law, *volenti non fit iniuria* covers both forms but its application in negligence liability and related torts is often found to be problematic.⁴⁴⁵ *Volenti non fit iniuria* applies as a complete defence and the plaintiff will not recover anything. There are at least three requirements for the defence to succeed: there must be an agreement by the plaintiff (express or implied)⁴⁴⁶ to absolve the defendant from liability;⁴⁴⁷ the agreement must be voluntary; and the plaintiff must have full knowledge of the nature and extent of the risk assumed (implied consent).⁴⁴⁸

⁴⁴⁵ Clerk and Lindsell *Torts* 195.

⁴⁴⁶ In *Nettleship v Weston* 1971 2 QB 691, 701, Lord Denning held as follows: "Now that contributory negligence is not a complete defence, but only a ground for reducing damages, the defence of *volenti non fit iniuria* has been closely considered and in consequence, it has been severely limited. Knowledge of the risk of injury is not enough. Nor is a willingness to take the risk of injury. Nothing will suffice short of an agreement to waive any claim for negligence. The [plaintiff] must agree, expressly or impliedly to waive any claim for any injury that may befall him due to the lack of reasonable care by the defendant."; Clerk and Lindsell *Torts* 199-200; Williams *Joint torts* 296. There are however cases which suggest that the maxim applies where the plaintiff encounters an existing danger created by the defendant's negligence in circumstances where there was no agreement between the parties; see *Titchener v British Railways Board* 1983 1 WLR 1427; *Dann v Hamilton* 1939 1 KB 509, 517; Clerk and Lindsell *Torts* 199, 201-202.

⁴⁴⁷ A requirement not essential in our law.

⁴⁴⁸ Where the plaintiff ought reasonably to have known of the risk but did not know, it follows that he is not *volens* and contributory negligence may be applicable (*Dixon v King* 1975 2 NZLR 357); Clerk and Lindsell *Torts* 205.

There may be cases in which knowledge of the danger may nevertheless be relevant to the success of the plaintiff's action for two reasons: it may negate the existence of any negligence on the part of the defendant in causing danger by giving notice of that danger to the plaintiff (thus the defendant fulfils his legal duty of care);⁴⁴⁹ or it may establish the existence of contributory negligence on the part of the plaintiff, as the act of the plaintiff in knowingly running a risk created by the defendant's wrongful act amounts to contributory negligence on his own part.⁴⁵⁰

The requirements for a successful plea of *volenti non fit iniuria* are applied strictly and it is invoked less frequently than it once was, partly due to the enactment of the Contributory Negligence Act of 1945, which authorises the court to apportion damages between parties, thus reducing the plaintiff's claim. There is an overlap between conduct that might be classified as *volenti non fit iniuria* and contributory negligence. In the 19th century *volenti non fit iniuria*, contributory negligence and the doctrine of common employment "formed the unholy trinity of defences, which generally prevented any claim by employees for injuries sustained at work".⁴⁵¹

The following cases will illustrate the application of *volenti non fit iniuria* (voluntary assumption of risk). The first two cases dealt with sports injuries. In the well-known case of *Wooldridge v Sumner*⁴⁵² a spectator was injured by a horse which crashed through a rope barrier during a show-jumping competition. Diplock LJ rejected a plea of *volenti non fit iniuria* and considered consent to the risk of injury irrelevant, stating that the consent that is relevant is "consent to the lack of reasonable care that may produce that risk".⁴⁵³ The action failed because the court found that the defendant was not negligent, that is, there was no breach of a duty of care.⁴⁵⁴ According to this decision the negligence of the defendant must be established before the plaintiff's voluntary assumption of risk. In *Murray v Harringay Arena Ltd*,⁴⁵⁵ a six year old boy was injured when a puck was hit out of the ice rink and landed among the

⁴⁴⁹ A doctrine which should be rejected in our law; see *supra* chapter 2 par 2.4; cf Neethling and Potgieter *Delict* 152-154.

⁴⁵⁰ Salmond and Heuston *Torts* 476.

⁴⁵¹ In *Smith v Baker* 1891 AC 325, the House of Lords recognised that a worker who remained in his job despite being aware of unsafe working practices did not necessarily do so voluntarily when the options were to work or starve; Clerk and Lindsell *Torts* 197.

⁴⁵² 1963 2 QB 43.

⁴⁵³ *Supra* 69-70.

⁴⁵⁴ Clerk and Lindsell *Torts* 198.

⁴⁵⁵ See *White v Blackmore* 1972 2 QB 651; Clerk and Lindsell *Torts* 213.

spectators. The Court of Appeal held that the defendants were not liable on the basis that there was no negligence and the boy had voluntarily assumed the risk of harm. However, a spectator's knowledge of an element of risk involved in a particular sporting event does not automatically lead to the conclusion that he or she has consented to the risk of harm as a result of the negligence of the organisers in charge of safety arrangements.

In *Reeves v Commissioner of the Police for the Metropolis*⁴⁵⁶ the court was confronted with the defence of *volenti non fit iniuria* with regard to suicide. Here a prisoner who was not mentally ill, but who was known to have suicidal tendencies committed suicide while in police custody. The defence of *volenti non fit iniuria* was raised but the House of Lords held that the defence was not applicable where the plaintiff's act is the very thing that the defendant was under a duty to take reasonable precautions to prevent, irrespective of the patient's mental state. In cases of suicide the courts are of the view that the person committing suicide is not of sound mind and has impaired volition in forming a decision to commit such an act. Furthermore the suicide does not constitute a *novus actus interveniens*.⁴⁵⁷

Cases involving intoxication and the defence of *volenti non fit iniuria* often came before the courts. In *Morris v Murray*⁴⁵⁸ the plaintiff (who was intoxicated) agreed to take a flight with a friend, the pilot, who had to his knowledge consumed about 17 whiskies that afternoon before the flight. In the Court of Appeal the question arose as to whether the claimant's intoxication was of such a nature that he could not be said to be aware of the nature and extent of the risk of going on a flight with a drunken pilot. Stocker LJ stated⁴⁵⁹ that the test was not objective, but what should be established was whether the plaintiff was so intoxicated that he was incapable of appreciating the nature of the risk involved and did not in fact appreciate it, and therefore did not consent to it. The court unanimously found that the plaintiff was aware of the risk and the defence of *volenti non fit iniuria* succeeded. Fox LJ⁴⁶⁰ stated that "he knowingly and willingly embarked on a flight with a drunken pilot".

⁴⁵⁶ 2000 1 AC 360; 1999 3 WLR 363.

⁴⁵⁷ Neethling and Potgieter *Delict* 207 fn 232; cf Mullis and Oliphant *Torts* 156; see also *supra* par 3.2.2.4.

⁴⁵⁸ 1991 2 QB 6 CA; Clerk and Lindsell *Torts* 204-205.

⁴⁵⁹ *Supra* 29.

⁴⁶⁰ *Supra* 16.

This decision is similar as that in *Lampert v Hefer*⁴⁶¹ in our law. But as argued with regard to *Hefer*, consent to serious bodily injury should be invalid whereas contributory intent as a ground excluding fault could be applicable.

Where a plaintiff accepts a lift in a vehicle driven by the defendant who is intoxicated and causes an accident, the plaintiff will most likely be found to be contributorily negligent and his or her damages will be reduced,⁴⁶² as was found in *Dann v Hamilton*.⁴⁶³ In terms of the Road Traffic Act of 1988,⁴⁶⁴ inebriation causing motor vehicle accidents cannot give rise to a plea of *volenti non fit iniuria* but contributory negligence or the defence of *ex turpi causa*⁴⁶⁵ may be raised.

Volenti non fit iniuria has rarely been applied to a claim of personal injury by an employee against his employer. In *Smith v Baker*,⁴⁶⁶ for example, it was held that even though the employee had voluntarily subjected himself to inherent danger he did not acknowledge and accept the additional risk created by his employers' negligence in omitting effective warnings to staff. It is possible that an employer may not be held liable because there is no breach of duty by the employer.⁴⁶⁷ However in *Imperial Chemical Industries Ltd (ICI) v Shatwell*⁴⁶⁸ two brothers, G and J, were employed by ICI and were charged with detonating explosives at a quarry. The brothers were testing explosives wired together and believed that one of the detonators in the circuit was a dud. They conducted a test close to the detonators (instead of at a safe distance, according to company regulations) and an explosion occurred. Both brothers were injured. G sued ICI alleging vicarious liability in respect of J's negligent conduct. The House of Lords ruled that G had voluntarily assumed the risk of harm "emphasising the brothers' deliberate disobedience of the company

⁴⁶¹ 1955 2 SA 507 (A); see also *supra* par 3.3.3.

⁴⁶² *Owens v Brimmell* 1977 QB 859 (20% reduction); *Donelan v Donelan and General Accident Fire and Life Assurance* 1993 PIQR 205 (75% reduction); Clerk and Lindsell *Torts* 207.

⁴⁶³ 1939 1 KB 509. In this case *volenti non fit iniuria* was raised, but Asquith J found that there was no implied consent. Therefore the driver could not be absolved of liability, but Asquith J suggested that the result may be different if the drunkenness of the driver was extreme and obvious (*supra* 518).

⁴⁶⁴ See s 149; Clerk and Lindsell *Torts* 208-209.

⁴⁶⁵ Also commonly known as the "illegality defence" based on the principle that "no action can be founded on an unlawful act"; Mullis and Oliphant *Torts* 157.

⁴⁶⁶ 1891 AC 325; see also *Harris v Brights Asphalt Contractors* 1953 1 QB 617; *Baker v James* 1921 2 KB 674; *Bowater v Rowley Regis B.C.* 1944 KB 476 referred to in Clerk and Lindsell *Torts* 208 fn 82.

⁴⁶⁷ Clerk and Lindsell *Torts* 208-209.

⁴⁶⁸ 1965 AC 656.

rules and their knowledge of the risk involved".⁴⁶⁹ As indicated,⁴⁷⁰ in *Malherbe v Eskom*⁴⁷¹ the court also acknowledged the defence of voluntary assumption of risk and upheld it, unfortunately not as a ground excluding fault but as a ground excluding wrongfulness.

Other cases of interest involving the defence of *volenti non fit iniuria* are the following. In *Cummings v Granger*⁴⁷² the plaintiff knew that there was a vicious Alsatian on the defendant's premises but she willingly and knowingly entered the premises and was bitten. The defence of *volenti non fit iniuria* was raised and the court found that as the plaintiff did voluntarily assume the risk of harm, she had *volens*. This case is analogous to the judgment in *Maartens v Pope*⁴⁷³ where voluntary assumption of risk was incorrectly upheld as a ground of justification (because consent to the risk of serious bodily injuries should have been *contra bonos mores*) and not as a ground excluding fault.

In *Tomlinson v Congleton Borough Council*⁴⁷⁴ the House of Lords held that the local authority was not liable for the plaintiff's injuries sustained when he dived into shallow water at the edge of a lake and hit his head. The authority had prohibited swimming in the lake and put up notices warning of the danger. The defence of *volenti non fit iniuria* was not raised, but Lord Hoffman⁴⁷⁵ stated that "it will be extremely rare for an occupier of land to be under a duty to prevent people from taking risks which are inherent in the activities they freely choose to undertake upon the land. If people want to climb mountains, go hang gliding, or swim or dive in ponds or a lake, that is their affair".⁴⁷⁶

⁴⁶⁹ Mullis and Oliphant *Torts* 157

⁴⁷⁰ See *supra* par 3.3.3.

⁴⁷¹ 2002 4 SA 497 (O).

⁴⁷² 1977 QB 397.

⁴⁷³ 1992 4 SA 883 (N); see also *supra* par 3.2.2.3.

⁴⁷⁴ 2003 UKHL 47; 2004 1 AC 46; Clerk and Lindsell *Torts* 198.

⁴⁷⁵ *Supra* 45.

⁴⁷⁶ But see the decision in *Holm v Sonland Ontwikkeling (Mpumalanga) (Edms) Bpk* 2010 6 SA 342 (GNP) where the plaintiff sued the defendant for damages arising out of the injury sustained by him pursuant to his having dived into the dam situated next to a volleyball court at a lakefront shopping complex, of which the defendant was the owner. As a consequence of the injury sustained by him the plaintiff was permanently paralysed from nipple level downwards and was thus confined to a wheelchair. The defendant was held liable for the plaintiff's loss. The court opined that (348-349) the defendant had a legal duty either to ensure that the dam was not hazardous, or to take appropriate steps to remove the volleyball court from the edge of the dam, or to warn the public about it, or to erect a barrier or railings preventing members of the public from proceeding into the dam. The court further

In *Nettleship v Weston*⁴⁷⁷ the plaintiff was instructing a friend and learner driver (the defendant). It transpired that the defendant had specially asked about the insurance cover. While receiving a lesson the defendant acted negligently which resulted in an accident. The plaintiff was injured and the defendant raised *volenti non fit iniuria*. The court held that there was no agreement between the parties but that if the plaintiff was a professional instructor and there was no express contract between the parties, it might be reasonable to infer an agreement that the professional would assume the risk of his student's inexperience, absolve her from liability and carry his own insurance cover.⁴⁷⁸ In our law an agreement between the parties would not be required and in any event one cannot consent to bodily injury in this instance since consent would be invalid, but contributory fault may be applicable.

Mention should also be made of the defence of *volenti non fit iniuria* in rescue cases. If a rescuer injures himself while attempting to rescue the defendant in a situation of peril created by the defendant's wrongdoing, the defence of contributory negligence as well as *volenti non fit iniuria* may usually not be raised as a defence against the rescuer's claim, because rescuers do not act freely and voluntarily but under the compulsion or pressure of a legal, social or moral duty and usually in the heat of the moment.⁴⁷⁹ The rescuer is still expected to act reasonably or he may be found contributorily negligent.⁴⁸⁰ The risks that a rescuer can reasonably be exposed to in an attempt to save life or limb will not be judged too harshly.⁴⁸¹

In *Haynes v Harwood*⁴⁸² followed in *Ogwo v Taylor*⁴⁸³ the Court of Appeal held that:

“the doctrine of assumption of risk does not apply where the plaintiff has, under an exigency caused by the defendant's wrongful misconduct, consciously and deliberately faced a risk, even of death, to rescue another from imminent danger of personal injury or death, whether the person endangered is one to whom he owes a duty of protection, as a member of his family, or is a mere stranger to whom he owes no such special duty”.

found that the defendant acted negligently but that the plaintiff was contributorily negligent. The defence of contributory intent (*volenti non fit iniuria*) on the plaintiff's side was not raised.

477

1971 2 QB 691, 702.

478

Clerk and Lindsell *Torts* 200.

479

See *Brandon v Osborne Garrett Co* 1924 1 KB 548; *Haynes v Harwood* 1935 1 KB 146, see also other cases referred to by Clerk and Lindsell *Torts* 212 fn 1; *Baker v TE Hopkins and Sons Ltd* 1959 3 All ER 225; Trindade, Cane and Lunney *et al Torts* 696.

480

Harrison v British Railways Board 1981 3 All ER 679.

481

Watt v Hertfordshire County Council 1954 1 WLR 835; Clerk and Lindsell *Torts* 188.

482

1935 1 KB 146.

483

1988 AC 431 (involving a fireman); Salmond and Heuston *Torts* 478.

In this case the defendant's servant had left his van and horses unattended in a crowded street. The horses bolted when a boy threw a stone at them. The plaintiff was a policeman on duty inside a police station. He saw that if he did not act a woman and children would be in grave danger. He managed to stop both horses, but in so doing he suffered serious personal injuries. He was entitled to damages as the negligent act preceded the alleged consent.⁴⁸⁴ The position is the same in our law, for example, in *Miller v Road Accident Fund*⁴⁸⁵ the plaintiff, who sustained injuries whilst endeavouring to rescue passengers from a car which spun off the road was entitled to damages as a result of the negligent conduct of the driver.

Williams⁴⁸⁶ states that the demarcation between the defence of contributory negligence and voluntary assumption of risk is important since the passing of the Contributory Negligence Act. In terms of the latter Act the court has the power to apportion loss, but assumption of risk is still a complete defence; and where both defences apply assumption of risk prevails. If the boundaries of assumption of risk are drawn too widely, the result will be to restrict the remedial effect of the statute.

What is interesting about English law with regard to the application of consent is that either implied consent is required, or an agreement between the parties to absolve the defendant from liability. In certain instances the agreement can be inferred depending on the circumstances of the case. An agreement between the parties is not a requirement in our law for valid consent. In any event even if an agreement was a requirement, an agreement to the risk of serious bodily injury would still be *contra bonos mores*.⁴⁸⁷ Therefore such an agreement could be rendered invalid. Only in two of the cases mentioned above, namely *Cummings v Granger* (involving a woman who voluntarily assumed the risk of being bitten by a dog) and *Morris v Murray* (involving a drunken passenger who assumed the risk of harm by accepting a ride on an aircraft with a drunken pilot) the defence of *volenti non fit iniuria* succeeded. Where a court wishes to deny liability altogether it is usually done by

⁴⁸⁴ Salmond and Heuston *Torts* 478.

⁴⁸⁵ 1999 4 All SA 560 (W); see also *supra* par 3.3.2.

⁴⁸⁶ *Joint torts* 295.

⁴⁸⁷ See Schwietering 1957 *THRHR* 139-141; see also Hutchison *et al Contract* 174 who refer to *Sasfin (Pty) Ltd v Beukes* 1989 1 SA 1 (A) 8, where the Appellate Division held that “[a]greements which are clearly inimical to the interests of the community, whether they are contrary to law or morality, or run counter to social or economic expedience, will accordingly, on the grounds of public policy not be enforced”.

asserting that the plaintiff's conduct breaks the chain of causation from the defendant's wrongdoing or by the manipulation of the standard of care of the defendant or the plaintiff's consent.⁴⁸⁸ Contrary to South African law, the view that consent to serious bodily injury or harm should in principle be invalid (*contra bonos mores*), and that this opens the door for the recognition of contributory intent which cancels the defendant's negligence, has not been propagated in English law. On the contrary, English courts are no doubt reluctant to apply this approach and prefer to manipulate the standard of care and enquire whether there was a breach of duty by the defendant in instances where it is clear that voluntary assumption of risk (*volenti non fit iniuria*) could validly apply as a complete defence, either (to use our legal terminology) as a ground of justification (especially with regard to injuries related to sports) or in the form of contributory intent (where consent is invalid) as a ground excluding negligence as in the cases of *Cummings v Granger* and *Morris v Murray*.

3.6.2 Australian law

Before the introduction of the apportionment legislation, *volenti non fit iniuria* and contributory negligence were often seen as alternatives. The differences between the defences was the requirement of knowledge of the risk, an element of *volenti non fit iniuria*, whereas a plea of contributory negligence could succeed if the plaintiff ought to have known of the risk but was not actually aware of it.

Since assumption of risk is a complete defence, courts have tended to apply the other requirements strictly in order to exclude its operation as much as possible, thereby giving the court the freedom to award the plaintiff some compensation.⁴⁸⁹

Trindade submits the following:

“However, those who predicted the demise of the defence may have been premature. The tort reform legislation of the early twenty-first century has, arguably, made it easier to establish the defence and it is possible that it will have something of a rebirth in the immediate future.”⁴⁹⁰

⁴⁸⁸ Rogers in Magnus and Martin-Casals (eds) *Contributory negligence* 60-61.

⁴⁸⁹ Trindade, Cane and Lunney *et al Torts* 693-694.

⁴⁹⁰ Trindade, Cane and Lunney *et al Torts* 694.

The defendant must prove that the plaintiff was aware of the facts constituting the danger,⁴⁹¹ that he or she fully appreciated the danger inherent in the factual circumstances and that⁴⁹² he or she encountered or submitted to the danger freely and willingly. If the plaintiff did not believe that the dangers of which he or she was aware would materialise, then the plaintiff could not have accepted those dangers. *Volenti non fit iniuria* is not based on the foreseeability of risk, but on subjective awareness and appreciation of risk.⁴⁹³ Australian courts have not consistently taken the view that the exact nature of the risk of negligent conduct cannot be sufficiently appreciated in advance to found the defence of *volenti non fit iniuria*.⁴⁹⁴ The plaintiff must still, for example, have known of the defendant's drunkenness, and have thought that this rendered the defendant incapable of driving carefully. Such knowledge may be proved by direct evidence from the plaintiff or others, or impliedly from the facts, but a finding of knowledge cannot be based on the judgment that the plaintiff ought to have realised that the defendant was drunk. This is the difference between voluntary assumption of risk and contributory negligence.⁴⁹⁵ Thus, if the plaintiff himself was so drunk as not to be able to assess the risk, a plea of *volenti non fit iniuria* could not succeed,⁴⁹⁶ but contributory negligence could be applicable. The mere fact that the plaintiff was drunk does not confirm that the plaintiff may not have been so drunk as to be unable to see the danger,⁴⁹⁷ but it will be harder to establish voluntary assumption of risk against a drunken plaintiff.⁴⁹⁸ The requirement of free and willing acceptance is sometimes put in terms of whether the risk was one that no reasonable person would have taken.⁴⁹⁹ The Reform legislation has been introduced and envisages a greater use of the defence as part of the realignment of the tort of negligence. A finding of voluntary assumption of risk as opposed to contributory negligence may imply a greater degree of culpability on the part of the

⁴⁹¹ *Insurance Commissioner v Joyce* 1948 77 CLR 39; *Parker v Lane* 1958 SASR 260; Trindade, Cane and Lunney *et al Torts* 695.

⁴⁹² Trindade, Cane and Lunney *et al Torts* 695.

⁴⁹³ *Scanlon v American Cigarette Co (Overseas) Pty Ltd* 1987 VR 289; Trindade, Cane and Lunney *et al Torts* 695.

⁴⁹⁴ *Roggenkamp v Bennett* 1950 80 CLR 292; Trindade, Cane and Lunney *et al Torts* 695.

⁴⁹⁵ *Heard v NZ Forest Products* 1980 NZLR 329, 357; Trindade, Cane and Lunney *et al Torts* 696.

⁴⁹⁶ *Dixon v King* 1975 2 NZLR 357; *Mcpherson v Whitfield* 1996 1 Qd R 474; Trindade, Cane and Lunney *et al Torts* 696.

⁴⁹⁷ The well-known case of *Morris v Murray* 1991 2 QB 6; Trindade, Cane and Lunney *et al Torts* 696.

⁴⁹⁸ Trindade, Cane and Lunney *et al Torts* 696.

⁴⁹⁹ Trindade, Cane and Lunney *et al Torts* 697.

plaintiff. Perhaps a person who takes a foreseen risk has less cause for complaint than one who takes a foreseeable risk that was not actually foreseen.⁵⁰⁰

Australian law effectively distinguishes between voluntary assumption of risk and contributory negligence. It seems that the Australian courts, like other courts worldwide, have been reluctant to apply the defence of voluntary assumption of risk, but on a positive note see its application as becoming more prominent in future either as a defence limiting or excluding delictual liability.

Finally, it is of interest that New South Wales regulates “assumption of risk” but only “obvious risks” that are patent or common knowledge in terms of the Civil Liability Act 2002 No 22. A person may however prove on the balance of probabilities that he or she was not aware of the risk. It is of significance that only fault in the form of negligence, and not intent, is recognised.⁵⁰¹

3.6.3 Israeli law

The Civil Wrongs Ordinance (CWO) was enacted in Israel in 1947 and generally applies to all torts, unless otherwise stated.⁵⁰² Contributory fault according to the CWO contains two elements: (a) carelessness on the plaintiff’s part, and (b) loss suffered by the plaintiff which was caused by the aforementioned carelessness.⁵⁰³

The defence of voluntary assumption of risk is recognised in Israel as a complete defence to liability.⁵⁰⁴ Section 5 of the CWO states that when “the plaintiff knew and appreciated or must have known and appreciated the state of affairs causing the damage and voluntarily exposes him- or herself or his or her property thereto, the defendant may raise the defence of assumption of risk, based on the maxim *volenti non fit injuria*”.⁵⁰⁵

⁵⁰⁰ Trindade, Cane and Lunney *et al Torts* 697.

⁵⁰¹ See Division 4 Assumption of risk 5G-I.

⁵⁰² Gilead in Magnus and Martin-Casals (eds) *Contributory negligence* 105.

⁵⁰³ S 64 CWO; Gilead in Magnus and Martin-Casals (eds) *Contributory negligence* 107.

⁵⁰⁴ Gilead in Magnus and Martin-Casals (eds) *Contributory negligence* 108.

⁵⁰⁵ Gilead in Magnus and Martin-Casals (eds) *Contributory negligence* 108.

A valid contract between the defendant and the plaintiff supports the defence,⁵⁰⁶ and where there is no contract the lack of favourable “policy considerations” in support of the defence has led to the courts restricting its scope. In restricting the scope of the maxim they use concepts of “free will” and “exposure to legal risk”. The courts narrowly interpret the notion of “free will”, holding for example that in instances where an employee exposes him- or herself to risk while in the scope of employment (where there is an element of danger) he or she is not acting of his or her own free will.⁵⁰⁷ In this case the economic pressure inherent in the circumstances renders his or her freedom of choice tainted. In the case of *Nahum v Israeli*⁵⁰⁸ it was also held that a feeling of moral duty, which results in a person putting him- or herself at risk in order to rescue another from imminent danger of bodily injury, leads to a negation of the element of “free will”. The onus is upon the defendant to prove that the plaintiff voluntarily exposed him- or herself not only to the physical risk of injury but also to the legal risk (that is, waiver of his or her right to compensation in respect of the injury inflicted by the defendant).⁵⁰⁹

Israeli law seems to recognise voluntary assumption of risk as a ground of justification excluding liability and implied waiver (contract) supports the defence. The application of voluntary assumption of risk is differentiated from the application of contributory negligence.⁵¹⁰ Israeli law, however, does not recognise voluntary assumption of risk in the form of contributory intent (as a form of fault), as contributory fault is dealt with in regard to the element of carelessness which applies within the ambit of negligence.

3.6.4 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

⁵⁰⁶ For example, in our law a *pactum de non petendo in anticipando*; see *supra* par 3.2.2.4.

⁵⁰⁷ *Deutsch v Franco* 1957 11 PD 1529; Gilead in Magnus and Martin-Casals (eds) *Contributory negligence* 109.

⁵⁰⁸ 1963 17 PD 2657 ; Gilead in Magnus and Martin-Casals (eds) *Contributory negligence* 109.

⁵⁰⁹ *Tzabari v 'Amidar' Housing Co Ltd* 1961 15 PD 281; Gilead in Magnus and Martin-Casals (eds) *Contributory negligence* 109. This is the view supported by Boberg (see *supra* par 3.5) in respect of what he terms “quasi consent” (voluntary assumption of risk).

⁵¹⁰ Gilead in Magnus and Martin-Casals (eds) *Contributory negligence* 108.

conduct than gross negligence, may even form a separate heading of fault).⁵¹¹ “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.⁵¹² According to German law contributory intent as a form of fault falls within the ambit of contributory negligence.⁵¹³ 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*).⁵¹⁴ Contributory intent on the part of the plaintiff generally excludes the defendant’s liability,⁵¹⁵ but only for those consequences the plaintiff intended to cause or recklessly accepted might happen.⁵¹⁶ German law recognises instances where the plaintiff is expected to be fully aware of the consequences when undertaking a dangerous activity (relating to an objective test) or is involved in a situation involving a high degree of risk or danger (“*Handeln auf eigene Gefahr*” or “*schuldhafte Selbstgefährdung*”) as instances of contributory negligence. Such instances occur for example where the plaintiff accepts a ride in a “technically insecure or uninsured vehicle” or with a driver who is unfit to drive as a result of fatigue or consumption of alcohol, or fails to take heed of a notice of warning in respect of dangerous dogs, or performs construction work before the necessary building permits are issued and contractual agreements have been made.⁵¹⁷ However, it seems that there is room, depending on the circumstances of the case, for total exclusion of liability on the part of the defendant where the plaintiff has acted with contributory intent. Plaintiffs injured during regular play or by minor fouls cannot claim compensation.⁵¹⁸ Plaintiffs who are injured in the course of highly dangerous activities such as boxing or car racing may also not claim compensation due to their consent to possible harm.⁵¹⁹

⁵¹¹ Markesinis and Unberath *German law of torts* 83-84.

⁵¹² Markesinis and Unberath *German law of torts* 110.

⁵¹³ “Mitverschulden”, the legal basis of which forms part of the general rules of the law of obligations of the *Bürgerliches Gesetzbuch* § 254, dealt with under the chapter concerning compensation of damage in general: see Fedtke and Magnus in Magnus and Martin-Casals (eds) *Contributory negligence* 75.

⁵¹⁴ Van Dam *European tort law* 801.

⁵¹⁵ Fedtke and Magnus in Magnus and Martin-Casals (eds) *Contributory negligence* 84.

⁵¹⁶ Van Dam *European tort law* 802.

⁵¹⁷ Fedtke and Magnus in Magnus and Martin-Casals (eds) *Contributory negligence* 81-82.

⁵¹⁸ Fedtke and Magnus in Magnus and Martin-Casals (eds) *Contributory negligence* 82.

⁵¹⁹ Fedtke and Magnus in Magnus and Martin-Casals (eds) *Contributory negligence* 82.

In older decisions of the German Supreme Court, the plaintiff's consent to the risk of harm as a ground of justification led to the exclusion of liability.⁵²⁰ Later the German Supreme Court rejected this approach and argued that consent to harm should be distinguished from consent to the risk of harm. Generally consent does not exclude liability but rather leads to a reduction of damages (§ 254 *BGB*). However, there are some exceptions, for example, cases involving highly dangerous sports activities where liability may be excluded.⁵²¹

With regard to rescue cases the issue of compensation is approached in terms of causation, fault, or the duty of care (in that the defendant may owe a duty of care to the injured as well as the rescuer). Fault will not be imputed to the rescuer, as a reasonable attempt to avert or minimise harm will not be treated as fault and the rescuer's actions will not interrupt the original chain of causation. Thus the rescuer will be entitled to compensation.⁵²² It must be noted though that in German law, similarly in our law, that a rescuer will not be entitled to compensation if he or she acts unreasonably.⁵²³ For example, disarming a robber may be a heroic act but it is disproportional to put one's life in danger merely to prevent financial loss.⁵²⁴

It seems that the application of German law is similar to our law since the courts have not taken full cognisance of the requirement that consent to serious bodily injury must not be *contra bonos mores*. They seem to resort rather to the application of contributory negligence, understandably for fear of the harsh consequences of the application of the defences (total exclusion of liability) and as a result of absence of authority. Nevertheless, German law does recognise contributory intent (in the form of fault) as a defence which may lead to the exclusion or the limitation of liability.

3.6.5 Swiss law

The so-called "*acceptation du risque*" (assumption of risk) is treated within the scope of "contributory negligence"⁵²⁵ but it is submitted by Widmer⁵²⁶ that logically it should

⁵²⁰ Fedtke and Magnus in Magnus and Martin-Casals (eds) *Contributory negligence* 83.

⁵²¹ Fedtke and Magnus in Magnus and Martin-Casals (eds) *Contributory negligence* 83.

⁵²² Markesinis and Unberath *German law of torts* 110-111.

⁵²³ See *supra* par 3.3.2.

⁵²⁴ Van Dam *European tort law* 1703.

⁵²⁵ Art 44 subs 1 Swiss Code of Obligations (SCO); Widmer in Magnus and Martin-Casals (eds) *Contributory negligence* 213.

rather serve as a ground of justification which negates wrongfulness. Contributory negligence on the part of the plaintiff can lead to the complete exclusion of the defendant's liability, if the facts of the case are of such a nature that warrants such exclusion. If not, then contributory negligence may serve to reduce the damages. Articles 43 and 44 of the Swiss Code of Obligations (SCO) are relevant here.⁵²⁷ Article 43 of the SCO states: "The judge determines the nature and the amount of the compensation at his discretion, taking into account the circumstances as well as the gravity of fault."⁵²⁸

Article 44 of the 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 to the aggravation of the loss or have otherwise prejudiced the position of the person liable".⁵²⁹

Thus if the plaintiff intentionally harms himself or exposes himself to an "unreasonable danger", his actions could under certain circumstances interrupt the "causal link" (of imputation between the determining act or fact, behaviour or specific risk, and the damaging event), thereby excluding the defendant's liability (even though the defendant may be *prima facie* liable).⁵³⁰ In certain statutes such as the Act on Liability of Nuclear Plants⁵³¹ contributory negligence is the only defence which may serve to exclude or reduce a claim. The operator of the plant can be exonerated (from liability) only if the victim has acted intentionally and a reduction may be applicable where there is "gross" contributory negligence. The judge has a discretion in such cases.⁵³²

Voluntary assumption of risk in certain circumstances could be applicable within the scope of "abuse of right", from the point of view of good faith. Article 2 of the Swiss

⁵²⁶ In Magnus and Martin-Casals (eds) *Contributory negligence* 213.

⁵²⁷ Art 43 and 44 of the SCO must be read together; Widmer in Magnus and Martin-Casals (eds) *Contributory negligence* 210-211.

⁵²⁸ Widmer in Magnus and Martin-Casals (eds) *Contributory negligence* 211.

⁵²⁹ Widmer in Magnus and Martin-Casals (eds) *Contributory negligence* 211.

⁵³⁰ Widmer in Magnus and Martin-Casals (eds) *Contributory negligence* 214.

⁵³¹ RS 732.44; Widmer in Magnus and Martin-Casals (eds) *Contributory negligence* 211.

⁵³² Widmer in Magnus and Martin-Casals (eds) *Contributory negligence* 211.

Civil Code (SCC) provides that it is “abusive” to make somebody else responsible for damage which is caused by the plaintiff himself.⁵³³

It seems that in Swiss law there may be room for the application of the defence of voluntary assumption of risk as a ground of justification and as a ground excluding fault. Swiss law recognises instances where the plaintiff takes an “unreasonable risk”, but interestingly takes cognisance of the breaking of the causal link which could result in the exclusion of liability.

3.6.6 Spanish law

According to the courts and legal doctrine, the “wilful and conscious conduct” of the plaintiff breaks the causal link between the conduct of the defendant and the damage or loss sustained by the plaintiff.⁵³⁴ An example in case law⁵³⁵ is where the deceased threw himself on a railway track when a train, breaching the regulations, was passing through a zone where traffic was not permitted. The Supreme Court held that the National Railway Company (RENFE) was not liable because “the wilful conduct of the victim absolutely breaks any causal link ... between the negligence of RENFE and the fatal result”.⁵³⁶ Contributory intent of the plaintiff does not always result in the exclusion of liability but depends on the facts of each case. An example is the case⁵³⁷ where a patient of a mental hospital departed from the hospital premises and committed suicide. The Supreme Court rejected the defence of contributory intent raised by the hospital.⁵³⁸

Spanish law recognises contributory intent as a ground excluding liability but akin to the application of Swiss law, Spanish law also relies on the plaintiff’s conduct being of such a nature that it breaks the causal link. Perhaps this theory could be considered in our law.⁵³⁹

3.6.7 Greek law

⁵³³ Widmer in Magnus and Martin-Casals (eds) *Contributory negligence* 210 fn 4.

⁵³⁴ Martin-Casals and Solé in Magnus and Martin-Casals (eds) *Contributory negligence* 180.

⁵³⁵ STS 5.2 1992 RJ 828; Martin-Casals and Solé in Magnus and Martin-Casals (eds) *Contributory negligence* 181.

⁵³⁶ Martin-Casals and Solé in Magnus and Martin-Casals (eds) *Contributory negligence* 181.

⁵³⁷ STS 3.4.2001; Martin-Casals and Solé in Magnus and Martin-Casals (eds) *Contributory negligence* 181.

⁵³⁸ Martin-Casals and Solé in Magnus and Martin-Casals (eds) *Contributory negligence* 181.

⁵³⁹ See also *supra* par 3.6.1, 3.6.5, 3.6.6.

Article 300 of the Greek Civil Code deals with contributory negligence. Under Roman law (previously applied) the defendant could have escaped liability in cases where the plaintiff “by his own fault” (*ex culpa sua*) had contributed to the damage caused to himself (except where the defendant acted with “wilful misconduct” (*dolus*)). This had proved inflexible as it resulted in complete liability or exoneration. The Civil Code brought about a more flexible approach⁵⁴⁰ and although contributory negligence usually results in the apportionment of damages, the application of Article 300 of the Civil Code could lead to the exclusion of liability if either the plaintiff or defendant had acted intentionally. It is possible that either party could be held solely responsible.⁵⁴¹

In terms of Greek law it seems that *volenti non fit iniuria* is not an applied defence as a result of the history of its prior harsh application, but contributory intent as a defence limiting liability may be applicable.

3.6.8 Summary

With regard to instances of voluntary assumption of risk, the law of England, Australia and Israel acknowledges that it applies only as a ground of justification and the requirement that consent must not be *contra bonos mores* is not considered.⁵⁴²

German law recognises instances where a plaintiff voluntarily assumes the risk of harm but generally applies it as a defence limiting liability.⁵⁴³

Swiss and Spanish law recognise voluntary assumption of risk in the form of contributory intent, and depending on the circumstances, the judge has the discretion to either exclude or limit liability.⁵⁴⁴

Greek law does not recognise voluntary assumption of risk as a ground of justification but recognises it in the form of contributory intent which may serve to either exclude or limit liability.⁵⁴⁵ In spite of some countries not recognising

⁵⁴⁰ Kerameus in Magnus and Martin-Casals (eds) *Contributory negligence* 99.

⁵⁴¹ Kerameus in Magnus and Martin-Casals (eds) *Contributory negligence* 100.

⁵⁴² See *supra* par 3.6.1-3.6.3.

⁵⁴³ See *supra* par 3.6.4.

⁵⁴⁴ See *supra* par 3.6.5-3.6.6.

⁵⁴⁵ See *supra* par 3.6.7.

contributory intent applying as a complete defence, Swiss, Spanish and Greek law do acknowledge contributory intent and may apply it as a complete defence.⁵⁴⁶

3.7 Conclusion

Comments have been made throughout the chapter with regard to relevant cases, authors' views and foreign law, so there is no need to repeat what has already been stated there. It is apparent though that it is not usual to view contributory intent as a form of voluntary assumption of risk. Furthermore, most countries apply voluntary assumption of risk only as a ground of justification and do not even consider the view that consent to serious bodily injury must not be *contra bonos mores*. Our courts as well as courts in foreign countries tend to conflate contributory intent and contributory negligence, and contributory intent is in any event either subsumed under consent (*volenti non fit iniuria*) or contributory negligence. Nevertheless, there is still a place for contributory intent to apply as a complete defence excluding delictual liability, besides voluntary assumption of risk as a ground of justification as illustrated above with various cases serving as examples. Most authors recognise contributory intent as a separate and distinct defence but Boberg⁵⁴⁷ points out that seldom has a doctrine (contributory intent) supported by so many academics been greeted with silence by the courts. Be that as it may, in *Wapnick v Durban City Garage*⁵⁴⁸ and *Columbus Joint Venture v ABSA Bank Ltd*⁵⁴⁹ the courts indeed gave recognition to the common law principle that contributory intent on the part of the plaintiff cancels any negligence on the part of the defendant and consequently functions as a complete defence which excludes liability.⁵⁵⁰ Seen thus, the requirement of reasonableness (*boni mores*) for a valid consent must be accepted, despite the courts insouciant attitude to the matter. Neethling and Potgieter⁵⁵¹ correctly submit that even though some decisions are reluctant to acknowledge "contributory intent"

⁵⁴⁶ See *supra* 3 par 3.6.5-3.6.7.

⁵⁴⁷ *Delict* 742.

⁵⁴⁸ 1984 2 SA 414 (D).

⁵⁴⁹ 2000 2 SA 491 (W).

⁵⁵⁰ See *infra* chapter 4 par 4.2.1.1 for a full discussion of these cases within the ambit of the Apportionment of Damages Act 34 of 1956.

⁵⁵¹ Neethling and Potgieter *Delict* 171.

as a separate defence,⁵⁵² it is a concept which has been developed in our law to explain a form of *volenti non fit iniuria*.⁵⁵³

⁵⁵² *Netherlands Insurance Co of SA Ltd v Van der Vyver* 1968 1 SA 412 (A) 422.

⁵⁵³ Neethling and Potgieter *Delict* 173.

Chapter 4

4. “Contributory intent” as a defence limiting delictual liability

4.1 Introduction

As mentioned before, fault refers to the defendant’s conduct whereas “contributory fault”⁵⁵⁴ refers to the conduct of the plaintiff. The contributory fault on the part of the plaintiff was previously in terms of our common law (Roman and Roman-Dutch law) applied as a complete defence. Thus 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.⁵⁵⁵ The adjudicator had the alternative “to condemn in the full amount or to absolve the defendant”.⁵⁵⁶ If both parties (plaintiff and defendant) were at fault neither could claim damages unless one was more to blame than the other.⁵⁵⁷ Reference is often made to Voet⁵⁵⁸ and the case of the barber who is shaving a slave’s beard at a place near a games arena. One of the players hits the ball out of the arena and strikes the hand of the barber who cuts the slave’s throat. Voet assumes that the slave is also to blame, but is of the view that the barber is more to blame and should therefore be held liable. Early South African law followed this “all or nothing rule”.

The courts, in an attempt to mitigate the harsh effect of the “all or nothing rule”, adopted the English “last opportunity rule”⁵⁵⁹ in spite of the fact that there was clear Roman-Dutch law authority for an approach based on relative degrees of fault of the plaintiff and the defendant.⁵⁶⁰ In terms of the “last opportunity” rule whichever party had the last opportunity (a test for causation)⁵⁶¹ of avoiding the accident by acting with reasonable care that party would be solely responsible for the damage or loss caused.⁵⁶² Thus the negligence of one of the parties was considered as the “decisive

⁵⁵⁴ Whether in the form of intent or negligence.

⁵⁵⁵ Loubser *et al Delict* 421; Neethling and Potgieter *Delict* 161; Burchell *Delict* 107; Van der Walt and Midgley *Delict* 239.

⁵⁵⁶ SALRC Report 2.

⁵⁵⁷ Neethling and Potgieter *Delict* 161.

⁵⁵⁸ 9.2.7; Neethling and Potgieter *Delict* 161 fn 222.

⁵⁵⁹ Burchell *Delict* 107; Neethling and Potgieter *Delict* 161.

⁵⁶⁰ Voet 9.2.17; Burchell *Delict* 107; SALRC Report 5 par 1.15

⁵⁶¹ Boberg *Delict* 657.

⁵⁶² Van der Walt and Midgley *Delict* 239; Neethling and Potgieter *Delict* 161-162.

cause” of the accident.⁵⁶³ 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.⁵⁶⁴ As pointed out by Boberg,⁵⁶⁵ the last opportunity rule had several weaknesses. Firstly, in actual fact the effect of the “all-or-nothing” principle remained the rule. Secondly, 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 opined, there would have been no accident!⁵⁶⁶ 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”.⁵⁶⁷ Since the “last opportunity rule” also proved untenable in South Africa, our legislature followed suit and enacted the Apportionment of Damages Act⁵⁶⁸ which changed the common law considerably.⁵⁶⁹ The Apportionment of Damages Act is somewhat similar to the English “Contributory Negligence Act” and provides for a more flexible and equitable principle of apportionment of damages in accordance with the respective degrees of fault of the parties in relation to the damage.⁵⁷⁰

Contributory fault in South Africa is still regulated by the Apportionment of Damages Act⁵⁷¹ (hereinafter referred to as the “Act”). 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.⁵⁷² “Apportioning of damages” in the Act does not entail an actual division of damages between the plaintiff and the defendant but is concerned with the process

⁵⁶³ Neethling and Potgieter *Delict* 161.

⁵⁶⁴ See *Pierce v Hau Mon* 1944 AD 175; Van der Walt and Midgley *Delict* 239.

⁵⁶⁵ *Delict* 653.

⁵⁶⁶ Boberg *Delict* 653-654.

⁵⁶⁷ Of 1945; see Kotze 1956 *THRHR* 186.

⁵⁶⁸ 34 of 1956.

⁵⁶⁹ Neethling and Potgieter *Delict* 161.

⁵⁷⁰ SALRC Report 2.

⁵⁷¹ 34 of 1956.

⁵⁷² *Minister van Wet en Orde v Ntsane* 1993 1 SA 560 (A) 570; Van der Walt and Midgley *Delict* 240 fn 12.

of reduction of damages received by the plaintiff as a result of the plaintiff's own contributory negligence.⁵⁷³ The reduction of the award of damages due to the plaintiff's contributory fault, and the sharing of liability between joint wrongdoers with respect to loss suffered by the plaintiff is governed by the Act.⁵⁷⁴

Although the positive aspect of following the English legislature resulted in a more equitable result, there was in actual fact Roman-Dutch law authority for an approach based on relative degrees of fault of the plaintiff and the defendant which could have been developed further.⁵⁷⁵ Nevertheless the influence of English law is evident in our law as the courts have followed the principles of that system. As will be shown,⁵⁷⁶ this has inevitably led to the reluctance of our courts to acknowledge the defence of contributory intent in the present context.

4.2 The application of the defence of “contributory intent” within the ambit of the Apportionment of Damages Act 34 of 1956

4.2.1 Section 1(1) and 1(3) of the Act

The provisions of section 1(1) and 1(3) of Act 34 of 1956 are relevant to the discussion of “contributory intent” as a defence limiting liability. Therefore these provisions will be discussed in detail with reference to its application as interpreted and applied by the courts in South Africa.

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

It is evident that this section is expressly confined to damage caused partly by the plaintiff's ‘own fault’, which serves to reduce the amount of damages awarded to the plaintiff, and partly by the defendant's fault. It does not lead to the defendant escaping liability completely and a court is entitled to reduce damages in accordance with what it deems fair and reasonable in the circumstances, having regard to the

⁵⁷³ Neethling and Potgieter *Delict* 162-163; Van der Walt and Midgley *Delict* 240.

⁵⁷⁴ Loubser *et al Delict* 421.

⁵⁷⁵ Voet 9.2.17; Burchell *Delict* 107; SALRC Report 5 par 1.15.

⁵⁷⁶ See *infra* par 4.4.1, 4.4.3 and 4.5

plaintiff's degree of fault in relation to the damage.⁵⁷⁷ If fault can be imputed to the plaintiff, the plaintiff must accept a reduction as a result of his or her blameworthy conduct. The onus lies on the defendant to prove fault on the part of the plaintiff.⁵⁷⁸

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 the Act was enacted with the clear intention of abolishing the “last opportunity rule”.⁵⁷⁹

In general “fault” encompasses both intention and negligence.⁵⁸⁰ The word “fault” is not defined in the Act, 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”⁵⁸¹ and the Act erroneously construes fault as an act or omission. It is trite 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.⁵⁸²

4.2.1.1 Meaning of “fault”⁵⁸³

Although the courts have on occasion expressed doubt about the view that “fault” in terms of section 1 of the Act includes intent,⁵⁸⁴ there are nevertheless sufficient other grounds also supporting the view that fault does include contributory intent.⁵⁸⁵

With regard to section 1 of the Act the following questions have been raised:

⁵⁷⁷ Loubser *et al Delict* 421.

⁵⁷⁸ Burchell *Delict* 108; Neethling and Potgieter *Delict* 166; Loubser *et al Delict* 421.

⁵⁷⁹ See s 1(1)(b) and s 2(14) of the Apportionment of Damages Act 34 of 1956; Van der Walt and Midgley *Delict* 240 fn 9; Neethling and Potgieter *Delict* 162.

⁵⁸⁰ Neethling and Potgieter *Delict* 162; Burchell *Delict* 110; Van der Walt and Midgley *Delict* 240.

⁵⁸¹ See Kotze 1956 *THRHR* 191 who also submits that the stipulation is strange and makes no sense.

⁵⁸² Neethling and Potgieter *Delict* 168; Goldstein J in *Greater Johannesburg Transitional Metropolitan Council v ABSA Bank Ltd* 1996 4 All SA 278 (W) 607 held that this section should not be regarded as a definition section; Scott 1997 *De Jure* 392.

⁵⁸³ Pretorius *Medewerkende opset* 220 *et seq* refers to views that varied considerably.

⁵⁸⁴ *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) 561.

⁵⁸⁵ This will be discussed further on with regard to case law, see *infra* par 4.2.1.2-4.2.1.4.

(1) Can a defendant who has intentionally caused damage to the plaintiff raise a plea of contributory negligence?⁵⁸⁶

(2) How does contributory intent play a role in limiting liability in the following situations:

(a) Where the plaintiff intentionally contributed to his or her own loss and the defendant acted negligently;⁵⁸⁷ and

(b) Where the defendant acted intentionally and the plaintiff acted with “contributory intent” in regard to the plaintiff’s loss?⁵⁸⁸

These questions will be considered next.

(1) Defendant had intent and plaintiff contributory negligence

It seems that the Act is not applicable where a defendant intentionally caused damage to a negligent plaintiff.⁵⁸⁹ This is in line with the rule emanating from our common law that a plea of contributory negligence (on the part of the plaintiff) cannot be raised in instances where the defendant intentionally caused damage to the plaintiff.⁵⁹⁰ It must be accepted that the statutory provisions of the Act do not change this principle.⁵⁹¹ McKerron⁵⁹² points out that to allow a plea of contributory negligence in such instances “would constitute such a serious departure from the rule of the common law that an intention to injure negatives all defences, that it can hardly be supposed to have been the intention of the legislature”.⁵⁹³ The following two cases are relevant in this regard.

⁵⁸⁶ See *Minister van Wet en Orde v Ntsane* 1993 1 SA 560 (A); *Burchell Delict* 110; Neethling and Potgieter *Delict* 162; *Boberg Delict* 656.

⁵⁸⁷ 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.

⁵⁸⁸ See *Mabaso v Felix* 1981 3 SA 865 (A); *Greater Johannesburg Transitional Metropolitan Council v ABSA Bank Ltd* 1996 4 All SA 278 (W); Neethling and Potgieter *Delict* 162-163; Ahmed 2010 *THRHR* 702.

⁵⁸⁹ See *Du Bois et al Wille’s principles of South African law* 1148.

⁵⁹⁰ *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 fn 228; cf *Kotze* 1956 *THRHR* 149.

⁵⁹¹ *Wapnick v Durban City Garage* 1984 2 SA 414 (D) 418; *McKerron Delict* 297; Neethling and Potgieter *Delict* 163.

⁵⁹² *Delict* 297.

⁵⁹³ See *Scott Huldingsbundel Paul van Warmelo* 176; Neethling and Potgieter *Delict* 162 fn 229.

Wapnick v Durban City Garage⁵⁹⁴ It was alleged that an employee of the defendant, Magwaza, a parking attendant, acting while in the course and scope of his employment assaulted the deceased (co-employee), breadwinner of the plaintiffs, by hitting him with a stick, thereby inflicting severe injuries upon him which subsequently lead to his death. It was also alleged that Magwaza was provoked and acted in self-defence.⁵⁹⁵

Booyesen J⁵⁹⁶ held:

“It is clear that a Defendant who has wrongfully and intentionally caused the Plaintiff to suffer damages is not entitled to plead contributory negligence and equally clear 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 of the latter’s negligent conduct.”

Booyesen J⁵⁹⁷ referred to McKerron,⁵⁹⁸ Van der Walt⁵⁹⁹ and the view submitted by Wessels JA in the judgment of *Mabaso v Felix*⁶⁰⁰ that it is extremely doubtful that section 1(1)(a) of the Act is applicable where the fault of the defendant is in the form of intentional wrongdoing. Booyesen J further stated that fortunately he was not called upon to decide upon this issue in this matter - even though Magwaza had assaulted the deceased and the deceased had died as a result thereof, it was not alleged that Magwaza intended the deceased to die: “[I]t is clear that no contributory intent in relation to the death of the deceased has been alleged.”

This case nevertheless confirms that where a defendant intentionally causes the plaintiff’s loss, such defendant cannot raise contributory negligence on the part of the plaintiff. Furthermore a plaintiff who has intentionally contributed to his own damage cannot claim his own damage or part of it from a defendant who acted negligently.⁶⁰¹

Minister van Wet en Orde v Ntsane⁶⁰² A policeman shot and wounded a suspect who escaped from lawful arrest. It transpired that the policeman had the opportunity to warn the escapee orally that he would shoot if the escapee did not stop, and could have fired a warning shot prior to the shooting but did not do so. The policeman’s

⁵⁹⁴ 1984 (2) SA 414 (D).

⁵⁹⁵ *Supra* 415-416.

⁵⁹⁶ *Supra* 418.

⁵⁹⁷ *Supra* 418.

⁵⁹⁸ *Delict* 297.

⁵⁹⁹ *Law of South Africa* par 45.

⁶⁰⁰ 1981 3 SA 865 (A).

⁶⁰¹ See Van der Walt and Midgley *Delict* 147.

⁶⁰² 1993 1 SA 560 (A).

use of force was found to be both unreasonable and unnecessary in the court *a quo*. On appeal, the Appellate Division found that where the policeman had intentionally wounded the plaintiff, the policeman and his employer could not rely on the contributory negligence of the escapee and were not entitled to an apportionment of damages in terms of the Act. The decision of the court *a quo* was confirmed.⁶⁰³

Van Heerden JA⁶⁰⁴ held that where the legislature uses the phrases ‘his own fault’ and ‘by the fault of any other person’ next to each other, it had the same form of fault in mind. Furthermore, if fault on the part of the plaintiff was in the form of negligence, the legislature, by the use of the second phrase, refers to, and only to, the negligence of the defendant.

Kelly⁶⁰⁵ points out that the Appellate Division in this case 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.⁶⁰⁶ Be that as it may, as said, there is clear authority in our common law⁶⁰⁷ (in addition to *Ntsane*) which confirms that where the defendant has been guilty of *dolus*, the defence of contributory negligence cannot be raised against the plaintiff. Botha⁶⁰⁸ 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 *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.

⁶⁰³ *Supra* 561.

⁶⁰⁴ *Supra* 561.

⁶⁰⁵ 2001 *SA Merc LJ* 516.

⁶⁰⁶ *Minister van Wet en Orde v Ntsane* 1993 1 SA 560 (A) 569.

⁶⁰⁷ Van der Walt and Midgley *Delict* 241 fn 16 refer to D 9 2 9 4; *Mabaso v Felix* 1981 3 SA 865 (A) 877; *Wapnick v Durban City* 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 ABSA Bank Ltd* 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.

⁶⁰⁸ *Verdeling van skadedragingslas* 315.

(2)(a) Defendant had negligence and plaintiff contributory intent

In instances where the plaintiff intentionally contributed to his or her own loss and the defendant acted negligently, the plaintiff forfeits his or her claim.⁶⁰⁹ The following two cases are relevant here.

Columbus Joint Venture v ABSA Bank Ltd⁶¹⁰ An employee of the plaintiff fraudulently caused cheques to be drawn by the plaintiff in favour of an account held with the defendant (collecting bank). The account was solely controlled by the employee. The court had to consider *inter alia* whether the collecting bank was negligent, whether the plaintiff was “vicariously liable” with regard to the actions of the employee and if so, whether the Apportionment of Damages Act was applicable. Malan J⁶¹¹ found that the collecting bank was not negligent and further that the plaintiff was not “vicariously liable” for the actions of the employee.⁶¹² Therefore Malan J did not find it necessary to deal with the plaintiff’s contributory fault, but quoted Booyesen J’s⁶¹³ submission in *Wapnick v Durban City Garage*⁶¹⁴ 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 of the latter’s conduct”.⁶¹⁵ The trial court therefore confirmed that in cases where a plaintiff intentionally contributes to his or her own loss, such plaintiff cannot have a claim against a negligent defendant.

Energy Measurements (Pty) Ltd v First National Bank of South Africa Ltd⁶¹⁶ An employee had stolen cheques from the plaintiff and deposited them into an account held at the defendant bank which then negligently collected the said cheques on behalf of the thief. It was alleged on behalf of the defendant that the plaintiff should be held “vicariously liable” for the intentional acts of its employee. The court held that

⁶⁰⁹ 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 fn 230; cf Du Bois *et al Wille’s principles of South African law* 1148; Van der Walt and Midgley *Delict* 244; Boberg *Delict* 656; Malan and Pretorius 1997 *THRHR* 156; Ahmed 2010 *THRHR* 701-702.

⁶¹⁰ 2000 2 SA 491 (W) 513.

⁶¹¹ *Supra* 512. It should be noted that the court, on close examination, was not dealing with the question of the “vicarious liability” of the plaintiff, but rather with an analogous question, namely whether the employee’s intentional conduct should vicariously be imputed to the plaintiff.

⁶¹² *Supra* 512.

⁶¹³ *Wapnick v Durban City Garage* 1984 (2) SA 414 (D) 418.

⁶¹⁴ *Supra* 418.

⁶¹⁵ *Columbus Joint Venture v ABSA Bank Ltd* 2000 2 SA 491 (W) 513.

⁶¹⁶ 2000 2 All SA 396 (W).

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 was the case in *Columbus Joint Venture*, avoided the application of section 1 of the Act by ascribing a narrow interpretation to “scope of employment”.⁶¹⁷ The court further held that the plaintiff had been careless but that mere carelessness could not form the basis of apportionment in terms of the Act. A similar approach is also apparent from *Bond Equipment (Pretoria) (Pty) Ltd v ABSA Bank (Ltd)*⁶¹⁸ where the court also ascribed to a narrow interpretation of “vicarious liability” but this approach was not followed in *Greater Johannesburg Transitional Metropolitan Council v ABSA Bank Ltd*.⁶¹⁹

(2)(b) Defendant had intent and plaintiff contributory intent

In instances where the defendant acted with intent and the plaintiff with “contributory intent” in regard to the plaintiff's loss the law was unsettled⁶²⁰ until the 1996 decision in *Greater Johannesburg Transitional Metropolitan Council v ABSA Bank Ltd*⁶²¹ brought about more certainty.⁶²²

Mabaso v Felix⁶²³ Felix (the defendant) conducted a business called “Parktown Fish and Chips” opposite a garage in Hillbrow. He intentionally fired two shots at Mabaso (the plaintiff) who was a petrol attendant at the said garage. The defendant alleged that prior to the shooting, the plaintiff, together with several other men unknown to him, threatened to kill him as well as his family, and had approached him with that intention. Upon firing the two shots, the defendant alleged that he used such force upon the plaintiff as was necessary in order to defend himself and prevent the plaintiff from killing or injuring him or his family.⁶²⁴ The court *a quo* was called upon to determine whether or not the defendant had justifiably shot the plaintiff in self-

⁶¹⁷ SALRC Report 20-21. But see the remark *supra* fn 611.

⁶¹⁸ 1999 2 SA 63 (W); see discussion *infra* 123.

⁶¹⁹ 1996 4 All SA 278 (W); see discussion *infra* 100-103.

⁶²⁰ 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 *Delict* 244 fn3; 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.

⁶²¹ 1996 4 All SA 278 (W).

⁶²² Neethling and Potgieter *Delict* 163; Loubser *et al Delict* 424 submit that presuming both parties acted intentionally the situation would be no different to the situation where both parties are negligent.

⁶²³ 1981 3 SA 865 (A).

⁶²⁴ *Supra* 869-871.

defence.⁶²⁵ Faced with conflicting versions of the incident, the court *a quo* held that the plaintiff bore the onus of proving on a balance of probabilities that the defendant had acted wrongfully in shooting him. On appeal, counsel for the defendant advanced that in the event of the court finding that the defendant was not justified in shooting the plaintiff, any damages recoverable by the plaintiff “should be reduced in accordance with s 1 of the Apportionment of Damages Act 34 of 1956”. It was argued that the plaintiff by his own partial fault caused the damage he suffered.⁶²⁶ In response to this submission Wessels JA⁶²⁷ *obiter*⁶²⁸ stated that “[w]hether it [the Act] is applicable where the ‘fault’ of a defendant is intentional wrongdoing is extremely doubtful”. He⁶²⁹ held that the defendant (on whom the onus rested) failed to prove either, on a preponderance of probabilities, that in shooting the plaintiff he acted reasonably or justifiably in self-defence or that there was fault on the part of the plaintiff.⁶³⁰ The appeal succeeded and judgment was granted in favour of the plaintiff.⁶³¹

Goldstein J correctly remarked in *Greater Johannesburg Transitional Metropolitan Council v ABSA Bank Ltd t/a Volkskas Bank*⁶³² 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.⁶³³

Greater Johannesburg Transitional Metropolitan Council v ABSA Bank Ltd⁶³⁴

Thoms, who was employed by the Soweto City Council (SCC) (which was later dissolved with its assets and liabilities being transferred to the plaintiff), stole eight cheques drawn by the Central Witwatersrand Regional Services Council (RSC) in favour of SCC, during the course of his employment. Thoms handed the stolen

⁶²⁵ *Supra* 871.

⁶²⁶ *Supra* 876-877.

⁶²⁷ *Supra* 877.

⁶²⁸ See Mahomed J’s remarks on the *obiter dictum* in *Randbond Investments v FPS (Northern Region) (Pty) Ltd* 1992 (2) SA 608 (A) 616-617.

⁶²⁹ *Mabaso v Felix* 1981 3 SA 865 (A) 876.

⁶³⁰ *Supra* 877.

⁶³¹ *Supra* 876-877.

⁶³² 1997 2 SA 594 (W) 608.

⁶³³ See also Scott 1997 *De Jure* 392.

⁶³⁴ 1996 4 All SA 278 (W).

cheques to his wife, Mrs Thoms, who was in the employ of the defendant bank. Mrs Thoms was a controller who had to supervise the collection of cheques at the Rosettenville branch of the defendant bank. Mrs Thoms deposited the stolen cheques into an account held by her child at the defendant bank thereby causing the drawee, SCC, to lose the amounts reflected on the cheques. The plaintiff sued the bank for damages in respect of the amounts reflected in the cheques, based on the bank's vicarious liability.⁶³⁵ The defendant, in the hope of obtaining an apportionment of damages, *inter alia* raised the defence of contributory intent alleging that Thoms who was in the employ of SCC intentionally and wilfully committed fraud.⁶³⁶ The court *inter alia* had to decide whether the defendant was vicariously liable as a result of Mrs Thoms' conduct and whether the defendant was entitled to a reduction of the amount claimed in terms of section 1(1)(a) of the Apportionment of Damages Act.⁶³⁷ Section 1 applies where a person suffers damage partly by *his own fault* and partly by the fault of another. Counsel for the plaintiff argued that section 1(1)(a) is not applicable in cases regarding vicarious liability, but Goldstein J⁶³⁸ found that the section can be invoked against a plaintiff who is "vicariously liable" in respect of the fault of its employee. With respect to Mrs Thoms' actions, the judge found that she did act within the scope and course of her employment and that the Bank was therefore vicariously liable.⁶³⁹ The evidence also confirmed that Mr Thoms stole the cheques while in the course and scope of his employment with SCC⁶⁴⁰ and that both Mr and Mrs Thoms had the intention to defraud the SCC.

Most importantly, the judge held⁶⁴¹ that section 1 was applicable in instances where both the plaintiff and the defendant acted intentionally and that "fault" includes intent. Goldstein J⁶⁴² 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

⁶³⁵ *Supra* 281.

⁶³⁶ Scott 1997 *De Jure* 388.

⁶³⁷ *Greater Johannesburg Transitional Metropolitan Council v ABSA Bank Ltd* 1996 4 All SA 278 (W) 285.

⁶³⁸ Loubser *et al Delict* 424; Neethling *et al Case book on the law of delict* 392. But see the remark *supra* fn 611

⁶³⁹ *Supra* 285.

⁶⁴⁰ *Supra* 290.

⁶⁴¹ *Greater Johannesburg Transitional Metropolitan Council v ABSA Bank Ltd* 1996 4 All SA 278 (W) 291.

⁶⁴² *Supra* 291.

(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 J⁶⁴³ 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". He⁶⁴⁴ referred to the dictum of Mahomed J⁶⁴⁵ 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.

Scott⁶⁴⁶ 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 cent deviation from the norm of the reasonable man,⁶⁴⁷ 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*.⁶⁴⁸ Malan and Pretorius⁶⁴⁹ suggest that the conclusion reached by Goldstein J is correct and in

⁶⁴³ *Supra* 292.

⁶⁴⁴ *Supra* 294.

⁶⁴⁵ In *Randbond Investments (Pty) Ltd v FPS (Northern Region) (Pty) Ltd* 1992 2 SA 608 (W).

⁶⁴⁶ 1997 *De Jure* 393.

⁶⁴⁷ See Neethling and Potgieter *Delict* 163 fn 233.

⁶⁴⁸ Scott 1997 *De Jure* 393-394.

⁶⁴⁹ 1997 *THRHR* 159.

accordance with a view that is jurisprudentially justifiable.⁶⁵⁰ The express recognition of the existence of the defence of contributory intent is welcomed by them.⁶⁵¹

This case is the first case that officially recognises the applicability of the defence of contributory intent⁶⁵² within the ambit of section 1 of the Apportionment of Damages Act and can be the authority and basis for further future development of the defence by our courts.

4.2.1.2 Arguments supporting the view that fault excludes intent

Certain arguments have been raised as to why fault does not include intent in terms of section 1 of the Act. To begin with, in regard to 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).⁶⁵³ Chapter 1 of the Act is headed “CONTRIBUTORY NEGLIGENCE”. Section 1 is headed “Apportionment of liability in case of contributory negligence”.⁶⁵⁴ 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 negligence⁶⁵⁵ and not “contributory intent”.⁶⁵⁶

⁶⁵⁰ They refer to Neethling, Potgieter and Visser *Delict* 153 fn 170; Pretorius *Medewerkende opset* 223 fn 1.

⁶⁵¹ See also Neethling and Potgieter *Delict* 173; Loubser *et al Delict* 424 submit that, presuming both parties acted intentionally, the situation would be no different to the situation where both parties are negligent.

⁶⁵² SALRC Report 20.

⁶⁵³ Van der Walt and Midgley *Delict* 244 fn 9 refer to *South British Insurance Co Ltd v Smit* 1962 3 SA 826 (A) 835-836.

⁶⁵⁴ See *Greater Johannesburg Transitional Metropolitan Council v ABSA Bank Ltd t/a Volkskas Bank* 1996 4 All SA 278 (W) 290 - 291.

⁶⁵⁵ *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 fn 223.

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

This view is also supported by case law.⁶⁵⁷ In *South British Insurance Co Ltd v Smit*⁶⁵⁸ the court held that “fault” means negligence and “degree of fault” means degree of negligence.⁶⁵⁹ The Appellate Division stated *obiter* in *Mabaso v Felix*⁶⁶⁰ that it was extremely doubtful whether section 1(1)(a) was applicable where the fault of a defendant was an intentional wrongdoing.⁶⁶¹ 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*⁶⁶² the Appellate Division did not find it necessary to decide upon the issue. But in *Thoroughbred Breeders’ Association of South Africa v Price Waterhouse*,⁶⁶³ the Supreme Court of Appeal stated the following in a majority judgment:

“Moreover ‘fault’ must obviously be confined to negligence. The context of the Act shows that to be so. *Dolus* is a form of fault in the wide sense but obviously not included. The legislature did not exclude it by name because the context of the Act showed plainly enough that it was to be excluded.”

Also in *King v Pearl Insurance Co Ltd*⁶⁶⁴ the court held that fault as used in section 1 refers exclusively to contributory negligence.⁶⁶⁵

Against this background, **Potgieter**⁶⁶⁶ submits that the majority of the decisions indicate that the meaning of the word “fault” in section 1 is limited to negligence and does not include intent.⁶⁶⁷ In support of his view Potgieter quotes Van der Walt and Midgley:⁶⁶⁸

“Although the question has been raised whether ‘fault’ in section 1 of the Apportionment of Damages Act includes intent, this seems extremely doubtful. The legislature clearly intended section 1 of the Act to connote either negligence or contributory negligence. In *King v Pearl Insurance Co Ltd* the court held that ‘fault’ on the part of the plaintiff means and refers exclusively to conduct which would have grounded a defence of contributory negligence at

⁶⁵⁷ See Kelly 2001 *SA Merc LJ* 514-517.

⁶⁵⁸ 1962 3 SA 826 (A) 835.

⁶⁵⁹ SALRC Report 13; cf Du Bois *et al Wille’s principles of South African law* 1148.

⁶⁶⁰ 1981 3 SA 865 (A) 877.

⁶⁶¹ Du Bois *et al Wille’s principles of South African law* 1148.

⁶⁶² 1968 1 SA 412 (A) 422.

⁶⁶³ 2001 4 SA 551 (SCA) 600.

⁶⁶⁴ 1970 1 SA 462 (W); see also Du Bois *et al Wille’s principles of South African law* 1148.

⁶⁶⁵ SALRC Report 13.

⁶⁶⁶ 1998 *THRHR* 734.

⁶⁶⁷ Potgieter 1998 *THRHR* 734 refers to *King v Pearl Insurance Co Ltd* 1970 1 SA 462 (W); *South British Insurance Co Ltd v Smit* 1962 3 SA 826 (A) 835; *Mabaso v Felix* 1981 3 SA 865 (A) 877; *Botha Verdeling van skadedragingslas* 310; Van der Walt and Midgley *Delict: Principles and cases* (1997) 211; cf Scott 1984 *Huldigingsbundel Paul van Warmelo* 166, 177; Neethling, Potgieter and Visser *Deliktereg* (1996) 153; *contra Greater Johannesburg Transitional Metropolitan Council v ABSA Bank Ltd t/a Volkskas Bank* 1997 2 SA 591 (W) 606-609.

⁶⁶⁸ *Delict: Principles and cases* (1997) 211.

common law. The explicit reference to contributory *negligence* in both the long title of the Act and the heading to section 1, the use of a similar concept of 'fault' with reference to both the plaintiff and the defendant, and the historical background to the enactment of section 1 [cf *OK Bazaars (1929) Ltd v Stern and Ekermans* 1976 2 SA 521 (C) 528-529], indicate that 'fault' bears the restricted meaning of either contributory negligence on the part of the plaintiff, or negligence on the part of the defendant."⁶⁶⁹

Potgieter⁶⁷⁰ also submits that the legislature with regard to section 1 intended to govern only the defence of contributory negligence; in other words, the apportionment of damages where both the plaintiff and the defendant were negligent. Furthermore, he⁶⁷¹ submits that it cannot be inferred from the wording of the Act that section 1 applies to the defence of contributory intent on the part of the plaintiff. The Act did not intend to allow the apportionment of damages where the plaintiff acted with intent and the defendant with negligence or where both parties acted with intent. In both these types of cases, the plaintiff forfeited his claim at common law,⁶⁷² and the Appeal Court has on occasion expressed doubt as to whether there could be any possibility of a defence of contributory intent in terms of the provisions of the Act.⁶⁷³ With regard to the case of *Greater Johannesburg Transitional Metropolitan Council v ABSA Bank Ltd*, Potgieter⁶⁷⁴ said that no matter how much this judgment satisfies one's sense of justice, in view of the preponderance of authority to the contrary, it cannot be the intention of the legislature to govern instances of contributory intent with section 1 of the Act. It is a matter that needs to be sorted out by the legislature. Potgieter⁶⁷⁵ with reference to the principles laid down in *S v Ngubane*⁶⁷⁶ (that intent and negligence may be present simultaneously and that an intentional act generally amounts to a deviation from the norm of the reasonable man, thereby rendering such conduct negligent),⁶⁷⁷

⁶⁶⁹ However, Van der Walt and Midgley, in a later edition of *Delict* 240-241, submit that "[t]he word 'fault' is used with reference both to the plaintiff and the defendant, and it ordinarily includes both negligence and intention. Despite indications that the Act does not apply where fault takes the form of intention, the question remains arguable." Furthermore, Van der Walt and Midgley *Delict* 147, 241 acknowledge the defence of "contributory intent" as a separate and complete defence which could apply in principle and even acknowledge that the defence may apply as a complete defence as well as a defence limiting liability.

⁶⁷⁰ 1998 *THRHR* 734-735.

⁶⁷¹ See SALRC Report 14.

⁶⁷² See SALRC Report 14.

⁶⁷³ *Netherlands Insurance Co of SA Ltd v Van der Vyver* 1968 1 SA 412 (A) 422; *Mabaso v Felix* 1981 3 SA 865 (A) 876-877; cf *Wapnick v Durban City Garage* 1984 2 SA 414 (D) 418; Potgieter 1998 *THRHR* 735.

⁶⁷⁴ 1998 *THRHR* 735.

⁶⁷⁵ 1998 *THRHR* 731.

⁶⁷⁶ 1985 3 SA 677 (A).

⁶⁷⁷ Potgieter 1998 *THRHR* 737; see the discussion *infra* par 4.2.1.3.

submits that no matter how attractive this approach may seem this could lead to a redefinition of intent as a form of negligence. This would blur the material differences between intent and negligence and sidestep the true intention of the legislator, as well as the common law prohibition of apportionment between intentional and negligent wrongdoers.

Boberg⁶⁷⁸ likewise does not favour the inclusion of intent in the concept of “fault” in section 1 of the Act. After referring to *South British Insurance Co Ltd v Smit*⁶⁷⁹ and *Jones v Santam*⁶⁸⁰ he submits that “‘fault’ means negligence - a deviation from the norm of the *diligens paterfamilias*”. Boberg⁶⁸¹ refers to authors who support the application of contributory intent,⁶⁸² in terms of section 1 of the Act, when awarding reduced damages to the plaintiff if the defendant also acted intentionally but says that, like Van der Walt,⁶⁸³ he prefers to pay greater heed to the “discouraging noises” made by the court which increased in *Mabaso v Felix*. Boberg prefers to dismiss the plaintiff’s claim entirely by applying the principle of *compensatio* (each party’s fault cancels out the other’s). He⁶⁸⁴ submits that if apportionment would be attempted (with regard to instances of intentional wrongdoing) it would have to be on causation, for intention, unlike negligence, cannot be measured in degrees - it either exists or it does not. This would require the court to embark upon the almost impossible task of assessing the respective degrees of causative potency of conduct. Moreover, it seems “undesirable that a court of law should come to the assistance of a plaintiff who has intentionally contributed to his damage”.⁶⁸⁵

678 *Delict* 657.

679 1962 3 SA 826 (A).

680 1965 2 SA 542 (A).

681 *Delict* 743.

682 Van der Merwe and Olivier *Die onregmatige daad* 172-173, Pretorius *Medewerkende opset* 222-223; Boberg *Delict* 743.

683 *Delict* § 45; Boberg *Delict* 743.

684 Boberg *Delict* 743.

685 As will be discussed in detail *infra* par 4.2.2.3, the impossible task referred to by Boberg of assessing the respective degrees of intent was canvassed in *Randbond Investments (Pty) Ltd v FPS (Northern Region) (Pty) Ltd* 1992 2 SA 608 (W). In this case the court held that the Act also applies to intentional, as opposed to only negligent joint wrongdoers. The court further stated 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”. Even though this case dealt with joint wrongdoers, the principles laid down are relevant in applying apportionment between the plaintiff and defendant, where the plaintiff or both parties acted intentionally.

Scott⁶⁸⁶ correctly points out that the term “contributory fault” as a concept comprising contributory negligence and contributory intent is not commonly encountered in the literature or case law. On the one hand there are academic authors who submit that “fault” should be given its ordinary meaning to include both intention and negligence,⁶⁸⁷ whereas others argue that it should be strictly interpreted as referring exclusively to negligence.⁶⁸⁸ Scott⁶⁸⁹ submits that:

“if the present position regarding the treatment of contributory intent in South African law is undesirable, it is for the legislature to amend the Apportionment of Damages Act to bring it in line with modern thought: for lawyers to endeavor to build a concept into this act, for which it had never been intended, on the lines of what they regard as desirable to achieve an equitable result, would certainly be to tread onto dangerous ground”.

4.2.1.3 Arguments supporting the view that fault 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.⁶⁹⁰ Thirdly, in *Greater Johannesburg Transitional Metropolitan Council v ABSA Bank Ltd*⁶⁹¹ Goldstone J rejected the argument that the heading to section 1 indicates that the legislature intended only a restricted meaning for the term “fault”. He⁶⁹² quoted the dictum of Innes CJ in *Turffontein Estates Ltd v Mining Commissioner, Johannesburg*⁶⁹³ in which the court laid down the rule that the heading of a section could only be invoked as an aid to construction, when the intention of the lawgiver as expressed in any clause is

⁶⁸⁶ 1984 *Huldigingsbundel Paul van Warmelo* 177.

⁶⁸⁷ For example, Van der Merwe and Olivier *Die onregmatige daad* 168 (Scott 1997 *De Jure* 390).

⁶⁸⁸ Van der Walt *Delict: Principles and Cases* (1979) 88; Burchell *Delict* (1993) 110-111; cf Neethling, Potgieter and Visser *Delict* (2005) 152-153 (Scott 1997 *De Jure* 390).

⁶⁸⁹ 1984 *Huldigingsbundel Paul van Warmelo* 177.

⁶⁹⁰ Van der Walt and Midgley *Delict* 244-245 fn 10; *Randbond Investments (Pty) Ltd v FPS (Northern Region) (Pty) Ltd* 1992 2 SA 608 (W).

⁶⁹¹ 1996 4 All SA 278 (W) 290.

⁶⁹² *Supra* 292; 1997 2 SA 591 (W) 607.

⁶⁹³ 1917 AD 419, 431.

unclear. Goldstein J⁶⁹⁴ further submitted that the wording of section 1(1)(a) is quite clear and unambiguous, thus preventing recourse to the heading of section 1.⁶⁹⁵

Fourthly, **Kelly**⁶⁹⁶ 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*⁶⁹⁷ where it was held that if a person acts intentionally, he simultaneously also acts negligently. This view should be thoroughly scrutinised.

According to **Van der Merwe and Olivier's**⁶⁹⁸ definition of negligence, negligence may only exist in respect of a consequence if the wrongdoer has not intentionally caused that consequence. Thus, in terms of this view, 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.⁶⁹⁹

S v Ngubane⁷⁰⁰ The Appellate Division held that for purposes of criminal law, (relevant to the law of delict) intent and negligence may be present simultaneously. In this case, the accused at the time of the killing was under the influence of alcohol and a quarrel arose between him and the deceased. The accused stabbed the deceased five times which subsequently led to the deceased's death. The court *a quo* came to the conclusion that the accused intentionally killed the deceased, a woman with whom he had some association. On appeal Jansen JA⁷⁰¹ held that the accused intentionally killed the deceased and that such intent was in the form of *dolus eventualis*. He⁷⁰² further stated that even though the inference of intention is evident, "no doubt a reasonable man in the position of the accused would not only

⁶⁹⁴ *Greater Johannesburg Transitional Metropolitan Council v ABSA Bank Ltd* 1997 2 SA 591 (W) 607.

⁶⁹⁵ See SALRC Report 20.

⁶⁹⁶ 2001 SA Merc LJ 515; see also Neethling and Potgieter *Delict* 133-134; cf Van der Walt and Midgley *Delict* 245; Ahmed 2010 *THRHR* 703.

⁶⁹⁷ 1985 3 SA 677 (A).

⁶⁹⁸ Referred to by Neethling and Potgieter *Delict* 133. This view is according to Neethling and Potgieter *Delict* 133 fn 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.

⁶⁹⁹ Neethling and Potgieter *Delict* 133 fn 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.

⁷⁰⁰ 1985 3 SA 677 (A).

⁷⁰¹ *Supra* 682-683.

⁷⁰² *Supra* 684.

have realised that his use of the knife could lead to death but he would also have refrained from attacking the deceased in the manner he did". Therefore it is not logically impossible that proof of *dolus* necessarily excludes *culpa*.⁷⁰³ Jansen JA⁷⁰⁴ continued:

"[T]he concepts of *dolus* and *culpa* are totally different. *Dolus* connotes a volitional state of mind; *culpa* connotes a failure to measure up to a standard of conduct. Seen in this light it is difficult to accept that proof of *dolus* excludes *culpa*. The facts of the present case illustrate this. The [accused], somewhat under the influence of liquor, without premeditation and as a result of some provocation, stabbed the deceased five times, the fatal injury penetrating the heart. The inference drawn by the Court *a quo* that he foresaw the possibility of death ensuing and that he killed intentionally (*dolus eventualis*) is clear. This, however, does not preclude the matter being viewed from a different angle: did not the [accused], foreseeing the possibility of death ensuing by failing to curb his emotions and failing to desist from attacking the deceased, fall short of the standard of the reasonable man (or, if the subjective approach were to be applied, to measure up to the standard of his own capabilities)? The existence of *dolus* does not preclude the answering of this question in the affirmative. On this approach *dolus* does not exclude *culpa*."

Mahomed J in *Ranbond Investments (Pty) Ltd v FPS (Northern Region) (Pty) Ltd*⁷⁰⁵ also expressed the view that intention and negligence are not mutually exclusive concepts. It is logically possible for both to be present simultaneously.⁷⁰⁶

The view that if intent is present, negligence is simultaneously present is accepted by Burchell,⁷⁰⁷ Boberg⁷⁰⁸ and Neethling and Potgieter.⁷⁰⁹ 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.⁷¹⁰ If Neethling's suggestion is accepted that intent simultaneously constitutes negligence and that an intentional act (which may differ

⁷⁰³ *Supra* 685.

⁷⁰⁴ *Supra* 687.

⁷⁰⁵ 1992 2 SA 608 (W) 621.

⁷⁰⁶ 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 Report 27.

⁷⁰⁷ *Delict* 91.

⁷⁰⁸ *Delict* 273-274.

⁷⁰⁹ *Delict* 133-134; cf Du Bois *et al Wille's principles of South African law* 1148-1149.

⁷¹⁰ Neethling and Potgieter *Delict* 133.

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 Apportionment of Damages Act.⁷¹¹ Similarly apportionment can be applied between joint wrongdoers using the same yardstick.⁷¹²

Burchell⁷¹³ acknowledges that generally fault includes both negligence and intention, but refers to the Appellate Division’s doubt in *Mabaso v Felix*⁷¹⁴ whether section 1 applies to the defence of contributory intent. However, he points out that Booyesen J’s expressed reservation in *Wapnick v Durban City Garage*⁷¹⁵ was made before the Appellate Division accepted in *S v Ngubane*⁷¹⁶ that proof of intention does not necessarily exclude a finding of negligence.

Kotze⁷¹⁷ disagrees with McKerron’s remark that section 1 of the Act applies only to actions based on negligence and that it does not include intent, because the touchstone of a claim in terms of the Act is based on fault. Fault should be interpreted in a wider sense. Kotze agrees that the Act should be applied in instances where both parties acted with intent, for example, in cases such as *Stern v Podbrey*⁷¹⁸ where the court found that though both parties had acted negligently, their attitude had been reckless and fell rather under *dolus eventualis*. In this case, S, a director of a factory, tried driving a delivery van through a factory gate during a strike by factory workers, but factory workers and inciters tried to block the road by standing in the way. S hooted and shouted to them that he was going to drive through. The workers, however, stood their ground and refused to move, not caring about the consequences. P was knocked down and injured. Kotze J correctly submits that the attitude of the parties could rather be classified under intent than under negligence. As mentioned before, one should be careful of the term “reckless” as it may be confused with “gross negligence”.⁷¹⁹

⁷¹¹ Neethling and Potgieter *Delict* 163 fn 233.

⁷¹² 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.

⁷¹³ *Delict* 110-111.

⁷¹⁴ 1981 3 SA 865 (A) 877.

⁷¹⁵ 1984 2 SA 414 (D).

⁷¹⁶ 1985 3 SA 677 (A).

⁷¹⁷ 1956 *THRHR* 149.

⁷¹⁸ 1947 1 SA 350 (C).

⁷¹⁹ See chapter 2 par 2.2.1.

Kotze⁷²⁰ further states that the premise of the entire Act rests on considerations of fairness and justice. Furthermore, as regards fault, since there is no fixed norm according to which the respective degrees of blameworthiness of parties can be apportioned, it cannot be determined with mathematical precision – “it is a question, not of principle, but of proportion, of balance and relative emphasis and of weighing different considerations”.⁷²¹ This also appears to be the attitude in *General Accident Versekeringsmaatskappy SA Bpk v Uijs*⁷²² where the plaintiff deliberately refused to wear a seatbelt. According to the evidence led, the accident was caused as a result of the gross negligence of the driver. Van Heerden JA however took into account the plaintiff’s deliberate refusal to wear a seatbelt and reduced the plaintiff’s claim for damages by a third. He was in favour of 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.⁷²³

Malan and Pretorius⁷²⁴ refer to Strauss⁷²⁵ who has no doubt that “fault” in terms of section 1 of the Act includes intent:

“The word ‘encompasses’ in section 1(3) of the Act unequivocally signifies that the Legislator for purposes of section 1 did not wish to give a comprehensive definition of fault, and is a clear acknowledgement that the word ‘fault’ may also have other meanings. ‘Fault’ is a legal term and there is no indication in the words of the section that the Legislator wished to attach to it a different meaning than the common law meaning. It is a rule of the interpretation of statutes that if the Legislator uses a word which has an established legal meaning, a deviation from that meaning cannot be readily accepted. ‘Fault’ in its common law sense includes intent as well as negligence. It would therefore appear as if ‘contributory intent’ on the part of an aggrieved party who suffered damage due to the fault of another, should also lead to the consequences prescribed by section 1(1)(a).”

4.2.1.4 Conclusion

⁷²⁰ 1956 *THRHR* 187.

⁷²¹ Stated by Lord Wright in *British Fame (Owners) v McGregor (Owners)* 1943 AC 197 in respect of the apportionment of damages in the Maritime Conventions Act referred to by Kotze 1956 *THRHR* 187.

⁷²² 1993 4 SA 228(A).

⁷²³ Neethling and Potgieter *Delict* 166; cf 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 fn 251); see *infra* 128-129.

⁷²⁴ 1997 *THRHR* 156-157.

⁷²⁵ *Toestemming tot benadeling* 357-358.

In regard to section 1 of the Act, on the face of it, it seems that the legislature intended the Act to apply in instances of negligent wrongdoing. However, our courts have been faced with instances where either or both the plaintiff and the defendant have acted intentionally. In *Greater Johannesburg Transitional Metropolitan Council v ABSA Bank Ltd*⁷²⁶ the court, in trying to reach a “just and equitable” result (as provided for in section 1 of the Act) recognised the Act’s applicability where the plaintiff had fault in the form of contributory intent and the defendant, fault in the form of intent. Furthermore the view that intent is usually a more culpable form of fault and may include negligence is logical.

Therefore, in spite of the opposition of some of the authors mentioned above to section 1 of the Act applying in cases of contributory intent, the recognition of this defence in *Greater Johannesburg Transitional Metropolitan Council* has been welcomed by Neethling,⁷²⁷ Malan and Pretorius.⁷²⁸ On a practical note, even though Potgieter’s arguments are noteworthy, the courts have had to apply basic principles of delict to situations that were not previously envisaged at common law or at the time of the enactment of the Act. Fault does include intention and negligence and it is possible for both to be present simultaneously. Furthermore the courts’ main aim is to provide for a fair and equitable result as provided for in section 1 of the Act. The legislature must provide for the defence of contributory intent in terms of the Act to eradicate any doubt.⁷²⁹ The Apportionment of Loss Bill⁷³⁰ does specifically provide for the recognition of contributory intent, but the Bill has not yet been enacted and until such time the courts can at least rely on the judgment of *Greater Johannesburg Transitional Metropolitan Council* when faced with the plaintiff’s (or both parties’) fault in the form of intent.

4.2.2 Section 2 of the Act

4.2.2.1 Introduction

⁷²⁶ 1997 2 SA 591 (W).

⁷²⁷ Neethling and Potgieter *Delict* 173-174.

⁷²⁸ 1997 *THRHR* 159; see also Ahmed 2010 *THRHR* 703.

⁷²⁹ See *Du Bois et al Wille’s principles of South African law* 1149.

⁷³⁰ 2003.

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.⁷³¹ As mentioned before,⁷³² what is relevant in regard to this section and the defence of “contributory intent”, is the practical manner⁷³³ 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,⁷³⁴ or where the defendant and plaintiff both acted intentionally.⁷³⁵

For the purposes of this study it is important that section 2 provides for the recognition and regulation of a right of contribution between joint wrongdoers who are jointly and severally liable in delict for the same damage.⁷³⁶ 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.⁷³⁷

4.2.2.2 Meaning of “fault”

The word “liable” as it appears in the phrase “liable in delict” refers to enforceable legal responsibility. The Act does not contain a definition of the term “delict”. **McKerron**⁷³⁸ states that in the absence of a definition it must be assumed that it bears its generally accepted meaning. Therefore, liability in delict may arise out of intentional or negligent wrongdoing.⁷³⁹ Unlike section 1, there is nothing in section 2 which indicates that liability is limited to negligent wrongdoing only.⁷⁴⁰ 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

⁷³¹ Neethling and Potgieter *Delict* 265.

⁷³² *Supra* chapter 1 par 1.

⁷³³ As illustrated in the cases discussed *infra* at par 4.2.2.3.

⁷³⁴ See *supra* par 4.2.1.1 (2)(a).

⁷³⁵ See *supra* par 4.2.1.1 (2)(b); see Ahmed 2010 *THRHR* 702.

⁷³⁶ Neethling and Potgieter *Delict* 265; Van der Walt and Midgley *Delict* 246.

⁷³⁷ Neethling and Potgieter *Delict* 266.

⁷³⁸ *Delict* 109; SALRC Report 15.

⁷³⁹ See SALRC Report 15.

⁷⁴⁰ *Randbond Investments (Pty) Ltd v FPS (Northern Region) (Pty) Ltd* 1992 2 SA 608 (W) 619-621; Van der Walt and Midgley *Delict* 246-247.

negligence. Either of the wrongdoers is liable for the full extent of the loss.⁷⁴¹ **Kotze**⁷⁴² also submits that with regard to section 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.

4.2.2.3 Relevant case law and commentary

Randbond Investments (Pty) Ltd v FPS (Northern Region) (Pty) Ltd⁷⁴³ is the *locus classicus* for the view that the Act also applies to intentional, as opposed to negligent, joint wrongdoers. Tarry, an employee of the applicant (Randbond) was tasked with investing clients' funds and usually did so by obtaining a 60 day call deposit. Tarry contacted the respondent (FPS North) and was put through to Beaumont, an employee of the respondent. According to an agreement made between the two, certain moneys (R2 150 000: the "investment amount") were invested by the applicant with Beaumont and was according to the applicant placed with the United Building Society at an interest rate of 18,8 per cent for a period of 93 days. It was alleged by the applicant that Beaumont then advised him that NBS was prepared to pay 19 per cent for a period of 60 days, and this was accepted by Tarry who then made out a cheque to NBS for the investment amount (which was deposited on the same day). Tarry received a fraudulent certificate of investment with respect to the investment. The maturity date was thereafter further allegedly extended for a period of 31 days. On the investment date Tarry alleged that he called Beaumont to notify him about the maturity date and that he did not want to reinvest the investment amount, at which time Beaumont was supposed to account to Tarry. This never happened and it transpired that no 60 day notice deposit had ever been opened with NBS by Beaumont and that all that had been opened was a savings account with an amount of R600 remaining.⁷⁴⁴ The applicant averred that Beaumont had misappropriated the money and the applicant sued the respondent for payment of the amount. The respondent wanted to join NBS and two others as joint wrongdoers, thus third party notices were served on them. It was argued on behalf of

⁷⁴¹ *ABSA Bank Ltd v Bond Equipment (Pty) Ltd* 2001 1 SA 372 (SCA) par 11; *Nedcor Bank Ltd t/a Nedbank v Lloyd-Gray Lithographers (Pty) Ltd* par 11; Van der Walt and Midgley *Delict* 248 fn 35.

⁷⁴² 1956 *THRHR* 192.

⁷⁴³ 1992 2 SA 608 (W).

⁷⁴⁴ *Supra* 609-610.

NBS that any delictual liability on the part of the joint wrongdoers would be based on intent and that the Act was not applicable to intentional wrongdoing.⁷⁴⁵

The merits of the application according to Mahomed J had not been argued and the application was postponed *sine die*. However, in light of the facts, Mahomed J made some important submissions⁷⁴⁶ with regard to section 2 of the Act. He⁷⁴⁷ 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”.⁷⁴⁸

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. Mahomed J⁷⁴⁹ in answer to this argument stated:

“Apportioning liability between joint tortfeasers 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 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’.”

Neethling⁷⁵⁰ 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 section 2(1) includes delicts committed negligently as well intentionally.⁷⁵¹ Potgieter⁷⁵² submits that the outcome of this decision better satisfies one’s sense of justice but still amounts to the incorrect application of the Act.

⁷⁴⁵ See SALRC Report 17-18.

⁷⁴⁶ *Randbond Investments (Pty) Ltd v FPS (Northern Region) (Pty) Ltd* 1992 2 SA 608 (W) 622.

⁷⁴⁷ *Supra* 619.

⁷⁴⁸ *Supra* 620.

⁷⁴⁹ *Supra* 620-621.

⁷⁵⁰ 1998 *THRHR* 519-520.

⁷⁵¹ See *Randbond Investments (Pty) Ltd v FPS (Northern Region) (Pty) Ltd* 1992 2 SA 608 (W) 619-620.

⁷⁵² 1998 *THRHR* 740.

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 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. This case, like the case of *Greater Johannesburg Transitional Metropolitan Council v ABSA Bank Ltd*,⁷⁵³ are groundbreaking cases which support, albeit by analogy in *Randbond Investments*, the defence of contributory intent applying in instances of limitation of liability.

Holscher v ABSA Bank⁷⁵⁴ The plaintiff instituted an action against the first defendant (collecting bank) for payment in respect of damages on the ground that the first defendant had collected a stolen cheque on behalf of a thief, D. The cheque was issued in respect of the plaintiff's pension moneys. The plaintiff had arranged with D, a brokering company, that his pension moneys would be invested with the second defendant. D had instructed the pension fund to send a cheque in favour of the second defendant to it. The cheque in favour of the second defendant, drawn on S Bank, was crossed and marked "not transferable" and posted to D. Instead of investing the money with the second defendant, D deposited the cheque into D's own account with T Bank (a division of the first defendant). T Bank, notwithstanding the crossing of the cheque and the "not transferable" marking thereon, collected the money from S Bank and credited D's account. Soon thereafter D was liquidated. The plaintiff was unable to prove a claim against D in liquidation. At the end of the trial of the action, the first defendant closed its case without adducing evidence. The issues to be decided upon included *inter alia* whether the plaintiff was entitled to recover damages from the first defendant.⁷⁵⁵

It was held *inter alia* that T Bank had received payment of the cheque which it was not entitled to and that this was unlawful and negligent.⁷⁵⁶ Van Dijkhorst J⁷⁵⁷ held

⁷⁵³ 1997 2 SA 591 (W).

⁷⁵⁴ 1994 2 SA 667 (T).

⁷⁵⁵ *Supra* 696-670.

⁷⁵⁶ *Supra* 672.

that the plaintiff had a right of action against the first defendant based on the unlawful and negligent conduct of T Bank. The evidence disclosed that a liquidation dividend of R2400 would probably have been received from D had the plaintiff lodged a claim against it and further that the actual reduction of the plaintiff's *universitas* was the amount of the value of the cheques minus the dividend he would have received had he proved a claim in liquidation.⁷⁵⁸ Judgment was granted in favour of the plaintiff against the first defendant.

According to Potgieter⁷⁵⁹ this decision partially carries into effect the common law position that the negligent bank and thief cannot be joint wrongdoers for purposes of apportionment (due to Van Dijkhorst J finding that the plaintiff's claim be reduced by the dividend he would have received). Potgieter⁷⁶⁰ submits that the intentional conduct of a wrongdoer is a defence against the claim instituted against the negligent wrongdoer and the plaintiff should in the first instance turn to the intentional wrongdoer (the thief) for his claim against the negligent wrongdoer to succeed. Potgieter⁷⁶¹ suggests that if the result is inequitable, because the owner of a stolen cheque fails in his claim against a negligent collecting bank, or because the bank and thief are not considered to be joint wrongdoers, or because the claimant's claim is reduced by the dividend it would have been entitled to (as in this case), neither the common law nor the Act offers a satisfactory solution and the legislature must remedy this.

Dendy does not agree. He⁷⁶² submits that the thief, D, and the first defendant were joint wrongdoers in relation to the loss suffered by the plaintiff. Each were jointly and severally liable, and the plaintiff as *dominus litis* was entitled to recover the full amount from whichever joint wrongdoer he chose. Dendy points out that if this judgment were correct, then every joint wrongdoer would be able to point to his fellow wrongdoer and contend that the value of a right of action against the other joint wrongdoer must be included in the value of the plaintiff's estate after the delict, and hence excluded from the plaintiff's claim against him. If that was correct then the

⁷⁵⁷ *Supra* 673.

⁷⁵⁸ *Supra* 675.

⁷⁵⁹ SALRC Report 23.

⁷⁶⁰ SALRC Report 23.

⁷⁶¹ 1998 *THRHR* 738; SALRC Report 23-24.

⁷⁶² Dendy 1998 *THRHR* 514.

plaintiff would not receive any compensation at all from the defendant unless the total sum was recoverable in damages from all joint wrongdoers. Such a loss would be contrary to the scheme of section 2 of the Act. Dendy⁷⁶³ submits that in such cases no damages would be claimable against the negligent collecting bank in the overwhelming majority of cases of stolen cheques; only in the event of sequestration or liquidation of the thief would an action be available against the collecting bank, and then only for the difference between the amount stolen and the sum recoverable from the estate of the insolvent thief. He opined that this is unacceptable. Dendy acknowledges that it could just as effectively be argued in accordance with the view of the common law regarding intentional and negligent wrongdoers that it would be unfair to hold a negligent bank fully liable whereas the thief, who acted with intent, in most cases gets away with it.

Kelly takes the view⁷⁶⁴ that in this case the plaintiff failed to institute a claim timeously for a dividend against the liquidated estate and since it was too late for the negligent collecting bank to exercise its right of recourse against the estate, the court may have reached the decision that the plaintiff should be penalised for his neglect. Therefore, had the negligent collecting bank still had a right of recourse against the liquidated estate in the form of a claim for a dividend against that estate, the court might have ordered the negligent collecting bank to pay the full amount of damages suffered by the true owner of the cheque.

This decision was mainly criticised for the calculation of the plaintiff's claim and led to a debate on whether or not the thief and bank were regarded as joint wrongdoers. If they were regarded as joint wrongdoers then this decision would have confirmed that the Act was applicable to intentional wrongdoing at least in terms of section 2 of the Act.

Lloyd-Gray Lithographers (Pty) Ltd v Nedcor Bank t/a Nedbank⁷⁶⁵ The plaintiff had received cheques in payment of amounts due to it. The cheques were deposited unlawfully into S's banking account instead of the plaintiff's banking account which was held with the defendant (collecting) bank. The defendant negligently collected

⁷⁶³ 1998 *THRHR* 515.

⁷⁶⁴ 2001 *SA Merc LJ* 528.

⁷⁶⁵ 1998 2 SA 667 (W).

payment of the cheques for S instead of for the plaintiff, who was the true owner of the cheques. The plaintiff instituted a delictual action against both the defendant and S. The court, in its determination of the matter, first had to consider whether the defendant (collecting bank) who had acted negligently and a thief of the cheques, who acted intentionally were joint wrongdoers in terms of section 2 of the Act.⁷⁶⁶ It was argued on behalf of the plaintiff that the defendant and S were concurrent wrongdoers at common law and therefore by definition of joint wrongdoers in terms of the Act, were jointly and severally liable to the plaintiff for the loss suffered.⁷⁶⁷ In contradistinction it was argued on behalf of the defendant *inter alia* that the provisions of section 2(1) of the Act were not applicable as the defendant and S were separate wrongdoers and therefore not amenable to the Act and further that the Act did not apply in instances where one wrongdoer was guilty of intentional wrongdoing and the other of negligence.⁷⁶⁸

Boruchowitz J⁷⁶⁹ held that the combined independent wrongful acts of both the defendant and S produced the same damage, namely the loss of its claim against the drawers of the cheques. Therefore the defendant and S were joint wrongdoers in terms of section 2 of the Act. Boruchowitz J,⁷⁷⁰ turning to the question of whether the Act applied in instances where one wrongdoer was guilty of intentional wrongdoing and the other of negligence, found the cases of *Minister Van Wet en Orde v Ntsane*⁷⁷¹ and *Greater Johannesburg Transitional Metropolitan Council v ABSA Bank Ltd t/a Volkskas Bank*⁷⁷² not in *pari materia*.⁷⁷³ He preferred to take note of the decision of *Ranbond Investments (Pty) Ltd v FPS (Northern Region) (Pty) Ltd* (where both wrongdoers acted intentionally) where the scope of section 2 of the Act was considered, and where Mahomed J⁷⁷⁴ recognised that the Act was applicable to intentional joint wrongdoers who acted intentionally and opined that apportioning

⁷⁶⁶ *Supra* 670.

⁷⁶⁷ *Supra* 670-671.

⁷⁶⁸ *Supra* 671.

⁷⁶⁹ *Supra* 672.

⁷⁷⁰ *Supra* 672-673.

⁷⁷¹ 1993 1 SA 944 (O).

⁷⁷² 1997 2 SA 591 (W).

⁷⁷³ See Dendy 1998 *THRHR* 516-517 who agrees with Boruchowitz.

⁷⁷⁴ 1992 2 SA 608 (W) 619; see *supra* 114-116 for a discussion of *Ranbond Investments (Pty) Ltd v FPS (Northern Region) (Pty) Ltd* 1992 2 SA 608 (W).

liability between intentional wrongdoers is not an insuperable exercise.⁷⁷⁵ According to Boruchowitz J⁷⁷⁶ there is “no reason in principle as to why there cannot be an apportionment of 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”.⁷⁷⁷ He⁷⁷⁸ referred to *S v Zoko*⁷⁷⁹ where it was held that *dolus* is merely a species or a particular form of blameworthiness which constitutes *culpa*. Boruchowitz J⁷⁸⁰ concluded:

“[A]ppportioning 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.”

On appeal⁷⁸¹ the court held that the bank and S were concurrent wrongdoers at common law. In terms of common law one concurrent wrongdoer may be sued for the full amount of the plaintiff’s loss, as concurrent wrongdoers are liable *in solidum*.⁷⁸² Therefore the plaintiff was able to recover its full loss from the bank and for the purpose of calculating the loss the respondent’s right of action against S was disregarded.⁷⁸³

Neethling⁷⁸⁴ as well as Dendy⁷⁸⁵ commend the decision of the trial court for establishing the principle that two persons causing the same damage to a third person, the one by intent (a thief of cheques) and the other negligently (a collecting bank) are joint wrongdoers for purposes of section 2 of the Act; and that⁷⁸⁶ the apportionment of liability between intentional and negligent wrongdoers involved an

⁷⁷⁵ *Supra* 620-621.

⁷⁷⁶ *Lloyd-Gray Lithographers (Pty) Ltd v Nedcor Bank t/a Nedbank* 1998 2 SA 667 (W) 672-673.

⁷⁷⁷ Boruchowitz J (*supra* 673) also referred to *S v Ngubane* 1985 3 SA 677 (A) 687; Neethling, Potgieter and Visser *Delict* 123-124; Boberg *Delict* 273-274.

⁷⁷⁸ *Supra* 673.

⁷⁷⁹ 1983 1 SA 871 (N) 896; see *supra* 109 fn 706.

⁷⁸⁰ *Lloyd-Gray Lithographers (Pty) Ltd v Nedcor Bank t/a Nedbank* 1998 2 SA 667 (W) 673.

⁷⁸¹ *Nedcor Bank Ltd t/a Nedbank v Lloyd-Gray Lithographers (Pty) Ltd* 2000 4 SA 915 (A).

⁷⁸² See *Union Government (Minister of Railways) v Lee* 1927 AD 202; SALRC Report 19.

⁷⁸³ SALRC Report 19-20.

⁷⁸⁴ 1998 *THRHR* 518-519; cf SALRC Report 22.

⁷⁸⁵ 1998 *THRHR* 512; cf Potgieter 1998 *THRHR* 732.

⁷⁸⁶ *Lloyd-Gray Lithographers (Pty) Ltd v Nedcor Bank t/a Nedbank* 1998 2 SA 667 (W) 671, 673; Potgieter 1998 *THRHR* 731.

assessment of the degrees of blameworthiness in accordance with what the court considered to be just and equitable.⁷⁸⁷

Neethling⁷⁸⁸ 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*⁷⁸⁹ that if a wrongdoer 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 Apportionment of Damages Act, as accepted by *Jones v Santam Ltd.*⁷⁹⁰ This is done by reflecting the wrongdoers' degree of deviation from the norm of the reasonable person expressed as a percentage.⁷⁹¹ Neethling supports Mahomed J's⁷⁹² 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 logical⁷⁹³ 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 120:60.⁷⁹⁴ Neethling⁷⁹⁵ concludes:

⁷⁸⁷ *Supra* 673.

⁷⁸⁸ 1998 *THRHR* 520.

⁷⁸⁹ 1985 3 SA 677 (A).

⁷⁹⁰ 1965 2 SA 542 (A).

⁷⁹¹ Neethling 1998 *THRHR* 520.

⁷⁹² *Randbond Investments (Pty) Ltd v FPS (Northern Region) (Pty) Ltd* 1992 2 SA 608 (W) 620.

⁷⁹³ *Supra* 620.

⁷⁹⁴ Neethling 1998 *THRHR* 521.

⁷⁹⁵ Neethling 1998 *THRHR* 521.

“The wrongdoer’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 joint wrongdoers ‘in a just and equitable’ manner, having regard to the degree of their ‘fault in relation to the damage’.”

Neethling⁷⁹⁶ points out that in this case S was not joined as a party and the damages could therefore not be apportioned between S and the banker. Boruchowitz J⁷⁹⁷ was therefore correct in finding that the defendant banker was liable for the plaintiff’s full damage. Neethling⁷⁹⁸ states that for purposes of development of the law, it is a pity that S was not before the court. The court would then have been compelled to apportion the damages between the negligent banker and the thief, in accordance with their respective degrees of culpability.

Dendy⁷⁹⁹ and Kelly⁸⁰⁰ agree that had the court in this case decided according to the principles laid down in *Holscher v ABSA Bank*,⁸⁰¹ namely, that the true owner’s claim against the collecting bank had to be reduced by the amount of the claim against S, it would have led to a total elimination, rather than a reduction, of the true owner’s claim against the collecting bank. They suggest that the effect would be unfair because no damages would be claimable against the negligent collecting bank in the overwhelming majority of cases concerning stolen cheques. Kelly⁸⁰² further submits that it would be unacceptable that a negligent collecting bank cannot be held liable for the damage it caused given that had it not been for its negligence, a thief would not have succeeded with his intentional wrongdoing. She correctly states that it is also unfair and difficult for the courts to establish what amount of damages can in fact be recovered from a wrongdoer who is not a party before the court; a court should only be required to make a decision based on the facts before it.

In contrast, Potgieter⁸⁰³ 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. Potgieter⁸⁰⁴ submits that, in his opinion, Boruchowitz J is wrong in this case to hold that the

⁷⁹⁶ 1998 *THRHR* 521-522.

⁷⁹⁷ *Lloyd-Gray Lithographers (Pty) Ltd v Nedcor Bank t/a Nedbank* 1998 2 SA 667 (W) 675.

⁷⁹⁸ 1998 *THRHR* 522.

⁷⁹⁹ 1998 *THRHR* 515; cf SALRC Report 22.

⁸⁰⁰ 2001 *SA Merc LJ* 528.

⁸⁰¹ 1994 2 SA 667 (T).

⁸⁰² 2001 *SA Merc LJ* 528.

⁸⁰³ 1998 *THRHR* 732.

⁸⁰⁴ 1998 *THRHR* 734.

meaning of “fault” in section 1(1)(a), as well as the judgments of *Minister van Wet en Orde v Ntsane*⁸⁰⁵ and *Greater Johannesburg Transitional Metropolitan Council v ABSA Bank Ltd t/a Volkskas Bank*,⁸⁰⁶ both dealing with the meaning of “fault” in section 1(1)(a), was irrelevant in determining the meaning of “fault” in section 2. In establishing the meaning of “fault” in section 2 the court should, in Potgieter’s opinion, have considered its meaning in section 1. He⁸⁰⁷ argues that it would also be unfair to hold a negligent collecting bank liable for the full amount of damages while the intentional thief escapes liability completely. He⁸⁰⁸ further submits that the court moved even further beyond the boundaries of the Act, by holding a (merely) negligent bank jointly and severally liable as joint wrongdoer with a thief whose conduct had been far more blameworthy. On the other hand, it would not be acceptable that the bank, being negligent, completely escape liability (which would have been the result of Potgieter’s interpretation of the Act).

Be that as it may, this judgment is nevertheless important since it approves of the decision in *S v Ngubane*⁸⁰⁹ that where there is intention, negligence is simultaneously present. Furthermore Neethling’s suggestions provide an acceptable 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. This judgment, like *Greater Johannesburg Transitional Metropolitan Council v ABSA Bank Ltd* 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 and to take note of the fact that it is not impossible to apportion damages in instances of intentional wrongdoing.

In *ABSA Bank Ltd v Bond Equipment (Pretoria) (Pty) Ltd*⁸¹⁰ and other similar cases where an employee had stolen cheques from his employer and deposited them into an account at the defendant bank which negligently collected the proceeds for the thief, such as in *Energy Measurements (Pty) Ltd v First National Bank of South*

⁸⁰⁵ 1993 1 SA 560 (A).

⁸⁰⁶ 1997 2 SA 591 (W).

⁸⁰⁷ Potgieter 1998 *THRHR* 738.

⁸⁰⁸ Potgieter 1998 *THRHR* 740.

⁸⁰⁹ 1985 3 SA 677 (A).

⁸¹⁰ 2001 1 SA 372 (SCA).

Africa Ltd,⁸¹¹ *Columbus Joint Venture v ABSA Bank Ltd*,⁸¹² and *Ess-Kay Electronics PTE Ltd v First National Bank of Southern Africa Ltd*,⁸¹³ the courts have avoided the application and interpretation of section 2 of the Act by interpreting “scope of employment” narrowly and finding the employer not vicariously liable for the dishonest employees’ conduct.⁸¹⁴ As such, these cases did not deal with apportioning liability between joint wrongdoers and is thus not relevant for the purposes of this study.

As indicated, Potgieter opposes the view that an intentional wrongdoer and a negligent wrongdoer qualify as joint wrongdoers for purposes of the Act. His arguments merit further discussion. According to him⁸¹⁵ the legislator obviously intended “fault” in both sections 1 and 2 to have the same meaning. Therefore if it is accepted that “fault” in section 1 does not include intent, but is limited to negligence, the inevitable inference is that “fault” in section 2 also means only negligence.⁸¹⁶ Potgieter⁸¹⁷ further states that the intention of the legislature was to leave the common law unchanged in this respect as there was no reason to include intent in the meaning of fault in section 2. It would be absurd to limit the meaning of “fault” in section 1 to negligence (as contributory intent is clearly not included in section 1) but to allow a different form of fault between joint wrongdoers in terms of section 2 without giving any indication that the meaning of fault, which is *prima facie* the same in both sections, has changed for purposes of apportionment in terms of section 2. He⁸¹⁸ submits that where an Act intends to change the common law, such intention must be expressly stated. Consequently the common law rule is still in operation irrespective of the decisions of *Ranbond Investments (Pty) Ltd v FPS (Northern*

⁸¹¹ 2000 2 All SA 396 (W).

⁸¹² 2000 2 SA 491 (W).

⁸¹³ 1998 4 SA 1102 (W).

⁸¹⁴ SALRC Report 20-21.

⁸¹⁵ Potgieter 1998 *THRHR* 735.

⁸¹⁶ As authority, Potgieter 1998 *THRHR* 735 refers to the following quotation: “There is undoubtedly considerable authority which supports the view that one joint wrongdoer cannot claim a contribution from another joint wrongdoer where the wrongful delictual act had been perpetrated intentionally. (McKerron *Law of Delict in South Africa* 1st ed at 73; I van Zyl Steyn ‘Contribution Between Joint Tortfeasors’ 1926 (43) *SALJ* 251 at 254, 256 and 267; *Digest* 27.3.1 par 13; Voet 9.2.12; *Digest* 27.8.7; M de Villiers *The Roman-Dutch Law of Injuries* at 45; *Walker v Matterson* 1936 NPD 495 at 501; *Toerien v Duncan* 1932 OPD 180 at 203)”; *Ranbond Investments (Pty) Ltd v FPS (Northern Region) (Pty) Ltd* 1992 2 SA 608 (W) 619; cf Ahmed 2010 *THRHR* 703.

⁸¹⁷ 1998 *THRHR* 735.

⁸¹⁸ See SALRC Report 22-23.

Region) (Pty) Ltd and Lloyd-Gray Lithographers (Pty) Ltd v Nedcor Bank t/a Nedbank.

Potgieter⁸¹⁹ refers to two other factors which confirm the intention of the legislator to limit the provisions of section 2 to negligent joint wrongdoers only: firstly, in section 2(14) of the Act, the “last opportunity” rule between joint wrongdoers is also abolished (as is the case with contributory negligence in section 1(1)(a)). He opined that if the legislator intended also to dispose of contributory intent as a defence between joint wrongdoers, this would have been done expressly, as in the case of the “last opportunity” rule. Secondly, section 3 of the Act expressly makes the provisions of section 2 applicable to liability in terms of the Motor Vehicle Insurance Act 29 of 1942 for damage arising from the driving of a motor vehicle. It is a well-known fact that liability in terms of this Act (and its successors) is based virtually exclusively on negligence, and not on intent. However, it may be argued that it does not matter whether the form of fault is in the form of intent or negligence, for even in motor vehicle accidents where intent is present, negligence may be simultaneously present. For example, in the case of *Shield Insurance Co Ltd v Booyesen*⁸²⁰ four men intentionally attacked the deceased (Booyesen) in a street, they threw stones at him and one of them drove the motor vehicle over him (allegedly either deliberately or negligently). Booyesen subsequently died five minutes later.⁸²¹ One of the questions raised in the court *a quo* was whether the driving of the motor car caused his death thereby rendering the insurance company liable. The court held that the driving of the motor vehicle was the cause of his death. The driver of the car was indicted for the murder of the deceased, and his other assailants were indicted for assault with intent to do grievous bodily harm.⁸²² Clearly the form of fault was intent but the particular Act was in any case applicable. In practice there are many instances where fault is in the form of intent and this has been recognised as applicable in terms of section 1 of the Act as *per Greater Johannesburg Transitional Metropolitan Council v ABSA Bank Ltd* and in section 2 of the Act as *per Randbond Investments (Pty) Ltd v FPS (Northern Region) (Pty) Ltd*.

⁸¹⁹ 1998 *THRHR* 735-736.

⁸²⁰ 1979 3 953 (A).

⁸²¹ *Supra* 957.

⁸²² *Supra* 961.

Potgieter⁸²³ states that if it is assumed that “fault” in section 2 does include intent (as held in the *Randbond Investments (Pty) Ltd v FPS (Northern Region) (Pty) Ltd*), apportionment between joint wrongdoers would only be possible if both joint wrongdoers had the same form of fault (whether negligence or intent). According to the common law, apportionment between intentional and negligent joint wrongdoers was impossible and the legislator did not intend the disposal of this principle, no matter how practicable such apportionment seems to be between intentional and negligent wrongdoers. With regard to the argument that where intent is present so negligence is simultaneously present, Potgieter⁸²⁴ submits that this approach could possibly provide a loophole to effect apportionment of damages between intentional and negligent wrongdoers in terms of the Act but should rather be avoided to keep the distinction between intent and negligence and to avoid defeating the intention of the legislator. Changing the legal position, if this is deemed necessary, should be left to the legislature. Although Potgieter’s arguments are logical and cannot be faulted, it nevertheless seems that his views can be circumvented by utilising the approach in *S v Ngubane*⁸²⁵ as he himself admits.

Unlike Potgieter, Kelly⁸²⁶ is comfortable with the Act also applying to intentional joint wrongdoers. She states that, generally, liability in delict may arise out of intentional or negligent wrongdoing. Thus if the requirement of delictual liability is met, the Act will apply where both joint wrongdoers acted negligently. There appears to be nothing in the plain and ordinary meaning of section 2 of the Act that implies that liability is limited to comparable negligent wrongdoing only. Therefore section 2 is applicable to joint wrongdoers who acted intentionally as *per Randbond Investments (Pty) Ltd v FPS (Northern Region) (Pty) Ltd*, notwithstanding the common law rule that there can be no question of contribution between intentional wrongdoers.⁸²⁷

The recognition of the defence of "contributory intent" stemming from *Greater Johannesburg Transitional Metropolitan Council v ABSA Bank Ltd* and further that apportionment could be applied between joint wrongdoers whose fault was in the

⁸²³ 1998 *THRHR* 737.

⁸²⁴ 1998 *THRHR* 737.

⁸²⁵ 1985 3 SA 677 (A). See the discussion *supra* par 4.2.1.3.

⁸²⁶ 2001 *SA Merc LJ* 520.

⁸²⁷ McKerron *Delict* 309; Kelly 2001 *SA Merc LJ* 520.

form of *dolus*, stemming from *Randbond Investments (Pty) Ltd v FPS (Northern Region) (Pty) Ltd* has been welcomed. There are anomalies in the Act which need to be addressed, but it should be borne in mind that before cases like *Lloyd-Gray Lithographers (Pty) Ltd v Nedcor Bank t/a Nedbank* cases of apportionment between negligent and intentional wrongdoers were rare.⁸²⁸

4.3 Legal reform

4.3.1 Report of 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 and published a report thereon in July 2003 (hereinafter referred to as the Report). In the summary of the Report⁸²⁹ the following statement is of relevance:

“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”.⁸³⁰ 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

⁸²⁸ Potgieter 1998 *THRHR* 737; Ahmed 2010 *THRHR* 703.

⁸²⁹ SALRC Report xi-xvi.

⁸³⁰ SALRC Report 26.

confines of the Act for grounds for a just and equitable basis for apportionment while they incorrectly assert that the Act justifies their findings”.⁸³¹

Fortunately, the Report⁸³² recommends “fault” to include both intention and negligence and expressly refers to intention in the definition of “wrong” in section 1:

[W]rong” 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.

This seems also to be the trend in other countries.⁸³³ For example, the New Zealand Law Commission⁸³⁴ 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.”⁸³⁵

Section 5 of the draft Civil Liability and Contribution Act⁸³⁶ 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”.⁸³⁷ In Canada, the Ontario Law Reform Commission in their report on “contribution among wrongdoers and contributory negligence”⁸³⁸ also makes it clear that their proposed draft Act by its definition of “fault” includes all torts, whether or not intentional.⁸³⁹

Of great importance is that the SALRC advocates not only that contributory intent is also relevant when apportioning damages, but, even more significantly, a broader

⁸³¹ SALRC Report 26.

⁸³² SALRC Report 27.

⁸³³ See SALRC Report 24-25.

⁸³⁴ At 83 of their preliminary paper 19 on the Apportionment of Civil Liability (NZLC Report 47).

⁸³⁵ SALRC Report 24-25.

⁸³⁶ Act 199.

⁸³⁷ 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 (<http://www.lawcom.govt.nz/project/civil-contribution> (accessed 28 February 2011)).

⁸³⁸ 1988.

⁸³⁹ SALRC Report 25.

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*⁸⁴⁰ was also in favour of this broader approach when seeking “justice and equity” with regard to the apportionment of liability.⁸⁴¹

4.3.2 Dogmatic views

McKerron⁸⁴² suggests that the defect in the Act can be remedied by restoring the definition of “fault” contained in the Bills of 1952 and 1955, “where fault was defined to include a breach of a statutory duty, or any other act or omission which gives rise to delictual liability”.

Kelly⁸⁴³ recommends a comprehensive definition of “fault” to include both negligent and intentional conduct and that a defence of contributory intent should be allowed. She further agrees with the submission made in *Randbond Investments (Pty) Ltd v FPS (Northern Region) (Pty) Ltd* that the difficulty of apportioning liability between joint wrongdoers who both acted intentionally can be overcome by taking their degrees of culpability (blameworthiness) into account, and with the suggestion made by Neethling that if a person acts intentionally, he simultaneously acts negligently and therefore that an intentional act deviates 100 per cent from the norm of a reasonable person. She suggests that the Act should apply in instances where both the plaintiff and the defendant acted intentionally contributing to the plaintiff’s loss and in instances where both wrongdoers acted intentionally causing the same damage.⁸⁴⁴ Kelly⁸⁴⁵ points out that granting an intentional thief a right of contribution against a negligent bank as *per* section 2 of the Act may not be satisfactory and suggests that perhaps a subsection could be added to the effect that in instances where one wrongdoer acted negligently and the other intentionally in causing the same damage to a third party, a condition should be included that in such cases the

⁸⁴⁰ 1993 4 SA 228 (A); see *supra* 111 for discussion of this case; see also Neethling and Potgieter 1994 *THRHR* 131

⁸⁴¹ *Supra* 229.

⁸⁴² 1968 *SALJ* 20; SALRC Report 26.

⁸⁴³ 2001 *SA Merc LJ* 529; SALRC Report 26.

⁸⁴⁴ Ahmed 2010 *THRHR* 703.

⁸⁴⁵ 2001 *SA Merc LJ* 529.

right of contribution will be at the disposal of the negligent wrongdoer alone. Such a condition will prevent an intentional wrongdoer from claiming a contribution from a negligent wrongdoer. This is in line with clause 11(2) of the draft Bill which provides that where, in the case of two joint wrongdoers, the one acts negligently and the other intentionally, “a joint wrongdoer whose wrong consists of the failure to prevent another’s intentional wrong is not liable to pay a contribution to that other person”.

Potgieter⁸⁴⁶ urges the legislature to act quickly to identify *lacunae* in the law and rectify them. Therefore priority should be given to the revision of the law in this area. Even though the Bill⁸⁴⁷ has been prepared to replace the current Act, it has unfortunately not yet been promulgated - nine 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.

4.4 Comparative law

In this paragraph it is intended to ascertain whether and to what extent contributory intent has been recognised as a defence limiting delictual liability in a few foreign legal systems.

4.4.1. English law

The English law of torts follows a casuistic approach and therefore recognises specific torts with their own rules.⁸⁴⁸ Thus a wrongdoer can only be liable if all the requirements for the specific tort are met.⁸⁴⁹ 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.⁸⁵⁰ 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

⁸⁴⁶ 1998 *THRHR* 518; SALRC Report 26.

⁸⁴⁷ Apportionment of Loss Bill 2003.

⁸⁴⁸ 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.

⁸⁴⁹ Neethling and Potgieter *Delict* 4.

⁸⁵⁰ Williams *Joint torts* 197-198.

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.⁸⁵¹

It is established that fault in terms of the Contributory Negligence Act 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.⁸⁵² In *Reeves v Commissioner of Police for the Metropolis*,⁸⁵³ 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).⁸⁵⁴

Section 1 (1) of the Contributory Negligence Act⁸⁵⁵ 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”.⁸⁵⁶ The Act itself refers to “share in the responsibility”⁸⁵⁷ whereas our Act is based only on fault.⁸⁵⁸

⁸⁵¹ Clerk and Lindsell *Torts* 382.

⁸⁵² Clerk and Lindsell *Torts* 176.

⁸⁵³ 2000 1 AC 360; see *supra* chapter 3 par 3.6.1.

⁸⁵⁴ Clerk and Lindsell *Torts* 176.

⁸⁵⁵ Of 1945.

⁸⁵⁶ Rogers in Magnus and Martin-Casals (eds) *Contributory negligence* 61.

⁸⁵⁷ See s 1 Contributory Negligence Act of 1945.

⁸⁵⁸ See s 1 Apportionment of Damages Act of 1956.

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).⁸⁵⁹ The exclusion of the defence conforms to public policy in that the defendant's wrongful intention outweighs the plaintiff's negligence so as to cancel any responsibility on the part of the plaintiff.⁸⁶⁰ 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. 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.⁸⁶¹

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)*,⁸⁶² 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 exact compliance of 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 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

⁸⁵⁹ See *supra* par 4.2.1.1 (1).

⁸⁶⁰ Williams *Joint torts* 198.

⁸⁶¹ Rogers in Magnus and Martin-Casals (eds) *Contributory negligence* 61-62.

⁸⁶² 2002 UKHL 43 2003; 1 AC 959; Rogers in Magnus and Martin-Casals (eds) *Contributory negligence* 62 fn 21.

held that PNS's contention was defeated by the rule that contributory negligence could not apply to a claim of fraud (intentional wrongdoing).⁸⁶³ This decision which conformed to a strict interpretation of the Act, applying to contributory negligence only, no doubt accords with Potgieter's submissions discussed above.⁸⁶⁴

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.⁸⁶⁵

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.⁸⁶⁶

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 consent⁸⁶⁷ 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)*.

4.4.2. Australian Law

Contributory fault in Australia is regulated by common law as well by statute. The legislation regulating apportionment of fault in Australia is based on the English Contributory Negligence Act.⁸⁶⁸ The prescribed criterion is the plaintiff's "share of

⁸⁶³ Rogers in Magnus and Martin-Casals (eds) *Contributory negligence* 62.

⁸⁶⁴ See *supra* 117 as well as par 4.2.1.2.

⁸⁶⁵ Rogers in Magnus and Martin-Casals (eds) *Contributory negligence* 60.

⁸⁶⁶ See *Surtees v Kingston on Thames BC* 1992 PIQR 101; Rogers in Magnus and Martin-Casals (eds) *Contributory negligence* 71.

⁸⁶⁷ Williams *Joint torts* 197-198.

⁸⁶⁸ Of 1945; Fleming *Torts* 306.

responsibility” and paramount is the element of fault.⁸⁶⁹ A comparison of the plaintiff’s and defendant’s fault is taken into account in assessing damages awarded to the plaintiff.⁸⁷⁰ The degrees of fault may range from trivial inadvertence to the grossest recklessness. For example, deliberate disregard for safety rules must 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 master of the situation.⁸⁷¹ Although there is authority from the High Court to the effect that a reduction of 100 per cent is not possible,⁸⁷² statutes in most jurisdictions now expressly allow this.⁸⁷³ 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.⁸⁷⁴ 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.⁸⁷⁵ 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 ex 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.⁸⁷⁶

In principle even if the defendant was careless, it is possible that the plaintiff’s conduct will be held to be the sole cause of the damage, but such a finding is

⁸⁶⁹ Fleming *Torts* 307-308.

⁸⁷⁰ Fleming *Torts* 307.

⁸⁷¹ Fleming *Torts* 308.

⁸⁷² *Wynbergen v Hoyts Corporation Pty Ltd* 1997 149 ALR 25.

⁸⁷³ The exceptions are South Australia, Western Australia and the Northern Territory; Trindade, Cane and Lunney *et al Torts* 689-690 fn 75.

⁸⁷⁴ Trindade, Cane and Lunney *et al Torts* 690.

⁸⁷⁵ Trindade, Cane and Lunney *et al Torts* 697.

⁸⁷⁶ *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 of unsound mind); Trindade, Cane and Lunney *et al Torts* 704 fn173.

unlikely where both parties have been at fault.⁸⁷⁷ 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.⁸⁷⁸

It has been held that the apportionment legislation is not applicable to intentional torts such as assault, battery, conversion and deceit which suggest that the defence is only available where the liability is based on negligence. The defence of contributory negligence is generally denied where the defendant acted intentionally while the plaintiff acted negligently⁸⁷⁹ (like in our law).⁸⁸⁰ In Western Australia apportionment applies to "any claim for damages founded on an allegation of negligence". This probably excludes intentional or strict liability torts.⁸⁸¹ 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.⁸⁸²

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 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.

4.4.3. Israeli law

⁸⁷⁷ *McKew v Holland & Hannen* 1970 171 CLR 506; Trindade, Cane and Lunney *et al Torts* 688 fn 58.

⁸⁷⁸ Trindade, Cane and Lunney *et al Torts* 688 fn 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.

⁸⁷⁹ Williams *Joint torts* 198 ; Trindade, Cane and Lunney *et al Torts* 689 fn 66.

⁸⁸⁰ See *supra* par 4.2.1.1 (1).

⁸⁸¹ S 54(7) Wrongs Act 1954; see s 3 of Law Reform (Contributory Negligence and Tortfeasers' Contribution) Act 1947 (WA); Trindade, Cane and Lunney *et al Torts* 689 fn 69.

⁸⁸² Trindade, Cane and Lunney *et al Torts* 689.

Generally contributory fault constitutes a statutory defence which is incorporated in the Civil Wrongs Ordinance (CWO) and applies to reduce 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, the plaintiff's contributory negligence 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.⁸⁸³

Section 68 of the CWO⁸⁸⁴ 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."⁸⁸⁵

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, but this may be circumvented by making 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 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.⁸⁸⁶ 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

⁸⁸³ Gilead in Magnus and Martin-Casals (eds) *Contributory negligence* 105.

⁸⁸⁴ Similar to s 1 of our Apportionment of Damages Act of 1956 and almost identical to the English s 1 (1) Contributory Negligence Act of 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; Fleming *Torts* 306.

⁸⁸⁵ See Gilead in Magnus and Martin-Casals (eds) *Contributory negligence* 106 fn 8.

⁸⁸⁶ Gilead in Magnus and Martin-Casals (eds) *Contributory negligence* 110.

case law a defendant who acts intentionally in respect of the plaintiff's loss cannot raise the plaintiff's contributory fault as a defence.⁸⁸⁷

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).⁸⁸⁸ 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.⁸⁸⁹ The effect of relaxing the standard of care is that a plaintiff might not be deemed careless when causing harm to him or herself.⁸⁹⁰

In instances where a claimant intentionally injures him- or herself, two cases of suicide in Israeli law have reached two different conclusions, creating ambiguity. In *Abu Se'ada v the Israeli Police and the Prison Service*⁸⁹¹ the state was found negligent for 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, 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*⁸⁹² a patient who was hospitalised after a failed suicide attempt, committed suicide while still in the hospital. The hospital was found negligent for

⁸⁸⁷ *Pierce v Hau Mon* 1944 AD 175 198; *Minister van Wet en Orde v Ntsane* 1993 1 SA 560 (A) 570.

⁸⁸⁸ Section 64 CWO; Gilead in Magnus and Martin-Casals (eds) *Contributory negligence* 107, 113.

⁸⁸⁹ Gilead in Magnus and Martin-Casals (eds) *Contributory negligence* 110.

⁸⁹⁰ *La Nasional Ins CO Ltd v Stanflast Indus* 1976 Ltd 1979 33 (1) PD 337 at 340-341; Gilead in Magnus and Martin-Casals (eds) *Contributory negligence* 111 fn 30.

⁸⁹¹ 1997 51 (ii) PD 704; Gilead in Magnus and Martin-Casals (eds) *Contributory negligence* 109 fn 24.

⁸⁹² 1999 53 (iii) PD 529; Gilead in Magnus and Martin-Casals (eds) *Contributory negligence* 109 fn 25.

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.⁸⁹³ 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 each case.⁸⁹⁴ In cases of suicide it may be argued that the plaintiff intentionally caused his death which could amount to contributory fault as a defence excluding delictual liability,⁸⁹⁵ nevertheless, the courts in Israel, Australia and England⁸⁹⁶ 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.⁸⁹⁷ 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 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.⁸⁹⁸ 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 minimize the employee's share. In cases of pure economic loss suffered by a party who is 'strong' in terms of economic stature and

⁸⁹³ 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 in Magnus and Martin-Casals (eds) *Contributory negligence* 109 fn 26.

⁸⁹⁴ 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 in Magnus and Martin-Casals (eds) *Contributory negligence* 110 fn 27.

⁸⁹⁵ As argued *supra* in chapter 3 par 3.2.2.4.

⁸⁹⁶ See *supra* par 4.4.1-4.4.3.

⁸⁹⁷ Section 65 CWO; Gilead in Magnus and Martin-Casals (eds) *Contributory negligence* 110 fn 29.

⁸⁹⁸ Gilead in Magnus and Martin-Casals (eds) *Contributory negligence* 111.

risk control, the claimant's share of loss should 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.⁸⁹⁹ 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.⁹⁰⁰

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. Since 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 more sound than the defendant.

4.4.4 German law

As mentioned before,⁹⁰¹ contributory intent as a form of fault falls within the ambit of contributory negligence. § 254 of the *BGB*⁹⁰² provides for a distribution of damage according to the degree of responsibility on the side of the tortfeasor (defendant) and on the side of the injured party (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

⁸⁹⁹ Gilead in Magnus and Martin-Casals (eds) *Contributory negligence* 113-114.

⁹⁰⁰ Gilead in Magnus and Martin-Casals (eds) *Contributory negligence* 117-118.

⁹⁰¹ In chapter 3 par 3.6.4.

⁹⁰² German Civil Code of 1900.

different possible degrees of fault on both sides (negligence, intent and presumed fault, “*Maß des beiderseitigen Verschuldens*”).⁹⁰³

Intent on the side of the tortfeasor, generally, as in South Africa,⁹⁰⁴ excludes the consideration of contributory negligence on the side of the plaintiff as the damage itself and not only the behaviour in question was intended.⁹⁰⁵ Furthermore intent on the side of the tortfeasor does not affect the duty of the plaintiff to minimize the damage. Intent can in instances even exclude gross negligence.⁹⁰⁶ Where a servant acts with intent a master cannot be held vicariously liable for the conduct of its servant⁹⁰⁷ and is therefore not liable.⁹⁰⁸ Generally if the plaintiff acted intentionally by provoking the injury, compensation is excluded.⁹⁰⁹ 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.⁹¹⁰ In instances where both parties acted with either intent or negligence both parties will be equally liable.⁹¹¹

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.

4.4.5. Swiss law

⁹⁰³ Fedtke and Magnus in Magnus and Martin-Casals (eds) *Contributory negligence* 83.

⁹⁰⁴ See *supra* par 4.2.1.1 (1).

⁹⁰⁵ See Fedtke and Magnus in Magnus and Martin-Casals (eds) *Contributory negligence* 84 fn 83.

⁹⁰⁶ See Fedtke and Magnus in Magnus and Martin-Casals (eds) *Contributory negligence* 84 fn 84.

⁹⁰⁷ In terms of § 831 of the *BGB*.

⁹⁰⁸ See Fedtke and Magnus in Magnus and Martin-Casals (eds) *Contributory negligence* 84 fn 85.

⁹⁰⁹ §254 no 53; Fedtke and Magnus in Magnus and Martin-Casals (eds) *Contributory negligence* 84 fn 89.

⁹¹⁰ Fedtke and Magnus in Magnus and Martin-Casals (eds) *Contributory negligence* 97.

⁹¹¹ §254 no 53, 54; Fedtke and Magnus in Magnus and Martin-Casals (eds) *Contributory negligence* 84 fn 90.

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.⁹¹² 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 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.⁹¹³ As mentioned,⁹¹⁴ contributory intent in terms of Swiss law is dealt with under contributory negligence.⁹¹⁵ 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".⁹¹⁶

As also mentioned,⁹¹⁷ if the plaintiff injures himself intentionally, his contribution will usually be sufficient enough to break the causal link of imputation between the determining act and damaging event, so as to exclude the defendant's liability.⁹¹⁸ 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.⁹¹⁹

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

⁹¹² Widmer in Magnus and Martin-Casals (eds) *Contributory negligence* 209.

⁹¹³ Widmer in Magnus and Martin-Casals (eds) *Contributory negligence* 210.

⁹¹⁴ In chapter 3 par 3.6.5.

⁹¹⁵ Widmer in Magnus and Martin-Casals (eds) *Contributory negligence* 213.

⁹¹⁶ Widmer in Magnus and Martin-Casals (eds) *Contributory negligence* 211.

⁹¹⁷ In chapter 3 par 3.6.5.

⁹¹⁸ Widmer in Magnus and Martin-Casals (eds) *Contributory negligence* 214.

⁹¹⁹ Widmer in Magnus and Martin-Casals (eds) *Contributory negligence* 214.

defendants' reaction to the mild provocation is clearly excessive, with a slight possible deduction if this was not the case).⁹²⁰

Swiss law recognises contributory intent in the form of "autoresponsibility" and as said before 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 contributory intent is taken into account in apportioning responsibility and the courts may exercise their discretion with regard to such apportionment.

4.4.6 Spanish law

Legal doctrine and court decisions in Spanish law refer to contributory fault as *inter alia* "concurrency of faults" and "concurrency of fault of the victim".⁹²¹ 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.⁹²² 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".⁹²³

A reduction as a result of contributory fault operates in all fields of tortious liability and is a general rule in Spanish tort law.⁹²⁴ As mentioned,⁹²⁵ 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 case⁹²⁶ 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 patient⁹²⁷

⁹²⁰ Widmer in Magnus and Martin-Casals (eds) *Contributory negligence* 222.

⁹²¹ Martin-Casals and Solé in Magnus and Martin-Casals (eds) *Contributory negligence* 173-174.

⁹²² Martin-Casals and Solé in Magnus and Martin-Casals (eds) *Contributory negligence* 174.

⁹²³ Martin-Casals and Solé in Magnus and Martin-Casals (eds) *Contributory negligence* 175.

⁹²⁴ Martin-Casals and Solé in Magnus and Martin-Casals (eds) *Contributory negligence* 176.

⁹²⁵ In chapter 3 par 3.6.6.

⁹²⁶ Also mentioned in chapter 3 par 3.6.6.

⁹²⁷ Also discussed in chapter 3 par 3.6.6.

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.⁹²⁸

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).⁹²⁹ For example, in one particular case⁹³⁰ 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 its computers. 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.⁹³¹

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.⁹³² 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.⁹³³

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

⁹²⁸ Martin-Casals and Solé in Magnus and Martin-Casals (eds) *Contributory negligence* 181.

⁹²⁹ See *supra* par 4.2.1.1 (1).

⁹³⁰ STS 8.6. 1995 RJ 4563; Martin-Casals and Solé in Magnus and Martin-Casals (eds) *Contributory negligence* 181.

⁹³¹ STS 2^a24.9 1966 RJ 6753; Martin-Casals and Solé in Magnus and Martin-Casals (eds) *Contributory negligence* 181.

⁹³² Martin-Casals and Solé in Magnus and Martin-Casals (eds) *Contributory negligence* 194.

⁹³³ Martin-Casals and Solé in Magnus and Martin-Casals (eds) *Contributory negligence* 194.

the plaintiff acts intentionally, while the defendant negligently, generally his or her wilful and conscious conduct will break the causal link between the conduct of the defendant and the damage sustained (except in cases of 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.

4.4.7 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.⁹³⁴ 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.⁹³⁵ 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.⁹³⁶ *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 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.⁹³⁷

⁹³⁴ Kerameus in Magnus and Martin-Casals (eds) *Contributory negligence* 99.

⁹³⁵ Kerameus in Magnus and Martin-Casals (eds) *Contributory negligence* 99.

⁹³⁶ According to article 300 of the Civil Code; Kerameus in Magnus and Martin-Casals (eds) *Contributory negligence* 100.

⁹³⁷ Kerameus in Magnus and Martin-Casals (eds) *Contributory negligence* 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.

4.4.8 Summary

As a general rule in all foreign systems, 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.⁹³⁸ As pointed out in Israeli law,⁹³⁹ 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.⁹⁴⁰ 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.⁹⁴¹ 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.⁹⁴²

According to German, Greek, South African, Spanish and Swiss law the plaintiff's intent excludes the liability of the negligent defendant.⁹⁴³ 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 to play a role in preventing prisoners or patients from harming themselves or committing suicide,⁹⁴⁴

⁹³⁸ According to German, Greek, South African, Spanish and Swiss law; Magnus and Martin-Casals *Contributory negligence* 274 fn 134.

⁹³⁹ See *supra* par 4.4.3.

⁹⁴⁰ See *supra* par 4.4.6 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 Solé in Magnus and Martin-Casals (eds) *Contributory negligence* 181; see also Magnus and Martin-Casals *Contributory negligence* 274-275.

⁹⁴¹ According to English law; Magnus and Martin-Casals *Contributory negligence* 274 fn 135.

⁹⁴² Magnus and Martin-Casals *Contributory negligence* 275.

⁹⁴³ See Magnus and Martin-Casals *Contributory negligence* 275 fn 141.

⁹⁴⁴ Magnus and Martin-Casals *Contributory negligence* 275 fn 145 refers to the English, German and Israeli law. This is also the case in Australian law, see *supra* par 4.4.2 as well as Spanish law see *supra* par 4.4.6; Magnus and Martin-Casals *Contributory negligence* 276.

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.⁹⁴⁵ 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.⁹⁴⁶

4.5 Conclusion

Comments have been made throughout the chapter with regard to contributory intent applying as a defence limiting liability in terms of the Apportionment of Damages Act. Relevant cases, authors' views, proposed future legislation and foreign law have also been discussed. Therefore there is no need to repeat what has already been stated.

What is glaringly apparent is that although most countries recognise contributory intent on the part of the plaintiff, these countries (and this includes South Africa) deal with contributory intent in terms of legislation referring to contributory negligence. Hence the need to reiterate throughout that contributory intent as a defence limiting liability is subsumed under contributory negligence. The reason for this is understandable in light of the history of the application of contributory negligence, which initially applied as a complete defence and thereafter as a defence limiting liability in terms of legislation. Furthermore, as Potgieter⁹⁴⁷ points out, cases such as *Lloyd-Gray Lithographers (Pty) Ltd v Nedcor Bank t/a Nedbank*⁹⁴⁸ only came to the fore recently. The English Contributory Negligence Act has been influential in a few countries⁹⁴⁹ and, to date, still does not expressly recognise contributory intent as a defence limiting liability (although it does do so by implication). Seen against this

⁹⁴⁵ According to South African law and German law see Magnus and Martin-Casals *Contributory negligence* 276.

⁹⁴⁶ According to German, English, Greek, Israeli, South African, Spanish and Swiss law; Magnus and Martin-Casals *Contributory negligence* 290 fn 287.

⁹⁴⁷ 1998 *THRHR* 737.

⁹⁴⁸ 1998 2 SA 667 (W).

⁹⁴⁹ South Africa, Israel, Australia – see *supra* par 4.4.1, 4.4.2 and 4.4.3.

background, it is also understandable why Israeli, Australian and South African law is reluctant to expressly recognise the defence. Fortunately, our Apportionment of Loss Bill specifically refers to and acknowledges the defence of contributory intent and our courts have commenced to apply it, albeit in a limited context.

Chapter 5

5. Summary, recommendations and conclusion

5.1 Contributory intent as a defence excluding delictual liability

5.1.1 South African law

Before the enactment of the Apportionment of Damages Act in 1956 there were two main defences at the disposal of the defendant in cases where the plaintiff had contributed to his or her own loss. They were: *volenti non fit iniuria* and contributory negligence. The former applied as a ground of justification to exclude wrongfulness while the latter applied as a ground excluding fault. They were both applied as complete defences.⁹⁵⁰

Volenti non fit iniuria initially applied only to consent to a specific injury and thereafter to consent to the risk of injury, also called voluntary assumption of risk. Voluntary assumption of risk may manifest itself either in the form of consent to the risk of injury (a ground of justification) or contributory intent (a ground excluding fault).⁹⁵¹ A ground of justification negates the element of wrongfulness, thereby rendering the defendant's conduct lawful. The basic test for wrongfulness in our law is the *boni mores* or reasonableness criterion.⁹⁵² In order for voluntary assumption of risk to apply as a ground excluding wrongfulness all the requirements for consent must be met. If any of the requirements for consent are not met the consent is invalid, but voluntary assumption of risk as a form of contributory intent and as a ground cancelling fault may still be relevant.⁹⁵³

Three of the elements (requirements) of consent have been labelled as the "essential elements" by courts worldwide, namely, knowledge, appreciation and

⁹⁵⁰ See in general *supra* chapter 4 par 4.1; chapter 3 par 3.1.

⁹⁵¹ See in general *supra* chapter 1 par 1; chapter 3 par 3.1.

⁹⁵² See *supra* chapter 3 par 3.2.1.

⁹⁵³ See *supra* chapter 3 par 3.3.1

consent.⁹⁵⁴ As with any defence all the requirements for the defence must be present in order to exclude liability. In respect of voluntary assumption of risk as a ground of justification in South Africa, the consent must in fact be given (subjectively), freely and voluntarily by a person capable of volition who has knowledge and appreciation of the extent of the possible prejudice, and the consent itself must be permitted by the legal order (consent must not be *contra bonos mores* or against the legal convictions of the community).⁹⁵⁵ As mentioned,⁹⁵⁶ voluntary assumption of risk as a ground of justification has been successfully raised in only three cases, namely, *Card v Sparg*,⁹⁵⁷ *Boshoff v Boshoff*,⁹⁵⁸ and *Maartens v Pope*.⁹⁵⁹ However, in *Maartens v Pope* the defence of voluntary assumption of risk as a ground of justification should have failed due to the requirement that consent to serious bodily injury is *contra bonos mores* and voluntary assumption of risk in the form of contributory intent should have applied as a ground excluding fault.

As further pointed out,⁹⁶⁰ there are numerous cases (for example *Santam Insurance Co Ltd v Vorster*,⁹⁶¹ *Madelbaum v Bekker*,⁹⁶² *Broom v Administrator Natal*,⁹⁶³ *Rousseau v Viljoen*,⁹⁶⁴ *Clark v Welsh*,⁹⁶⁵ *Van Wyk v Thrills Incorporated (Pty) Ltd*,⁹⁶⁶ *Fourie v Naranjo*,⁹⁶⁷ *Green v Naidoo*⁹⁶⁸ and *Waring and Gillow Ltd v Sherborne*)⁹⁶⁹ where the defence of consent to the risk of injury as a ground of justification had been unsuccessfully raised. The courts either found that the plaintiff's fault was in the form of contributory negligence or that the defendant was not negligent, but the

⁹⁵⁴ See *Waring and Gillow Ltd v Sherborne* 1904 TS 340 344; *Esterhuizen v Administrator, Transvaal* 1957 3 SA 710 (T) 712; *Lampert v Hefer* 1955 2 SA 507 (A) 508; *Santam Insurance Co Ltd v Vorster* 1973 4 SA 764 (A) 781; *Williams Joint torts* 296; *Trindade, Cane and Lunney et al Torts* 695.

⁹⁵⁵ See *supra* chapter 3 par 3.2.2.2.

⁹⁵⁶ Chapter 3 par 3.2.2.3.

⁹⁵⁷ 1984 4 SA 667 (E).

⁹⁵⁸ 1987 2 SA 694 (O).

⁹⁵⁹ 1992 4 SA 883 (N); but see also *Castell v De Greef* 1994 4 SA 408 (C) where it seems that by implication the defence of *volenti non fit iniuria* succeeded, at least as far as certain claims were concerned (see *supra* chapter 3 par 3.2.2.3).

⁹⁶⁰ Chapter 3 par 3.2.2.3.

⁹⁶¹ 1973 4 SA 764 (A).

⁹⁶² 1927 CPD 375.

⁹⁶³ 1966 3 SA 505 (D).

⁹⁶⁴ 1970 3 SA 413 (C).

⁹⁶⁵ 1975 4 SA 469 (W).

⁹⁶⁶ 1978 2 SA 614 (A).

⁹⁶⁷ 2007 4 All SA 1152 (C).

⁹⁶⁸ 2007 6 SA 372 (W).

⁹⁶⁹ 1904 TS 340.

defence of voluntary assumption of risk as a ground excluding fault could have been applicable. Contributory intent applying as a complete defence (in terms of common law), albeit not *eo nomine*, has nevertheless been successfully raised in *Lampert v Hefer*⁹⁷⁰ and *Malherbe v Eskom*.⁹⁷¹ In *Netherlands Insurance Co of SA v Van der Vyver*⁹⁷² the court mentioned contributory intent (in the form of *dolus eventualis*) but in absence of authority was not bold enough to recognise it as a separate and complete defence.⁹⁷³ In any event, as mentioned,⁹⁷⁴ in *Wapnick v Durban City Garage*⁹⁷⁵ and *Columbus Joint Venture v ABSA Bank*⁹⁷⁶ the courts indeed gave recognition to the common law principle that contributory intent on the part of the plaintiff cancels any negligence on the part of the defendant and consequently functions as a complete defence which excludes liability.

Quite a number of authors,⁹⁷⁷ such as Schwietering, Pretorius, Knobel, Neethling and Potgieter, support the view that in instances of voluntary assumption of risk where consent is invalid, contributory intent could be an applicable defence leading to the exclusion of liability. Thus only in instances where consent is invalid does contributory intent become relevant. Voluntary assumption of risk in the form of contributory intent may be applied as a complete defence in all types of practical situations,⁹⁷⁸ whether it relates to participation in sport, medical treatment, the employment situation, bodily injuries caused by domestic animals or motor vehicle accidents etcetera. The dividing line between voluntary assumption of risk as a ground of justification and as a ground excluding fault lies mainly in the requirement that consent must not be *contra bonos mores*. It is only where consent is *contra bonos mores* that voluntary assumption of risk as a ground excluding fault becomes relevant, but each case must be judged on its own merits.

⁹⁷⁰ 1955 2 SA 507 (A).
⁹⁷¹ 2002 4 SA 497 (O).
⁹⁷² 1968 1 SA 412 (A) 422.
⁹⁷³ See *supra* chapter 3 par 3.3.3.
⁹⁷⁴ Chapter 3 par 3.7.
⁹⁷⁵ 1984 2 SA 414 (D).
⁹⁷⁶ 2000 2 SA 491 (W) 513.
⁹⁷⁷ Chapter 3 par 3.5.
⁹⁷⁸ See chapter 3 par 3.2.2.3.

In view of the numerous cases where the defence of voluntary assumption of risk as a ground excluding fault could have been applicable,⁹⁷⁹ there are indeed sufficient practical and theoretical grounds which validate the need for the defence of contributory intent as a complete defence to be fully recognised, developed and incorporated in our law. As pointed out, the foundation for this approach has already been laid in *Lampert, Malherbe, Wapnick and Columbus Joint Venture*.

5.1.2 Comparative law

To begin with,⁹⁸⁰ the common law countries (England, Australia and Israel) do not recognise contributory intent as a separate, complete defence. In all three countries voluntary assumption of risk applies only within the maxim of *volenti non fit iniuria*: in England especially as regards sports injuries, or as a ground excluding negligence;⁹⁸¹ in Australia where the requirement of free and willing acceptance of a risk is, strangely enough, sometimes put in terms of whether the risk was one that a reasonable person would have taken; and in Israel where *volenti* is considered separate from contributory negligence. Unlike South Africa, none of these countries' systems require for *volenti non fit iniuria* that the consent should not be *contra bonos mores*. Moreover, in English law in instances of intentional torts, liability is altogether denied on the grounds that the plaintiff's voluntary assumption of risk broke the chain of causation from the defendant's wrongdoing or by the manipulation of the standard of care by holding that the defendant did not owe the plaintiff a duty of care.⁹⁸²

On the continent German law traditionally recognised voluntary assumption of the risk of harm as a complete defence, but nowadays applies it in terms of legislation as a defence limiting liability under the ambit of contributory negligence (except in cases involving highly dangerous activity such as boxing or car racing where consent excludes liability).⁹⁸³ Swiss law applies voluntary assumption of risk on the one hand under the cloak of causation, reasoning that where the plaintiff intentionally exposes himself to an unreasonable risk his actions may be considered a *novus actus*

⁹⁷⁹ Discussed in chapter 3 par 3.2.2.3.

⁹⁸⁰ See *supra* chapter 3 par 3.6.1-3.6.3.

⁹⁸¹ As occurred in *Cummings v Granger* 1977 QB 397 and *Morris v Murray* 1991 2 QB 6 CA.

⁹⁸² As in *Wooldridge v Sumner* 1963 2 QB 43.

⁹⁸³ See *supra* chapter 3 par 3.6.4.

intervenienti (this is also the position in Spanish law.) On the other hand Swiss law utilises the principle of “abuse of right”, arguing that it is “abusive” to make somebody else responsible for damage caused by the plaintiff.⁹⁸⁴ In Swiss as well as Spanish law the judge has the discretion either to exclude, or limit, liability. Greek law also recognises contributory intent as a ground excluding or limiting liability based on fault.

From the brief comparative review it is clear that the common law countries apply voluntary assumption of risk only under the ambit of *volenti non fit iniuria* but do not even consider the requirement of our law that consent must not be *contra bonos mores*. Foreign courts tend to conflate contributory intent and contributory negligence, since contributory intent is often subsumed under contributory negligence (or *volenti non fit iniuria*). Swiss, Spanish and Greek law do however acknowledge contributory intent and may apply it as a complete defence.⁹⁸⁵

5.2 Contributory intent as a defence limiting liability

5.2.1 South African law

Historically contributory negligence applied in our law as a complete defence and followed firstly the Roman and Roman-Dutch “all or nothing rule” and thereafter the English “last opportunity rule”. Due to the harsh effect of these rules our courts were no doubt relieved when the Apportionment of Damages Act came into force, as the statute enables the courts to apportion damages in accordance with each party’s degree of fault in relation to the damage. Apportioning of damages is concerned with the process of reduction of damages received by the plaintiff as a result of the plaintiff’s own contributory fault. Section 1 of the Act abolishes the common law doctrine of “all or nothing” and the “last opportunity rule”. The aim is to ensure that the plaintiff does not lose his or her claim even though he or she may be partly at fault. Section 2 of the Act deals with joint wrongdoers.⁹⁸⁶

⁹⁸⁴ See *supra* chapter 3 par 3.6.5.

⁹⁸⁵ See *supra* chapter 3 par 3.6.8.

⁹⁸⁶ See in general *supra* chapter 4 par 4.1.

The Apportionment of Damages Act did not specifically give a definition of fault but 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 defendant⁹⁸⁷ (which in general relates to intention and negligence).⁹⁸⁸ This caused confusion and uncertainty as to whether it applied only to negligence or to both the forms of fault (negligence and intention). With regard to section 1 of the Act a few questions were raised:⁹⁸⁹

First of all, could a defendant who has intentionally caused damage to the plaintiff raise a plea of contributory negligence? At common law and according to *Minister van Wet en Orde v Ntsane*⁹⁹⁰ 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.⁹⁹¹

Secondly, could a plaintiff who has intentionally contributed to his or her own loss succeed with a claim against a defendant who acted negligently? In such instances the plaintiff will have to forfeit his or her claim,⁹⁹² as per *Wapnick v Durban City Garage*⁹⁹³ and *Columbus Joint Ventures v ABSA Bank Ltd*,⁹⁹⁴ and therefore the Act does not seem to be applicable.

Thirdly, 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? Here the law has remained unsettled for a long time, 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, 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*

⁹⁸⁷ See s 1 of the Apportionment of Damages Act of 1956.

⁹⁸⁸ See *supra* chapter 4 par 4.2.1.1.

⁹⁸⁹ See *supra* chapter 4 par 4.2.1.1.

⁹⁹⁰ 1993 1 SA 560 (A).

⁹⁹¹ See *supra* chapter 4 par 4.2.1.1.

⁹⁹² See *supra* chapter 4 par 4.2.1.1.

⁹⁹³ 1984 (2) SA 414 (D).

⁹⁹⁴ 2000 2 SA 491 (W) 513.

*Johannesburg Transitional Metropolitan Council v ABSA Bank Ltd*⁹⁹⁵ where it was held that a defence of contributory intent could be raised in instances where the plaintiff and the defendant acted with intention.⁹⁹⁶

Thereafter the courts (with regard to the application of section 2 of the Act relating to wrongdoers) were faced with analogous instances where one wrongdoer acted negligently and the other intentionally, or where both acted intentionally. In *Holscher v ABSA Bank*⁹⁹⁷ and *ABSA Bank Ltd v Bond Equipment (Pretoria) (Pty) Ltd*⁹⁹⁸ section 2 of the Act was not applied in these situations, but in *Randbond Investments (Pty) Ltd v FPS (Northern Region) (Pty) Ltd*⁹⁹⁹ and *Lloyd-Grey Lithographers (Pty) Ltd v Nedcor Bank t/a Nedbank*¹⁰⁰⁰ the courts recognised that apportionment of liability could be applied between joint wrongdoers where they acted intentionally, or where one wrongdoer acted intentionally and the other negligently. Furthermore the courts recognised that where there is intention, negligence may be simultaneously present and that it is possible to apportion liability even in respect of different forms of intention.¹⁰⁰¹ This no doubt spurred much academic debate as authors were either for the Act applying to intent or against it.¹⁰⁰² Those who were for the Act applying to intent relied on the ordinary interpretation of the word “fault” used in the text¹⁰⁰³ as well as the notion emanating from *S v Ngubane*¹⁰⁰⁴ that intent and negligence are not mutually exclusive concepts. Thus, it is possible for both to be present simultaneously, along with Neethling’s theory that in actual fact an intentional act deviates 100 per cent from the norm of a reasonable person.¹⁰⁰⁵ Those who were against the Act applying to intent relied mainly on the history relating to the enactment of the Act, where contributory negligence was the defence excluding liability as well as the references in the long title of the Act and the heading of section

⁹⁹⁵ 1996 4 All SA 278 (W).

⁹⁹⁶ See *supra* chapter 4 par 4.2.1.1.

⁹⁹⁷ 1994 2 SA 667 (T).

⁹⁹⁸ 2001 1 SA 372 (SCA).

⁹⁹⁹ 1992 2 SA 608 (W).

¹⁰⁰⁰ 1998 2 SA 667 (W).

¹⁰⁰¹ See *supra* chapter 4 par 4.2.1.3.

¹⁰⁰² See *supra* chapter 4 par 4.2.1.3; par 4.2.1.2..

¹⁰⁰³ See *supra* chapter 4 par 4.2.1.3.

¹⁰⁰⁴ 1985 3 SA 677 (A).

¹⁰⁰⁵ See *supra* chapter 4 par 4.2.1.3.

1 to contributory negligence.¹⁰⁰⁶ Nevertheless the court in *Greater Johannesburg Transitional Metropolitan Council v ABSA Bank* officially recognised the applicability of the defence of “contributory intent” in terms of section 1 of the Apportionment of Damages Act¹⁰⁰⁷ and this important case can serve as the authority and basis for further future development of the defence by our courts.

The South African Law Reform Commission thereafter compiled a report on the Act and drafted the “Apportionment of Loss Bill”¹⁰⁰⁸ which recommends that as far as fault is used as a basis for or factor in apportionment of damages, it should include both intention and negligence. If this Bill is enacted it would clear up the uncertainty and actually provide a wider basis for apportionment (not only based on fault, but also on other factors).¹⁰⁰⁹ The fact that the South African Law Reform Commission compiled a report and proposed that the Bill should apply to contributory intent shows that there is a need for the defence of contributory intent (applying as a defence limiting liability) to be developed and incorporated in our law.

5.2.2 Comparative law

As far as comparative law is concerned, English law (which provides the basis of legislation in various countries such as South Africa, Israel, and Australia)¹⁰¹⁰ does not *per se* recognise contributory intent in instances where a plaintiff clearly acts with intent and the defendant with negligence, but it may be applied to apportionment (as opposed to exclusion) where the plaintiff’s contributory intent falls within the ambit of contributory negligence and therefore limits liability. In instances where both parties act intentionally it seems that apportionment is not applicable.¹⁰¹¹

In Australian law intentional conduct would be judged more severely than negligent conduct and causal responsibility is relevant. Statutes in most jurisdictions allow a reduction of 100 per cent for compensation to be awarded to a plaintiff. The plaintiff’s

¹⁰⁰⁶ See *supra* chapter 4 par 4.2.1.2.

¹⁰⁰⁷ See *supra* chapter 4 par 4.2.1.1

¹⁰⁰⁸ 2003.

¹⁰⁰⁹ See *supra* chapter 4 par 4.3.1

¹⁰¹⁰ See *supra* chapter 4 pars 4.4.1- 4.4.3; 4.2.1.

¹⁰¹¹ Such as in *Standard Chartered Bank v Pakistan National Shipping Corp (No 4)* 2002 UKHL 43; 2003 1 AC 959; Rogers in Magnus and Martin-Casals (eds) *Contributory negligence* 62 fn 21. See *supra* chapter 4 par 4.4.1.

conduct must amount to contributory negligence for apportionment to apply.¹⁰¹² It seems that Australian law follows English law as there is a reluctance to acknowledge contributory intent *per se* as a defence limiting liability.

As to contributory fault, Israeli law makes use of causation and more frequently relative fault based on moral blameworthiness (the deviation from an objective standard), which can only be applied where both parties, or at least one of them, acted intentionally or recklessly in creating a risk or in failing to avoid it. In instances where a plaintiff acts with contributory intent, the courts prefer to apply apportionment within the ambit of contributory negligence. The court has the discretion to reduce the plaintiff's contribution, as the judge may consider just, when the fault of the defendant was brought about by the conduct of the plaintiff. Thus Israeli law by implication recognises contributory intent as a defence limiting liability but deals with it under legislation referring to contributory negligence.¹⁰¹³

According to German law a distribution of damage is made in accordance with the degree of each party's responsibility. Although the focus is primarily on causation, a process of balancing is undertaken 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). Seen thus, German law recognises both forms of fault even if it is dealt with under the statute dealing with negligence. 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. Thus contributory intent is recognised as a defence both excluding and limiting liability.¹⁰¹⁴

Swiss law refers to contributory fault as "autoresponsibility" and recognises the role of "good faith". In instances where a plaintiff acts with contributory intent the plaintiff must bear the loss to such extent that it cannot be imputed to others and is regulated by legislation referring to contributory negligence. The plaintiff's contributory intent is

¹⁰¹² See *supra* chapter 4 par 4.4.2.

¹⁰¹³ See *supra* chapter 4 par 4.4.3.

¹⁰¹⁴ See *supra* chapter 4 par 4.4.4.

taken into account in apportioning damages and the courts have a discretion in this regard. Thus contributory intent is recognised as a defence limiting liability.¹⁰¹⁵

In Spanish law the defence of contributory fault, which includes intent and negligence and leads to a reduction of damages, has general application in tort law. Contributory intent is clearly recognised as a defence excluding liability where the defendant was negligent, for his or her intent will as a rule break the causal link between the conduct of the defendant and the damage sustained. Where both parties act intentionally, the plaintiff's compensation may be reduced but depends on the defendant's form of intent. Seen thus, Spanish law also recognises contributory intent as a defence limiting liability.¹⁰¹⁶

Similarly Greek law recognises the defence of contributory intent which allows the court to exclude or reduce liability. Like most other countries, contributory intent is dealt with under the ambit of contributory negligence.¹⁰¹⁷

A few countries with apportionment of damages legislation, such as New Zealand and Canada, are reviewing their legislation to accommodate the defence of contributory intent in general, or in instances where both parties acted with intent.¹⁰¹⁸

From this comparative review the conclusion is that contributory intent is recognised in almost all countries but is dealt with in terms of legislation relating mainly to contributory negligence. The two forms of contributory fault (intent and negligence) have been conflated with the result that contributory intent is either subsumed under causation or contributory negligence instead of rightfully earning its place as a separate defence.¹⁰¹⁹

5.3 Recommendations

As has been mentioned, voluntary assumption of risk on the part of the plaintiff may apply as a ground of justification in instances where consent is valid, such as in the case of *Boshoff v Boshoff*.¹⁰²⁰ If the consent is rendered invalid mainly due to the

¹⁰¹⁵ See *supra* chapter 4 par 4.4.5.

¹⁰¹⁶ See *supra* chapter 4 par 4.4.6.

¹⁰¹⁷ See *supra* chapter 4 par 4.4.7.

¹⁰¹⁸ See *supra* chapter 4 par 4.3.1.

¹⁰¹⁹ See *supra* chapter 4 par 4.5.

¹⁰²⁰ 1987 2 SA 694 (O).

requirement that consent must not be *contra bonos mores* (as one may not consent to serious bodily injury) then voluntary assumption of risk as a ground excluding fault should be applicable. Some authors are in agreement with this proposition as theoretically sound and practically possible. The courts should endeavour to follow this approach when confronted with a set of facts where the plaintiff has voluntarily and intentionally assumed the risk of harm. The courts should decide whether wrongfulness is excluded due to valid consent or, where the consent is invalid, whether contributory intent is applicable. If neither consent nor contributory intent is applicable the court should consider contributory negligence. This approach has been suggested by Neethling and Potgieter¹⁰²¹ and is to my mind both logical and theoretically correct. It should therefore be followed by the courts.

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 act and the consequence. This view is also supported by Van der Walt.¹⁰²²

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,¹⁰²³ and consists of two elements, factual and legal causation.¹⁰²⁴ The test for factual causation is the *conditio sine qua non* or “but for” test.¹⁰²⁵ The crucial question is, but for the act, would the consequence have occurred? 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 this test it must be ascertained whether a sufficiently close relationship exists between the wrongdoers conduct and the consequence for that consequence to be imputed to the wrongdoer in view of policy considerations based on reasonableness, fairness and justice.¹⁰²⁶ For the purposes of this study it is important to ascertain whether the contributory intent of

¹⁰²¹ See *supra* chapter 2 par 2.5; Neethling and Potgieter *Delict* 104 fn 502.

¹⁰²² See *supra* chapter 3 par 3.5.

¹⁰²³ Neethling and Potgieter *Delict* 175; Van der Walt and Midgley *Delict* 197; Loubser *et al Delict* 66.

¹⁰²⁴ Neethling and Potgieter *Delict* 175, 187-188; Van der Walt and Midgley *Delict* 197; Loubser *et al Delict* 67.

¹⁰²⁵ Neethling and Potgieter *Delict* 178; Van der Walt and Midgley *Delict* 198; Loubser *et al Delict* 68.

¹⁰²⁶ Neethling and Potgieter *Delict* 190; Loubser *et al Delict* 87.

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. Of importance is 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*.¹⁰²⁷ Here mention must be made again of *Road Accident Fund v Russell*.¹⁰²⁸ Chetty AJP¹⁰²⁹ 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 principle¹⁰³⁰ 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*.¹⁰³¹ Knobel¹⁰³² however argues that in light of the fact that the deceased in actual fact tried to commit suicide twice before he was successful, showed an advanced level of premeditation which could have been regarded as a *novus actus interveniens*, but perhaps it 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 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*¹⁰³³ and it is uncertain

¹⁰²⁷ See Neethling and Potgieter *Delict* 207-208.

¹⁰²⁸ 2001 2 SA 34 (SCA) discussed *supra* in chapter 3 par 3.2.2.4.

¹⁰²⁹ *Supra* 41.

¹⁰³⁰ Here we need only to refer to *Reeves v Commissioner of Police for the Metropolis* 2000 1 AC 360; 1999 3 WLR discussed *supra* in chapter 3 par 3.6.1; see also the cases encountered in Spanish law (*supra* par 3.6.6).

¹⁰³¹ Neethling and Potgieter *Delict* 207 fn 232.

¹⁰³² 2004 *THRHR* 413-414.

¹⁰³³ 2010 2 SA 356 (SCA).

what the outcome would have been if it had. In any case, as in *Road Accident Fund v Russell*¹⁰³⁴ the question as to contributory intent on the part of the deceased was not raised.

The Apportionment of Loss Bill (hereinafter referred to as the “Bill”)¹⁰³⁵ 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. Knobel¹⁰³⁶ interestingly refers to the facts of *Mafesa v Parity Versekeringsmaatskappy Bpk*¹⁰³⁷ 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 splinters 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 apportionment of damage with regard to the second fracture could have taken place between the plaintiff and the insurer of the negligent driver. Knobel¹⁰³⁸ however warns 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 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.

Botha¹⁰³⁹ is also in favour of utilising causation when dealing with instances of contributory intent. According to him contributory intent is a term invented by

¹⁰³⁴ 2001 2 SA 34 (SCA) discussed *supra* in chapter 3 par 3.2.2.4.

¹⁰³⁵ Discussed *supra* in chapter 4 par 4.3.1.

¹⁰³⁶ 2004 *THRHR* 420-421.

¹⁰³⁷ 1968 2 SA 603 (O).

¹⁰³⁸ 2004 *THRHR* 420-425.

¹⁰³⁹ *Verdeling van skadedragingslas* 339.

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 in for example cases where the court held that contributory intent cancels negligence on the part of the defendant. Even though contributory intent has been recognised by the court in *Greater Johannesburg Transitional Metropolitan Council v ABSA Bank Ltd t/a Volkskas Bank*¹⁰⁴⁰ as a defence limiting liability, this approach has been criticised for applying outside the constraints of the Apportionment of Damages Act. Botha submits that far better and 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 the 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 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.

¹⁰⁴⁰ 1997 2 SA 591 (W).

The decision in *General Accident Versekeringsmaatskappy SA Bpk v Uijs*¹⁰⁴¹ 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 really achieve a 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.¹⁰⁴² 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 degree of causation as well as the different possible degrees of fault of both parties, and take into account negligence, intent and presumed fault.¹⁰⁴³

5.4 Conclusion

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

¹⁰⁴¹ 1993 4 SA 228 (A) 235; see *supra* 111 and 128-129 for the discussion of this case; see also Neethling and Potgieter 1994 *THRHR* 131.

¹⁰⁴² See *supra* chapter 3 par 3.6.5; chapter 4 par 4.4.5.

¹⁰⁴³ See *supra* chapter 3 par 3.6.4; chapter 4 par 4.4.4.

(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 who both acted with intent (as in *Greater Johannesburg Metropolitan Council v ABSA Bank Ltd t/a Volkskas Bank*). Furthermore, our courts¹⁰⁴⁴ 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*.¹⁰⁴⁵ It has also been held¹⁰⁴⁶ 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,¹⁰⁴⁷ 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 can also 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". Neethling¹⁰⁴⁸ 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.

¹⁰⁴⁴ See *Ranbond Investments (Pty) Ltd v FPS (Northern Region) (Pty) Ltd* 1992 2 SA 608 (W) 620-621.

¹⁰⁴⁵ See the discussion *supra* chapter 4 par 4.2.2.3 in respect of *Ranbond Investments (Pty) Ltd v FPS (Northern Region) (Pty) Ltd* and *Lloyd-Grey Lithographers (Pty) Ltd v Nedcor Bank t/a Nedbank*.

¹⁰⁴⁶ See *Lloyd-Gray Lithographers (Pty) Ltd v Nedcor Bank t/a Nedbank* 1998 2 SA 667 (W) 672-673, also discussed *supra* in chapter 4 at par 4.2.2.3.

¹⁰⁴⁷ Neethling 1985 *THRHR* 250.

¹⁰⁴⁸ 1998 *THRHR* 521

(3) In the final analysis, courts should have the discretion to take into account any other relevant factor (such as 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 Bill¹⁰⁴⁹ 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 mentioned before by Knobel,¹⁰⁵⁰ this may result in uncertainty as to the exact ratio of apportionment, our courts will at least have many factors to take into account to provide a fair and equitable result - there is no Act without any challenges arising 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. 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 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.

¹⁰⁴⁹ See s 3(1) of the Apportionment of Loss Bill 2003.

¹⁰⁵⁰ 2004 *THRHR* 420-425.

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6.4.3 Australia

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6.4.4 Israel

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Nahum v Israeli 1963 17 PD 2657

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6.4.5 New Zealand

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6.4.6 Spain

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6.4.7 United States of America

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Gramm v Boener 56 Ind 497.502 (1877)

6.5 Reports

New South Wales Law Reform Commission Discussion Paper 38

New Zealand Law Commission *Preliminary Paper on the Apportionment of Civil Liability*

Ontario Law Reform Commission *Report on Contribution among Wrongdoers and Contributory Negligence*

SALRC Report

South African Law Reform Commission *Report on the Apportionment of Damages Act 34 of 1956*

6.6 Electronic Resources

New Zealand Law Commission *Report* at <http://www.lawcom.govt.nz/project/civil-contribution> (accessed 28 February 2011)

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