
"CONTRIBUTORY INTENT" AS A DEFENCE LIMITING DELICTUAL LIABILITY

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SUMMARY

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

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

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