An analysis of the Apportionment of Damages Act 34 of 1956 in South African law

By

Dané du Plooy

An analysis of the Apportionment of Damages Act 34 of 1956 in South African law

by

Dané du Plooy

26084920

Submitted in partial fulfilment of the requirements for the degree LLM

in the

Faculty of Law

University of Pretoria

Supervisor: Professor HB Klopper

April 2015

UNIVERSITY OF PRETORIA

DECLARATION OF ORIGINALITY

I (full names): Dané du Plooy

Student number: 26084920

Subject of the work: MND800 - Mini dissertation

Declaration

1. I understand what plagiarism entails and am aware of the University's policy in this regard.
2. I declare that this dissertation is my own, original work. Where someone else's work was used (whether from a printed source, the internet or any other source) this has been acknowledged and reference was made according to departmental requirements.
3. I did not make use of another student's previous work and submitted it as my own.
4. I have not allowed, and will not allow, anyone to copy my work with the intention of presenting it as his or her own work.

_____

Dané du Plooy

DEDICATION

I would like to dedicate this work to God, Almighty.

"I can do all things through Him who strengthens me." Philippians 4:13

ACKNOWLEDGEMENTS

There are innumerable people to whom I am indebted for their support and contribution and I extend my sincere gratitude to every person who has in some way contributed to the finalisation of this dissertation. I would like to thank the following persons:

- My supervisor, Prof Klopper, whose enthusiasm on the subject is contagious, for his guidance in the subject and his invaluable input that has resulted in this final product. Without his effort and involvement this work would not have been completed.
- My family, especially my parents, Kobus and Hannetjie for always emphasising the value of education and for providing me with the opportunity to gain the best education that I possibly could have. My brother Hein, for his moral support and understanding when I became despondent;
- My husband Duane, for his continuous support, love, understanding and encouragement. Words cannot express my gratitude. *Semper Amemus*.

SUMMARY

Where a party wrongfully suffers harm due to the negligent conduct of another, that harm is repaired through the payment of damages. In terms of the principle *res perit domino*, it is however a fundamental principle of the law of delict that a person should bear the loss he suffers. It stands to reason that where he contributes to his damages by his own negligent conduct, this should be taken into account and his damages reduced accordingly. The legal position regarding contributory negligence and the effect on recovery of damages, is governed by the Apportionment of Damages Act 34 of 1956. The relevance of the Act is often considered when dealing with the issue of liability; however, it ultimately effects the quantum of a damages award. This is not to say that the apportionment of liability will or should mirror the extent to which the damages are apportioned. In certain cases, damages may be further apportioned to account for other factors.

In practice, the Act is often exercised incorrectly and differently from case to case, due to varying interpretations and approaches to underlying principles. The Act does not define concepts fundamental thereto nor does it prescribe an approach to determine the reduction of a party's damages. Specifically the meaning of fault in the Act, whether this fault relates to the damage or damage-causing event, as well as how this fault should be measured and applied to the facts of each case have been interpreted and applied inconsistently. The highlight the various scenaria that have appeared in the practical application of the Act to claims arising out of delict and specifically, motor vehicle collisions. Through practical illustrations and case law, one can deliberate on the factors to be considered when a particular approach is adopted. It is ultimately necessary to determine whether the Act can be applied effectively and fairly, by adopting a single approach, or whether the law has to be revised.

If the Act were to be reviewed, the extent to which negligent conduct is to be applied as well as how this is to be assessed should be clarified. It is necessary for courts to bear in mind that a person's conduct as it is causally linked to harm, should be apportioned and a separate enquiry to extent to which harm is exacerbated by

contributory negligence should be done. Mere negligent conduct is not sufficient – it must be linked to increased harm. As it stands, he approach followed in the *Jones* case provides for a definable formula in which the parties' conduct as it relates to the harm are assessed separately and then compared. If the comparative approach can be enforced, uniformity will be achieved and the uncertainty of discretionary application can be eliminated, even if the Act is not redrafted. If legal practitioners are able to clearly make this distinction and apportion the parts to which a claimant's actions are related, the purpose of the Act can be achieved.

INDEX

CHAPTER 1 – INTRODUCTORY COMMENTS AND GENERAL CONCEPTS

1.1 Introduction

One of the requirements for the recovery of damages is fault.[1] Where a party contributes to his damages by his own negligent conduct, it follows that such negligence has to be taken into consideration and that his damages is to be reduced accordingly. In South Africa, the legal position regarding contributory negligence and the effect on recovery of damages, is governed by the Apportionment of Damages Act 34 of 1956.[2] The Act was promulgated to ameliorate the harsh consequences of the common law "last opportunity rule".[3] In essence and prior to the Act, a wrongdoer would be absolved from liability in circumstances where it was found that the plaintiff had "the last opportunity" to avert the accident. The interpretation of the Act has over the years been adapted through precedent and courts have followed different approaches in determining the reduction of damages in accordance with the fault of the litigants. As a result contradictory results relating to the application of the Act are in practice common.

The following prominent legal questions and issues have been the subject of debate:

1. The interpretation of "fault" in the Act;
2. Whether this fault refers to a party's negligent conduct in relation to the harm or the event that caused the harm;[4]
3. The distinction between apportionment of fault[5] and apportionment of damage[6];

---

1 The exception is in respect of liability without fault, i.e. "no-fault" or strict liability; Visser & Potgieter (2012) 355; Neethling *et al* (2015) 4; Van der Walt & Midgley (2005) 147.

2 Hereafter "the Act".

3 The purpose of the Act is apparent from its Preamble which reads: "To amend the law relating to contributory negligence and the law relating to the liability of persons jointly or severally liable in delict for the same damage, and to provide for matters incidental thereto."

4 Loubser & Midgley (eds) (2012) 438.

5 Which is a merits enquiry determining presence of negligence and liability for harm caused by such negligence; Erasmus & Gauntlett (2005) 3.

6 Which is a quantum enquiry taking into account what the extent of the harm is and how such liability is causally connected to the harm suffered; Erasmus & Gauntlett (2005) 3.

4. Which is the correct approach in which this fault is to be assessed and applied to achieve the object of the Act; and
5. The application of provisions relating to contributorily negligence or joint wrongdoers, under specific circumstances relating to dependant's claims.

At the outset it is necessary to reflect on the motivation for the promulgation of and the principles underlying the Act. The purpose of the Act and an evaluation of the different concepts related thereto, with particular emphasis on fault, has to be considered when an analysing the diverse interpretations. The advantage of the Act having been passed some 60-odd years ago is that a large volume of precedent and discussion exists on the subject.[7] This enables, through practical illustrations, deliberation of the principles and factors considered by judicial officers when adopting their particular approach. It is ultimately necessary to determine whether the Act can be applied effectively and fairly, by adopting a single approach, or whether the law has to be revised.[8]

1.2 Relevance and significance of the analysis

The Act is used on a daily basis in courts, arbitrations and even in general negotiations. In general and seemingly unbeknown to the majority of litigants, the Act is often applied incorrectly and differently from case to case. General principles have crystallised in our law which serves as precedent and therefore legal ambiguity can and should be avoided.[9] The relevance of the Act is often considered when dealing with the issue of liability. However, it ultimately effects the amount of a damages award. This is not to say that the apportionment of liability will or should mirror the extent to which the damages are apportioned. In certain cases, the damages may be further apportioned to account for other factors.

---

7 Kotzé (1957) 20 *THRHR* 148; Swanepoel (1959) 22 *THRHR* 263; Millner 1956 (53) *SALJ* 319; McKerron (1956) 1; McKerron (1971) 289; Van der Merwe & Olivier (1989) 156; Boberg (1984) 652; SALRC (2003) *Report*.

8 Either by way of reviewing legislation or Supreme Court rulings to clarify the position.

9 Neethling *et al* (2015) 168.

1.3 Problem statement and goal of the dissertation

The principles underlying the Act are often underappreciated, misinterpreted or simply ignored resulting in inappropriate and inconsistent decisions. The Act does not define its terms and underlying concepts properly and also does not provide a method in which fault should be measured, save to state that damages should be reduced as deemed "fair and equitable".[10] In daily litigation the legal profession requires a practical doctrine which can be implemented with certainty. I will determine whether or not there is a single approach which will result in a consistent and just outcome, when applying the Act and if so, what steps should be taken and implemented throughout.

1.4 Methodology and delineations

A combination of legal historical and logical analytical approaches will be used to illustrate the development of apportionment principles as we recognise them today. In order to address the different interpretations of the Act the nature, content and application of the principles underlying apportionment will be examined. The practical application of core sections of the Act and its effect on the apportionment of damages will be demonstrated. Only selected sections of the Act will be considered insofar as each has been the subject of significant confusion or debate outlined above. The focus will be on the meaning of "fault" in the Act, as well as how this fault should be measured and applied to the facts of each case. The discussion is restricted to delictual matters - in particular claims arising from motor vehicle collisions.[11]

---

10 Section 1(1)(a).

11 The Act does not apply to contractual actions; Boberg (1984) 713; McKerron (1971) 298; Havenga 2001 (64) *THRHR* 124; *Thoroughbred Breeders' Association of South Africa v Price Waterhouse* 2001 (4) SA 511 (SCA).

1.5 Definition of concepts

For purposes of this dissertation the following definitions and assumptions are accepted.[12]

1.5.1 Law of damages

The law of damages indicates how the realisation and extent of damages, as well as the appropriate amount of damages or compensation are to be determined following a delict. It also includes legal principles relating to how such damages are to be paid.[13]

1.5.2 Delict

A delict refers to conduct of a person that "in a wrongful and culpable way causes harm to another."[14] Five elements, namely, an act, wrongfulness, fault, causation and harm are required for the particular conduct to be classified as a delict.[15]

1.5.3 Damage / Harm

Damage refers to the "diminution, as a result of a damage-causing event, of the utility or quality of a patrimonial or personality interest in satisfying the legally recognised needs of the person involved."[16] The word harm is preferred and denotes the effect as measured in monetary terms.[17] Hereafter the concepts of damage and harm will be used interchangeably as needed to express the applicable meaning depending on the context.

---

12 Further discussion on these definitions fall outside the scope of this work.

13 Visser & Potgieter (2012) 1; Van der Walt (1977) 1; Erasmus & Gauntlett (2005) 4; Van der Walt 180 *THRHR* 3.

14 Neethling *et al* (2015) 4.

15 Boberg (1984) 652; Van der Walt & Midgley (2005) 239; Loubser & Midgley (eds) (2012) 420; Van der Merwe & Olivier (1989) 156; McKerron (1971) 109.

16 Visser & Potgieter (2012) 19; Neethling *et al* (2015) 222; Van der Walt & Midgley (2005) 197.

17 Loubser & Midgley (eds) (2012) 69; Reinecke 1976 *TSAR* 26.

1.5.4 Damages

Damages can be defined as "a monetary equivalent of damage[18] awarded to a person with the object of eliminating as fully possible his past as well as future damage." It also denotes "the process through which an impaired interest may be restored through money."[19] This may also be referred to as compensation, which in a general sense means the process of reparation of any patrimonial or non-patrimonial loss.[20]

1.5.5 Fault and Contributory fault

Fault can be present in one of two forms; either intent or negligence.[21] The Act does not apply where damage was caused intentionally and discussions are thus limited to negligent conduct.[22] In limiting the extent of a wrongdoer's liability for damages, contributory fault is relevant to the conduct of the plaintiff or such party so represented.[23] In terms of section 1(3) of the Act fault is defined as including "any act or omission which would have given rise to the defence of contributory negligence".

1.5.6 Negligence

In this context it denotes the blameworthiness of a wrongdoer in a delictual action.[24]

---

18 Par1.5.3 above.

19 Visser & Potgieter (2012) 19; Van der Merwe & Olivier (1989)163; *South British Insurance Co Ltd v Smit* 1962 (3) SA 826 (A).

20 It does not include cost of suit; Visser & Potgieter (2012) 20 and 302.

21 Visser & Potgieter (2012) 242; Neethling *et al* (2015) 129.

22 *Greater Johannesburg Transitional Metropolitan Council v ABSA Bank Ltd t/a Volkskas Bank* 1997 (2) SA 591 (W); Loubser & Midgley (eds) (2012) 439; Neethling *et al* (201) 169; McKerron (1971) 296.

23 Van der Walt & Midgley (2005) 147; Loubser & Midgley (eds) (2012) 314; Ahmed 2014 (17) 4 *PELJ* 1518.

24 *Smit* above n19; Visser & Potgieter (2012) 19; Boberg (1984) 652; Van der Walt & Midgley (2005) 239; Loubser & Midgley (eds) (2012) 420; Van der Merwe & Olivier (1989) 156; McKerron (1971) 58.

CHAPTER 2 – THE ORIGIN AND DEVELOPMENT OF APPORTIONMENT OF DAMAGES IN SOUTH AFRICAN LAW

2.1 Introduction

In order to establish whether the Act is effective, it is necessary to reflect on its origin and purpose. The Act was introduced to amend the common law position relating to contributory negligence following the inequitable and flawed outcomes resulting from the application of the "all or nothing" and "last opportunity" principles initially assimilated from Roman-Dutch and English common law.

2.2 Relevance of historical development

An evaluation of the legal history and development of apportionment of damages provides perspective on how our legal system adapts to legal questions that arise.[25] The South African law of damages contains elements of both Roman-Dutch law and English common law.[26] Although the South African legal system has a hybrid nature, the law of delict which relates to obligations, is strongly based on its Roman predecessor.[27] The law of delict follows a general approach in which general principles regulate delictual liability.[28] A legal system that embraces general principles of delictual liability should be able to adapt to new situations and contemporary legal issues as they emerge, which is a valuable characteristic for any legal system, even more so in the case of a developing country.[29]

---

25 By implementation of legislation or interpretation of common law principles.

26 Van der Merwe & Olivier (1989) 18; Visser & Potgieter (2012) 9; Erasmus & Gauntlett (2005) 6; Erasmus 1975 (38) *THRHR* 105.

27 Van der Walt & Midgley (2005) 1; Van der Merwe & Olivier (1989) 3; Thomas *et al* (2000) 213; Erasmus 1975 (38) *THRHR* 278.

28 Van der Walt & Midgley (2005) 18; Boberg (1984) 26; Neethling *et al* (2015) 4; Erasmus 1975 (38) *THRHR* 362.

29 Van der Walt & Midgley (2005) 31; Neethling *et al* (2015) 5.

2.3 Aspects of the history and development of the apportionment of damages in South African law

2.3.1 The common law position

Originally the "all or nothing" rule applied in cases where some fault could be attributed to a plaintiff.[30] The general rule in Roman-Dutch law was that any fault on the part of the plaintiff excluded him from claiming from the wrongdoer entirely.[31] Neethling, Potgieter and Visser explain the principle as follows: "Where negligence of two people contributed to the causing of a particular result, and one or both of the parties suffered damages as a consequence, neither party could institute an action".[32]

The English courts, after considering the harsh implications of the "all or nothing" rule in the case *Davies v Mann*[33] adopted a new approach, known as the "last opportunity" rule.[34] The plaintiff in that case had negligently left his haltered donkey in the road, whereas the defendant on his part collided with the donkey whilst negligently driving his wagon. The court ruled that where the negligence of one of the parties was the decisive cause of the accident, the contributing party's negligence was completely ignored and he could succeed with his claim in full. In order to determine whose negligence was the decisive cause of the accident, the courts looked at who had the last opportunity of avoiding the accident.[35]

---

30 Par 2.1 above; Neethling *et al* (2015) 167; Boberg (1984) 107; Loubser & Midgley (eds) (2012) 436.

31 Neethling *et al* (2015) 167; Van der Walt & Midgley (2005) 239.

32 Neethling *et al* (2015) 168.

33 (1982) 10 M & W 546.

34 Examples of case law in South Africa is *Union Government (Minister of Railways) v Lee* 1927 AD 202 and *Pierce v Hau Mon* 1944 AD 175.

35 Neethling *et al* (2015) 168; Van der Walt & Midgley (2005) 239; McKerron 1968 (31) *SALJ 15.*

2.3.2 The introduction and object of the Act

The "last opportunity" rule did not work well in practice.[36] One example of the application of this harsh rule in England is on employees injured on duty, which given the poor working conditions following the industrial revolution of the late 1800s, occurred frequently. The effect was that, even if there had been negligence on the part of the employer which caused his employee to be mangled by machinery, the employee could not claim compensation if he had had the last opportunity to avoid the accident. It finally resulted in such a prejudicial situation that the legislature had to intervene.[37] In England this rule was replaced in 1945 with the principle of proportional division of damages in accordance with each party's degree of fault.[38] The South African legislature mimicked this movement by introducing the Act in 1956 and as a result a wrongdoer may no longer avoid liability with the defence of the "last opportunity" rule.[39]

Boberg explains that this approach was in essence a test for causation and was not based on the comparative blame of the parties.[40] He concludes that it would be impossible to think away the impact of the actions of the more careful party completely. With perfect hindsight, there would have been no accident if both parties behaved as they ought to have done from the outset. He accurately observes that in many modern-day motor collisions, it is nearly impossible to determine who had the last opportunity to avoid the accident.[41]

---

36 *Waite v North-Eastern Railway Co* (1858) EB&E 71; *Swadling v Cooper* [1931] A.C. 1.

37 The Law Reform (Contributory Negligence) Act 1945; Kotze 1956 *THRHR* 186.

38 *Coetzee v Van Rensburg* 1954 4 SA 616 (AD); Wilson 1950 (48) *Res. Jud.* 193; Boberg (1984) 653.

39 *Minister van Wet en Orde v Ntsane* 1993 (1) SA 560 (A); Davel (1987) 85; Van der Walt & Midgley (2005) 240; Neethling *et al* (2015) 168.

40 This was problematic in matters where continuing negligence by the parties were involved, or where actions were almost simultaneous. The SALRC gives the example of a collision between two cars both travelling at high speed; SALRC (2003) *Report* Chapter 1; Boberg (1984) 652; McKerron (1971) 64.

38 Boberg (1984) 652.

2.3.3 The influence of the Constitution of South Africa and the Bill of Rights

The Constitution[42] as the supreme law[43] of the Republic of South Africa together with the incorporated Bill of Rights[44] influences the interpretation of the Act.[45] In the interpretation of any legislation, and when developing both common and customary law, the courts must promote the spirit, purport and objects of the Bill of Rights.[46] When constitutional values are applied in private law it influences the so-called open ended or flexible delictual principles[47], where policy considerations and factors such as reasonableness, fairness and justice may play a central part.[48]

2.4 Development, problems and future of the Act in South African law

Since its introduction the wording and draftmanship of the Act has been criticised[49] and amended.[50] In the attempt to eliminate weaknesses associated with the doctrine of damage, solutions are commonly sought by following an *ad hoc* approach.[51] Unfortunately when the Act has to be applied or interpreted, mistakes come about in practice because of this discretionary approach.

The South African Law Reform Commission[52] has also analysed the Act in a report where several difficulties were identified and review of the Act in its entirety was

---

42 The Constitution of the Republic of South Africa, 1996 (hereafter "the Constitution").

43 Section 2 of the Constitution.

44 Contained in Chapter 2 of the Constitution.

45 Erasmus & Gauntlett (2005) 7.

46 Section 39(2) of the Constitution.

47 E.g. the *boni mores* test for wrongfulness, the imputability test for legal causation and the reasonable person test for negligence.

48 Neethling *et al* (2015) 22; Currie & De Waal (2005) 49 and 64.

49 Visser & Potgieter (2012) 15; Boberg (1984) 655; *Taylor v SAR&H* 1958 (1) SA 139 (D); Cooper (1996) 284; Reinecke 1988 (21) *De Jure* 238.

50 Apportionment of Damages Amendment Act 58 of 1971; Matrimonial Property Act 88 of 1984; General Law Amendment Act 49 of 1996 ; Justice Laws Rationalisation Act 18 of 1996.

51 Van der Walt (1977) 3.

52 Hereafter "the SALRC".

suggested.[53] It is necessary to assess whether the Act can be applied effectively as is or whether review is needed to eliminate any confusion. In consideration of the various problems arising from the Act, the Apportionment of Loss Bill 2003 has been prepared but has not yet been promulgated.[54] Thus currently the Act is the ultimate authority on apportionment and it is useful to clarify the position thereof as regards harm resulting from motor vehicle collisions.

53 SALRC (2003) *Report* Chapters 1 and 5.

54 Ahmed 2014 (17) 4 *PELJ* 1518.

CHAPTER 3 – BASIC PRINCIPLES AND CONSIDERATIONS IN THE DETERMINATION AND APPORTIONMENT OF DAMAGES

3.1 Introduction

The object of the Act is that damages to which a party is entitled would be reduced in accordance with his contributory negligence in a just and equitable manner. The Act consists of three chapters, of which the first deals with the apportionment of liability in the case of contributory negligence, the second with proceedings against joint and several wrongdoers and the third with incidental matters. Chapter 1 of the Act regulates the reduction of damages in case of contributory negligence.[55] Section 1(1)(a) and (b) read as follows:

> (*a*) Where any person suffers damage which is caused partly by his own *fault* and partly by the *fault* of any other person, a claim in respect of that damage shall not be defeated by reason of the *fault* of the claimant but the damages recoverable in respect thereof shall be *reduced* by the court to such extent as the court may deem just and equitable having regard to the degree in which the claimant was at *fault in relation to the damage*.[56]
> (*b*) Damage shall for the purpose of paragraph (*a*) be regarded as having been caused by a person's *fault* notwithstanding the fact that another person had an *opportunity* of avoiding the consequences thereof and negligently failed to do so.

The element of fault is clearly one of the key terms in the Act and has to be interpreted correctly in context. For the Act to be applicable, contributory fault, either on the part of the plaintiff or another defendant, has to be established. An understanding of the interaction between fundamental legal principles underlying the Act, specifically as it relates to the concept of fault, is important. The application of the reasonable person test, how negligence of each party is to be assessed and the concept of damage are briefly discussed to shed light on their importance with reference to the Act.

---

55 Loubser & Midgley (eds) (2012) 436.

56 My emphasis.

3.2 The concept of fault as background to the Act

3.2.1 Negligence

In the application of the Act, only negligence is relevant.[57] Where negligence is considered an individual is held liable for an attitude or conduct of "carelessness, thoughtlessness or imprudence" as he has not adhered to the standard of care legally required of him.[58] The accepted standard of care is measured by applying the objective reasonable person test. A wrongdoer is negligent if the reasonable person in his position would have acted differently and if the outcome would have been different following reasonable conduct.[59]

3.2.2 Reasonable person test

The test of the reasonable person, generally accepted by the courts, was set out in the case of *Kruger v Coetzee*[60] 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.

---

57 Par 1.5.5 above; Neethling & Potgieter 1992 (55) *THRHR* 658.

58 Neethling *et al* (2015) 137; Visser & Potgieter (2012) 119; Van der Walt & Midgley (2005) 133; Loubser & Midgley (eds) (2012) 200.

59 *Tenza v Putco Ltd* 1988 (2) SA 330 (NPD); Visser & Potgieter (2012) 122; Van der Walt & Midgley (2005) 134; Loubser & Midgley (eds) (2012) 212.

60 1966 2 SA 428 (A) 430.

3.2.3 Foreseeability and preventability of damage

From the aforegoing it is clear that the test for negligence is twofold. The reasonable foreseeability as well as the reasonable preventability of damage are considered.[61] The concrete approach to foreseeability is favoured in our courts.[62] In terms of this approach, one can only be negligent if the occurrence of a specific consequence, and not merely damage in general, was reasonably foreseeable.[63] It is not required that the precise nature and extent of the harmful consequences, or the exact manner in which the damage was caused, has to be reasonably foreseeable. Once reasonable foreseeability has been determined, it must be established whether the reasonable person would have taken precautionary measures to prevent the realisation of damage.

3.3 Damage and causation

3.3.1 Factual and legal causation distinguished [64]

Factual causation can be determined by following a chain of events. Reasonableness and fairness however requires that limits be provided to avoid an objectionable domino-effect argument.[65] Legal causation becomes relevant when it has to be established for which harmful consequences a wrongdoer should be held liable. In the well-known case of *International Shipping Co Pty Ltd v Bentley* [66] the court stated that:

---

61 Neethling *et al* (2015) 148; Scott 1995 *TSAR* 127; Neethling & Potgieter 1994 *THRHR* 131.

62 Also referred to as the "relative" approach; Neethling *et al* (2015) 148.

63 Put differently, reference should be had to the consequences that were indeed reasonably foreseeable.

64 Neethling *et al* (2015) 183; Van der Walt & Midgley (2005) 197; Loubser & Midgley (eds) (2012) 70.

65 Neethling & Potgieter 1993 (56) *THRHR* 157; Potgieter 1990 (53) *THRHR* 267; Scott 1995 *TSAR* 127.

66 [1990] 1 All SA 498 (A).

> Demonstration that the wrongful act was *causa sine qua non* of the loss does not necessarily result in legal liability. The second enquiry, *viz* whether the wrongful act is linked sufficiently closely or directly to the loss for legal liability to ensue or whether, as it is said, the loss is too remote. This is basically a juridical problem in the solution of which considerations of policy may play part. This is sometimes called 'legal causation'.

Legal causation is established by assessing the factual causation in light of policy considerations, most notably whether the damage was foreseeable and whether the damage is too remote to be attributed to the wrongdoer. This is distinguishable from consequences taken into consideration when determining apportionment of damages. Legal causation restricts the extent to which the harm can be linked to the factual chain of events, while apportionment considers each party's contribution to that established harm.

3.3.2 Limitation of extent of liability

Various theories for determining legal causation exist.[67] The preference is for the use of the flexible approach, which is based on the policy considerations of reasonableness, fairness and justice has been expressed by our courts.[68] The reasonable foreseeability criterion has been generally applied, however it has been found that different situations may warrant different approaches in order to achieve fair outcomes.[69]

3.3.3 Double or alternative causation

It is possible for different events to lead to the same damage simultaneously. It is also possible that these different events could have given rise to the damage equally. Where a plaintiff has through his own negligence contributed to the damage

---

67 Visser & Potgieter (2012) 271; Neethling & Potgieter 1993 (56) *THRHR* 157.

68 *S v Mokgethi* 1990 (1) SA 32 (A).

69 Other theories include: The Theory of adequate causation; the Theory of direct consequences; and the Theory of wrongfulness and fault. Visser & Potgieter (2012) 271; *Minister of Police v Skosana* 1977 (1) SA 31 (A); *Bentley* above n65.

which was caused by the wrongdoer, it would have to be determined to what extent his damage could be attributed to him.[70] The plaintiff and the wrongdoer would then be seen as joint wrongdoers in respect of the same damage. In an example where both parties were found indistinguishably negligent it would be fair to hold each party equally liable for the damages, i.e. 50% each.[71]

3.4 Damages and apportionment

3.4.1 Apportionment of damages and causation

It is often the case that the issue of quantum of damages is decided separately from the merits of a claim. Parties may reach agreement on the merits of a claim but differ on the amount of damages and *vice versa*.[72] Fault in relation to damage is actually apportioned and not the fault in relation to the damage-causing event. The distinction begs the question: When does the enquiry of apportionment of damages arise? It is often introduced when considering the liability and not revisited when assessing the actual damages and its relation to the parties' conduct. A practical view exists that a plaintiff is always potentially negligent, which may be represented by a nominal percentage of 10% and that this apportionment should be applied in all situations, no matter the cause of the damage. This approach disregards the considerations of the objective reasonable person test and does not take into account the distinction between contributing to the collision and contributing to the harm following the collision. Apportionment, of liability, should only be considered where it can be proven that the plaintiff was in a position to avoid the collision.[73] It would not be fair to regard a person as negligent without objectively assessing his conduct.

---

70 Visser & Potgieter (2012) 89; Van der Merwe & Olivier (1989) 292; Reinecke 1976 *TSAR* 38.

71 This should be distinguished from cases where it is uncertain what the correct version of events is and where absolution from the instance is granted where it cannot be determined what the cause of the damage was.

72 Erasmus & Gauntlett (2005) 3.

73 Klopper in Isaacs and Leveson (2012) 85.

Due to the use of the terms “just and equitable” the degree of apportionment may be measured on a discretionary basis with the considerations of the reasonable person test and, to an extent, precedent as a guideline. Commonly the degree of negligence linked with the damage-causing event is equated to the degree of apportionment.

3.4.2 The assessment of damages and the effect of apportionment

Where the Act is applicable, harm is assessed and the apportionment, expressed in percentage form, is applied to reduce the damages payable.[74] It is thus necessary to determine the amount of the award before the apportionment is imposed thereon. In general the following heads of damage are accepted in claims related to motor vehicle collisions: Medical and related expenses; Loss of income or loss of support by a dependant whose breadwinner was killed[75]; and general (non-patrimonial) damages.[76] The process of the determination of the damage does involve causation, however the tests for causation related to the damage-causing event and the determination to the damage itself are not one and the same.[77]

It is crucial to consider whether a causal link between the plaintiff’s negligence and the ensuing harm exists. A plaintiff may appear to be negligent, but despite such negligence, he would have suffered the harm anyway. I.e. his contributory negligence was not causally connected to the harm suffered. Apportionment should not be applied if the plaintiff would have suffered the same harm despite his negligent actions, as it has no relevance to the harm. It has to be proven on a balance of probabilities that the outcome would have been different if the plaintiff had acted reasonably.[78] It is submitted that the issue of causality and the apportionment of harm are not considered thoroughly by our courts and that by they accept that

---

74 In terms of the Act damages are not strictly apportioned, they are reduced; Klopper in Isaacs and Leveson (2012) 83; Visser & Potgieter (2012) 303; Loubser & Midgley (eds) (2012) 346.

75 Dendy 1990 (107) *SALJ* 155; Davel (1984) *LLD Proefskrif* 1; Davel (1987) 86.

76 Visser & Potgieter (2012) 121;

77 The practical implications are discussed in Par 4.3.1 below; Visser & Potgieter (2012) 85 and 120.

78 *Guardian National Insurance Company Ltd v Saal* 1993(2) SA 161 (C).

there is a causal link if negligence is proven.[79] The contributory negligence should have a direct relationship to the ensuing harm and no link can be established, apportionment is not applicable.

3.4.3 The *condictio sine qua non* "test" and sum-formula approach

In terms of the *condictio sine qua non* test[80] an action or event is thought away and then it is seen whether or not the consequences are also absent.[81] This can be illustrated with an example regarding a driver, Z, who is involved in an accident caused by another driver. He was not wearing a seatbelt and he sustains bodily injuries including whiplash injury and facial fractures. Even if the negligent omission on his part is thought away, that is if Z had worn his seatbelt, the accident would still have occurred. His conduct thus did not directly influence the occurrence of the accident.

The sum-formula approach serves as the basis for the evaluation of patrimonial loss in our law.[82] This method which is used to determine loss should not be confused with the *condictio sine qua non* "test" for causation.[83] The difference lies therein that in the approach to determining loss, there is no elimination of an event. This approach involves the element of causation, as it illustrates that a particular consequence has been caused by an event, but goes further as it also measures the extent of said consequence.[84] In our example above, Z would not have sustained facial fractures due to his face hitting the dashboard, if he had acted reasonably and worn his seatbelt. Without the accident being thought away, it is possible to evaluate and compare the two positions to determine damages; being the outcome had he acted reasonably on the one hand as opposed to unreasonably on the other hand.

---

79 Klopper in Isaacs and Leveson (2012) 89.

80 Also known as the "but for" test.

81 Neethling *et al* (2015) 186; Loubser & Midgley (eds) (2012) 71; Van der Walt & Midgley (2005) 198; Visser 1989 (50) *THRHR* 558.

82 Visser & Potgieter (2012) 55 and 65; Van der Walt (1977) 265; *Union Government v Warneke* 1911 AD 657; *Oslo Land Co v Union Government* 1938 AD 54.

83 Visser &Potgieter (2012) 120; Van der Walt (1977) 267.

84 Visser & Potgieter (2012) 66.

3.5 Parties affected by the Act

3.5.1 Scenarios of apportionment

Loubser and Midgley provide a useful framework identifying the possible combinations of apportionment between parties.[85] The Act essentially makes provision for three scenarios where liability for damages are apportioned between:

1. The Plaintiff and Defendant - where the principles relating contributory fault is applicable;
2. The Defendant and another Defendant - where the principles relating to joint wrongdoers is applicable; and
3. More than one Plaintiff and more than one Defendant - where a combination of the above situations apply.

3.5.2 Who has the right to claim damages?

The person who in reality suffers harm due to a damage-causing event may claim damages.[86] In a situation where a dependant has suffered harm as a result of the injury or death of another, such a dependant may claim compensation for that loss.[87] It is important to identify from what right a party's claim is derived, in order to establish whether a party can be classified as either a joint wrongdoer or as contributorily negligent for purposes of the Act. If the party does not comply with the descriptions provided by the Act, the Act cannot apply.

3.5.3 Who is liable for those damages?

Only a party that acted contributorily negligent may be held liable for damages. The individual who committed the delict, or a person or body that may be held liable in his place, is liable to pay damages.[88] In South Africa claims arising out of bodily injuries

---

85 Loubser & Midgley (eds) (2012) 435.

86 Visser & Potgieter (2012) 244.

87 Dendy 1990 (107) *SALJ* 159; Davel (1987) 90.

88 Visser & Potgieter (2012) 253.

or death caused by the negligent driving of a motor vehicle, are instituted against the Road Accident Fund[89], which as it were, steps into the shoes of the wrongdoer.[90]

3.5.4 Who has the duty to limit damages?

The plaintiff's duty to mitigate his loss, by taking reasonable steps, in reality only becomes relevant after the damage-causing event. The duty is not "to not cause damage to himself", but to not exacerbate the wrongdoer's burden to pay damages.[91] It can however be argued that a form of "advance mitigation" can be expected of parties. In a society where individuals interact, they attract inevitable duties and have to act reasonably in their conduct. This entails that they must consider the possible conduct of other individuals and mitigate their damages, albeit "in advance".[92] This failure to act reasonably is taken into consideration.[93] The reduction in terms of the Act serves to ensure that a person should not be overcompensated, thus the degree to which he is responsible for his own damage has to be taken into account. This links with the *res perit domino*[94] principle in which a person is in the first instance responsible for his own damages.[95]

3.5.5 Who bears the onus of proving contributory negligence?

The party who raises contributory negligence or a counterclaim bears the burden of proving, on a balance of probabilities, the negligence on the part of another. If the probabilities do not favour him or are evenly balanced, he has not discharged the

---

89 Hereafter "the RAF"; Road Accident Fund Act 56 of 1996 as Amended.

90 Section 3 of the Act reads: "The provisions of section two shall apply also in relation to any liability imposed in terms of the Motor Vehicle Accidents Act, 1986 […], on the State or any person in respect of loss or damage caused by or arising out of the driving of a motor vehicle."

91 Visser & Potgieter (2012) 260; Neethling & Potgieter 1981 (44) *THRHR* 204.

92 Buchanan 1982 (99) *SALJ* 209; *Amicus Curiae* 1972 (89) *SALJ* 236.

93 Van der Walt and Midgley (2005) 179; Neethling *et al* (2015) 244.

94 "Everyone has to bear the loss he or she suffers".

95 *Telematrix (Pty) Ltd t/a v Advertising Standards Authority* SA 2006 (1) SA 461 (SCA); *Roux v Hattingh* 2012(6) SA 428 (SCA); *Imvula Quality Protection (Pty) Ltd v Loureiro and Others* 2013 (3) SA 407 (SCA); Van der Walt & Midgley (2005) 31; Neethling *et al* (2015) 3.

onus of proof and cannot succeed in his claim.[96] Contributory negligence is usually pleaded but if if the plea sufficiently places the negligence of the plaintiff in issue, the court may take it into account even in the event that it has not been expressly pleaded.[97]

3.6 Conclusion

The Act is to be read against the background of the preceding principles. Negligent conduct has to be considered insofar as it is causally linked to any damage. When determining liability as regards the damage-causing event the following is trite: The different degrees of negligence on the part of the plaintiff on the one hand and the wrongdoer on the other hand are compared. These degrees of negligence are expressed in percentages to reflect the deviation from the norm of the reasonable person. These two individual percentages are then compared and the percentage of damage that the wrongdoer is liable for is determined.

In order to measure negligence and the accompanying reduction of damages the reasonable person test is generally used. A distinction between the causal *nexus* as regards the damage-causing event as opposed to the damage itself has to be made as these are clearly two different enquiries. There are however different approaches to the determination of the reduction stemming from contributory fault. Due to the lack of guidance in the Act, disagreement has existed on firstly, how the respective parties' fault is to be measured and applied; and secondly, whether it relates to the exacerbation of harm or the contribution to the event causing the harm. As will be illustrated hereunder, this merits enquiry is often directly translated to the reduction in terms of the Act, however the Act requires that a specific enquiry be made into the fault in relation to the damage.

---

96 Klopper in Isaacs and Leveson (2012) 88; *Saal* above n76; Cooper (1996) 484.

97 *AA Mutual Insurance Association Ltd v Nomeka* 1976 (3) SA 45 (A); Visser & Potgieter (2012) 268; Boberg (1984) 659; Swanepoel 1959 (22) *THRHR* 262.

CHAPTER 4 – THE APPLICATION OF APPORTIONMENT OF DAMAGES IN SOUTH AFRICAN LAW

4.1 Introduction

The Act does not have a definition section, but makes provision for two occurrences. The first instance is where a plaintiff claims compensation following injury to his own person, which falls under Chapter 1 relating to contributory negligence. The second is where the plaintiff claims compensation following the injury or death of another person, causing the plaintiff to suffer harm, which falls under Chapter 2 relating to joint and several wrongdoers.

4.2 Chapter 1 of the Act: Contributory negligence

Section 1 of the Act provides that where a person suffers damage caused partly by his own fault and partly by the fault of another, the damages recoverable by him shall be reduced. The practical application of such a reduction is dealt with extensively in various works on the law of delict.[98] Apportionment can only be raised against a party that has been contributorily negligent. The application of section 1(1)(a) is restricted by the requirement that the plaintiff's damage must have been caused partly by 'his own fault'. The issue of contributory negligence and the meaning of fault in this context are also provided for in this section.

4.3 Fault in terms of the Act[99]

4.3.1 Distinction of fault in regard to the damage as opposed to the damage-causing event

As to whether contributory negligence refers to the damage-causing event or to the resultant damage is a source of confusion.[100] In *King v Pearl Insurance Co Ltd*[101]

98 Visser & Potgieter (2012) 265; Klopper in Isaacs & Leveson (2012) 83; Loubser & Midgley (eds) (2012) 435.

99 Par 1.5.5 above.

100 Swanepoel 1959 (22) *THRHR* 263; Boberg 1980 (97) *SALJ* 204.

the plaintiff was a driver of scooter and was not wearing a crash helmet when she was involved in a collision. The court found that the failure of the plaintiff to wear a helmet was negligent but did not constitute contributory negligence for purposes of the Act. The effect of this was that the Act was restricted to scenarios where the conduct of the plaintiff contributed to the collision or damage causing event itself.

However, in *Union National South British Insurance Co Ltd v Vitoria*[102] the Appellate Division held that the failure to wear a seat belt which aggravated the plaintiff's injuries constituted contributory negligence.[103] This approach was confirmed by the court in *Vorster v AA Mutual Insurance Association Ltd*[104] where the plaintiff's damages in respect of the aggravated loss was reduced by 20%. In *Bowkers Park Komga Co-operative Ltd v SAR&H*[105] the court held that the contributory negligence of a claimant relates to the harm and not the damage-causing event. The Plaintiff's negligence as it relates to his harm can lead to a reduction, even if he cannot be blamed for the damage-causing event.[106] The negligent conduct of the claimant is only taken into consideration insofar as it has resulted in an exacerbation of damages.

Neethling and Potgieter[107] illustrate the distinction and the effect of apportionment practically - specifically in a situation where one is able to divide the damages in portions related to its cause. A suffers damage of R10 000.00, due to a motor vehicle collision caused entirely by the negligence of B. It can be proven that A's damages would have been only R6000.00 if he had not been contributorily negligent by failing to wear his seatbelt. Thus his conduct resulted in additional damage of R4000.00. B is responsible for the full amount of R6000.00 (as it is not influenced by

---

101 1970 (1) SA 462 (W).

102 1982 1 SA 444 (A).

103 Visser & Potgieter (2012) 305; Van der Merwe & Olivier (1989) 158; Boberg (1984) 436; Buchanan 1982 *SALJ* 209.

104 1982 (1) SA 145 (T).

105 1980 (1) SA 91 (E).

106 Boberg 1980 *SALJ* 204; Van der Merwe & Olivier (1989) 160.

107 1981(44) *THRHR* 206.

the claimant's conduct). The balance of R4000.00 is subject to apportionment in terms of the Act.[108]

Another judgment which illustrates clearly the distinction between negligence as regards the event and the harm is *October v Road Accident Fund*.[109] In this case the failure to wear a crash helmet was found not to be unreasonable in the circumstances and in any event irrelevant. The facts are briefly as follows: Bradley October, aged 11 at the time collision, was hit by the insured vehicle whilst sitting on his stationary bicycle on the side of the road. The Defendant raised contributory negligence in that Bradley had failed to wear a helmet. The court commented that it was not unreasonable that he did not wear a helmet in the circumstances and that, it did not have a causal link to the occurrence of the collision. It was held that the collision was caused by the sole negligence of the insured driver. Without expressly deciding on the applicability of the Act, the court referred to prominent cases on the determination of degree of fault and negligence as set out hereafter.

4.3.2 Apportionment as a factor of fault

After the introduction of the Act, confusion existed on the correct basis of apportionment.[110] More specifically the question was whether the basis of such apportionment should be the "causative relationship to the damage" or the "relative blameworthiness" of the parties. In accordance with the wording of Section 1(1)(a)[111] apportionment is a factor of *fault*, and not of *causation*.[112] The relevance of causation as such would be restricted to the initial stage of identifying what and whose conduct led to the damage. Boberg opines that the "degrees of causation play no part in the apportionment process, which proceeds solely on the basis of a comparison between the 'degrees of fault' of the parties".[113]

---

108 Van der Merwe & Olivier (1989) 160; Boberg 1980 *SALJ* 206.

109 (6293/2008) [2010] ZAWCHC 222.

110 Boberg (1984) 668; McKerron 1962 (79) *SALJ* 443.

111 Par 3.1 above.

112 Boberg (1984) 657; Boberg 1980 (97) *SALJ* 205.

113 Boberg (1984) 668.

4.3.3 Development of different approaches in case law

In the case of *South British Insurance Co Ltd v Smit*[114] the Appellate Division held that "fault" should be interpreted to mean negligence and that "degrees of fault" meant degree of negligence. It has also been interpreted to mean "negligence causally linked with the damage".[115] Boberg notes that the degree of a party's fault is the degree of the deviation from the norm of the *diligens paterfamilias*. Thus the degree of fault of each party has to be assessed, and those degrees compared. The court in *Smit* above however held that in determining the degree of the plaintiff's fault expressed as a percentage, the balance would automatically represent the defendant's negligence.[116] For example if a court had found that the plaintiff was 30% negligent the wrongdoer was automatically found to be 70% negligent and liable for the same percentage of damages.

The aforementioned approach was rejected in *Jones NO v Santam Bpk*.[117] The court held that the conduct of the plaintiff and the wrongdoer was to be assessed against the norm of the reasonable person separately. The degree of fault of both parties must be weighed separately and then compared to each other, in order to arrive at an apportionment of 100%.[118] In *AA Mutual Insurance Association Co Ltd v Nomeka*[119] the court returned to the earlier view that the degree of the plaintiff's fault automatically determined the degree of the fault of the defendant.[120]

The courts subsequently proceeded to apply either of the above two approaches; sometimes adopting the two-stage method described in *Jones*, other times simply comparing the parties' negligence in a single-stage allocation of percentages.[121] It is submitted that the approach in *Jones* is preferable as was confirmed by the

---

114 *Smit* above n19; Boberg (1984) 670.

115 Klopper (2009) B-47.

116 To combine to a total of 100%.

117 1965 (2) SA 542 (A); McKerron 1971 (79) *SALJ* 449.

118 Boberg (1984) 658.

119 *Nomeka* above n97; Devenish 2005 (68) *THRHR* 515.

120 Van der Merwe & Olivier (1989) 165.

121 Boberg (1984) 670; Scott 1995 *TSAR* 127; Neethling & Potgieter 1994 *THRHR* 131.

Appellate division in the *Vitoria*[122] *case*. In *Harrington NO and Another v Transnet Ltd and Others*[123] the court expressed its support for the interpretation outlined in *Jones* and that this interpretation has been applied consistently over many years.

In contrast the current general practice appears to be based largely on the approach followed in *Nomeka*, that is, to apply percentages forming a total of 100%, based on pre-set similar fact scenarios in a rough and ready way.[124] The danger in this approach is that the blameworthiness of each party (as it relates to the harm) is not considered separately and measured on the merits of each case.[125] As a result if a party wishes to deviate from these percentages arguments will have to be made in support thereof. It is important that the individual facts of each case and comparative blameworthiness of each party should not be marginalised.[126]

4.3.4 Criteria when assessing fault

In *General Accident Versekeringsmaatskappy SA Bpk v Uijs*[127] the Respondent was a passenger who was injured after he had failed to comply with the driver's request to wear a seatbelt. The court decided that the Plaintiff's fault was to be considered differently from that of the driver as the passenger's fault did not contribute to the accident. The court found that a one third reduction was proper in the circumstances. It was held that the degree of contributory negligence is but one of various factors that may be considered when reducing his damages. The reason for this was that any reduction of damages should be done in a just and equitable manner.[128] The introduction of reasonableness and fairness as further criteria has been criticised as hindering the establishment of fixed guidelines.[129]

---

122 1982 (1) SA 444 (A); Neethling *et al* (2015) 172.

123 2007 (2) SA 228 (C).

124 Neethling *et al* (2015) 172; *Maphosa v Wilke* 1990 (3) SA 789 (T); *Rabie v Kimberley Munisipaliteit* 1991 (4) SA 243 (NC); *Payne v Minister of Transport* 1995 (4) SA 153 (C); *Goss v Crookes* 1998 (2) SA 946 (N).

125 Boberg (1984) 670; *Weber v Santam Versekeringsmaatskappy Bpk* 1983 (1) SA 381 (A).

126 *Da Silva v Coutinho* 1971 (3) SA 123 (A).

127 1993 (4) SA 228 (A).

128 Visser & Potgieter (2012) 266.

129 Scott 1995 *TSAR* (1) 132; Neethling *et al* (2015) 172.

4.4 Approaches to the determination of apportionment

Loubser and Midgley have identified four distinguishable approaches which have been applied to reduce the harm in cases of contributory negligence.[130] Boberg notes if a claimant's harm is divisible, in the sense that "portions thereof can be attributed to particular causes, each cause can only be related to the portion of harm it has caused".[131] If the harm is indivisible, each party has a duty to prove that it is not wholly to blame, failing which they are considered equally liable. The approaches below are also applicable to such identified and subdivided portions.

4.4.1 Approach 1: Degrees of fault are interdependent

This was the approach of the courts in the *Smit*[132] and *Nomeka*[133] cases. The degree of fault attributed to one party automatically determines the degree of negligence attributed to the other, which adds up to a total of 100%. If it is found that the claimant was 25% negligent, the balance of 75% is automatically attributed to the Defendant. This approach is popular in our courts as it leads to the simplest practical application of apportionment.

4.4.2 Approach 2: Degrees of fault are measured separately and compared (The ratio approach)

This approach was shaped in the *Jones*[134] case. The degree of fault attributed to the defendant does not depend on the degree of fault attributed to the plaintiff. The respective degrees of negligence are measured independently against a reasonable person and those degrees are then compared to provide a mathematical formula. The practical implications of this approach can be illustrated as follows[135]: If a claimant is held to be 20% negligent and the defendant is held to be 60% negligent

130 Loubser & Midgley (eds) (2012) 437.

131 Boberg 1980 (97) *SALJ* 206.

132 *Smit* above n19.

133 *Nomeka* above n97.

134 *Jones* above n117.

135 Erasmus & Gauntlett (2005) 39.

as measured separately, the ratio between the two will determine the defendant's liability. In this example it will be 20:60 thus 1:3. The claimant's negligence would be calculated as 1/4[136] x 100 = 25%. The defendant's negligence would be calculated as 3/4 x 100 = 75%.

4.4.3 Approach 3: The plaintiffs' degree of fault is not the deciding factor

The court in the *Uijs*[137] case introduced this approach. The court did not regard the plaintiff's degree of fault as the deciding factor and held that other factors which are relevant and unique to each case should be considered. That damages should be reduced in a fair and equitable way appears to be in line with the object of the Act; however it is challenging to apply consistently due to the different meanings these principles may have for different litigators and judicial officers.

4.4.4 Approach 4: Application of "gut feel" percentages following instructive cases

As is evident from reported and unreported judgements, courts apportion damages without specifically applying any of the three approaches above.[138] This assessment is done having regard to the traditional approach to negligence, whilst allowing for discretionary leeway. This approach is often followed in complicated scenarios in order to avoid re-inventing the wheel as it were. It is of considerable practical assistance. However, its biggest criticism is that it has no basis in law. A merits finding is often directly applied to the harm without considering the issues separately.

4.5 Examples of common scenarios and percentages in practice

Through precedent general guidelines have evolved in circumstances where the question of apportionment typically occurs. This aspect will be briefly discussed

136 1:3 = 4 parts.

137 *Uijs* above n127.

138 As will be illustrated par 4.5 hereafter.

below. The most common principles relate to: Failure to keep a proper lookout; Right-hand turns and overtaking; and Intersections and stop streets.

4.5.1 Driving with obscured vision or diminished visibility

There is no shortage of cases dealing with contributory negligence in circumstances where a driver's vision is obscured or diminished and is usually dealt with as instances where a party "failed to keep a proper lookout".[139] This includes driving in dust, poor or misty weather or in dark conditions or any other scenario where a driver's visibility of oncoming traffic or presence of pedestrians is obscured.[140] Naturally the facts of each case have to be assessed to see whether the conduct was reasonable and the damage foreseeable.[141]

An example of a case where a motorist's field of vision was severely diminished is *Santam Versekeringsmaatskappy Bpk v Swart*[142]. A LDV[143] collided into the back of a stationary truck in a thick cloud of dust. The dust was caused by a third motor vehicle behind which the LDV was travelling. The third motor vehicle passed the stationary truck but the LDV was not able to do so. The court held that even though the driver of the stationary truck was the main cause of the collision, the driver of the LDV drove too close behind the third motor vehicle and into the cloud of dust caused by it. Because of his failure to keep a safe following distance he did not have the opportunity to handle any unusual circumstances and in so doing, he was held to be contributorily negligent in relation to the subsequent collision. Findings varying between 70-75% in favour of a claimant and a corollary balance of 30-25% to defendant has emerged as a guideline.[144]

---

139 Klopper in Isaacs and Leveson (2012) 48; *Marine and Trade Insurance Co Ltd v Biyasi* 1981 (1) SA 918 (A); *Rondalia Assurance Corporation of SA Ltd v Mthombeni* 1979 (3) SA 967 (AD); *Saal* above n76; *Maphosa* above n119.

140 *Sinqwebo v RAF* (701/01) ZAECMHC 11.

141 *Nogude v Union and South West Africa Insurance Co Ltd* 1975 (3) SA 685 (A).

142 1987 (4) SA 816 (A).

143 Light delivery vehicle.

144 *Khwerana v SA Mutual Fire and General Insurance* 1979 (2) SA 947 (A); *AA Mutual Insurance Associated Ltd v Maqula* 1978 (1) SA 805 (A).

4.5.2 Right-hand turns and overtaking

In the well-known case of *Bata Shoe Co Ltd (South Africa) v Moss*[145] the court stated that to turn across a lane of oncoming traffic is a potentially dangerous manoeuvre. In this scenario the enquiry is on the duty of care placed on the right-turning driver. The overruling finding has been that a right-turning driver is required to indicate his intention to turn and that he has a duty to satisfy himself that his fellow road users have noted the signal and have responded appropriately thereto.[146] A driver wishing to overtake another vehicle has a similar duty.[147] A very strict duty is therefore placed on a party executing such a turn or overtaking and an average finding of 75% to claimant and 25% to defendant is often made.[148]

4.5.3 Stop streets or intersections (including robot-controlled intersections)

A motorist driving along a 'through street' has a duty to keep a proper lookout for traffic entering the intersection from the stop street.[149] The degree of care expected on the part of the driver travelling along a through street is however less than that expected of a motorist entering from the stop street.[150] There is a general duty on drivers who enter intersections to drive at such a speed so as to provide them with an opportunity to avoid collisions with other drivers.[151] A driver entering a robot controlled intersection has the aforementioned duty of care and the closer the driver was to the intersection when the lights changed to his favour, the greater the degree of care is that he has to exercise.[152] Circumstances in scenarios involving

---

145 1977(4) SA 16 (W).

146 *Brown v Santam* 1979 4 SA 370 W; *Boots Co v Somerset West Municipality* 1993 SA 216 (C); *Potgieter v AEG Telefunken* 1977 (4) SA 3 (O).

147 *Mabaso vs Marine & Trade Insurance* 1963 (3) SA 439 (D); *Castle & Castle v Pritchard* 1975 (2) SA 392 (R); *Beswick v Crews* 1965 (2) SA 690 (A).

148 *Khwerana* above n139; *Boots* above n141.

149 *Ulrich v Pepler & Co (Pty) Ltd* 1935 CPD 46.

150 *Electric Supply Commission v Le Roux* 1954 (1) SA 1047; *National Employers' General Insurance CO Ltd v Sullivan* 1988 (1) SA 27 (A); *Saal* above n76.

151 *Diale v Commercial Union Assurance* 1975 (4) SA 572 (A); *Cramer v SAR&H* 1949 (2) SA 125 (T); *Victoria Falls & Transvaal Power v Thorntons Cartage Company Ltd* 1931 TPD 516.

152 *Van Der Walt v Gershalter* 1944 TPD 240; *Santam v Gouws* 1988 (2) SA 629 (A).

intersections vary, however findings of equal fault (i.e. 50%) is used as a starting point, especially where it is not possible to determine who is largely responsible.[153]

4.6 Conclusion: Which approach is preferable?

From the above expositions provided it is clear that our court favours a comparative approach, as was first established in the *Smit*[154] case. The problem with the above examples is that it essentially represents merits findings which are automatically equated to the liability for harm. A determination of the degree of fault on the part of the plaintiff does not automatically determine the degree in which the defendant was at fault in relation to the damage. The court must also explicitly decide how the conduct of the defendant, causally linked to the damage in issue, deviated from the norm of the reasonable person.[155]

Van der Walt and Midley are of the opinion that none of the aforementioned approaches are correct.[156] Their reasoning is that the Act does not require a comparison of the degrees of negligence of the plaintiff and defendant. They state that regard should be had to the plaintiff's fault alone and that the courts should make a reduction according to what is fair and reasonable. Pienaar and Louw submit that a contextual interpretive process should be applied in deciding on an approach.[157] They conclude that the most equitable way to apportion fault in terms of the section is to evaluate the degree of fault of each party who contributed to the damage separately.[158] Such an interpretation and application of the section would be more contextual since it examines the situation pertaining to each person's conduct.

---

153 *Biddlecombe v RAF* (797/10) [2011] ZASCA 225; *Van Wyk v Road Accident Fund* (1175/05) [2007] ZAFSHC 6.

154 *Smit* above n19.

155 Erasmus & Gauntlett (2005) 39.

156 Loubser & Midgley (eds) (2012) 438; Van der Walt & Midgley (2005) 169.

157 Louw & Pienaar *Speculum Juris* 2012 (1) 74.

158 Louw & Pienaar *Speculum Juris* 2012 (1) 85.

In his critique of the judgment in *Minister of Safety and Security v Venter*[159], Scott approved of how apportionment was applied.[160] He praised the judgment for applying the mathematical approach to apportionment of contrasting the degrees of blame. Acting Judge Majiedt in deciding on an apportionment of 25% to 75% in favour of the respondents held at 77H: "In my assessment the appellant's degree of fault is indeed three times that of the respondents, i.e., 75%." Such a contrast essentially reflects a comparative approach. The approach of applying instructive percentages, which may seem arbitrary, may be viewed as an attempt to apply a comparative method whilst catering for distinguishable situations. The use of the words "just and equitable" in the Act serves to mitigate any unduly harsh outcomes, against both the plaintiff and the defendant. No matter how difficult these principles are to define, this requirement cannot be ignored. It is however submitted that these terms are already represented in the test for negligence by measuring reasonableness.

The approach in the *Jones*[161] case is preferable. A solution to the interpretation of the Act is that a clearly distinguishable two stage approach should be applied. Firstly determining the fault in relation to the damage-causing event and secondly in relation to the harm. The degree in which a party's damages have been exacerbated due to negligent conduct should be attributed to him.[162] A burden is placed on a party to act reasonable as soon as he interacts with other individuals in a community. There is no right to obtain compensation for harm caused by your own actions. Stated differently, the application of the Act should ensure that a plaintiff only recovers damages which was caused by the fault of the defendant, so that he is not compensated for damages which he is not entitled to by virtue of the fact that he caused such damages.[163] It all boils down to the purpose of damages. The purpose is to place an individual in the position he would have been in, had it not been for negligent actions. This should include his own actions.

---

159 2011 (2) SACR 67 (SCA).

160 Scott 2012 (75) *THRHR* 290.

161 *Jones* above n117.

162 Boberg 1980 (97) *SALJ* 206.

163 Par 3.5.3 above; Erasmus & Gauntlett (2005) 38; Neethling *et al* (2015) 173; *Vitoria* above n102; *Uijs* above n127.

4.7 Chapter 2 of the Act: Joint or several wrongdoers

Chapter 2 of the Act sets out the position as regards joint and several wrongdoers. The Act does not define the concept of a "joint wrongdoer", other than to describe the type of liability attaching to persons to whom the provisions of section 2 apply.[164] With regard to "Proceedings against and contributions between joint and several wrongdoers" Section 2(1) and (1B) reads as follows:

> 2(1) Where it is alleged that two or more persons are jointly or severally liable in delict to a third person (hereinafter referred to as the plaintiff) for the same damage, such persons (hereinafter referred to as joint wrongdoers) may be sued in the same action.
> 2(1B) Subject to the provisions of the second proviso to subsection (6) (*a*), if it is alleged that the plaintiff has suffered damage as a result of any injury to or the death of any person and that such injury or death was caused partly by the fault of such injured or deceased person and partly by the fault of any other person, such injured person or the estate of such deceased person, as the case may be, and such other person shall for the purposes of this section be regarded as joint wrongdoers.

4.7.1 Joint wrongdoers

4.7.1.1 Joint or several liability

It is noteworthy that the Act applies in respect of joint and several wrongdoers.[165] Joint wrongdoers are persons who can be held jointly or severally liable in delict for the same harm.[166] Only those who are jointly and severally liable (either joint or concurrent wrongdoers, i.e. persons who either jointly or severally combine to produce the same harm) can be joint wrongdoers. Those who cause different harm are not joint wrongdoers.

---

164 *Commercial Union Assurance Co Ltd v Pearl Assurance Co Ltd* 1962 (3) SA 856 (E).

165 Van der Walt & Midgley (2005) 245; McKerron (1971) 296; Van der Merwe & Olivier (1989) 168.

166 *ABSA Brokers (Pty) Ltd v RMB Financial Services and Others* 2009 (6) SA 549 (SCA).

Section 2(1) does not create a new cause of action; it merely provides a procedural method. In *Smith v Road Accident Fund*[167] the court confirmed this and commented that "[w]hat it does is to provide a means of sharing the burden of damages between joint wrongdoers in delict." As per *Nedcor Bank Ltd v Lloyd-Gray Lithographers (Pty) Ltd*[168] the distinction is this: "[J]oint wrongdoers are persons who, acting in concert or in furtherance of a common design, jointly commit a delict [...]. Concurrent wrongdoers, on the other hand, are persons whose independent or several delictual acts (or omissions) combine to produce the same damage."

Where more than one party's negligent conduct caused different harm each party is liable only for such harm as he has personally caused. The Act is applicable in scenarios where the "same damage" resulted from the parties actions.[169] In *Minister of Safety and Security and Another v Rudman and Another*[170] it was not medically possible for the expert witnesses to determine what harm resulted from which actions. The Supreme Court of Appeal, held that in those circumstances, where all the available evidence had been placed before the court, it had a duty to do the best it could to make an allocation of how much damage could be attributed to the actions of each party respectively.[171] The court held that it was simply not possible to make an allocation and reduced the finding of liability from one of 80% to one of 50% of the damages proved.

4.7.1.2 Marriage in community of property

A person married within community of property to the plaintiff may be regarded as a joint wrongdoer.[172] Section 2(1A), provides that: "A person shall for the purposes of

---

167 2006 (4) SA 590 (SCA).

168 2000 (4) SA 915 (SCA).

169 Par 3.3.3 above; *Holscher v Absa Bank en 'n Ander* 1994 (2) SA 667 (T); Neethling 1998 (61) *THRHR* 518.

170 2005 (2) SA 16 (SCA).

171 *Esso Standard SA (Pty) Ltd v Katz* 1981 (1) SA 964 (A); *Caxton Ltd and Others v Reeva Forman (Pty) Ltd* 1990 (3) SA 547 (A).

172 *Van der Merwe v Road Accident Fund* 2006 4 SA 230 (CC); *Labuschagne v Cloete* 1987 (3) SA 638 (T).

this section be regarded as a joint wrongdoer if he would have been a joint wrongdoer but for the fact that he is married in community of property to the plaintiff."

4.7.2 Damage as a result of death or injury[173]

Section 2(1B) deals with the death of or injury to a breadwinner.[174] The Act is often incorrectly applied where a dependant suffers loss of support due to the death or injury of a breadwinner, where both the breadwinner and a third party have been negligent.[175] Boberg correctly emphasises that the condition of "own fault" implies that contributory negligence on the part of the physically injured or deceased person is not a ground for reducing the damages to which his dependants[176] are entitled.[177] This is so because the plaintiff's harm was not caused partly by *his* own fault.[178]

A dependant's claim for loss of support, is the dependant's own action and not an action derived from the deceased's estate.[179] As such it cannot be reduced on account of any contributory negligence on the part of the deceased.[180] In the event of death of the breadwinner, the defendant and the estate of the breadwinner are considered to be joint wrongdoers.[181] The dependant may claim from them jointly and severally. Furthermore the Plaintiff needs to prove only 1% negligence on the part of the insured driver for a wrongdoer to incur responsibility for 100% of the harm.[182] The 1%-rule results from the practical implications of the rights of recourse

---

173 Visser & Potgieter (2012) 257.

174 Boberg 1979 (96) *SALJ* 525; Klopper 2007 (70) 441; Neethling 1988 (51) *THRHR* 107; Koch 1986 (49) *THRHR* 217; Koch 1989 (52) *THRHR* 67.

175 Boberg (1984) 664; Examples are discussed in para 4.7.3 – 4.7.5 below.

176 Acting as Plaintiff in an action.

177 Boberg (1984) 664.

178 Unless the plaintiff himself was involved and negligent in a way that contributed causally to the injury or death on which his claim is based.

179 *Jameson's Minors v CSAR* 1908 (TS) 575; Dendy 1990 (107) *SALJ* 155; Klopper 2007 (70) *THRHR* 441.

180 *Kleynhans v Santam Versekeringsmaatskappy Bpk* 1974 (3) SA 53 (A); See Chapter 5 below and the discussion of *Deale v Padongelukfonds* (21484/2008) [2011] ZAGPPHC 167.

181 Davel (1987) 91; Dendy 1990 (107) *SALJ* 155.

182 *Odendaal v Road Accident Fund* 2002 (3) SA 70 (W).

between joint wrongdoers.[183] The Act regulates the way in which the amount awarded to the dependant for loss of support is to be calculated in Section 2(6)(a) of the Act. If a joint wrongdoer pays a judgment debt in full, he may recover contributions from other joint wrongdoers for their portions as per the court's division of responsibility for the plaintiff's harm.[184]

The wrongdoer who has satisfied his obligation may exercise his right of recourse against the estate of the deceased only in respect of assets that were not taken into account in assessment of the damages. Any benefit received by the dependant in terms of the law of succession from the estate of the deceased person, may be subtracted from the estimated value of the loss of support. If such a benefit as aforementioned is taken into consideration when determining the value of damages, the dependant who has suffered the loss may not be deprived of this benefit.[185]

Koch makes the significant observation that: "When the estate has no assets, as happens with the vast majority of deceased victims in South Africa, the wrongdoer is without recourse.[186] The so-called "1% rule" then applies whereby the wrongdoer incurs liability for 100% of the damages notwithstanding contributory negligence of only 1% on his part."[187]

4.7.3 Breadwinner's contributory negligence in representative capacity

Where a plaintiff is acting in representative capacity his contributory negligence cannot be imputed to his dependants.[188] Where a plaintiff's personal claim is

183 See par 4.8.1 below.

184 Sec 2(6)(a).

185 Visser & Potgieter (2012) 257.

186 Koch (1993) *LLD Thesis* 343; He provides an exposition of practical application as follows: "With small estates it is usual that the widow takes over the assets and signs an undertaking to pay all debts of the estate. It is conceivable that a wrongdoer may exercise his right of recourse against such a widow. It is doubtful though that the master would require the widow to meet such a claim. An executor could then be appointed and the estate wound up as insolvent".

187 *Lee* above n34.

188 Boberg (1984) 667; *Windrum v Neunborn* 1968 (4) SA 286 (T).

combined in a single action with a representative claim for dependant's damages, the representative claim is reduced while the personal claim is not.[189] The following example serves to illustrate the above statement: A father is driving a vehicle in which his child is a passenger and they are involved in a collision. Pursuant to the collision he claims compensation in his personal and representative capacities on the basis of the negligence of the driver of the other vehicle. If he was in fact contributorily negligent, then that can be raised only against his claim in his personal capacity, and not in respect of his claim in representative capacity. In respect of such a claim, the desired apportionment can only be achieved by way of a conditional counterclaim, in which the defendant claims that if it is held liable to the plaintiff in his representative capacity, then the plaintiff in personal capacity is a joint wrongdoer, and the defendant is entitled to a contribution accordingly. A debt owed by a person in his personal capacity cannot be set-off against a debt owed to the same person in a representative capacity.[190]

The above was confirmed by the Supreme Court of Appeal in *Road Accident Fund v Myhill NO*[191]. Mrs Swalibe had been walking alongside an unpaved road together with her two minor children, when they were struck by a motor vehicle. She claimed compensation in her personal and representative capacities from the RAF, which apportioned 30% to 70% in favour of the plaintiff, and made offers on that basis, simply applying that apportionment percentage to all of the claims. A Curator *ad litem* was appointed in the childrens' interests and some 10 years later the settlements were set aside. The court held that the settlements were clearly prejudicial to the interests of the minors and emphasised that "individuals in their personal capacities are treated as different persons from when they act in representative capacities". It was held that it was impermissible to reduce the appellant's liability to the minor children by of setting off the personal liability of the plaintiff (due to contributory negligence on her part) against their claims. The same principle should apply where a negligent plaintiff also sues as cessionary of the claim

189 *Smit* above n19; *Jones* above n117; *Neuhaus v Bastion Insurance Co Ltd* 1967 (4) SA 275 (W).

190 Christie (2001) 498; Van der Merwe & Olivier (1989) 168.

191 2013 (5) SA 426 (SCA).

of an innocent party, such as e.g. the plaintiff's father, who incurred medical expenditure as a result.

4.7.4 Where a dependant is injured due to his own negligence and that of a third party

A breadwinner's claim for damages resulting from his dependants' injuries, being the father's own *personal* claim, cannot be reduced on account of contributory negligence on the part of the dependants.[192] A familiar example is as follows. A parent suffers financial loss as a result of his child's injuries, in relation to which the child has also been negligent. Both the child and the third party are deemed to be joint wrongdoers opposite the parent. Theoretically the parent may elect to claim compensation from either of the parties, but in practice he will claim from the third party and the third party will not recover any contribution.[193]

4.7.5 Where a breadwinner is injured by his own negligence and that of a third party

According to the court in *De Vaal v Messing*,[194] the dependants have no claim against the third party as the breadwinner can institute an action himself. In contradiction, according to the provisions of the Act a dependant should have a full action against the third party (who will have a right of recourse against the breadwinner as a joint wrongdoer).[195] The latter's damages will, of course, be reduced in relation to his contributory negligence, possibly leaving the dependants with very little.[196] The court in *De Vaal* emphasised the difference in origin of the rights of the breadwinner as opposed to the dependants. It warned against the risk of

---

192 *Nieuwenhuizen NO v Union & National Insurance Co Ltd* 1962 (1) SA 760 (W); *Saitowitz v Provincial Insurance Co Ltd* 1962 (3) SA 443 (W); *Du Preez v AA Mutual Insurance Association Ltd* 1981 (3) SA 795 (E); *Schnellen v Rondalia Assurance Corporation of SA Ltd* 1969 (1) SA 31 (W); Boberg 1979 (96) *SALJ* 525; Neethling 1988 (51) *THRHR* 106.

193 Visser & Potgieter (2012) 257; *Windrum* above n184.

194 1938 TPD 34.

195 Neethling 1998 (51) *THRHR* 107.

196 Visser & Potgieter (2012) 258.

creating opportunity where a breadwinner could intentionally contribute to an injury in order to provide financial gain for his dependants.[197]

4.8 Incidental matters: Joinder of parties and recourse

4.8.1 Joinder of parties, apportionment between joint wrongdoers and recourse

A wrongdoer can exercise a right of recourse against another joint wrongdoer either by giving Notice in terms of Sections 2(2) and 2(6)(a), or by joining such other party in proceedings under Rule 13 of the Uniform Rules of Court.[198] A court may apportion the damages among joint wrongdoers, *mero motu* or on their request, on any basis it deems fair and by taking into account the respective degrees of negligence. [199] If a plaintiff is successful in recovering only part of his damages from a wrongdoer, he may claim the balance from any such joint wrongdoer.[200]

4.8.2 Effects of settlement, judgment or payment

The Act provides for recourse between joint wrongdoers on settlement or judgment.[201] In *Picbel Groep Voorsorgfonds (in liquidation) v Somerville and other related matters*[202] the court found that the full amount has to be settled before such rights could be relied upon by other joint wrongdoers. Visser and Potgieter say the following: "If the plaintiff recovers only part of his or her damages from a joint

---

197 Dendy 1990 (107) 155; Davel (1987) 90.

198 Van der Walt & Midgley (2005) 249; *Shield Insurance Co Ltd v Zervoudakis* 1967 (4) SA 735 (E); *Hart and Another v Santam Insurance Co Ltd* 1975 (4) SA 275 (E).

199 Section 8(a)(i-iii) of the Act; "[P]rovided any amount which the plaintiff is unable to recover from any joint wrongdoer under a judgment so given […] whether by reason of the said joint wrongdoer's insolvency or otherwise, may be recovered by the plaintiff from the other joint wrongdoer or, if there are two or more other joint wrongdoers, from those other joint wrongdoers in such proportions as the court may deem just and equitable."

200 Visser & Potgieter (2012) 255.

201 Sections 2(6) and 2(12); Boberg 1962 (79) *SALJ* 126.

202 [2013] 2 All SA 692 (SCA).

wrongdoer, the plaintiff may sue any other wrongdoer for the balance."[203] The Act also provides for discharge or release by settlement or payment.[204] Section 2(10) must relate to a compromise arrived at after the delict, as a person who successfully disclaims liability beforehand cannot be a joint wrongdoer, since the successful disclaimer precludes him from being liable in delict.[205] In *Prinsloo v Du Preez NO*[206] the court held that such a discharge does not have the result that a party waives his right to claim damages or limit the amount owed to him by anyone and everyone as a result of a delict. It will merely be binding between the parties so discharged and for those accompanying portions. The remainder of the damages, and not the full amount, may be claimed from the remaining parties.[207]

In *Mosholi v Putco (Pty) Limited*[208] the court found that the Road Accident Fund is not a joint wrongdoer in terms of the Act, specifically for purposes of section 2(10), which is with respect arguably incorrect.[209] There is nothing in the Act which precludes the RAF from being a joint wrongdoer, in fact the opposite is true.[210] In this case the Plaintiff was a fare-paying passenger on a bus. The Plaintiff settled with the RAF for the full amount possible in terms of the statutory limit applicable at the time, being R25 000.00. She claimed the balance from the appellant, being the employer of the bus driver at the time of the collision, as she was entitled to do. The finding was made by the court *a quo* on the basis that the bus driver was contributorily negligent on his own version. The court's finding was that the collision in question was entirely the fault of the driver of the bus, so there was in fact no question of an apportionment. The case is nevertheless instructive in that the

---

203 Visser & Potgieter (2012) 291.

204 Section 2(10) and 2(13) of the Act; *Boyce NO v Bloem and Others* 1960 (3) SA 855 (T).

205 *Protea Assurance Co Ltd v Casey* 1970 (2) SA 643 (AD); *Windrum* above n184.

206 1965 (4) SA 300 (W).

207 In *Lamont and Another v Rocklands Poultry and Others* 2010 (2) SA 236 (SE) the court held that a plaintiff may be generous at his own expense, but not at the expense of other parties and referred to *Prinsloo v Du Preez NO* 1965 (4) SA 300 (W).

208 2011 (5) SA 38 (GNP).

209 The matter was heard on appeal however the court did not revisit the issue of whether the RAF can be a joint wrongdoer in terms of the Act; *Putco (Pty) Ltd v W M Mosholi* (577/2010) [2011] ZASCA 95.

210 Par 3.5.3 above.

plaintiff's settlement with the RAF and discharging of it from all liability beyond that, would not have precluded her from suing the Fund on the basis of the negligence of another negligent driver (had there been one), so that Section 2(10) would in any event not have applied.

CHAPTER 5 – ILLUSTRATION OF MISINTERPRETATION OF PROMINENT PRINCIPLES - *Deale v Padongelukfonds*[211]

5.1 Introduction

As was set out above various interpretations and approaches are possible when applying the Act. Where a person's own conduct contributed to his death or injury, the procedure which is followed in determining whether apportionment is applicable, in if so, how it should be applied is often incorrect. The unreported judgment of *Deale v Padongelukfonds* is illustrative of the application of the Act and the issues identified in the aforegoing chapters. The question before the court was whether damage suffered by the Plaintiff, the widow of the deceased, should be reduced due to the contributory negligence on the part of the deceased. The court found that it should be reduced and it is respectfully submitted that the court misdirected itself in that regard. The facts of the case will be set out and briefly analysed thereafter.

5.2 Facts

The Plaintiff claimed loss of support following the death of her husband, in a motor vehicle collision. The accident occurred when the insured driver ignored a stop sign and the deceased, a motorcycle rider, was not wearing a helmet at the time. The parties agreed that the insured driver caused the accident and that the RAF as Defendant was 100% liable for the Plaintiff's proven or agreed damages. The question of the Defendant's liability for the Plaintiff's damage and the apportionment thereof in terms of section 1(1) of the Act was separated from the question with regard to the quantum of damages.[212]

Acting Judge Hiemstra found that the deceased's failure to wear a helmet constituted contributory negligence and that accordingly the damage suffered by the Plaintiff must be reduced.[213] The deceased died as a result of fractures to his skull and

211 Unreported: 21484/2008 [2011] ZAGPPHC 167.

212 In terms of Rule 33(4) of the Uniform Rules of Court; Sec 2(3) of the Act allows the court to order a separation of trials on application.

213 *Vitoria* above n102; *Vorster* above n104; *Bowkers* above n105; *Uijs* above n127.

extensive injuries to his brain. Expert evidence was led on the extent to which wearing a helmet may have limited the risk of death or injury. The expert witnesses for the Plaintiff and the Defendant respectively, estimated that if he had worn a helmet there would have been a 10% or 66.6% possibility that he would have sustained a head a fatal head injury.

Despite these statistics, the court held that the extent to which the risk is reduced by the wearing a helmet, is not determinable of the percentage to which the damage of the Plaintiff should be reduced.[214] The court considered how far the deceased's conduct deviated from the norm of the reasonable person. In this case the judge found that it is so obvious that a helmet should be worn at all times, that the deceased's conduct amounts to a 100% deviation from that norm. The parties agreed the insured driver also deviated 100% from the norm of the reasonable person. It could be argued that both had equal fault relating to the causing of the damage if the 100% deviations were compared in this approach.

The court however noted that the fault of the two drivers in this scenario are not the same. The court regarded an individual failing to wear a helmet so much more reckless and irresponsible than an individual failing to wear a safety belt, where the percentage of fault attributed seemed not to exceed 25%.[215] The deceased did not in any way contribute to the causing of the collision and if not for the insured driver's negligence the collision would not have occurred. Therefore it was regarded as fair that the defendant be held responsible for the largest part of the damage. The Judge thought it "fair and just" to order a reduction of 30% against the Plaintiff and that the Defendant is liable for 70% of the damage that the Plaintiff may prove.

5.3 Discussion

In light of the background provided by the discussion of principles in previous chapters it is now possible to identify the practical implications thereof. The court respectfully erred in the following on the following aspects:

214 *Uijs* above n127.

215 The court stated that it could not refer to any cases dealing with the failure to wear a helmet.

1. The contributory negligence of the deceased cannot be credited to the dependants due to the requirement of "his own fault in relation to the damage" in the Act. The dependants did not bring about harm in any way and as such their damages cannot be reduced. This is so because their right to claim stems from a right to financial support, which was impaired by the actions of the insured driver and they have only to prove 1% negligence on his part.

2. In order for the deceased's actions to be taken into consideration, the deceased estate should have been joined as a joint wrongdoer.[216] The deceased's contributory negligence cannot be directly set off against the dependant's claims.

3. One must distinguish between mere negligence and negligence causally connected to the damage.[217] The question before the court would be: Would the wearing of the crash helmet have prevented death? If so what would the probable effect of a crash helmet have been on the damages? The negligence must have contributed to the harm. Therefore only those damages caused by the contributory negligence are apportionable and not the total harm.[218]

4. If one postulates that the deceased would have survived if he had worn the crash helmet, how would the non-wearing of the crash helmet have aggravated the damage? Only the aggravated damages will be subject to apportionment and it would be necessary to divide the damages.[219] It is necessary for the court to determine specifically what the exacerbation is and only that portion can be apportioned. If he would have survived, but suffered concussive brain injury, the difference in loss between the two scenarios are

---

216 Par 4.7.2 above.

217 Par 3.5.3 and 4.3.1 above; *Amicus Curiae* 1972 (89) *SALJ* 236; Boberg 1980 (97) *SALJ* 204; Neethling & Potgieter 1981 (44) 204.

218 This must be distinguished from situations where for example deceased passed away due to unrelated injuries, i.e caused by bodily injuries, such as amputation or abdominal injuries, and a helmet would not have resulted in a different outcome in any event.

219 *Vitoria* above n102; *Vorster* above n104; *Uijs* above n127.

apportioned due to his negligence. In this case the difference is 100% attributable to his negligent conduct.

5.4 Conclusion

With respect, in this judgment the interpretation of the principles underlying the Act was inappropriate and bad in law. Although certain principles are open for interpretation because the Act is too vague, our legal practitioners and judiciary should be in a position to identify and apply recognized approaches. Enough discussion on the topic exists to provide guidelines for the application of the Act. It is necessary for practitioners to familiarise themselves with the principles and obtain a clear idea of the application to avoid confusion.

CHAPTER 6 – CONCLUSION

6.1 Introduction

In order to realise the ideals of justice, fairness and reasonableness, one needs to find the intricate balance between; being put back in the position a person would have been had the incident not occurred and the principle that one cannot benefit from their own negligence. The development and practical implementation of the Act has been largely affected by the interpretation thereof. As it stands apportionment is applied by use of the Act, which is amplified and interpreted by means of common law principles, academic theories and case law, as well as the recent open-ended considerations such as reasonableness and fairness. Most challenges have been addressed by our courts and precedent exists for the application of the Act. Whilst our courts have provided clarity on these issues by delivering motivated and well researched judgments, it has occurred on many occasions that authoritative precedent has been completely disregarded and overruled. This is an undesirable situation as the incorrect and discretionary application of the Act leads to uncertainty.

6.2 Recommendations

Various recommendations were made by the SALRC in its discussion paper. [220] The recommendations would allow for clarity and result in consistent application of the Act. The Commission is of the opinion that a broader basis for apportionment is necessary and that the criterion for the apportionment should be responsibility rather than fault.[221] I agree with the submission that "fault" means negligence and that the wording of the Act should make it clear. To that end all references to "fault" in section 1 of the Act should be substituted with the words "negligent conduct".

Neethling, Visser and Potgieter rightly express the view that the difference of approaches in measuring parties' respective fault for purposes of reduction has led to an unsatisfactory situation and that the Supreme Court of Appeal should, in the

220 SALRC (2003) *Report* Chapter 5.

221 *Ibid.*

interest of legal certainty identify and reject incorrect approaches and confirm an absolute approach. It is submitted that the approach in the *Jones*[222] case is preferable, that is, the parties' negligent conduct resulting in harm should be measured separately and only applied to the portions of damage which have been caused and exacerbated by that conduct. The precedent developed as regards percentages discussed above may be used as guidelines when considering merits and liability, but should not result in a disregard of the unique conditions of each case. It is essential that proper attention be given to all portions of a delict. The court should have not only the discretion, but also the duty, to consider the degrees of negligence of each party separately as it relates to the collision and then to damage caused. This is not the same as the fault in relation to the damage-causing event and to deal with both issues in one fell swoop indicates an undesirable apathetic approach.

6.3 Conclusion

Where a defendant is not solely responsible for a claimant's damages due to wrongful conduct of another, it has to be taken into account. In determining how this has to be done, it is necessary for a standardised approach to be identified and applied throughout. If the Act were to be reviewed, clarification as regards the extent to which negligent conduct is to be applied as well as provision for an unequivocal guideline of how this is to be assessed should be included. The comparative approach followed in the *Jones*[223] case provides for a definable formula and would thus be best suited in determining a damages reduction. Policy considerations are intensified by Constitutional values and these are in effect accommodated for in the reasonable person test when negligence is considered. This test acts as a sufficient and workable guideline in all scenarios. If the comparative approach can be enforced, uniformity will be achieved and the uncertainty of discretionary application can be eliminated, even if the Act is not redrafted. It is necessary for courts to bear in mind that a person's conduct as it is causally linked to harm, should be apportioned and a separate enquiry to extent to which harm is exacerbated by contributory

222 *Jones* above n117.

223 *Ibid.*

negligence should be done. Mere negligent conduct is not sufficient – it must be linked to increased harm. If legal practitioners are able to clearly make this distinction and apportion the parts to which a claimant's actions are related, the purpose of the Act can be achieved.

(Word count including footnotes: 14997)

BIBLIOGRAPHY

Primary Sources

Legislation

Apportionment of Damages Act 34 of 1956

Apportionment of Damages Amendment Act 58 of 1971

Assessment of Damages Act 9 of 1969

The Constitution of the Republic of South Africa 1996

Maintenance of Surviving Spouses Act 27 of 1990

Matrimonial Property Act 88 of 1984

Road Accident Fund Act 56 of 1996

Apportionment of Loss Bill 2003

Case Law

AA Mutual Insurance Association Ltd v Maqula 1978 (1) SA 805 (A)

AA Mutual Insurance Association Ltd v Nomeka 1976 (3) SA 45 (A)

Bata Shoe Co Ltd (South Africa) v Moss 1977 (4) SA 16 (W)

Beswick v Crews 1965 (2) SA 690 (A)

Biddlecombe v RAF (797/10) [2011] ZASCA 225

Boots Co v Somerset West Municipality 1993 (3) SA 216 (C)

Bowkers Park Komga Cooperative Ltd v SAR&H 1980 (1) SA 91 (E)

British Columbia Electric Railway v Loach [1916] 1 AC 719 (PC)

Brown v Santam 1979 (4) SA 370 (W)

Butterfield v Forrester (1809) II East 60; 103 ER 962

Castle & Castle v Pritchard 1975 (2) SA 392 (R)

Caxton Ltd and Others v Reeva Forman (Pty) Ltd 1990 (3) SA 547 (A)

Coetzee v Van Rensburg 1954 (4) SA 616 (AD)

Commercial Union Assurance Co Ltd v Pearl Assurance Co Ltd 1962 (3) SA 856 (E)

Cramer v SAR&H 1949 (2) SA 125 (T)

Da Silva v Coutinho 1971 (3) SA 123 (A)

Davies v Mann (1982) 10 M&W 546

Deale v Padongelukfonds (21484/2008) [2011] ZAGPPHC 167

De Vaal v Messing 1938 TPD 34

Diale v Commercial Union Assurance 1975 (4) SA 572 (A)

Du Preez v AA Mutual Insurance Association Ltd 1981 (3) SA 795 (E)

Electric Supply Commission v Le Roux 1954 (1) SA 1047

Esso Standard SA (Pty) Ltd v Katz 1981 (1) SA 964 (A)

General Accident Versekeringsmaatskappy SA Bpk v Uijs NO 1993 (4) SA 228 (A)

Goss v Crookes 1998 (2) SA 946 (N)

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

Guardian National Insurance Co Ltd v Saal 1993 (2) SA 161 (C)

Harrington NO and another v Transnet Ltd and others 2007 (2) SA 228 (C)

Hart and Another v Santam Insurance Co Ltd 1975 (4) SA 275 (E)

Holscher v Absa Bank en 'n Ander 1994 (2) SA 667 (T)

Imvula Quality Protection (Pty) Ltd v Loureiro and Others 2013 (3) SA 407 (SCA)

International Shipping Co Pty Ltd v Bentley [1990] 1 All SA 498 (A)

Jameson's Minors v CSAR 1908 TS 575

Jones NO v Santam Bpk 1965 (2) SA 542 (A)

Khwerana v SA Mutual Fire and General Insurance 1979 (2) SA 947 (A)

King v Pearl insurance Co Ltd 1970 (1) SA 462 (W)

Kleynhans v Santam Versekeringsmaatskappy Bpk 1974 (3) SA 53 (A)

Kruger v Coetzee 1966 (2) SA 428 (A)

Labuschagne v Cloete 1987 (3) SA 638 (T)

Lamont and Another v Rocklands Poultry and Others 2010 (2) SA 236 (SE)

Mabaso vs Marine & Trade Insurance 1963 (3) SA 439 (D)

Maphosa v Wilke 1990 (3) SA 789 (T)

Marine and Trade Insurance Co Ltd v Biyasi 1981 (1) SA 918 (A)

Minister of Police v Skosana 1977 (1) SA 31 (A)

Minister of Safety and Security and Another v Rudman and Another 2005 (2) SA 16 (SCA)

Minister of Safety and Security v Venter 2011 (2) SACR 67 (SCA)

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

Mosholi v Putco (Pty) Limited 2011 (5) SA 38 (GNP)

National Employers' General Insurance Co Ltd v Sullivan 1988 (1) SA 27 (A)

Nedcor Bank Limited v Lloyd-Gray Lithographers (Pty) Ltd 2000 (4) SA 915 (SCA)

Neuhaus v Bastion Insurance Co Ltd 1967 (4) SA 275 (W)

Nieuwenhuizen NO v Union & National Insurance Co Ltd 1962 (1) SA 760 (W)

Nogude v Union and South West Africa Insurance Co Ltd 1975 (3) SA 685 (A)

October v Road Accident Fund (6293/2008) [2010] ZAWCHC 222

Odendaal v Road Accident Fund 2002 (3) SA 70 (W)

Oslo Land Co v Union Government 1938 AD 54

Payne v Minister of Transport 1995 (4) SA 153 (C)

Picbel Groep Voorsorgfonds (in liquidation) v Somerville and other related matters [2013] 2 All SA 692 (SCA)

Pierce v Hau Mon 1944 AD 175

Potgieter v AEG Telefunken 1977 (4) SA 3 (O)

Prinsloo v Du Preez NO 1965 (4) SA 300 (W)

Protea Assurance Co Ltd v Casey 1970 (2) SA 643 (AD)

Putco (Pty) Ltd v W M Mosholi (577/2010) [2011] ZASCA 95

Rabie v Kimberley Munisipaliteit 1991 (4) SA 243 (NC)

Road Accident Fund v Myhill NO 2013 (5) SA 426 (SCA)

Rondalia Assurance Corporation of SA Ltd v Mthombeni 1979 (3) SA 967 (AD)

Roux v Hattingh 2012 (6) SA 428 (SCA)

S v Mokgethi 1990 (1) SA 32 (A)

Saitowitz v Provincial Insurance Co Ltd 1962 (3) SA 443 (W)

Santam v Gouws 1988 (2) SA 629 (A)

Santam Versekeringsmaatskappy Bpk v Swart 1987 (4) SA 816 (A)

Schnellen v Rondalia Assurance Corporation of SA Limited 1969 (1) SA 31 (W)

Shield Insurance Co Ltd v Zervoudakis 1967 (4) SA 735 (E)

Sinqwebo v RAF (701/01) ZAECMHC 11

Smith v Road Accident Fund 2006 (4) SA 590 (SCA)

South British Insurance Co Ltd v Smit 1962 (3) SA 826 (A)

Swadling v Cooper [1931] A.C. 1

Taylor v SAR&H 1958 (1) SA 139 (D)

Telematrix (Pty) Ltd t/a v Advertising Standards Authority SA 2006 (1) SA 461 (SCA)

Thoroughbred Breeders' Association of South Africa v Price Waterhouse 2001 (4) SA 511 (SCA)

Ulrich v Pepler & Co (Pty) Ltd 1935 CPD 46

Union Government (Minister of Railways) v Lee 1927 AD 202

Union Government v Warneke 1911 AD 657

Union National South British Insurance Co Ltd v Vitoria 1982 (1) SA 444 (A)

Van der Merwe v Road Accident Fund 2006 (4) SA 230 (CC)

Van der Walt v Gershalter 1944 TPD 240

Van Wyk v Road Accident Fund (1175/05) [2007] ZAFSHC 6 (11 January 2007)

Victoria Falls & Transvaal Power v Thorntons Cartage Company Ltd 1931 TPD 516

Vorster & Another v AA Mutual Insurance Association Ltd 1982 (1) SA 145 (T)

Waite v North-Eastern Railway Co (1858) EB&E 71

Windrum v Neunborn 1968 (4) SA 286 (T)

Secondary Sources

Books

Boberg PQR (1984) *The Law of Delict Volume 1 Aquilian Liability* Cape Town: Juta

Cooper WE (1996) *Delictual Liability in Motor Law* Cape Town: Juta

Christie RH (2001) *The Law of Contract in South Africa 6th Edition* Durban: Butterworths

Currie I & De Waal J (2005) *The Bill of Rights Handbook 5th Edition* Landsdowne: Juta

Davel CJ (1987) *Skadevergoeding aan Afhanklikes by die Dood van die Broodwinner* Digma: Roodepoort

Erasmus HJ & Gauntlett JJ (updated by Visser PJ) (2005) *Damages LAWSA Volume 7* Durban: Butterworths

Klopper HB (2012) *Isaacs and Leveson: The Law of Collisions in South Africa 8th Edition* Durban: LexisNexis

Klopper HB (2012) *The Law of Third Party Compensation 3rd Edition* Durban: LexisNexis

Klopper HB (2009) *RAF Practitioner's Guide (Service issue 20)* Durban: LexisNexis

Loubser M & Midgley JR (eds) (2012) *The Law of Delict in South Africa 2nd Edition* Cape Town: Oxford University Press

McKerron RG (1956) *The Apportionment of Damages Act, 1956* Cape Town: Juta

McKerron RG (1971) *The Law of Delict 7th Edition* Cape Town: Juta

Neethling J, Potgieter JM & Visser PJ (2015) *Law of Delict 7th Edition* Durban: LexisNexis

Thomas PhJ, Van der Merwe CG and Stoop BC (2000) *Historical Foundations of South African Private Law 2nd Edition* Durban: Butterworths

Van der Merwe NJ & Olivier PJJ (1989) *Die Onregmatige Daad in die Suid-Afrikaanse Reg 6de Uitgawe* Pretoria: Van der Walt & Seun

Van der Walt JC & Midgley JR (2005) *Principles of Delict 3rd Edition* Durban: LexisNexis Butterworths

Visser PJ & Potgieter JM (2012) *Law of Damages 3rd Edition* Claremont: Juta

Journal Articles

Ahmed R "Contributory intent as a defence limiting delictual liability" 2014 (17) 4 *Potchefstroom Electronic Law Journal* 1517

Amicus Curiae "Contributory negligence and the crash helmet" 1972 (89) *South African Law Journal* 236

Boberg PQR "Contribution between joint-wrongdoers – costs" 1962 (79) *South African Law Journal* 126

Boberg PQR "The assessment of damages for death" 1972 (89) *South African Law Journal* 147

Boberg PQR "Who can sue for wife or child's medical expenses" 1979 (96) *South African Law Journal* 525

Boberg PQR "Multiple causation, contributory negligence, mitigation of damages and the relevance of these to the failure of wearing a seatbelt" 1980 (97) *South African Law Journal* 204

Buchanan JL "Apportionment of damages and fault" 1982 (99) *South African Law Journal* 209

Dendy M "Claims for damages for loss of support: Dependant's or breadwinners' actions?" 1990 (107) *South African Law Journal* 155

Devenish GE "Precedent revisited – Overruling the Supreme Court of Appeal" 2005 (68) *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 515

Erasmus HJ "Aspects of the history of the South African Law of Damages" 1975 (38) *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 104-115, 268-283, 362-369

Havenga PH "Contractual claims and contributory negligence" 2001 (64) *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 124

Klopper HB "The widow's portion" 2007 (70) *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 440

Koch RJ "Damages for personal injury and death" 1986 (49) *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 215

Koch RJ "Aquilian damages for personal injury and death" 1989 (52) *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 66-80, 203-215

Kotzé, PJ "The Apportionment of Damages Act 1956" 1957 (20) *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 148

Louw TJG & Pienaar J "Whose fault is it anyway? A Reflection on the interpretation of Section 1(1)(a) of the Apportionment of Damages Act (No. 34/1956) as Amended" 2012 (1) *Speculum Juris* 74

McKerron RG "Apportionment of damages and the 'Last Opportunity' Rule" 1968 (31) *South African Law Journal* 15

McKerron RG "Reduction of damages under the Apportionment of Damages Act" 1971 (79) *South African Law Journal* 443

Millner MA "Prickly problems in damages" 1957 (74) *South African Law Journal* 371

Neethling J "Die benadeling van die gemeenskaplike boedel of van 'n gade getoud binne gemeenskap van goedere deur die nalatige optrede van die ander gade en 'n derde" 1988 (51) *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 106

Neethling J & Potgieter JM "Bydraende nalatigheid – Versuim om veiligheidsgordel te dra" 1981 (44) *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 204

Neethling J & Potgieter JM "Bydraende opset en die Wet op Verdeling van Skadevergoeding 34 van 1956" 1992 (55) *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 658

Neethling J & Potgieter JM "Aspekte van die delikselemente nalatigheid, feitelike en juridiese kousaliteit (insluitend die sogenaamde eierskedelgevalle)" 1993 (56) *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 157

Neethling & Potgieter "Die korrekte kriterium vir die berekening van bydraende nalatigheid" 1994 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 131

Potgieter JM "Feitelike en juridiese kousaliteit" 1990 (53) *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 267

Reinecke MFB "Die element van die begrip skade" 1976 *Tydskrif vir die Suid-Afrikaanse Reg* 26

Reinecke MFB "Nabetragtinge oor die skadeleer en voordeeltoerekening" 1988 (21) *De Jure* 221

Scott TJ "Die kriterium vir die berekening by bydraende nalatigheid. Enkele gedagtes" 1995 *Tydskrif vir die Suid-Afrikaanse Reg* 127

Scott TJ "Delictual liability of the police flowing from non-compliance with the Domestic Violence Act: Minister of Safety and Security v Venter 2011 2 SACR 67 (SCA) (May 2, 2012)" 2012 (75) *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 288

Swanepoel HL "Oor die Wet op Verdeling van Skadevergoeding" 1959 22 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 262

Van der Walt "Die Voordeeltoerekeningsreël - knooppunt van uiteenlopende teorieë oor die oogmerk met skadevergoeding" 1980 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 1

Visser PJ "*Conditio sine qua non*" 1989 (50) *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 558

Wilson PA "Tort: Contributory negligence and the last opportunity rule" *Res Judicatae* 1950 (48) 193

Reports

The South African Law Reform Commission: *Project 96 The Apportionment of Samages Act 34 of 1956* (July 2003: Pretoria)

Theses

Davel CJ (1984) *Die Dood van die Broodwinner as 'n Skadevergoedingsoorsaak* (LLD-thesis: University of Pretoria)

Koch RJ (1993) *The Reduced Utility of a Life Plan* (LLD-thesis: University of Stellenbosch)

Van der Walt CFC (1977) *Sommeskadeleer en die "Once and for all" Reël* (LLD-thesis: UNISA Pretoria)