THE APPLICABILITY OF THE APPORTIONMENT OF DAMAGES ACT 34 OF 1956
TO CONTRACTUAL CLAIMS WITH EMPHASIS ON THE DEVELOPMENT OF
APPORTIONMENT LAWS IN SOUTH AFRICA AND SIMILAR FOREIGN
JURISDICTIONS

Submitted in partial fulfilment of the requirements for the degree LLM

By : MATHEW GRIMBEEK
27281371

Prepared under the supervision of Professor Steve Cornelius

at the University of Pretoria

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I, MATHEW GRIMBEEK

Student Number : 27281371

Module and subject of the assignment: MND 800 Dissertation

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ABSTRACT

This study will follow the development of the rules pertaining to apportionment of damages, with particular emphasis on the Apportionment of Damages Act 34 of 1956 ("the Act") and its applicability to contractual claims.

It furthermore delves into the current legal position in England, Australia and New Zealand.

In Thoroughbred Breeders Association v Price Waterhouse 1999 (4) SA 968 (W), the Court decided that the Act was applicable to contractual claims and apportioned the damages payable by the defendant to the plaintiff.

However, the matter was taken on appeal with the decision of the Court a Quo overturned.

It will be argued that, although the reasoning at first glance seems sound, upon closer examination, the application of the Act need not be limited solely to delictual claims.

The best manner in which to remedy this lacunae in our law is an amendment to Section 1 (1) and 1(3) of the Act, to explicitly extend the application thereof to contractual claims.
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CHAPTER 1

INTRODUCTION

This dissertation will focus on the Apportionment of Damages Act 34 of 1956 ("the Act"), more specifically the applicability of Section 1(1) and Section 1(3) to contractual claims. At present the applicability of the Act extends only to claims based or framed in delict. Thus should a plaintiff sue in delict and the defendant proves that the plaintiff was, in itself negligent and contributed to the loss suffered by him or her, the court will then accordingly, apportion the damages payable by the defendant to the plaintiff in respect of their relative degrees of fault. A very just and equitable manner in which to settle such matters one would assume. However, what if there is a concurrence of liability in both delict and contract? A suitable example being where the plaintiff owed a certain duty of care to the defendant in terms of a contractual agreement, think of a doctor who is to perform a surgery on a patient. The relationship between the doctor and patient is one of delict and contract. The patient will have signed a consent form allowing the doctor to perform the particular operation. What if the doctor botches the operation and the patient suffers loss. The patient can sue based on a delict or alternatively based on the breach of the contract between them. If the patient sues based on the contract between the parties and proves that the doctor breached the duty of care owed to the patient, the doctor would be liable for damages due to the breach. Now then, what if the patient failed to disclose a certain fact to the doctor that added to the patient's loss? The doctor would be liable for the full amount of damages as apportionment would not take place. Yet if the patient sued in delict, damages would be apportioned accordingly.

The words justice and equity spring to mind. Yet, unfortunately, this is not the case. The main problem, so it seems, is that the Supreme Court of Appeal in the case of Thoroughbred Breeders Association v Price Waterhouse 2001 (4) SA 551 (A), refused to accept that the legislature, when drafting the Act, intended the Act to extend to claims based on contract. The history of contributory negligence was also a critical factor taken into account.
I will be canvassing the development of the rules relating to the apportionment of damages from the “all or nothing” approach and the “last opportunity rule” to the accompanying need for concrete apportionment legislation. This will be followed by a thorough examination of the rules relating thereto and the application thereof in the foreign jurisdictions of England, Australia and New Zealand. This will involve an analysis of the plethora of important cases that have been heard by their respective courts as well as their interpretation and application of their apportionment legislation.

Thereafter, I will focus on the development of the rule in South Africa to its current status as a result of the Thoroughbred Breeders Association v Price Waterhouse 2001 (4) SA 551 (A), which overturned the Court a Quo’s finding that the Act is applicable to the contractual claims as well as delictual claims and the potential constitutional aspect that may well be applicable.

The focus will be on a situation where the plaintiff has an election to sue in contract or in delict (and was negligent), or where both the plaintiff and defendant were negligent. I acknowledge that negligence on the part of the defendant is not a requirement for liability based on breach of contract¹ and thus, negligence on the part of the plaintiff should therefore not be a requirement. However, this dissertation is an analysis of apportionment legislation, specifically, the Apportionment of Damages Act 34 of 1956. That being so, “fault” is a minimum requirement for liability and thus plays a critical role in the apportionment of damages. Thus were a plaintiff is proven to be negligent, and sues in contract, then damages should be apportioned accordingly and the defendant should not be obligated to compensate the defendant for 100% of the damages sustained. In Scottish Law Commission No 115 (1988),² the main objection to allowing a plea of contributory negligence to a defendant in an action based on contract was the following:

The fault of the defender is irrelevant to liability; therefore any fault on the part of the pursuer should also be irrelevant

However, in line with my assertion above, this contention was later rejected. In Report on Remedies for Breach of Contract (1999), which was a later report by the

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¹ Scain Trading v Bernstein 2011 (2) SA 118 (SCA)
² At paragraph 4.18
Scottish Law Commission, they took cognisance of the very assertion that, as negligence on the part of the defendant is not a requirement for liability, then negligence on the part of the plaintiff is irrelevant. They said:\footnote{At part 4, Paragraph 4.6}

The main reason for this Commission's recommendation that contributory negligence should not be available to the defender where the defender's breach did not consist of negligence was that where the defender's fault was irrelevant to the breach, the pursuer's fault should also be irrelevant. This, however, does not necessarily follow. The fact that the party in breach is liable notwithstanding absence of fault does not necessarily mean that liability should extend to loss or damage which was partly caused by the aggrieved party. In any event it could be provided, as in the Unidroit Principles, that the conduct of both parties can be taken into consideration where both have contributed to the loss or harm.

\section*{CHAPTER 2}

\textbf{HISTORICAL OVERVIEW AND DEVELOPMENT OF SPECIFIC RULES RELATING TO THE APPORTIONMENT OF DAMAGES.}

\subsection*{2.1 INTRODUCTION}

Responsibility for loss or damaged cause by a person is generally regarded as individual. However, today it is a frequent occurrence that responsibility / liability for loss or damage caused may be attributed to more than one damage causing event and thus we can assign responsibility / liability to more than one individual who is a party to the (1) contractual or (2) delictual relationship.

Where only one party has caused loss against another, the rights pertaining to recovery are relatively straightforward. However, where more than one party can be held responsible in the particular circumstances of the matter, or the plaintiff has attributed or increased the amount of damage suffered, then apportionment of liability (or loss) must take place. The court is tasked with the responsibility of determining the relative degrees of fault of the parties who should bear the loss occasioned to or caused by his or her actions.
In terms of our South African common law it was thought that liability could not be apportioned where two or more people could be held responsible for the same loss, it was regarded as an indivisible obligation that lay at the feet of those who shared the liability. This chapter will focus on the development of the rules relating to apportionment and fault, from the perspective of the plaintiff and the defendant, as well as the specific positions in Roman and Roman-Dutch law, English law and South African law. To ensure fluidity and ease of comparison for this dissertation I have grouped the foreign law together with the analysis of our domestic law and its development. However a full exposition on the relative apportionment rules as applied in different jurisdictions will follow in chapter 4.

CHAPTER 2.2. THE POSITION OF THE PLAINTIFF IN DETERMINING FAULT

CHAPTER 2.2.1 ROMAN AND ROMAN-DUTCH LAW

The Aquilian action, which developed in the Roman Law, followed a strict all-or-nothing rule. If a party suffered damage or harm through their own fault or negligence, they were prohibited from recovering any of the loss they had suffered as a result thereof. Where a defendant raised contributory negligence as a defence against a claim for damages, it was regarded as a complete defence. Where a party was partly (contributory) to blame for damage caused against his person or property he was not entitled to claim compensation from any other person who had contributed to that damage.\(^4\)

A common example is that of of an athlete who is training at honing his javelin skills. While training in a recognised, demarcated training area a slave is hit by a javelin that is thrown a miss, here the athlete would bear no liability. However, if he was training at a public venue, such as Magnolia Park, he is held liable. Thus due to the

\(^4\) Voet Commentaries 9 2 17.
fact that the incident occurs outside of a training area, could his actions be seen as negligent?  

Another common example given to illustrate this point as used regularly today is as follows:

A barber sets up his shaving chair near a sports field. While shaving a slave, the barbers hand is hit by a ball that was kicked by one of the players playing nearby. The barbers hand then slices the neck of the slave being shaved.

Three opinions are given:

1. Mela states that he who is negligent is liable. Which is a simple answer, but fails the answer the critical question. Who is negligent? The barber or the player who has kicked the ball?

2. Proculus thinks that the barber is negligent for setting up his chair too close to a sports field. Which I believe is the correct view point if one considers that the barber should have foreseen the possibility that a stray ball may be kicked in his direction.

3. Ulpian believes that the slave is at fault as he knowingly sat in the barber's chair which was stationed near a sports field. This can't possibly be seen as a correct opinion regarding liability in this instance.

To elaborate on the above, I am in favour of the opinion raised by Proculus. The barber would have had a large number of alternative areas to set up his chair. A responsible, reasonable person would have foreseen the possibility of a ball being kicked and leaving the area of playing. It's a natural course of events. He should have foreseen the possibility of it impacting on his work. One can argue that, what would the position be had he been working at that exact spot for 10 years, without incident? The answer would still be the same, the possibility of a ball leaving the field of play is a very reasonable possibility. We are not required to determine when then the damage causing event will occur, only if (reasonably possible) it might occur. Mela and Proculus believed that the answer lay in the field of culpa. In contrast to

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5 D 9.2.9.4  
6 9.2.11.pr
Ulpian who seemed to raise the defence of *volenti non fit injuria*\(^7\). What is clear however is that the problem relating to causes is solved by having due regard to fault or wrongfulness.

Pomponius\(^8\) stated the principle that if anyone incurs loss which is his own fault, he cannot be seen as having incurred any loss.

Zimmerman\(^9\) explains that the problem is more easily and readily explained in terms of fault:

> The fault of the plaintiff/victim was, in a way, 'set-off' against that of the defendant/wrongdoer, with the result that 'culpa culpam obolet...In the later usus modernus, at any rate, the issue seems to have been decided on a preponderance of fault; only if he had displayed the same or greater degree of negligence that the wrongdoer did the victim lose his claim. Where, on the other hand, his negligence was less significant, when compared with that of the wrongdoer, his claim for damages remained completely intact.

Thus, if A (as the victim) was 51% to blame for the loss, then he lost 100% of his claim. If B (as the wrongdoer) was 51% to blame, then A could recover 100% of his damages.\(^{10}\)

**CHAPTER 2.2.2 ENGLISH LAW**

In terms of the English common law any contributory negligence on the part of the plaintiff denied him or her of their right to claim for damages. The first case dealing with this situation was *Butterfield v Forrester*\(^{11}\):

In casu, the defendant had undertaken to effect repairs on his own house. While effecting the repairs, he placed a wooden pole across the road. The plaintiff in the matter left a nearby house which was situated in the same neighbourhood. He subsequently rode into the wooden pole and was badly injured. The plaintiff was denied any compensation for the damage he suffered. The court stated:

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\(^{7}\) He who consents cannot suffer injury. (writers definition)

\(^{8}\) D50.17.203

\(^{9}\) Zimmerman *Law of Obligations* at 1030.

\(^{10}\) For an elaboration please see chapter 2.4

\(^{11}\) (1809) 11 East 50. (UK Law reports)
A party is not to cast himself upon an obstruction which has been made by the fault of another and avail himself of it, if he does not himself use common and ordinary caution to be in the right...one person being in fault will not dispense with another's using ordinary care for himself.

Thus in terms of the above interpretation, the slightest negligence on the part of the plaintiff precluded him from claiming any damages. This rule was developed to prevent people from attempting to "create" a damage causing event by not exercising reasonable care when they see an opportunity to do so. In other word 'opportunists' similar to those that we see in movies, whereby they see a "Caution: Wet Floor" sign, but the floor is already dry. This doesn’t stop them though, they whip out a water bottle, spray some of the floor, and then "slip" and "injure" their spine and claim damages from the owners of the premises. However, even if one believes this reasoning to be true, there is no hiding the fact that this was a very unjust, nonsensical rule, if one considers the implications it has on innocent and honest victims.¹²

Following on from this rather unjust rule, there was a development of what is known today as the "last opportunity rule". In terms of this rule, the party who had the last opportunity to avoid the harmful damage-causing event through exercising the care of a reasonable person, was held solely responsible for the damage.¹³

The Law Reform (Contributory Negligence) Act of 1945 was enacted in the United Kingdom to remedy the common law rule that only negligence on the part of the plaintiff provided a complete defence to an action in delict.

CHAPTER 2.2.3 SOUTH AFRICAN LAW

In South Africa we followed the English developed “all or nothing” rule as opposed to the relative fault principle explained earlier.¹⁴ In Pierce v Hau Mon¹⁵, Watermeyer J criticised this position:¹⁶

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¹² Davies v Mann 10 M & W 546; Pierce v Hau Mon 1944 AD 175; Moore v Minister of Posts & Telegraphs 1949 1 SA 815 (A); Coetzee v Van Rensburg 1954 4 SA 616 (A).

¹³ SAR&H v Acutt & Worthington 1935 NPD 314

¹⁴ See foot note 6.
The law relating to the subject of contributory negligence which was applied by our courts has been taken over from the English law and it is seldom that any Roman-Dutch authority is referred to. In fact there is plenty of authority in Roman Law (see Greuber, Lex Aquilia (2.7.4, p. 228 et seq) and also Roman-Dutch law (see Voet 9.2.17; 9.2.22), and the principle of culpa compensation was referred to by De Villiers CJ in Lennons's case 1914 AD 1 by Kotze JA in Jacobs v Union Government 1919 AD 325 and by Gardnier AJA on the case of Union Government v Lee 1927 AD 202. It may be that if Roman-Dutch authorities had been more fully referred to in earlier South African cases, our law of contributory negligence might have developed on different lines from the English law. However, if we take the English law on the subject as it now is, and as it had been adopted by our Courts, we shall find that there are still doubts and difficulties about its application in certain classes of cases.

The harsh and inequitable results produced by the application of the all or nothing doctrine led courts in South Africa (and England as stated above) to evolve and introduce the so-called last opportunity rule.\textsuperscript{17} Accordingly, the party who had the last opportunity of avoiding the damage causing event by the exercise of reasonable care was held to be solely responsible for the loss. If the defendant had the last opportunity, he or she had to compensate the negligent plaintiff to the full extent of the latter's loss. If the plaintiff had the last opportunity, he would fail to recover any damages. The last opportunity rule was applied to determine legal responsibility for the harm caused.\textsuperscript{18} Legal responsibility meant determination of the legal cause of the loss occasioned by the harmful event.\textsuperscript{19} Thus the defendant could raise the contributory negligence on the part of the plaintiff as a defence if certain circumstances were present. The rule was also extremely difficult to apply, particularly in collision cases between fast-moving vehicles.

\textbf{CHAPTER 2.3 \hspace{1cm} POSITION OF THE DEFENDANT}

\textsuperscript{15} 1944 AD 175
\textsuperscript{16} at 195
\textsuperscript{17} Davies v Mann (1842) 10 M & W 546; Pierce v Hau Mon 1944 AD 175;
\textsuperscript{18} Sarah M Lean v James A Hunter Bell 1932 SC 21 (HL) 29
\textsuperscript{19} Caswell v Powell Dulcryn Associated Collieries Ltd 1940 AC 152 165; British Columbia Electric Railway Co Ltd v Loach 1916 1 AC 719 727
In terms of the common law, where it is proven that two or more defendants acted in a manner that caused a single loss to a plaintiff, the liability in terms thereof should be shared. Each defendant who shared liability were all fully responsible for the entire loss. Two types of wrongdoers can be distinguished:

1. Joint Wrongdoers:

Joint wrongdoers acted jointly in committing a delict. They were held jointly and severally liable. Should one wrongdoer pay the full amount of damages towards the plaintiff, the other wrongdoer(s) were no longer liable to the plaintiff. Furthermore, the wrongdoer who paid the damages in full did not have a right of recourse against the other non-paying wrongdoer(s).

2. Concurrent Wrongdoers:

A concurrent wrongdoer acted independently of the other wrongdoer(s). However both acts contributed to the loss suffered by the plaintiff. They too were held jointly and severally liable to the plaintiff. The main distinction of importance was that in such an instance there was a right of recourse between the wrongdoers's should one them pay the full amount of damages to the plaintiff. The right to a contribution was the right to recover from each concurrent wrongdoer a contribution proportionate in amount to their number, and not on the basis of their respective degrees of blameworthiness.

The reasoning behind joint and several liability in terms of the aforementioned is sound. In order to protect the interests of the injured party in the circumstances, each wrongdoer was liable for the full amount of damages owed to the plaintiff. Where it was proven that two or more wrongdoers caused the same damage the plaintiff could institute a claim against all the wrongdoers. Should one wrongdoer pay more than his “share” of the damage, the matter needed to be resolved between the wrongdoers themselves. This

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20 Toerien v Duncan 1932 OPD 180; Naude & Du Plessis v Mercier supra 38-40
21 Allen v Allen 1951 3 SA 320 (A) at 327; Walker v Matterson 1936 NPD 495 at 501
22 Union Government (Minister of Railways) v Lee 1927 AD 202 at 226–227; Botes v Hartogh 1946 WLD 157 at 160
23 British Oak Insurance Co Ltd v Gopali 1955 4 SA 344 (D) at 349; Pepper v Lipschitz 1956 1 SA 423 (W) at 426
24 Windrum v Neunborn 1968 (4) SA 286 (T); Nu-Life Battery Reconditioners (Pvt) Ltd v Boddington 1974 (2) SA 175 (R)
however could lead to unjust results vis a vis the wrongdoers where there was no right of recourse between them.

At common law there was no right of contribution between the joint wrongdoers. Should one of them have paid the debt in full, he/she was forced to bear the whole loss. This is due to the fact that the Aquillian action was originally penal in nature.\textsuperscript{25}

Thus we had a position where the courts refused to to enforce a contribution between joint wrongdoers.\textsuperscript{26} A so called contribution action was seen as an attempt to recover a part of a penalty imposed for a wrongful act and that a wrongdoer should not be permitted to escape liability for his own wrongful act by shifting the consequences of his actions to another wrongdoer.\textsuperscript{27}

The main principle or emphasis that was followed was that the plaintiff received the full amount of damages that he was entitled to. Any prejudice towards the defendants was viewed as a secondary concern of less importance than recouping the damages owed or due to the plaintiff. The principle of joint and several liability enabled the plaintiff to claim his damages from either wrongdoer. Thus in a situation where one wrongdoer was a "man of straw" and the other wrongdoer had amassed great wealth, the plaintiff would recover the full amount from the wrongdoer who he was certain would be capable of paying. Where there was no possibility of a contribution action between the wrongdoers, it would result in very unjust results. Especially if the richer of the wrongdoers was not the wrongdoer who was predominantly at fault for the damage caused.

\textbf{CHAPTER 2.4 \hspace{1cm} NEED FOR LEGISLATIVE REFORM}

\textbf{CHAPTER 2.4.1 \hspace{1cm} INTRODUCTION}

By the early twentieth century there was a sense of recognition among the legal fraternity that the current position was unsatisfactory. There was a shift towards

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\textsuperscript{25} See LAW OF DELICT TXTBOOK
\textsuperscript{26} See Allen v Allen 1951 (3) SA 320 (AD) at 327
\textsuperscript{27} Project 96 SALRC 2003 at 1.24
apportionment of damages where the apportionment would result in a fairer result and promote feelings of justice between the parties.\textsuperscript{28}

CHAPTER 2.4.2 LEGISLATIVE REFORM IN SOUTH AFRICA

In South Africa, the Apportionment of Damages Act 34 of 1956\textsuperscript{29} was promulgated on the 1\textsuperscript{st} June 1956. Our common law was drastically altered in relation to the rules pertaining to contributory negligence. Sec 1(1)(b) abolished the last opportunity rule and Sec 1(1)(a) introduced the principle of apportionment of liability. Thus apportionment in relation to each party’s respective degree of fault was introduced.

Sec 2 of the Act placed joint and concurrent wrongdoers on the same page and the common law distinction between joint and concurrent wrongdoers was removed. Sec 2(6)(a) also provides for a right of contribution between wrongdoers. The provisions of our Act relating to contributory negligence are based on the Law Reform (Contributory Negligence) Act of 1945 enacted in England.

Since the Act was passed into law there have been major developments in the law of delict. The Aquilian action has been extended to cases of negligent misstatements which cause pure economic loss,\textsuperscript{30} negligent misstatements which induce a contract,\textsuperscript{31} and have allowed a concurrence of delictual and contractual actions where certain circumstances are present.\textsuperscript{32} These developments have led to anomalies in the law of delict, particularly with the meaning of the word “fault” as it is contained in the Act and have led to a need for the Act to be extended to other areas of the law with particular emphasis on the law of contract.

\textsuperscript{28} New Zealand Law Commission Preliminary Paper 19 at 12

\textsuperscript{29} Hereinafter referred to as “the Act”

\textsuperscript{30} See Administrator, Natal v Trust Bank van Afrika BPK 1979 (3) SA 824 (A)

\textsuperscript{31} Bayer South Africa (Pty) LTD v Frost 1991 (4) SA 559 (A)

\textsuperscript{32} Lillicrap, Wassenaar and Partners v Pilkington Brothers 1985 (1) SA 475 (A)
CHAPTER 2.5 RELEVANCE OF FAULT (OF THE PLAINTIFF) IN DETERMINING LIABILITY FOR BREACH OF CONTRACT AND THE ACCOMPANYING DAMAGES

In *Scoin Trading (Pty) Ltd v Bernstein*33 ("Scoin") it was submitted on behalf of the Respondent that for a person to be in *mora*, failure to perform must be due to the *culpa* of the debtor and that *mora* is referred to as the wrongful delay or default in making payment of the failure without lawful excuse to perform timeously.34

This line of thinking presupposes that the breach must be as a result of the wrongful conduct of the debtor. This argument has found favour in previous cases:35

...it is, in my view, trite that in a contractual context an entitlement to *mora* interest presupposes some form of culpability attaching to the debtor’s conduct, and more specifically his failure to pay by the stipulated date. *Mora* interest is, as Mr King submitted, based upon the concept of default which encompasses the notion that the debtor was capable of making payment on due date, but failed to do so. It is a damages claim which arises from wrongful conduct.36

It was therefore argued that that as the deceased in that matter had died before his obligation to pay had arisen, that his default was not wrongful and cannot be blamed for such non-payment. The court stated:

I must say that Mr King’s submissions seem to me to have merit, founded in logic. In my view the deceased cannot be said to have breached the contract, nor can it be said that his death was a wrongful or culpable act such as to constitute a breach of contract. That being the case there is in my view no basis in law to find that the deceased is liable to pay damages (mora interest) to the applicant.

However, in *Scoin* this line of thought was rejected and the approach taken described as erroneous.37

That *mora* interest is sometimes regarded as a kind of penalty for a failure to pay on due date does not mean that the breach of contract is a delict or that a breach of contract is only established if the debtor acted ‘wrongfully’ or ‘culpably.’

33 [2011] 2 All SA 608 (SCA)
34 At paragraph 15
35 RB Ranchers (Pvt) Limited v McLean’s Estate & another 1986 (4) SA 271 (ZS)
36 [2011] 2 All SA 608 (SCA) at paragraph 16
37 At paragraph 17
The reasoning behind this line of thought being that, unlike an action framed in delict, in cases of breach of contract, damages are not intended to compensate the innocent party for their loss. The purpose is put them into the same position they would have been in had the contract been properly performed.\textsuperscript{38}

This principle was explained in \textit{Trotman v Edwick}\textsuperscript{39} as follows:

A litigant who sues on contract sues to have his bargain or its equivalent in money or in money and kind. The litigant who sues on delict sues to recover the loss which he has sustained because of the wrongful conduct of another, in other words that the amount by which his patrimony has been diminished by such conduct should be restored to him.

Thus, liability for contractual damages does not depend on fault. The question that arises is then, if fault on the part of the defendant or debtor is not a requirement for liability for breach of contract, then fault on the part of the plaintiff should similarly be of no consequence when assessing the quantum of damages due to the plaintiff.

Strictly speaking, the above assertion is correct. But, when a plaintiff has contributed (through his own negligent conduct) to the loss suffered, then his conduct is highly relevant to the loss suffered. If the loss suffered is as a result of, strictly, the debtors conduct then he should be liable for 100% of the loss suffered.

However, where the defendant can prove that the negligent conduct of the plaintiff has contributed or increased the loss suffered then his conduct becomes highly relevant. The fact that the party in breach is liable notwithstanding absence of fault does not necessarily mean that liability should not extend to loss or damage which was partly caused by the aggrieved party.

If one takes cognisance of the Unidroit Principles of International Commercial Contracts\textsuperscript{40}, the very question as is catered for. They provide the following:\textsuperscript{41}

\textsuperscript{38} RH Christie \textit{The Law of Contract in South Africa} Sed (2006) at page 544
\textsuperscript{39} 1951 (1) SA 443 (A) at 4498-C
\textsuperscript{40} At its 45\textsuperscript{th} session (New York 25 June to 26 July 2012) UNCITRAL unanimously endorsed the 2010 edition of the UNIDROIT Principles (cf Report on the United Nations Commission on International Trade Law on the work of its forty fifth session, New York, 25 June -26 July at paragraph 137 -140) recommending there use as appropriate for their intended purposes as set out in the Preamble.
\textsuperscript{41} Section 4 "Damages" Article 7.4.7
Where the harm is due in part to an act or omission of the aggrieved party or to another event as to which that party bears the risk, the amount of damages shall be reduced to the extent that these factors have contributed to the harm, having regard to the conduct of each of the parties.

Thus, in terms of this principle the conduct of both parties in relation to the loss is deemed to be relevant and may be taken into consideration when assessing the liability of the defendant and the plaintiff in relation to the loss suffered. Where the plaintiff was deemed to have increased his loss the damages awarded were apportioned appropriately. Thus, in terms of International Private law, the conduct of the aggrieved party, in an action for breach, is relevant when determining the amount of damages the defendant is liable to pay.

CHAPTER 3.

SECTION 1(1) OF THE APPORTIONMENT OF DAMAGES ACT AND THE INTERPRETATION OF "FAULT"

CHAPTER 3.1 INTRODUCTION

Section 1(1) of the Apportionment of Damages Act, hereinafter referred to as “the Act” states the following:

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 an 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.

Thus Section 1(1) of the Act empowers a Court to reduce a plaintiff's damages to which he would have been entitled to if he or she is guilty of contributory negligence. The damages shall be reduced to such an extent as the court deems just and equitable "having regard to the degree in which the claimant was at fault in relation to the damage". As was stated earlier the Act is closely modelled on the English Act. The English Act provides that the plaintiff's damages shall be reduced to such an extent as the court thinks is just and equitable "having regard to the plaintiff's share in the responsibility for the loss".

In Stapley43 the court concluded that when determining how liability is to be apportioned the court must have regard not only to the relative degrees of fault of the parties, but also the relative importance of the act in causing the damage suffered.

Mckerron44 however states that in terms of our Act fault is the sole criterion of apportionment.

The word "fault" is not definitively defined in our Act and as such there are problems associated with its interpretation. Fault generally encompasses both negligence and intention. However it has been argued that it should be strictly interpreted as only referring to negligence with the exclusion of intent.

The long title of our Act states:

To amend the law relating to contributory negligence and the law relating to the liability of persons jointly and severally liable for the case of damage, and to provide for matters incidental thereto.

For the ease of reading I repeat that which is contained in Section 1(1):

Where any person suffers damage which is caused by 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 an 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.

Section 1(3) of our Act defines "fault" as:

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43 Stapely v Gypsum Mines Ltd [1953] AC 663
44 Mckerron The Apportionment of Damages Act 1956 5
For the purposes of this section ‘fault’ includes any act or omission which would, but for the provisions of this section, have given rise to the defence of contributory negligence.

CHAPTER 3.2 FAULT IN RELATION TO SECTION 1(1)(a) OF THE ACT

There is much debate among the legal fraternity of whether term “fault” should be given its common law meaning, which includes both negligence and intent. On the other hand other writers argue that it should be strictly interpreted as referring only to negligence. Van der Walt and Midgley argue that due to the explicit reference to contributory negligence in both the long title of the Act as well as the heading to Section 1, that fault should be interpreted as meaning either contributory negligence by the plaintiff or negligence by the defendant. This does make sense if one has cognisance of the common law rule which prohibits a plaintiff from benefiting through his own wilful (intentional) misconduct. Naturally the rules of interpretation are relevant and can be of great help in ascertaining the meaning of the relevant Act. Thus, in the Thoroughbred Breeders Association v Price Waterhouse 2001 (4) SA 551 (A), these very rules were analysed, a discussion of which is detailed under chapter 5.4 and 5.5.

Our Courts have interpreted “fault” in Section 1 of the Act to mean negligence and not encompassing intent. They have held that “fault” means either negligence or contributory negligence.

In the South British Insurance case the meaning of “fault” as contained in Section 1(3) of the Act was analysed. It was held that the legislature used the word “fault” throughout the section as encompassing only a negligent act or omission that is casually linked with the damage caused. The court is required to determine the parties’ respective degrees of negligence. It further held that blameworthiness is not the correct criterion of apportionment.

45 Burchell Principles of Delict 110
46 McKerron Law of Delict 296 ; Neethling, Potgieter and Visser Deliktereg 152-153
47 Van der Walt and Midgley Delict: Principles and Cases paragraph 152
48 Mabaso v Felix 1981 (3) SA 865 (A) ; Wapnick v Durban City Council 1984 (2) SA 414 (D)
49 South British Insurance Company Ltd v Smit 1962 (3) SA 826 (A)
In *Mabaso v Felix* 50, the court in obiter dictum, stated it was extremely doubtful that Section 1(1) of the Act would be applicable where the fault of the defendant was intentional wrongdoing.

In *Wapnick v Durban City Council* 51, Boosyen J stated that it was clear that where a defendant had wrongfully and intentionally caused damage that the defence of contributory negligence could not be raised, and that a plaintiff who had intentionally contributed to his own damage cannot claim such damage that he has caused from the defendant on the basis that the defendant was negligent.

Potgieter 52 argues that the legislature’s clear intention is that Section 1 of the Act is intended to regulate the defence of contributory negligence. Thus he feels “fault” means negligence or contributory negligence and not intention or contributory intent used as a defence to a claim.

The position seems to be clear that “fault” means negligence. The use of the words “contributory negligence” in the long title of the Act as well as the heading to Section 1 and in the definition of fault contained in Section 1(3) convinces me that this was the legislature’s intention. The legislature’s intention is clear, that at the time of drafting, they had only negligence in mind and not intention. The legislature should amend the Act and substitute the term “fault” with negligence or negligent conduct, thereby removing any uncertainty that continues to persist.

CHAPTER 4

APPORTIONMENT RULES AS APPLIED AND DEVELOPED IN FOREIGN JURISDICTIONS

CHAPTER 4.1 INTRODUCTION

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50 1981 (3) SA 865 (A)
51 1984 (2) SA 414 (D)
52 Potgieter 1998 (61) THRHR 734
What will follow is a discussion of the various rules of apportionment as they are currently applied in England, Australia and New Zealand. Our apportionment legislation is based on the English Act, whereas Australia and New Zealand, with both being former common wealth countries have particular relevance for this discussion and the apportionment legislation found in these jurisdictions has distinct similarities to ours. Our Constitution enables us to have regard to foreign law is also of importance pertaining to the relevance of a discussion of foreign law.

CHAPTER 4.2 ENGLAND

Section 1 of the Law Reform (Contributory Negligence) Act 1945 provides the following:

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

Provided that –

- This subsection shall not operate to defeat any defence arising under contract;
- Where any contract or enactment providing for the limitation of liability is applicable to the claim, the amount of damages recoverable by the claimant by virtue of this subsection shall not exceed the maximum limit so applicable

Section (4) of the English Act contains the definition of Fault as follows:

fault’ means negligence, breach of statutory duty or other act or omission which gives rise to a liability in tort or would apart from this Act, give rise to the defence of contributory negligence
Olivier JA\textsuperscript{53} stated that it was previously thought that the English Act could only apply where the defendant was in breach of a duty of care owed only in contract. The matter came before the English Courts in the Court of Appeal case of Forsikringsaktieselskapet Vesta v Butcher \textsuperscript{54}, herein after referred to as the Butcher case.

The Plaintiff (Vesta) was insurers of a fish farm. They had effected reinsurance of 90\% of the risk through the defendants' brokers. A condition of the re-insurance contract was that the farm was to be under twenty four hour watch. The owners of the fish farm informed Vesta that it was impossible to comply with this condition. Vesta then informed the defendant's. The defendant's took no further action. Vesta failed to follow up on their initial phone call to the defendant's informing them that the condition could not be met. The farm subsequently lost one hundred thousand fish (approximately). The re-insurers denied liability for the loss on the basis that there was non-compliance with the condition in that there was no twenty four hour watch. Vesta, alleging negligence, brought an action based on breach of contract against the defendants. The defendant's relied on the defence of contributory negligence, alleging that Vesta's failure to make a follow up phone call was negligent on their part. Hobhouse J ruled that the English Act had no application in matters based on breach of contract. Hobhouse J stated\textsuperscript{55}:

"The question whether the 1945 Act applies to claims brought in contract can arise in a number of classes of case. Three categories can be identified. (1) Where the defendant's liability arises from some contractual provision which does not depend on negligence on the part of the defendant. (2) Where the defendant's liability arises from a contractual obligation which is expressed in terms of taking care (or its equivalent) but does not correspond to a common law duty to take care which would exist in the given case independently of contract. (3) Where the defendant's liability in contract is the same as his liability in the tort of negligence independently of the existence of any contract."

He went further and stated that the present case fell squarely within category three as aforementioned and said\textsuperscript{56}:

\textsuperscript{53} 2001 (4) SA 531 (A) at 612
\textsuperscript{54} 1986 2 ALL ER 488 (confirmed on appeal – 1989 1 AC 852 (CA)
\textsuperscript{55} 1986 2 ALL ER 488 at 508-509
\textsuperscript{56} At page 509
The category three (3) question has arisen in very many different types of case and the answer is treated as so obvious that it passes without any comment. It is common place that actions are brought by persons who have suffered personal injuries as a result of the negligence of the person sued and that there is a contractual as well as tortious relationship. In such cases apportionment of blame is invariably adopted by the court notwithstanding that the plaintiff could sue in contract as well as in tort. The example normally cited in the present context is the decision of the Court of Appeal in Sayers v Harlow Urban District Council [1958] 2 All ER 342, [1958] 1 WLR 623, which concerned a contractual visitor to the premises (a lady who had paid to use a public lavatory). The Court of Appeal said it did not matter whether the cause of action was put in tort or in contract and proceeded to apportion blame awarding her three-quarters of her damages. This was a decision on a category three (3) case. The power to make an apportionment was part of the ratio decidendi and is binding on me. There are innumerable similar decisions to the same effect which could be cited, very many by Appellate Courts...

Thus, according to the learned judge, the 1945 Act only applies to the third category, namely where there was a contractual, as well tortious relationship. In such a case, apportionment would take place regardless of whether the action was framed in delict of contract.

On appeal\(^{57}\) the plaintiff's alleged that as their claim was formulated in contract and not delict, they could avoid the apportionment of damages under the English Act of 1945. The original decision of the court a quo was upheld and O'Conner LJ stated that \(^{56}\):

\[\ldots\] The important issue of law is whether on the facts of this case there is power to apportion under the Law Reform (Contributory Negligence) Act 1945 and thus reduce the damages recoverable by Vesta. I start by pointing out that Vesta pleaded its claim against the brokers in contract and tort. This is but a recognition of what I regard as a clearly established principle that under the general law a person owes a duty to another to exercise reasonable care and skill in some activity, a breach of that duty gives rise to a claim in tort notwithstanding the fact that the activity is the subject matter of a contract between them. In such a case the breach of duty will also be a breach of contract. The classic example of this situation is the relationship between doctor and patient.

\(^{57}\) See 1989 1 AC 852 (CA)

\(^{56}\) 1989 1 AC 852 (CA)
Since the decision of the House of Lords in Hedley Byrne and Co Ltd v Heller and Partners Ltd [1946] AC 456 the relationship between the brokers and Vesta is another example. [Counsel] for Vesta accepts that this is so but he submits that if a plaintiff makes his claim in contract then contributory negligence cannot be relied on by the defendant whereas it is available if the claim is made in tort. If this contention is sound then the law has been sadly adrift for a very long time for it would mean that in employers’ liability cases an injured employee could debar the employer from relying on any contributory negligence by framing his action in contract.

O'Connor LJ, stated that the present case fell into category three (3). Furthermore he ruled that the decision in Sayers v Harlow Urban District Council[69] was not only correct, but was binding on him. He therefore dismissed Vesta’s appeal.

It is apposite at this stage to mention The Law Commission Working Paper NO 114[60] which recommended that, unless the contract expressly declared to the contrary, the courts should be able to apportion damages in all three contractual cases where the plaintiff’s conduct contributed to his loss[62]. However, in its subsequent Report[63] the Law Commission recommended apportionment of damages where breach is of a strict contractual obligation. The Report recommended a separate legislative provision for the contractual position and included a draft Bill. Based on the proposed piece of Legislation it would, however, be possible to exclude apportionment for contributory negligence, either expressly or by implication.

CHAPTER 4.3 NEW ZEALAND

The similarity between the English Act and the New Zealand Act is plain to see. Section 3 (1) of the New Zealand Act is identical to Section 1 of the English Act. The definition of “fault” in Section 2 of the New Zealand Act can easily be reconciled with the contents of Section 4 of the English Act.

[69] 1958] 2 All ER 342
[60] UK Law Commission Report
[61] ‘Contributory Negligence as a Defence in Contract’ (1990)
[62] see at pp 69-73
[63] Law Commission No. 219, 1993
There are three leading cases where the issues discussed in this dissertation are elucidated and detailed upon.

Firstly, \textit{Rowe v Turner Hopkins and Partners}\textsuperscript{64}, in casu, the applicability of the New Zealand Act to contractual claims was first raised. The Court of Appeal in this matter highlighted the fact that the Contributory Negligence Act of 1947 applies wherever negligence is an essential ingredient of the plaintiff's cause of action, regardless of the source of the duty breached.

The second case is that of \textit{Moutat v Clark Boys}\textsuperscript{65}. In casu, the Appeal Court confirmed that the New Zealand Act applies to torts as well as to breaches of contract.

Finally, in arguably the most relevant and comprehensive discussion and finding on the matter at hand, was in the case of \textit{Dairy Containers Ltd v NZL Bank Ltd and Dairy Containers Ltd v Auditor General}\textsuperscript{66}. The relevant facts were as follows:

The Auditor General was auditor of Dairy Containers Ltd. This relationship was formed by way of a contract entered between them. Dairy Containers Ltd sued the Auditor General for damages. They relied on the breach of the Auditor's contractual duties. They alleged that that the auditor had committed various negligent acts and omissions.

The Court held that the Auditor General was negligent and thus committed an act of breach in relation to the contract. The auditor however, argued that the damages awarded against him should be so reduced (apportioned) due to the fact that Dairy Containers Ltd was contributorily negligent. He alleged that Dairy Containers Ltd had failed to give him any clear direction or supervision in respect of a major part of the company's business.

The Court held that the basis for Contributory Negligence Act was to rectify the arbitrary consequences occasioned with the all or nothing approach, which was developed for instances where the plaintiff was partly responsible for the loss which was suffered.

\textsuperscript{64} 1982 1 NZLR 178 (CA)
\textsuperscript{65} 1992 NZLR 178 (CA)
\textsuperscript{66} [1995] 2 NZLR 30 (HC Auckland)
Furthermore, it was inappropriate to apply the Act in a manner which would bring about arbitrary consequences of the same kind which the Act was designed to remedy.

In conclusion, the court held that it would be wrong to order the negligent Auditor General to pay the entire loss, if one considers that much of the damage caused was due to conduct attributed to Dairy Containers Ltd. As such, apportionment was applied and Dairy Containers Ltd damages were reduced by 40%.

CHAPTER 4.4 AUSTRALIA

The English precedent was followed in the Australian apportionment legislation. Of importance for the purposes of this dissertation is the case of Astley and Others v Austrust Ltd.\(^67\).

In casu, the approaches that were adopted in the English and New Zealand jurisdictions, was rejected by the High Court in Australia. The Australian legislation, as mentioned above, is closely modelled on the English Law Reform (Contributory Negligence) Act of 1945. However, the Australian High Court found that the Australian Act had no application in claims were the cause of action was based on breach of contract.

The facts of the case were as follows:

Austrust was a trustee company who had approached a firm of attorneys known as Astley. Astley, after accepting their mandate gave Austrust incorrect advice. Austrust, as a result of this incorrect advice, suffered damages and subsequent thereto instituted action for damages based on a breach of contract.

Astley denied liability, but pleaded that in the alternative that Austrust had been contributorily negligent.

\(^67\) [1999] HCA 6 (197 CLR1)
In the Court a Quo, the trial judge found that both Austrust and Astley had been negligent and apportioned the damages payable by Astley pursuant to the provisions of Section 27 A of the Wrongs Act 1936 of South Australia. The Court a Quo’s decision was taken on appeal.

The Appeal Court found that the finding of contributory negligence on the part of Austrust was incorrect and Astley was found to be 100% at fault. Thus they ordered Astley to pay 100% of the damages to Austrust.

This decision was also taken on appeal. The Court herein found that Astley was in fact guilty of contributory negligence. However, they found that the drafters of the Wrongs Act had not intended the Act to apply to cases of breach of contract.

The natural and ordinary meaning of Section 27 A (3), if one has cognisance of the definition contained therein, led the Court to the conclusion that this Act was only applicable to claims in tort and not claims based on breach of contract.

The Court further considered whether the Act would apply in instances where there was an overlapping of liability, thus were a defendant was liable in delict and/or in contract. The majority of the High Court found in the negative.

CHAPTER 5

THE CURRENT POSITION IN THE REPUBLIC OF SOUTH AFRICA

Chapter 5.1  Introduction

As I have previously indicated, the South African Act is closely modelled on the English Act. The only difference worth mentioning is that the English Act exhaustively defines "fault" whereas in our Act, "fault" is given a more open ended meaning which gives rise to problems of interpretation and whether or not the Act can be extended to cover claims based on breach of contract.
The first case before our Court that dealt with the claims based on breach of contract and the Apportionment of damages of Act was *Barclays Bank v Straw*\(^{68}\). This case involved negligence on the part of both the bank as plaintiff and the customer as defendant. The defendant had signed a cheque for R1, and left a gap between the words “one” and “rand”. When the cheque was presented for payment, the amount drawn had been altered to R1000.00. This was done by inserting the words “thousand” between “one” and “rand”.

The alteration however was made in a lighter colour ink that the ink used for the original amount. Furthermore, the R1000.00 exceeded the drawer’s (customer’s) by R400.

The Court held that the loss suffered by the customer could not be apportioned due to the fact that historically the Act had not been intended to apply to claims based on breach of contract.

In *OK Bazaars (1929) Ltd v Stern and Eckerman*\(^{69}\) the plaintiff claimed damages from a firm of land surveyors. The plaintiff’s claim was based on the fact that the defendant’s had failed to exercise “due care and skill” in performance of its obligations. The defendants pleaded that the plaintiff was partly responsible for causing the damage and that due to the fact that the plaintiff’s cause of action was framed in in delict that they Apportionment of damages Act would therefore apply.

The Court found that the claim was one based on a breach of contract and only that\(^{70}\). The defendant raised an alternative defence of contributory negligence, alleging that the plaintiff had by its own negligence contributed to the causing of the damage\(^{71}\), which the plaintiff excepted to\(^{72}\). The defendant had also served two third party notices and in the event of the Court’s finding that the defendant was in breach of its contract with the plaintiff, each of the third parties was alleged by the defendant to have contributed to the causing of the damages by committing a delict against the plaintiff\(^{73}\). The defendant in an alternative prayer, asked that the plaintiff’s claim be

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\(^{68}\) 1965 (2) SA 93 (O)
\(^{69}\) 1976 (2) SA 521 (C)
\(^{70}\) At page 525 H
\(^{71}\) At page 524 A
\(^{72}\) At page 524 C
\(^{73}\) At page 524 E to 525 A
reduced by reason of the plaintiff’s contributory negligence\textsuperscript{74} and in so far as the third parties were concerned, that they were in terms of section 2 of the Act liable to contribute to the payment of such damages\textsuperscript{75}. An exception was taken to the alternative defence on the basis that it disclosed no defence since the plaintiff’s case was based on a breach of contract and the Act dealt only with delictual claims and not to contractual ones\textsuperscript{76}. The third parties excepted essentially on the ground that the defendant’s breach was contractual and that section 2 of the Act had no application to contractual claims\textsuperscript{77}.

The Court held that Act does not apply based on, \textit{inter alia}, the following

The defendants main argument \textsuperscript{78} was centred on the meaning of "fault" as contained in Section 1 of the Act. Their assertions were that the concept and definition thereof was wide enough to include breach of contract insofar as it related to the defendant. However Watermayer J stated\textsuperscript{79} that "fault", in its normal or ordinary use of the word, emphasises that there must be a certain degree of blameworthiness. He stated\textsuperscript{80}:

\begin{quote}
There is a definition of the word 'fault' in sec. 1(3) of the Act but this clearly refers only to the fault of the plaintiff. There is no definition of the word 'fault' in so far as it applies to the defendant and Mr Ipp submitted that the word 'fault' in sec. 1(1) should therefore be given its ordinary meaning which he contended was sufficiently wide to include a breach of contract. Fault normally connotes a degree of blameworthiness, and a contract can, of course, be breached by a party through no fault of his own. This at once creates a difficulty in the construction of sec. 1. If it is construed as covering claims based upon a breach of contract, should it be held to apply to certain breaches of contract only, and not to others?
\end{quote}

In contradistinction, contracts may be breached by either party through no fault of their own. It seems the biggest obstacle is how apportionment would be applied to different types or cases of breach of contract. Would it only be applicable in certain types of breaches and not in others? The answer to that question would be yes, and I see no reason why the approach developed in England cannot be followed. This is

\textsuperscript{74} At page 524 B-C
\textsuperscript{75} At page 524 H
\textsuperscript{76} At page 524 C-D
\textsuperscript{77} At page 525 A
\textsuperscript{78} At page 528 A-B
\textsuperscript{79} At page 528 B
\textsuperscript{80} At page 528 A-B
evident if one has regard to instances where a contracting party is required to exercise a certain level of skill, care or expertise. If for example a contracting party had to exercise a certain duty of care, which he/she fails to do and thereby compounds the actual damage caused and claimed by the plaintiff, then the Act, in such an instance, would have an obvious and direct application (provided the duty of care breached rested with the plaintiff).

The second criticism was levelled at the historical purpose of the Apportionment of Damages Act. The Judge\footnote{At page 528 C-E} believed that the Act, when drafted, was only intended to have application in delictual matters/claims. His reasoning was based on the fact that the previous position for contributory wrongdoers was based on the all-or-nothing rule. This rule provided that if the plaintiff was in anyway negligent and his negligence contributed to his damage, then his claim would automatically fail. Watermayer J and Steyn J believed that chapter one of the Apportionment of Damages Act was enacted to remedy this position.

However, they based their decision on the wording of Section 1 (1) of the Act which states, \textit{inter alia,} "shall not be defeated by reason of the fault of the claimant" He stated that\footnote{At page 528 F}:

\begin{quote}
Although in a claim based upon breach of contract, negligence on the part of the plaintiff might be relevant in determining whether or not the damages claimed flowed from the defendant's breach, it would not be apposite to say that such negligence (fault) 'defeated' the plaintiff's claim. The plaintiff's claim would fail because he did not show that the damages flowed from the breach.
\end{quote}

The Judge seemed to believe that the legislature had the well-known defence of contributory negligence to a delictual claim when drafting the Act.

He continued, the fact that, prior to the passing of the Act, contributory negligence was not a recognised defence\footnote{At page 528 H} to claims based on breach of contract and if the legislature had intended on altering this position, they would not have done so in an indirect or oblique manner\footnote{At page 529 F-G} and would have expressly provided that it applied to
contracts as well as delictual claims. Furthermore the long title of the Act \(^{85}\) made it clear that the purpose was to amend the law relating to contributory negligence.

In the *Thoroughbred Breeders Association v Price Waterhouse* case (which will be discussed at length hereinafter), Olivier JA, in his dissenting judgement, criticised the finding in the OK Bazaars case.

Olivier JA states \(^{86}\) that Watermayer’s J argument that “fault” as contained in Section 1 of the Act is not wide enough to cover contractual cases is unconvincing. He stated that the object of the Act is to regulate the position where both parties have acted negligently. Section 1 (1) (a) specifically refers to cases where both parties are at fault or have a degree of blameworthiness. He states:

> How can the argument that the section cannot be applied, even if this particular defendant is at fault, because other defendant’s in contracts may be liable without any fault, be sound?

If one is to analyse the above quote his reasoning cannot be disputed. The Act is designed to regulate the position where both the plaintiff and the defendant are at fault. Thus, where a contracting party (with specific emphasis placed on the plaintiff) is not at fault, then the Act does not come into operation. The Act was promulgated to remedy the untenable all-or-nothing rule, which protected the defendant in that if the plaintiff was negligent he forfeited his claim. However based on how the courts interpret the Act, the defendant is now placed in this undesirable position whereby the negligent plaintiff in a contractual claim will be entitled to 100% of his damages even though he has contributed thereto.

In OK Bazaars, it was argued that the history of the Act indicates that its intended application was only to delictual actions. Olivier J stated \(^{87}\):

> If our legislature intended Section 1 to apply to delictual actions only, why did it not simply follow the English Act?

Watermayer J also held that contributory negligence is not normally one of the recognised defences to a claim based on breach of contract. Olivier J referred \(^{88}\) to a submission by Price Waterhouse’s Counsel, that this argument overlooked the

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\(^{85}\) At page 529 A

\(^{86}\) At page 200 2.2 A of [2001] JOL 8326 (A)

\(^{87}\) At page 201 (b)

\(^{88}\) At page 203 (e)
wording of the Act in its entirety as well as the principle laid down in *Principal Immigration Officer v Bhula*\(^{69}\) that in the case of conflicting provisions, the fair and equitable interpretation should be followed rather than the harsh and uncompromising one. Better yet, we should follow an approach which dispels the possibility of unjustifiable discrimination between different classes of defendant’s/

In regards to Watermeyer J’s finding that if the legislature had sought to change the position (that contributory negligence only applies in delictual claims) then the legislature would have expressly done so, Olivier JA \(^{90}\) agreed with Price Waterhouse’s submission that if it was the intention of the legislature for the Act to apply to delictual claims, it would have simply followed the English Act.

The argument was put forward in the OK Bazaars case, that at the very least, the Act should be interpreted as covering claims for breach of contract where there is a duty not to be negligent in commission of the breach. The argument was, however, rejected.

**CHAPTER 5.2 THOROUGHBRED BREEDERS ASSOCIATION V PRICE WATERHOUSE 1999 (4) SA 968 (W)**

The most important case, dealing with the application of the Apportionment of Damages Act has to be *Thoroughbred Breeders Association v Price Waterhouse 1999 (4) SA 968 (W)* which went on appeal. The principles and arguments highlighted throughout this dissertation were examined and discussed in fine detail.

The summary of the case is as follows:

The plaintiff was Thoroughbred Breeders Association, hereinafter referred to as ("TBA"). The defendant was Price Waterhouse, hereinafter referred to as ("PW"). TBA was a client of PW, who were a firm of auditors.

\(^{69}\) 1931 AD 323

\(^{90}\) At page 204 (g)
The plaintiff alleged that the defendant had breached the contract concluded amongst themselves, by failing to act with due care and diligence. They had failed to detect that substantial amounts of cash had not been deposited for long periods of time, furthermore, a promissory note belonging to the plaintiff had been encashed, which the maturity date thereof had long since lapsed and the defendant's representative was well aware of this fact. The plaintiff's own financial manager had stolen the money and had thereafter cashed the promissory note to cover his tracks. Following an audit in 1993, it was discovered that the financial manager had had stolen R 1 389 801.90 before his criminal activities were uncovered.

The plaintiff's argument rested on the basis that had the defendant executed the audit of the plaintiff correctly, the financial manager's illicit activities would have been brought to their attention and they would have summarily dismissed him. That being the case, the thefts would not have been committed and thus the plaintiff would not have suffered damage. The plaintiff's therefore, claimed the amount stolen, with interest, as damages from the defendant.

This case centred on the following issue: Was the defendant's conduct in respect of the outstanding deposits and missing promissory note a breach of their contractual obligations/duties?

The auditing contract required the defendant to give a report to the plaintiff based on the plaintiff's financial statements as a whole. This would involve the defendant having to do test checks. They were under no obligation to check and analyse each individual entry. In fact, the plaintiff proved that although there was no obligation to check each and every entry, the audit clerk's examination of the financial statements was so superficial to the point that they failed to notice any discrepancies, alternatively, failed to recognise the significance thereof. Therefore, in terms of the missing deposits the defendant had breached its contract with them. In regards to the promissory note, the defendant's should have examined it on the grounds that the maturity date thereof had long since lapsed. The auditor should have determined whether it had been encashed and if so, why it was still reflected as an asset. The defendant was thus negligent in that it had failed in doing so.
The next question related to causation. The Court found that the failure of the defendant to uncover the theft was a condition sin qua non of the theft that was perpetrated after the audit in 1993.

In regards to the factual causation, the defendant argued\(^{91}\) that the causa causans\(^{92}\) of the plaintiff's loss was due to the fact that they had continued to employ the financial manager even after they had become aware of his previous conviction on a charge of theft.

In *Incorporated General Insurances Ltd v Shooter t/a Shooter's Fisheries*\(^{93}\) the Appeal Court had this to stay regarding causation\(^{94}\), Galgut AJA stated:

> No difficulty arises when one cause only has to be considered. The difficulty arises when there are two or more possible causes. In such a case the proximate or actual or effective cause (it matters not which term is used) must be ascertained, and that is a factual issue. I cannot put it better than is done by Ivamy at 255, where it is said that an earlier event may be a dominant cause in producing the damage or loss; it may be the causa sine qua non but the issue is, is it the causa causans? Ivamy at the above page, Arnould at 773 and Gordon and Getz at 363 all stress that the rule to be applied is causa proxima non remota spectatur.

The Court, after examining the relevant case law put forward by the respective parties, held that\(^{95}\):

A) It must be decided whether the TBA's negligence or Price Waterhouse's breaches were the predominant or effective or real cause of the damages suffered or not;

B) in reaching this decision a practical common sense approach must be followed;

C) account must be taken of the parties' intention as to causation arising from their agreement.

The Court concluded that negligence may be attributed to both parties and that the negligence was significant in the causing of the damage suffered.

\(^{91}\) At page 72 of [1999] JOL 5233 (W)
\(^{92}\) "The real, effective cause of the damage"
\(^{93}\) 1987 (1) SA 842 (A)
\(^{94}\) At page 862 C-863 A
\(^{95}\) At page 86
However, the fact that the plaintiff's had employed a convicted thief as their financial manager, and continued to employ him (after this fact came to their knowledge) with very little oversight of his behaviour, was the *causa causans* of the loss.

This conclusion did not end the matter, as the question which now arises is whether the TBA's claim is not at least partly saved by the provisions of Chapter 1 of the Apportionment of Damages Act 34 of 1956.

The Act has a long heading which reads as follows:

> 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.

Chapter 1's heading is "Contributory Negligence". Section 1 is headed "Apportionment of Liability in Case of Contributory Negligence" and reads as follows:

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

(b) Damage shall for the purpose of para (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."

Section 3 reads as follows:

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

The Court found that indeed, the Act could be applied in a situation where the damages arose from a breach of contract. He stated that:

"There is nothing in section 1(1)(b) or 1(3) which dissuades me from applying section 1(1)(a) to the present case. Clearly section 1(1)(b) was introduced to effect the demise of the "last opportunity" rule. It does not limit the content of the fault referred to in section 1(1). Section 1(3) also does not do so. In any event, there appears to be no difficulty in applying section 1(3), since "but for the provisions of this section" (section 1) "the act(s) or omission(s)" of the

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96 At page 89
TBA in connection with Mitchell would "have given rise to the defence of contributory negligence" of the TBA and would have in fact defeated the claim.

I see no difficulty in the long title. The Act is divided into three chapters. As we have seen the first is headed "Contributory Negligence". The second is headed "Joint and Several Wrongdoers", and the reference to delict in the long title can thus be interpreted to refer only to chapter II. Furthermore the words "contributory negligence" seem apposite to the present facts although they arise in a contractual setting.

In relying on his interpretation, he quoted a passage from the case of *Bhyat v Commissioner for Immigration*[^7] which states[^8]:

> Still, as was said by a very sound and careful judge, 'the title of an Act of Parliament is no part of the law, but it may tend to show the object of the Legislature' per Lord Macnaghten in *Fenton v Thorley & Co.* (1903, A.C. at p 447). This view has been more than once adopted in our Courts ... But there is undoubtedly an older and less qualified rule of construction and that is that in construing a provision of an Act of Parliament the plain meaning of its language must be adopted unless it leads to some absurdity, inconsistency, hardship or anomaly which from a consideration of the enactment as a whole a court of law is satisfied the Legislature could not have intended. 'The words of a statute never should in interpretation be added to or subtracted from, without almost a necessity': per Lord Bramwell in *Cowper Essex v Action Local Board* (14, A.C. 153, 169). Assuming with the learned Judge in the Provincial Division that the literal effect of the plain words of the amending sub-section gives the Act a slightly wider operation than the title seems to indicate, nevertheless this is no sound reason, of itself, for departing from the plain meaning of the words used. Here the adoption of the ordinary and grammatical meaning of the words lead to no absurdity, inconsistency or inequity whatsoever.

The Judge seems entirely correct in his interpretation of Section 1 of the Act. This interpretation leads to a fair and equitable result. Both parties were at fault and as such they should share the damage occasioned by TBA. He furthermore stated that in his opinion "there is no conceivable reason why I should be astute to interpret the Act otherwise"[^9]

Thus the Court found that indeed the Act does apply to a situation where the damages arose through a breach of contract and the plaintiff was negligent and thereby contributed to his own loss. The Court went further and stated that the

[^7]: 1932 AD 125
[^8]: At page 129-130
[^9]: At page 92
defendant's breach of contract was insignificant in relation to the gross negligence of the plaintiff. The liability for the plaintiff's loss was apportioned and the defendant was deemed to be 20 % liable.

The judgement in this case given by the Court a Quo is to be lauded. It seems to be the most convincing, logical and sensical approach. A party should not be able to escape liability if they were negligent and increased the damage suffered due to the fact that the cause of action was based on contract and not in delict.

Havenga\textsuperscript{100} in his published article, in which he comments on Judge Goldstein's decision, states:\textsuperscript{101}

\begin{quote}
Goldstein J's interpretation of the Act is to be commended. It is not absurd, inconsistent or anomalous. Quite the contrary: it is absurd to non-suit a plaintiff merely because he or she has suffered damage caused partly by his or her own fault. In this case, it would also be inconsistent and anomalous to have different rules for claims based on breach of contract and for claims founded in delict.
\end{quote}

Thus if a party was capable of bringing an action based on breach of contract (such as a contractual duty not to be negligent) or an action framed in delict, he would obviously bring the action based on the breach for fear of having his damages apportioned (if he was found to be contributorily negligent) should he have brought the action in delict. Goldstein J's judgment altered this position thereby setting a new precedent and remediying this anomaly or lacunae ( as I perceive it) that existed. The current position, as it exists today, allows a plaintiff room to manipulate the law to his own benefit, which some would say is the purpose of a good attorney or advocate, which naturally involves using the law to the best advantage of your client. However, from a neutral point of view, if a plaintiff was negligent and his conduct contributed/exacerbated the damage suffered, then surely he should not be allowed to escape liability based on a technicality.

\textbf{Chapter 5.3} \hspace{1cm} \textbf{THE APPEAL}

\begin{footnotesize}
\footnotesubscript{100} 2001 (54) THRHR 124
\footnotesubscript{101} At page 128
\end{footnotesize}
Following the judgement in the Court a Quo, both parties appealed the decision.\textsuperscript{102} The majority decision of the Supreme Court of Appeal, unfortunately, overturned the judgement of the Court a Quo.

The focus will mainly be on the dissenting judgement of Olivier JA as his view of the situation accords with the view that I have on the matter.

The majority of the Supreme Court of Appeal held that the Act is not applicable to contractual claims and found that the decision of the court a quo to be wrong in fact and in law. Nienaber JA stated:\textsuperscript{103}

\begin{quotation}
In my view, both the dictum and, following it, the submissions are wrong both in fact and in law. It is wrong as a conclusion of fact since it cannot as a matter of practical common sense be said that PW's negligence was so minimal in comparison to TBA's carelessness as to be nullified as an effective cause of the loss. It is wrong as a proposition of law since it seeks to convert an approach which is more appropriate to the law of delict to the law of contract where it is not appropriate.
\end{quotation}

However, notwithstanding the fact that he was not in agreement with Judge Goldstein's finding in the court a quo, he does have sympathy for the dissenting judgement of Olivier JA which leads me to believe that although the Judge found that the Act does not apply to the apportionment of damages claimed in terms of a breach of contract, he clearly feels that legislative intervention is necessary, and that perhaps, through legislative intervention, the Act should be extended to cover this very situation. He stated: \textsuperscript{104}

\begin{quotation}
My sympathies and inclination are wholly on the side of the views expressed by Olivier E JA. There is, I believe, for the reasons stated by him, a pressing need for legislative intervention in a situation such as the present where the defendant's breach of contract is defined in terms of his negligent conduct but the plaintiff, by his own carelessness, contributed to the ultimate harm. But having said that, I am afraid that I have reluctantly come to the conclusion that this particular piece of legislation does not fulfil that function.
\end{quotation}

\textsuperscript{102} 2001 (4) SA 551 (A)
\textsuperscript{103} At para 53, page 587
\textsuperscript{104} At para 72 to 74, page 590
Olivier JA, in his dissenting judgement, expressed the view that the Act is applicable to contractual claims, although admitting that his decision may be controversial, he states: 105

Unfortunately, I disagree with my learned Colleagues that s 1(1)(a) of the Apportionment of Damages Act 34 of 1956 B ("the Act") is not applicable in the present case. I readily concede that the question whether the Act is applicable to contractual claims is controversial. In the end the opposing judicial views may well depend on differing philosophical and jurisprudential points of departure.

In his opinion, the question of whether or not the Act is applicable, boils down to statutory interpretation, where he makes reference to three approaches, namely the "plain meaning approach" and the "purposive and teleological" approaches. I will begin with the former.

CHAPTER 5.4       PLAIN MEANING APPROACH

The golden rule of statutory interpretation is giving the words of the relevant Act its plain meaning. If one follows this approach it is clear to me that Section 1(1)(a) of the Act may be applied to contractual claims. The rule was stated in Adampol (Pty) Ltd v Administrator, Transvaal 106 at 804 B to C:

The plain meaning of the language in a statute is the safest guide to follow in construing the statute. According to the golden or general rule of construction the words of a statute must be given their ordinary, literal and grammatical meaning and if by so doing it is ascertained that the words are clear and unambiguous, then effect should be given to their ordinary meaning unless it is apparent that such a literal construction falls within one of those exceptional cases in which it would be permissible for a court of law to depart from such a literal construction, eg. where it leads to a manifest absurdity, inconsistency, hardship or a result contrary to the legislative intent.

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105 At para 1, page 605
106 1989 (3) SA 800 (A)
The argument in this case was that Section 1 of the Act is clear and unambiguous. The only threshold requirement is the causative fault element that is required to be present on both sides. It was further stated in this regard:\footnote{107} Fault, at the very least, includes negligence. Section 1 of the Act does not specify the categories of obligations in which the “fault” can occur, i.e. delict, contract, statute or ex variis causarum figuris. There is nothing in the language of s 1(1)(a) that limits its operation to claims in delict; by its plain wording it is equally apposite to claims for damages flowing from a negligent breach of a statutory duty or a breach of a contractual duty to exercise reasonable care.

However, it was argued that it is not only the plain meaning approach that lends support to the contention that the Act is applicable to contractual claims. Counsel, on behalf of PW it was argued that weighty considerations favour the purposive or teleological approaches.

\section*{CHAPTER 5.5 \hspace{1cm} PURPOSES AND TELEOLOGICAL INTERPRETATION}

This approach involves the analysis of the genesis and legislative history of the particular Act. Thus, the legislative history of the Act was considered in ascertaining the intention of the legislature at the time of drafting, and whether their intention was that that the Act should apply to contractual claims.\footnote{108}

As discussed in detail previously\footnote{109}, our Act was closely modelled on the English Act, save for a small number of differences. The English Act states:\footnote{110}

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

\begin{itemize}
  \item this subsection shall not operate to defeat any defence arising under a contract;
\end{itemize}

\footnote{107}{At page 622}
\footnote{108}{At page 624}
\footnote{109}{At chapter 4.2}
\footnote{110}{Repeated for the sake of convenience}
where any contract or enactment providing for the limitation of liability is applicable to the claim, the amount of damages recoverable by the claimant by virtue of this subsection shall not exceed the maximum limit so applicable.

If one compares the English to the South African Act, the main, alternatively most important, was substantially reproduced in Section 1(1) (a) of our Act.

The only difference worth mentioning is that the definition of “fault” is given in the English Act. The definition of fault in the English Act was comprehensively defined in order to confine the application of the Act to claims in tort. Nonetheless, Professor Glanville Williams\textsuperscript{111} argued that the Act applies, not only to claims in tort, but to claims in contract as well. His argument was directed at the interpretation of the definition of “fault” and he stated:\textsuperscript{112}

> Whether the Act applies in contract depends largely upon the wording of the definition of “fault”. At first sight the definition...may appear to be limited to actions in tort, but it is submitted that where a breach of contract occurs through the negligence of the defendant, the Act will apply whether the action is framed in contract or in tort.

Olivier JA was of the opinion that the purpose of highlighting the fact that the exclusion of the definition of the word “fault” in our Act suggests to him that Section 1(1) (a) was, for intents and purposes, meant to be applicable to contractual claims.\textsuperscript{113} The English Act does not apply to contractual claims purely due to the fact (it does however have application when the liability of the defendant is the same in tort as it would be in contract) that the definition of “fault”, which limits the scope thereof. However, the simple fact that our Act has no similar provision, thus deliberately removes the obstacle that stands in the way of its applicability to contractual claims.

\textsuperscript{111} Joint Torts and Contributory Negligence (1951)
\textsuperscript{112} At 329
\textsuperscript{113} At para 2.6 of page 625
The Judge, in what seems to indicate a heightened understanding of and enlightened view of the situation, stated:114

"But both approaches to the interpretation of statutory interpretation mentioned above also attach importance to the purpose of the legislation, ie the mischief aimed at and the societal and legal ends desired. The phenomenon of causative negligence on the part of both a plaintiff and a defendant is not limited to delictual claims. It is obvious that in many instances of contractual claims for damages there can and will be a co-incidence of both contractual and delictual liability (ie if there was damage of the kind giving rise to Aquilian liability, eg in the case of a physician’s negligence, as in Van Wyk v Lewis 1924 AD 438 or Mukheiber v Raath1999 (3) SA 1065 (SCA)). If the plaintiff sues in delict, the Act would apply and the plaintiff would be liable only in part; if the action is brought in contract, the plaintiff would succeed totally if one follows the approach of our Courts at present, OK Bazaars (supra). Why should there be a difference, it was rhetorically asked by PW, depending not on the acts or the respective degrees of fault or blameworthiness of the parties, which are the same in both actions, but on the form of action chosen by one of the parties viz the plaintiff?115

Olivier JA’s decision to lean in favour of the application of the Act to contractual claims was based on two inter-related considerations, namely:116

1. There is a definite need for its applicability. Determining whether or not the act should apply to contractual claims is not merely an academic exercise of only of academic importance. There is a definite lacuna that currently exists in our law. To deny a defence of contributory negligence in the narrow circumstances of the present case would be against what is just and equitable.

2. To deny the existence of such a defence would result in a “glaring inequity” in the circumstances of the present case.

The facts of the case at hand perfectly illustrate both of the above stated propositions. To allow PW to bear the full amount of the loss would be inexplicably

114 At para 2.11 of page 625
115 My emphasis
116 At page 632 para 15(a) – (b)
unfair if you take into consideration the glaringly obvious negligence on the part of TBA in hiring an ex-convict who was previously imprisoned for theft and embezzlement. They have, without a shadow of a doubt, contributed to their own loss by virtue of their negligence (and stupidity).

In a Scottish Law Commission Report\textsuperscript{117} the following was stated, which due to the nature of this dissertation, it is apposite to draw attention hereto:

On principle it would seem to be desirable to take into account the conduct of the aggrieved party in contributing to the loss or harm. This is just an extension of the policy underlying the well-established rules on mitigation of loss. In cases where loss of damage is sustained as a result of breach of contract it will often be the case that the aggrieved party is partly to blame for the loss or harm. To force courts into an all or nothing choice is likely to produce unreasonable results.

Example: A contractor contracts with an electricity supply company for a continuous supply of electricity. The company, in breach of the contract, allows an interruption in the supply. This is one of the causes of a loss to the contractor who has to re-lay a large column of concrete. Another causal factor was that the contractor failed to take reasonable steps to see that a back-up system was available before beginning a task for which a continuous supply of concrete was indispensable.

In a case like this, awarding the contractor full damages or no damages may be equally unattractive. The reasonable course may be to apportion the liability, taking the conduct of both parties into account. Other, more commonplace, examples could easily be imagined. For example, a party to a contract for the carriage of goods gives the carrier a wrong address and then, when the carrier fails to take all reasonable steps to ascertain the correct address in time, claims damages for late delivery. Or a person who has bought sophisticated electronic equipment which does not in all respects conform to contract and causes damage to it by ignoring the clear instructions supplied with it and taking foolish and unreasonable steps to remedy the small defect. Or a woman injures herself in foolishly and unreasonably attempting to climb over a high gate which ought, in terms of a contract, to have been left open. In some such cases the effect of the existing law may be that the aggrieved party recovers nothing. A court, faced with arguments that there is no room for apportioning liability, may feel obliged to hold that the aggrieved party's conduct was the sole cause, or the sole effective cause, of the loss.

\textsuperscript{117} Report on Remedies for Breach of Contract (1999) at Part 4, paragraph 4.10
The above examples are all ones where it would seem reasonable to take contributory fault into account but none of them involves a contract to exercise care or skill. It may be a matter of chance whether an obligation is expressed as an obligation to achieve a result or to use all reasonable care and skill to achieve a result.

Fairness and justice should guide our courts and legislature when interpreting or drafting (as the case may be) Acts of Parliament. In this case, fairness and justice dictate that a claim for damages based on a breach of contract must, not may, be apportioned if it is proven that the plaintiff was itself negligent and contributed to his own loss.

Christie\textsuperscript{118} is of the view that:

> It is undesirable to leave the law in a state where the employment of purely technical skill in pleading may lead to a result fundamentally different from that which would be reached if a lesser degree of technical skill were employed. When a contract contains an express or implied term imposing an obligation not to be negligent (which very frequently happens) a breach of this term may equally well be described as a breach of contract or a delict giving rise to Aquilian liability. Under our law as it presently stands a skilful pleader, by pleading such a case in contract, could avoid the danger of a reduction of damages by apportionment under the Act, whereas a less skilful pleader, pleading the same facts in delict, would lay his client open to a reduction in damages....This degree of knife-edge technicality should be eliminated from the law where possible.

What will follow is a brief examination of certain Constitutional aspects that may have a bearing on the undue differentiation between certain classes of plaintiffs and defendants.

\textbf{CHAPTER 6}

\textbf{CONSTITUTIONAL ISSUE}

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\textsuperscript{118} Christie The Law of Contract in South Africa 3rd ed (1996) at page 613 - 14
The Constitution of South Africa lays out the rights of equality that all citizens enjoy.

Section 9(1) states:

Everyone is equal before the law and has the right to equal protection and benefit of the law.

Further, Section 9(3) declares:

The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

The equality provision does not prevent our government from making classifications. People are classified and treated differently for a variety of legitimate reasons. That being so, while the government may legitimately make classifications, the criteria upon which the classification is based must be, inter alia, reasonable and justifiable in the circumstances.

When a plaintiff sues in delict, and the Apportionment of Damages Act is applicable by reason of the negligence of the plaintiff, the damages awarded will be apportioned based upon either parties relative degrees of fault.

However, if the plaintiff sues in contract, and that plaintiff was in itself negligent, then according to our case law (previously canvassed) the Apportionment of Damages Act will not be applicable and the defendant, should judgment be made against it, will be liable for the total loss suffered by the plaintiff.

This, as it seems to me, is an unjust differentiation/discrimination between two “types/classes” of defendants. Namely, a defendant sued in delict and a defendant sued in contract.

Section 9 guarantees the right of all citizens to equal protection and benefit of the law. This guaranteed fundamental human right is breached where a defendant ( if the plaintiff has the decision to sue either in delict or contract) is sued in contract, yet the plaintiff was negligent and is partly responsible for its loss, but the defendant is
ordered to pay all of the plaintiffs damages. The opposite being, if the plaintiff sues in
delict the Act applies and damages will be apportioned accordingly.

Thus, as Christie points out 118 the damages that the defendant may be liable for
may very well depend upon the skill of the attorney or advocate who is tasked with
drafting the particulars of claim.

If the plaintiff is negligent, then it should not matter whether the claim is framed in
delict or contract, the damages should be apportioned. It is not fair, nor in the interest
of justice, that a defendant be liable for the total loss suffered by the plaintiff if the
defendant can prove that the plaintiff has contributed to its own loss.

Finally, it is surprising that no constitutional issue was raised in the Pricewaterhouse
case by the defendants, nor by any of the Judges. Thus, there is an opportunity in
the future for this very question to be taken on appeal to the Constitutional Court.

CHAPTER 7
CONCLUSION AND SOLUTION

The conclusion and solution is short and sweet. Clearly there is a need for the
applicability of the Act to contractual claims. The interests of justice and the
accompanying need for equity (and arguably equality) demand it. The legislature
need to intervene and draft an amendment to the Act and extend the applicability
thereof.

On principle it seems desirable that one take into account the conduct of the
aggrieved party in contributing to the loss or harm. This is just an extension of the
policy underlying the well-established rules on mitigation of loss. Where loss or
damage is sustained as a result of breach of contract it will often be the case that the
aggrieved party is partly to blame for the loss or harm.

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118 See FN 95
Marais JA, Farlam JA and Brand AJA delivering a concurring judgment in the appeal of TBA and PW expanding on the issue of the applicability of the Act stated the following:\textsuperscript{120}

By drawing attention to some of the implications of boldly applying the Act to cases in contract, (even if only to those where a breach entails negligence), we do not wish to be thought to be hostile to the very idea of extending the operation of the Act to contract cases by legislation. All that we would caution against is a decision to do so without a full appreciation and consideration of all its implications.

The legislature has not followed the advice given in the Appeal decision. They have failed to amend the Act to in either direction. What we need is legal certainty; this requires the legislature to either amend the Act and include its applicability or to unequivocally state that their intention was that it only be applicable to delictual claims. Silence is not a virtue in this instance.

It should be provided that, where loss was caused partly by a breach of contract and partly by the (negligent) act or omission of the aggrieved party, the amount of damages should be reducible to take account of the extent to which the aggrieved party’s conduct contributed to the loss or harm, the conduct of both parties being taken into account.

The Act should be applicable to claims based on breach of contract, where it is proven that the plaintiff was negligent, or, at the very least a breach of a statutory duty. Simply put, it just makes sense. Most writers seem to follow that same line of thought. But until the legislature steps in, the debate will continue.

\textsuperscript{120} At page 605
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