

South Australia



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ELIZABETHAE II REGINAE
A.D. 2001

**LAW REFORM (CONTRIBUTORY NEGLIGENCE AND
APPORTIONMENT OF LIABILITY) ACT 2001**

No. 41 of 2001

[Assented to 3 August 2001]

An Act to reform the law relating to contributory negligence and the apportionment of liability; to amend the Wrongs Act 1936; and for other purposes.

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The Parliament of South Australia enacts as follows:

Short title

1. This Act may be cited as the *Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001*.

Commencement

2. This Act will come into operation on a day to be fixed by proclamation.

Interpretation

3. In this Act—

"**claimant**" means a person who asserts, or is entitled to assert, a right to damages for harm;

"**contributories**" means the person (or persons) seeking contribution under this Act and the person (or persons) from whom contribution is sought;

"**contributory negligence**" means a failure by a person who suffers harm to take reasonable care for his or her own protection or the protection of his or her own interests;

"**damages**" means compensation or damages for harm and includes solatium but does not include workers compensation;

"**derivative harm**" means harm suffered as a result of injury to, or death of, another (but does not include nervous shock arising from injury to, or death of, another);

Examples—

1. The loss suffered by dependants as a result of the death of the person on whom they are dependent (See Part 2 of the *Wrongs Act 1936*).
2. Loss or impairment of consortium (See section 33 of the *Wrongs Act 1936*).
3. Business losses resulting from injury to or death of spouse who participated in the business (See section 34 of the *Wrongs Act 1936*).

"**derivative liability**" means—

- (a) a vicarious liability; or
- (b) a liability as an insurer; or
- (c) a liability as nominal defendant under a statutory scheme of third party motor vehicle insurance;

"**duty of care**" means a duty to take reasonable care or to exercise reasonable skill (or both);

"**fault**" means—

- (a) a breach of a duty of care that arises under the law of torts; or
- (b) a breach of a contractual duty of care; or

(c) a breach of a relevant statutory duty of care;

"harm" includes loss of life, personal injury, damage to property, economic loss and loss of any other kind (whether the harm is primary or derivative);

"primary harm" means harm other than derivative harm;

"relevant statutory duty of care" — a statutory duty of care is a relevant statutory duty of care if breach of the duty is actionable in damages.

Application of this Act

4. (1) This Act applies to liabilities of the following kinds—

- (a) a liability in damages that arises under the law of torts;
- (b) a liability in damages for breach of a contractual duty of care;
- (c) a liability in damages that arises under statute.

(2) This Act—

- (a) has no effect on criminal proceedings; and
- (b) does not make enforceable an agreement for an indemnity that would not have been enforceable apart from this Act.

Judgment does not bar an action against person who is also liable for the same harm

5. (1) A judgment for damages against one person does not bar an action against another person who is also liable for the same harm.

(2) The general rule is that if separate actions are brought for damages for the same harm—

- (a) the aggregate amount of damages recoverable in the actions cannot exceed the relevant amount; and
- (b) the claimant is not entitled to costs in any action except the first.

(3) However, if a court is satisfied that there were in the circumstances of a particular case reasonable grounds for bringing the actions separately, the court may depart from the general rule to the extent that it is fair and equitable to do so in the circumstances of that case.

(4) The relevant amount is—

- (a) the amount of the damages awarded in the judgment first given; or
- (b) if that amount is varied on appeal—the amount as varied.

Right to contribution

6. (1) A person who is liable in damages for harm suffered by another may recover contribution from a third person who is also liable in damages for the same harm.

(2) The right to contribution—

- (a)** exists even though the act or omission that gave rise to the liability of the person seeking to recover contribution may amount to an offence; and
- (b)** extends to liabilities incidental to damages (such as a liability for interest),

(but the right is subject to any other statutory provision¹ that may operate to modify, exclude or limit it in a particular case).

(3) An action for contribution may be brought—

- (a)** by way of third party proceedings in an action in which damages are sought from the person entitled to contribution; or
- (b)** by way of a separate action brought within the relevant time limit against the person from whom contribution is sought.

(4) The relevant time limit is the longer of the following—

- (a)** the period within which the person who suffered the harm could have brought an action against the person from whom contribution is sought;
- (b)** 2 years after the damages payable by the person entitled to contribution are finally determined.

(5) The contribution is to be an amount that is fair and equitable having regard to the extent of each contributory's responsibility for the harm.

(6) In determining the contribution to be made by a contributory whose liability for the harm is a derivative liability, the court is to have regard to the act or omission from which the liability arose.

(7) If it is fair and equitable to do so, the court may exempt a person from liability to make contribution or order that the contribution to be recovered is to amount to a complete indemnity.

(8) An action for contribution may be brought even though—

- (a)** judgment in an action in which damages are sought for the relevant harm has not yet been given; or
- (b)** the person who suffered the harm has released the person from whom contribution is sought from liability or has obtained judgment against that person; or
- (c)** a notice that would be required if the person who suffered the harm were to obtain a judgment against the person from whom contribution is sought has not been given; or
- (d)** the time within which the person who suffered the harm could have commenced an action against the contributory has expired.

¹ See for example section 111 of the *Supreme Court Act 1935* which deals with apportionment of liability in the case of a collision between ships at sea.

(9) However—

- (a) if a person is liable to indemnify another against the other's liability, the person is (to the extent of the liability to indemnify) not entitled to contribution from the other person under this section;
- (b) a contractual limitation or exclusion of liability operates to limit or exclude an entitlement to contribution under this section if—
 - (i) it arises from a contract made before the occurrence of the act or omission that gave rise to the liability; and
 - (ii) it would, assuming the person who suffered primary harm had brought an action for damages against the person from whom contribution is sought, have limited or excluded that person's right to recover damages;
- (c) an employer is not entitled to contribution from an employee under this section unless the employee's wrongful act amounted to serious and wilful misconduct².

Apportionment of liability in cases where the person who suffers primary harm is at fault

7. (1) If contributory negligence contributes to (but is not the sole cause of) the harm for which a claimant seeks damages, the claim is not to be defeated on the ground of the contributory negligence.

(2) If a claimant's harm is caused partly by another's fault and partly by contributory negligence, the court must proceed as follows:

- (a) the court must determine (and record) the amount of the damages to which the claimant would have been entitled assuming there had been no contributory negligence; and
- (b) the court must then reduce the amount so determined to the extent the court thinks just and equitable having regard to the extent the contributory negligence contributed to the harm.

(3) This section applies subject to—

- (a) any contractual modification, exclusion or limitation binding on the claimant or, in the case of a claim for damages for derivative harm, on the person who suffered the primary harm; and
- (b) any statutory modification, exclusion or limitation.

(4) In this section, a reference to contributory negligence extends, in the case of a claim for derivative harm, to negligence on the part of the person who suffered the primary harm.

Transitional provision

8. (1) This Act applies to a cause of action that arises from an act or omission that occurs on or after its commencement.

² Compare section 27C of the *Wrongs Act 1936*.

(2) The law of the State, as in force before the commencement of this Act, applies to a cause of action that arises from an act or omission that occurred before its commencement.

(3) This Act applies to a cause of action that arises in part from an act or omission that occurred before its commencement and in part from an act or omission that occurs on or after its commencement.

Consequential amendments

9. (1) Sections 24, 25, 26, 26A, 27, 27A and 27B of the *Wrongs Act 1936* and the headings immediately preceding sections 24 and section 27A are repealed.

(2) Section 6 of the *Survival of Causes of Action Act 1940* is repealed and the following section is substituted:

Saving of other rights

6. (1) This Act does not derogate from the rights of the dependants of a deceased person to bring an action in respect of the death of the deceased.

(2) The *Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001* applies to a cause of action that survives for or against the estate of a deceased person under this Act.