



Republic of Namibia  
Annotated Statutes

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## Apportionment of Damages Act 34 of 1956 (SA)

(SA GG 5689)

came into force in South Africa and South West Africa

on date of publication: 1 June 1956

(see section 6 of Act)

**APPLICABILITY TO SOUTH WEST AFRICA:** Section 6 originally stated "This Act shall apply also in the territory of South-West Africa." After amendment by Act 58 of 1971, section 6 states "This Act and any amendment thereof shall apply also in the territory of South West Africa, including the Eastern Caprivi Zipfel."

**TRANSFER TO SOUTH WEST AFRICA:** Although this Act makes no reference to any minister, because of its subject matter it probably fell under the Executive Powers (Justice) Transfer Proclamation, AG 33 of 1979, dated 12 November 1979. Support for this assumption can be found in the fact that this Act is one of the laws listed in the South African *Justice Laws Rationalisation Act 18 of 1996* (RSA GG 17129). As a result, the only South African amending act after the date of transfer and prior to Namibian independence – the *Matrimonial Property Act 88 of 1984* (RSA GG 9322) – did not apply to South West Africa because it was not made expressly so applicable.

as amended by

### Apportionment of Damages Amendment

Act 58 of 1971 (RSA) (RSA GG 3150)

came into force on date of publication: 16 June 1971

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## ACT

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.

*(English text signed by the Governor-General)  
(Assented to 16th May, 1956)*

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## ARRANGEMENT OF SECTIONS

### CHAPTER I

#### CONTRIBUTORY NEGLIGENCE

**Apportionment of Damages Act 34 of 1956 (SA)**

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1. Apportionment of liability in case of contributory negligence

CHAPTER II

JOINT OR SEVERAL WRONGDOERS

2. Proceedings against and contributions between joint and several wrongdoers
3. Application of provisions of section 2 to liability imposed in terms of Act 29 of 1942

CHAPTER III

GENERAL

4. Savings
5. This Act binds the State
6. Application of Act to South-West Africa
7. Short title

BE IT ENACTED by the Queen's Most Excellent Majesty, the Senate and the House of Assembly of the Union of South Africa, as follows:-

CHAPTER I

CONTRIBUTORY NEGLIGENCE

**Apportionment of liability in case of contributory negligence**

1. (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 paragraph (a) be regarded as having been caused by a person's fault notwithstanding the fact that another person had an opportunity of avoiding the consequences thereof and negligently failed to do so.

(2) Where in any case to which the provisions of sub-section (1) apply, one of the persons at fault avoids liability to any claimant by pleading and proving that the time within which proceedings should have been instituted or notice should have been given in connection with such proceedings in terms of any law, has been exceeded, such person shall not by virtue of the provisions of the said sub-section, be entitled to recover damages from that claimant.

(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.

CHAPTER II

JOINT OR SEVERAL WRONGDOERS

**Proceedings against and contributions between joint and several wrongdoers**

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2. (1) Where it is alleged that two or more persons are jointly or severally liable in delict to a third person (hereinafter referred to as the plaintiff) for the same damage, such persons (hereinafter referred to as joint wrongdoers) may be sued in the same action.

(1A) Subject to the provisions of the first proviso to subsection (6)(a), a person shall for the purposes of this section be regarded as a joint wrongdoer if he would have been a joint wrongdoer but for the fact that he is married in community of property to the plaintiff.

**[Subsection (1A) is inserted by Act 58 of 1971. Section 3 of Act 58 of 1971 states:**  
 "The provisions of section 1 of this Act **[which inserted subsection (1A)]** shall not apply in respect of any wrongful act committed before the commencement of this Act."

**[If Act 34 of 1956 was not in fact transferred to South West Africa by the Executive Powers (Justice) Transfer Proclamation, AG 33 of 1979, then amendments to the Act in South Africa would have continued to be automatically applicable to South West Africa by virtue of the wording of section 6 of this Act. If that is the case, then subsection (1A) would be amended by the *Matrimonial Property Act 88 of 1984 (RSA GG 9322)*, brought into force on 1 October 1984 by RSA Proc. R.157 of 1984 (RSA GG 9413), to read as follows:**

"(1A) A person shall for the purposes of this section be regarded as a joint wrongdoer if he would have been a joint wrongdoer but for the fact that he is married in community of property to the plaintiff."

(1B) Subject to the provisions of the second proviso to subsection (6)(a), if it is alleged that the plaintiff has suffered damage as a result of any injury to or the death of any person and that such injury or death was caused partly by the fault of such injured or deceased person and partly by the fault of any other person, such injured person or the estate of such deceased person, as the case may be, and such other person shall for the purposes of this section be regarded as joint wrongdoers.

**[Subsection (1B) is inserted by Act 58 of 1971. Section 3 of Act 58 of 1971 states:**  
 "The provisions of section 1 of this Act **[which inserted subsection (1B)]** shall not apply in respect of any wrongful act committed before the commencement of this Act."

(2) Notice of any action may at any time before the close of pleadings in that action be given -

- (a) by the plaintiff;
- (b) by any joint wrongdoer who is sued in that action,

to any joint wrongdoer who is not sued in that action, and such joint wrongdoer may thereupon intervene as a defendant in that action.

(3) The court may on the application of the plaintiff or any joint wrongdoer in any action order that separate trials be held, or make such other order in this regard as it may consider just and expedient.

(4) (a) If a joint wrongdoer is not sued in an action instituted against another joint wrongdoer and no notice is given to him in terms of paragraph (a) of sub-section (2), the plaintiff shall not thereafter sue him except with the leave of the court on good cause shown as to why notice was not given as aforesaid.

(b) If no notice is under paragraph (a) or (b) of subsection (2) given to a joint wrongdoer who is not sued by the plaintiff, no proceedings for a contribution shall be instituted against him under sub-section (6) or (7) by any joint wrongdoer except with the leave of the court on good cause shown as to why notice was not given to him under paragraph (b) of subsection (2).

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(5) In any subsequent action against another joint wrongdoer, any amount recovered from any joint wrongdoer in a former action shall be deemed to have been applied towards the payment of the costs awarded in the former action in priority to the liquidation of the damages awarded in that action.

- (6) (a) If judgment is in any action given against any joint wrongdoer for the full amount of the damage suffered by the plaintiff, the said joint wrongdoer may, if the judgment debt has been paid in full, subject to the provisions of paragraph (b) of sub-section (4), recover from any other joint wrongdoer a contribution in respect of his responsibility for such damage of such an amount as the court may deem just and equitable having regard to the degree in which that other joint wrongdoer was at fault in relation to the damage suffered by the plaintiff, and to the damages awarded: Provided that the amount of the damages recovered by the plaintiff referred to in subsection (1A) from any joint wrongdoer against whom the judgment has been given shall, for the purpose of the recovery of a contribution from the person referred to in the lastmentioned subsection, not be deemed to form part of the joint estate of such plaintiff and such person except in so far as any such amount relates to an asset of the said joint estate: Provided further that if the court, in determining the full amount of the damage suffered by the plaintiff referred to in subsection (1B), deducts from the estimated value of the support of which the plaintiff has been deprived by reason of the death of any person, the value of any benefit which the plaintiff has acquired from the estate of such deceased person no contribution which the said joint wrongdoer may so recover from the estate of the said deceased person shall deprive the plaintiff of the said benefit or any portion thereof.

**[Paragraph (a) is amended by Act 58 of 1971 to add the two provisos.**

**Section 3 of Act 58 of 1971 states:** "The provisions of section 1 of this Act **[which inserted the provisos to subsection (6)]** shall not apply in respect of any wrongful act committed before the commencement of this Act."

**[If Act 34 of 1956 was not in fact transferred to South West Africa by the Executive Powers (Justice) Transfer Proclamation, AG 33 of 1979, then amendments to the Act in South Africa would have continued to be automatically applicable to South West Africa by virtue of the wording of section 6 of this Act. If that is the case, then paragraph (a) would be amended by the *Matrimonial Property Act 88 of 1984* (RSA GG 9322), brought into force on 1 October 1984 by RSA Proc. R.157 of 1984 (RSA GG 9413), to delete the first proviso in paragraph (a), making it read as follows:**

"(a) If judgment is in any action given against any joint wrongdoer for the full amount of the damage suffered by the plaintiff, the said joint wrongdoer may, if the judgment debt has been paid in full, subject to the provisions of paragraph (b) of sub-section (4), recover from any other joint wrongdoer a contribution in respect of his responsibility for such damage of such an amount as the court may deem just and equitable having regard to the degree in which that other joint wrongdoer was at fault in relation to the damage suffered by the plaintiff, and to the damages awarded: Provided further **[sic]** that if the court, in determining the full amount of the damage suffered by the plaintiff referred to in subsection (1B), deducts from the estimated value of the support of which the plaintiff has been deprived by reason of the death of any person, the value of any benefit which the plaintiff has acquired from the estate of such deceased person no contribution which the said joint wrongdoer may so recover from the estate of the said deceased person shall deprive the plaintiff of the said benefit or any portion thereof."

- (b) The period of extinctive prescription in respect of a claim for a contribution shall be twelve months calculated from the date of the judgment in respect of which a contribution is claimed or, where an appeal is made against such judgment, the date of the final judgment on appeal: Provided that if, in the case of any joint wrongdoer, the period of extinctive prescription in relation to any action which may be instituted against him by the plaintiff, is governed by a law which prescribes a period of less than twelve months as the period within which legal proceedings shall be instituted against him or within which notice shall be given that proceedings will be instituted against him, the provisions of such law shall

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apply *mutatis mutandis* in relation to any action for a contribution by a joint wrongdoer, the period or periods concerned being calculated from the date of the judgment as aforesaid instead of from the date of the original cause of action.

- (c) Any joint wrongdoer from whom a contribution is claimed may raise against the joint wrongdoer who claims the contribution any defence which the latter could have raised against the plaintiff.
  
- (7) (a) If judgment is in any action given against one or more joint wrongdoers in respect of the damage suffered by the plaintiff, any joint wrongdoer who in pursuance of such judgment pays to the plaintiff in respect of his responsibility for such damage an amount in excess of the amount (hereinafter referred to as the amount apportioned to the firstmentioned joint wrongdoer) which the court deems just and equitable having regard to the degree in which he was at fault in relation to the damage suffered by the plaintiff and to the full amount of the damages awarded to the plaintiff, may, subject to the provisions of paragraph (b) of sub-section (4), recover from any other joint wrongdoer a contribution in respect of the latter's responsibility for such damage of an amount not exceeding so much of the amount which the court deems just and equitable having regard to the degree in which such other joint wrongdoer was at fault in relation to the damage suffered by the plaintiff and to the full amount of the damages awarded to the plaintiff, as has not been paid by such other joint wrongdoer to the plaintiff or to any other joint wrongdoer, or so much of the amount paid by the firstmentioned joint wrongdoer as exceeds the amount apportioned to him, whichever is less.
  
- (b) The provisions of paragraphs (b) and (c) of sub-section (6) shall apply *mutatis mutandis* to any claim for a contribution under paragraph (a) of this sub-section.
  
- (8) (a) If judgment is in any action given in favour of the plaintiff against two or more joint wrongdoers, the court may -
  - (i) order that such joint wrongdoers pay the amount of the damages awarded jointly and severally, the one paying the other to be absolved;
  
  - (ii) if it is satisfied that all the joint wrongdoers have been joined in the action, apportion the damages awarded against the said joint wrongdoers in such proportions as the court may deem just and equitable having regard to the degree in which each joint wrongdoer was at fault in relation to the damage suffered by the plaintiff, and give judgment separately against each joint wrongdoer for the amount so apportioned: Provided that any amount which the plaintiff is unable to recover from any joint wrongdoer under a judgment so given (including any costs incurred by the plaintiff in an attempt to recover the said amount and not recovered from the said joint wrongdoer) whether by reason of the said joint wrongdoer's insolvency or otherwise, may be recovered by the plaintiff from the other joint wrongdoer or, if there are two or more other joint wrongdoers, from those other joint wrongdoers in such proportions as the court may deem just and equitable having regard to the degree in which each of those other joint wrongdoers was at fault in relation to the damage suffered by the plaintiff;
  
  - (iii) where it gives judgment against the joint wrongdoers jointly and severally as aforesaid, at the request of any one of the joint wrongdoers, apportion, for the purposes of paragraph (b), the damages payable by the joint wrongdoers *inter se*, amongst the joint wrongdoers, in such proportions as the court may

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deem just and equitable having regard to the degree in which each joint wrongdoer was at fault in relation to the damage suffered by the plaintiff;

(iv) make such order as to costs as it may consider just, including an order that the joint wrongdoers against whom it gives judgment shall pay the plaintiff's costs jointly and severally, the one paying the other to be absolved, and that if one of the unsuccessful joint wrongdoers pays more than his *pro rata* share of the plaintiff's costs, that he shall be entitled to recover from each of the other unsuccessful joint wrongdoers his *pro rata* share of such excess.

(b) Any joint wrongdoer who pays more than the amount apportioned to him under sub-paragraph (iii) of paragraph (a) may recover from any joint wrongdoer who has paid less than or nothing of the amount so apportioned to him, a contribution of an amount not exceeding so much of the amount so apportioned to the lastmentioned joint wrongdoer as has not been paid by him, or so much of the amount paid by the firstmentioned joint wrongdoer as exceeds the amount so apportioned to him, whichever is less.

(c) The provisions of paragraph (b) of sub-section (6) shall apply *mutatis mutandis* to any claim for a contribution under paragraph (b) of this sub-section.

(9) If judgment is given in favour of any joint wrongdoer or if any joint wrongdoer is absolved from the instance, the court may make such order as to costs as it may consider just, including an order -

(a) that the plaintiff pay such joint wrongdoer's costs; or

(b) that the unsuccessful joint wrongdoers pay the costs of the successful joint wrongdoer jointly and severally, the one paying the other to be absolved, and that if one of the unsuccessful joint wrongdoers pays more than his *pro rata* share of the costs of the successful joint wrongdoer, that he shall be entitled to recover from each of the other unsuccessful joint wrongdoers his *pro rata* share of such excess, and that if the successful joint wrongdoer is unable to recover the whole or any part of his costs from the unsuccessful joint wrongdoers, that he shall be entitled to recover from the plaintiff such part of his costs as he is unable to recover from the unsuccessful joint wrongdoers.

[The word "absolved" is misspelt in the *Government Gazette*, as reproduced above.]

(10) If by reason of the terms of an agreement between a joint wrongdoer and the plaintiff the former is exempt from liability for the damage suffered by the plaintiff or his liability therefor is limited to an agreed amount, so much of that portion of the damages which, but for the said agreement and the provisions of paragraph (c) of sub-section (6) or paragraph (b) of sub-section (7), could have been recovered from the said joint wrongdoer in terms of sub-section (6) or (7) or could have been apportioned to him in terms of sub-paragraph (ii) or (iii) of paragraph (a) of sub-section (8), as exceeds the amount, if any, for which he is liable in terms of the said agreement, shall not be recoverable by the plaintiff from any other joint wrongdoer.

(11) (a) Whenever a joint wrongdoer who is entitled under any provision of this section to recover a contribution from another joint wrongdoer, is unable to recover that contribution or any amount thereof from that other joint wrongdoer, whether by reason of the latter's insolvency or otherwise, he may recover from any other joint wrongdoer such portion of that contribution or that amount thereof as the court may deem just and equitable having regard to the degree in which that other joint wrongdoer was at fault in relation to the damage suffered by the plaintiff and

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to the full amount of the said contribution or the said amount thereof, as the case may be.

- (b) Any costs incurred by a joint wrongdoer in an attempt to recover any contribution from any other joint wrongdoer, and not recovered from that joint wrongdoer, shall for the purpose of paragraph (a), be added to the amount of that contribution.

(12) If any joint wrongdoer agrees to pay to the plaintiff a sum of money in full settlement of the plaintiff's claim, the provisions of sub-section (6) shall apply *mutatis mutandis* as if judgment had been given by a competent court against such joint wrongdoer for that sum of money, or, if the court is satisfied that the full amount of the damage actually suffered by the plaintiff is less than that sum of money, for such sum of money as the court determines to be equal to the full amount of the damage actually suffered by the plaintiff, and in the application of the provisions of paragraph (b) of the said subsection (6), any reference therein to the date of the judgment shall be construed as a reference to the date of the agreement.

(13) Whenever judgment is in any action given against any joint wrongdoer for the full amount of the damage suffered by the plaintiff, or whenever any joint wrongdoer has agreed to pay to the plaintiff a sum of money in full settlement of the plaintiff's claim, and the judgment debt or the said sum of money has been paid in full, every other joint wrongdoer shall thereby also be discharged from any further liability towards the plaintiff.

(14) A person shall for the purposes of this section be regarded as a joint wrongdoer notwithstanding the fact that another person had an opportunity of avoiding the consequences of his wrongful act and negligently failed to do so.

### **Application of provisions of section 2 to liability imposed in terms of Act 29 of 1942**

3. The provisions of section *two* shall apply also in relation to any liability imposed in terms of the Motor Vehicle Insurance Act, 1942 (Act No. 29 of 1942), on the State or any person in respect of loss or damage caused by or arising out of the driving of a motor vehicle.

[The Motor Vehicle Insurance Act 29 of 1942 (SA GG 3041) applied to South West Africa. It was repealed by the Compulsory Motor Vehicle Insurance Act 56 of 1972 (RSA GG 3532), which applied to South West Africa. Act 56 of 1972 was repealed by the Motor Vehicle Accidents Act 84 of 1986 (RSA GG 10419), which applied to South West Africa. After independence, Act 84 of 1956 was repealed by the Motor Vehicle Accidents Act 30 of 1990 (GG 132), which was repealed by the Motor Vehicle Accidents Fund Act 4 of 2001 (GG 2547), which was repealed in turn by the Motor Vehicle Accident Fund Act 10 of 2007 (GG 3970).]

## CHAPTER III

### GENERAL

#### **Savings**

4. (1) The provisions of this Act shall not -
- (a) apply in respect of any wrongful act committed before the commencement of this Act;
  - (b) operate to defeat any defence arising under a contract;
  - (c) operate to increase the amount of damages beyond any maximum prescribed in any agreement or any law applicable in respect of any claim for damages.

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(2) Nothing in this Act contained shall derogate in any manner from the provisions of any law relating to collisions or accidents at sea, or of any rule of court promulgated before the commencement of this Act under section *one hundred and eight* of the South Africa Act, 1909, or under section *three* of the Administration of Justice Proclamation, 1919 (Proclamation No. 21 of 1919), of the territory of South-West Africa.

[The South Africa Act 1909 was an Act of the British Parliament which created the Union of South Africa from the British colonies of the Cape of Good Hope, Natal, the Transvaal, and the Orange River Colony. The Administration of Justice Proclamation 21 of 1919 is still in force in Namibia, but its provisions on the promulgation of rules of court have been repealed.]

**This Act binds the State**

5. This Act binds the State.

**Application of Act to South-West Africa**

6. This Act and any amendment thereof shall apply also in the territory of South-West Africa, including the Eastern Caprivi Zipfel.

[Section 6 is substituted by Act 58 of 1971. Prior to this substitution, it stated:  
"This Act shall apply also in the territory of South-West Africa."]

**Short title**

7. This Act shall be called the Apportionment of Damages Act, 1956.