

South Australia

# Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001

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

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### Legislative history

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**The Parliament of South Australia enacts as follows:**

## Part 1—Preliminary

### 1—Short title

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

### 3—Interpretation

- (1) In this Act—  
*apportionable liability*—see subsection (2);

**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;

**defendant** includes a third party (that is, the defendant to a third-party claim);

**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 (including a partner's liability for the act or omission of another member of the partnership); or
- (b) a liability of a person who is subject to a non-delegable duty of care for the act or omission of another that places the person in breach of the non-delegable duty; or
- (c) if an insurer or indemnifier is directly liable to a person who has suffered harm for the act or omission of a person who is insured or indemnified against the risk of causing the harm—the liability of the insurer or indemnifier; or
- (d) 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);

**group**—a group consists of a person who is directly liable for a particular act or omission and the person or persons (if any) who have a derivative liability for the person's act or omission;

**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);

**innocent**—wrongdoing is innocent if the wrongdoer whose act or omission actually caused the harm neither intended to cause harm nor was negligent in causing harm;

**negligent wrongdoing** 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 statutory duty of care that is actionable in damages or innocent wrongdoing that gives rise to a statutory right to damages;

**notional damages**—a plaintiff's notional damages is the amount of the damages (excluding exemplary damages) to which the plaintiff is, or would be, entitled assuming—

- (a) no contributory negligence; and
- (b) the defendant were fully liable for the plaintiff's harm and were not entitled to limitation of liability under—
- (i) this Act; or
- (ii) any other Act that limits the liability of defendants of a particular class (as distinct from one that imposes a general limitation of liability); or
- (iii) a contract;

**primary harm** means harm other than derivative harm;

**special limitation** of liability means a limitation of liability to which a defendant is entitled under—

- (a) an Act (other than this Act) that limits the liability of defendants of a particular class (as distinct from one that imposes a general limitation of liability); or
- (b) a contract;

**wrongdoer** means—

- (a) a person who commits an act, or makes an omission, that causes or contributes to harm (including a person whose act or omission contributes to his or her own harm); or
- (b) a person who has a derivative liability for harm resulting from the act or omission of someone else;

**Note—**

A person may be considered a wrongdoer even though the person—

- has died; or
- has been wound up or has ceased to exist; or
- has become insolvent; or
- cannot be found.

**wrongdoing** means an act or omission that causes or contributes to harm (including such an act or omission on the part of the person who suffers the harm); and a reference to the **wrongdoing of a wrongdoer** (or a **defendant**) is to be understood as a reference to wrongdoing for which that person is directly liable or for which that person has a derivative liability.

- (2) A liability is an **apportionable liability** if the following conditions are satisfied:
- (a) the liability is a liability for harm (but not derivative harm) consisting of—
- (i) economic loss (but not economic loss consequent on personal injury); or

- (ii) loss of, or damage to, property;
- (b) 2 or more wrongdoers (who were not acting jointly) committed wrongdoing from which the harm arose;
- (c) the liability is the liability of a wrongdoer whose wrongdoing was negligent or innocent.

**Example—**

A, who acts with intention to defraud, prepares a false and deceptive statement. B, who is not aware of the fraud, negligently publishes the statement to C, who relies on it and suffers financial loss in consequence. C brings an action against A and B under section 56 of the *Fair Trading Act 1987*. In this case, B's liability is an apportionable liability but A's is not.

- (3) A liability to pay exemplary damages is not however to be regarded as an apportionable liability.

#### **4—Application of Act**

- (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; and
  - (c) does not apply to liability subject to apportionment under section 72 of the *Development Act 1993*.

## **Part 2—Concurrent liability and contributory negligence**

### **6—Right to contribution**

- (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 Part 3 and any other statutory provision<sup>1</sup> 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, or proceedings between the parties, 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.
- (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 misconduct<sup>2</sup>.

**Notes—**

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

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

- (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 negligent wrongdoing 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.

**Part 3—Apportionable liability**

**8—Limitation of defendant's liability in cases of apportionable liability**

- (1) If a defendant's liability on a claim for damages is apportionable, the liability is limited under this section.
- (2) If the limitation applies, the defendant's liability is limited to a percentage of the plaintiff's notional damages that is fair and equitable having regard to—
  - (a) the extent of the defendant's responsibility for the harm; and
  - (b) the extent of the responsibility of other wrongdoers (including wrongdoers who are not party to the proceedings) whose acts or omissions caused or contributed to the harm.
- (3) For the purpose of subsection (2)—
  - (a) 2 or more wrongdoers who are members of the same group are to be treated as a single wrongdoer; and

- (b) if the plaintiff was guilty of contributory negligence, that contributory negligence will be brought into account as wrongdoing and a percentage assigned to it; and
  - (c) if 2 or more wrongdoers are each entitled to the benefit of a limitation of liability under this section (for some reason other than that they are members of the same group), the aggregate percentage assigned to them cannot exceed—
    - (i) if there is no contributory negligence on the plaintiff's part—100%; or
    - (ii) if there is contributory negligence on the plaintiff's part—100% less a percentage representing the extent of the plaintiff's responsibility for his or her harm.
- (4) In a case involving apportionable liability, the court must proceed as follows:
- (a) the court first determines the plaintiff's notional damages;
  - (b) the court gives judgment against any defendant whose liability is not subject to limitation under this section for damages calculated without regard to this Part;
  - (c) the court determines, in relation to each defendant whose liability is limited under this section, a proportion of the plaintiff's notional damages equivalent to the percentage representing the extent of that defendant's liability;
  - (d) the court then gives judgment against each such defendant based on the assessment made under paragraph (c) (but in doing so must give effect to any special limitation of liability to which any of them may be entitled).

**Example—**

A Ltd (which runs a forestry business) has engaged B (an independent contractor) to protect its forest from fire. C (an arsonist) sets the forest on fire. B is negligent in failing to detect and stop C's malicious act. A Ltd sues B and C for damages. In this case, B would be entitled to a limitation of liability under this section but C would not. In working out the amounts for which judgment should be given, the court would determine first the amount of damages necessary to cover the damage caused by the fire. Judgment for that amount would be given against C. In determining the amount for which judgment should be given against B, responsibility for the damage would be divided between B and C on essentially the same basis as would formerly have been applicable to an action for contribution between them. Judgment would be given against B for an amount reflecting the proportionate responsibility assigned to B on that basis.

- (5) The plaintiff is not entitled to recover, by way of damages under the judgment, more than the amount fixed as the plaintiff's notional damages.

**Example—**

Suppose that A has suffered a loss of \$1 000 for which B, C and D are liable. The liability of B and C is limited to 20% and 30% respectively, but D's liability is not limited. Judgment is therefore given against B for \$200, against C for \$300 and against D for \$1 000. In this case, the court would fix \$1 000 as the plaintiff's notional damages—thus limiting the damages that the plaintiff is entitled to recover under the judgment to that amount. If A proceeded first to recover in full against B and C, recovery against D would be limited to \$500. Conversely, recovery in full against D would preclude recovery against B and C. But rights of contribution may arise—see section 9.

- (6) However, this section does not affect the award of exemplary damages and, if such damages are awarded, they may be recovered in the ordinary way from a defendant against whom they were awarded.

## **9—Contribution**

In a case in which the liability of one or more wrongdoers is limited under this Part, the provisions of Part 2 regarding contribution apply but subject to the following qualifications:

- (a) no order for contribution between wrongdoers whose liability is limited may be made;

**Exception—**

Contribution will be allowed between wrongdoers who are members of the same group, in respect of the liability of the group, in the same way (and subject to the same exceptions) as apply under Part 2.

- (b) no order for contribution may be made in favour of a wrongdoer whose liability is limited against a wrongdoer whose liability is not limited;
- (c) no order for contribution may be made in favour of a wrongdoer whose liability is not limited (**A**) against a wrongdoer (**B**) whose liability is limited unless A has fully satisfied the judgment debt, and, if such an order is made, the amount of contribution awarded against B cannot exceed the amount of B's liability for damages under the judgment.

## **10—Procedural provision**

- (1) If a defendant entitled to a limitation of liability under this Part has reasonable grounds to believe that a person who is not a party to the action may be liable on the plaintiff's claim, the defendant must, as soon as practicable, provide the plaintiff with information that is in the defendant's possession, or reasonably available to the defendant (and not equally available to the plaintiff), about—
- (a) the other person's identity and whereabouts; and
- (b) the circumstances giving rise to the other person's liability.
- (2) If a defendant fails to comply with its obligation under this section, a court may order the defendant to pay costs incurred in proceedings that could have been avoided if the obligation had been carried out.
- (3) A court may order that costs payable under this section be assessed on the basis of an indemnity.

## **11—Separate proceedings**

If a plaintiff brings separate actions for the same harm against wrongdoers who are entitled to a limitation of liability under this Part, the judgment first given (or that judgment as varied on appeal) determines for the purpose of all other actions—

- (a) the amount of the plaintiff's notional damages; and
- (b) the proportionate liability of each wrongdoer who was a party to the action in which the judgment was given; and
- (c) whether the plaintiff was guilty of contributory negligence and, if so, the extent of that negligence.

## Part 4—General provision

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

- (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) in a case that does not involve apportionable liability—the amount of damages awarded in the judgment first given (or, if that amount is varied on appeal, the amount as varied);
  - (b) in a case involving apportionable liability—the amount fixed in the judgment first given as the plaintiff's notional damages<sup>1</sup> (or, if that amount is varied on appeal, the amount as varied).

**Note—**

- 1 See section 8.

## Legislative history

### Notes

- For further information relating to the Act and subordinate legislation made under the Act see the Index of South Australian Statutes or [www.legislation.sa.gov.au](http://www.legislation.sa.gov.au).

### Legislation amended by principal Act

The *Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001* amended the following:

*Survival of Causes of Action Act 1940*

*Wrongs Act 1936*

### Principal Act and amendments

New entries appear in bold.

Year	No	Title	Assent	Commencement
2001	41	<i>Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001</i>	3.8.2001	16.8.2001 ( <i>Gazette 16.8.2001 p3046</i> )
<b>2005</b>	<b>32</b>	<b><i>Law Reform (Contributory Negligence and Apportionment of Liability) (Proportionate Liability) Amendment Act 2005</i></b>	<b>14.7.2005</b>	<b>1.10.2005 (<i>Gazette 8.9.2005 p3275</i>)</b>

### Provisions amended

New entries appear in bold.

Entries that relate to provisions that have been deleted appear in italics.

Provision	How varied	Commencement
Long title	amended under <i>Legislation Revision and Publication Act 2002</i>	1.10.2005
Pt 1	heading inserted by 32/2005 s 4	1.10.2005
s 2	<i>omitted under Legislation Revision and Publication Act 2002</i>	<i>1.10.2005</i>
s 3		
s 3(1)	s 3 redesignated as s 3(1) by 32/2005 s 5(8)	1.10.2005
apportionable liability	inserted by 32/2005 s 5(1)	1.10.2005
defendant	inserted by 32/2005 s 5(2)	1.10.2005
derivative liability	substituted by 32/2005 s 5(3)	1.10.2005
<i>fault</i>	<i>deleted by 32/2005 s 5(4)</i>	<i>1.10.2005</i>
group	inserted by 32/2005 s 5(5)	1.10.2005
innocent	inserted by 32/2005 s 5(6)	1.10.2005

negligent wrongdoing	inserted by 32/2005 s 5(6)	1.10.2005
notional damages	inserted by 32/2005 s 5(6)	1.10.2005
<i>relevant statutory duty of care</i>	<i>deleted by 32/2005 s 5(7)</i>	<i>1.10.2005</i>
special limitation	inserted by 32/2005 s 5(7)	1.10.2005
wrongdoer	inserted by 32/2005 s 5(7)	1.10.2005
wrongdoing	inserted by 32/2005 s 5(7)	1.10.2005
s 3(2) and (3)	inserted by 32/2005 s 5(8)	1.10.2005
s 4		
s 4(2)	amended by 32/2005 s 6	1.10.2005
s 5—see s 12		
Pt 2	heading inserted by 32/2005 s 8	1.10.2005
s 6		
s 6(2)	amended by 32/2005 s 9(1)	1.10.2005
s 6(3)	amended by 32/2005 s 9(2)	1.10.2005
s 7		
s 7(2)	amended by 32/2005 s 10	1.10.2005
Pt 3	heading inserted by 32/2005 s 11	1.10.2005
ss 8 and 9	substituted by 32/2005 s 11	1.10.2005
ss 10 and 11	inserted by 32/2005 s 11	1.10.2005
Pt 4	heading inserted by 32/2005 s 11	1.10.2005
s 12	s 5 redesignated as s 12 by 32/2005 s 7(2)	1.10.2005
s 12(4)	s 5(4) substituted by 32/2005 s 7(1)	1.10.2005

## Transitional etc provisions associated with Act or amendments

### *Law Reform (Contributory Negligence and Apportionment of Liability) (Proportionate Liability) Amendment Act 2005*

#### 12—Transitional provision

- (1) The *Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001* (the *principal Act*) and the amendments made to the principal Act by this Act are intended to apply only prospectively.
- (2) It follows that—
  - (a) the law of the State, as in force before the commencement of the principal Act, applies to a cause of action that arose before its commencement; and
  - (b) a cause of action that arose after the commencement of the principal Act but before the commencement of Part 3 of that Act is unaffected by that Part.