

THE APPORTIONMENT OF DAMAGES ACT, 1969

No. 32



of 1969

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AN 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.

Date of Assent: 18. 8. 69.

Date of Commencement: 18. 8. 69.

ENACTED by the Parliament of Botswana.

Short Title

1. This Act may be cited as the Apportionment of Damages Act, 1969.

PART I

CONTRIBUTORY NEGLIGENCE

Apportionment of Liability in case of Contributory Negligence

2. (1) 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 (being a claim arising out of the fault of such other person) 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.

(2) Damage shall for the purpose of subsection (1) 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.

(3) Where in any case to which the provisions of subsection (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.

(4) 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 but does not include intentional wrongdoing.

PART II
JOINT OR SEVERAL WRONGDOERS

Proceedings against joint and several wrongdoers

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

(2) Where in any action in which damages are claimed it is alleged that any person (hereinafter referred to as the defendant) is liable in delict to another (hereinafter referred to as the plaintiff) notice of such action may be given in writing at any time before the close of pleadings either by the plaintiff or the defendant to any other person whom it is alleged is a joint wrongdoer and 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) 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 subsection (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.

(5) If no notice is given under subsection (2) to a joint wrongdoer who is not sued by the plaintiff, no proceedings for a contribution shall be instituted against him under section 4 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 subsection (2).

(6) 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.

Contributions Between Joint Wrongdoers

4. (1) If judgment is in any action given against any joint wrongdoer for the 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 section 3(5) recover from any other joint wrongdoer a contribution in respect of his responsibility for such damage (including costs incurred in defending the action) 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 full amount of the damages awarded to the plaintiff to the

extent that these have been paid by such other joint wrongdoer to the plaintiff or to any other wrongdoer.

(2) 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 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.

(3) 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.

(4) A joint wrongdoer may recover from another joint wrongdoer a contribution in accordance with the provisions of this section notwithstanding that such other joint wrongdoer is married to the plaintiff in community of property.

Judgment Against Two or More Joint Wrongdoers

5. (1) 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 other joint wrongdoers in such proportions as the damages awarded to the plaintiff were apportioned between them;

(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 subsection (2) the damages payable by the joint wrongdoers *inter se*, amongst the 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;

(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.

(2) Any joint wrongdoer who pays more than the amount apportioned to him under subparagraph (iii) of subsection (1) may, if the judgment debt has been paid in full, 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 last mentioned joint wrongdoer as has not been paid by him, or so much of the amount paid by the first mentioned joint wrongdoer as exceeds the amount so apportioned to him, whichever is less.

(3) The provisions of subsection (2) of section 4 shall apply *mutatis mutandis* to any claim for a contribution under subsection (2) of this section.

(4) 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.

Inability to Recover Contribution From Joint Wrongdoer

6. (1) Whenever a joint wrongdoer who is entitled under any provision of this Part 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 to the full amount of the said contribution or the said amount thereof, as the case may be.

(2) Any costs reasonably 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 subsection (1) be added to the amount of that contribution.

Settlement of Claim by Joint Wrongdoer

7. 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 section 4 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 section 4(2) any reference therein to the date of the judgment shall be construed as a reference to the date of the agreement.

Effect of Judgment for full Amount or Settlement on Other Joint Wrongdoers

8. 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.

Abolition of Last Opportunity Rule in the case of Joint Wrongdoers

9. A person shall for the purposes of this Part 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 Part II to Liability Imposed in Terms of Chapter 170

10. The provisions of this Part shall apply in relating to any liability imposed in terms of the Motor Vehicle Insurance Proclamation (Chapter 170) on any person in respect of loss or damage caused by or arising out of the driving of a motor vehicle.

**PART III
GENERAL**

Savings

11. (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, or by reason of voluntary assumption of risk;
 - (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.

This Act binds the State

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Passed by the National Assembly this day, the 14th August, 1969.

G.T. MATENGE
Clerk of the National Assembly.