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Apportionment of Damages Act, 1970

Act 4 of 1970

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Apportionment of Damages Act, 1970
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Apportionment of Damages Act, 1970

Act 4 of 1970

Assented to on 25 November 1969

Commenced on 9 January 1970

[This is the version of this document at 1 December 1998.]

An Act to amend the law relating to contributory negligence and the law relating to the liability of persons jointly and severally liable in delict for the same damage and to provide for matters incidental thereto.

Part I – General

1. Short title

This Act may be cited as the Apportionment of Damages Act, 1970.

2. Interpretation

In this Act, unless inconsistent with the context—

"**fault**" means negligence, breach of statutory duty or other act or omission which gives rise to delictual liability or which but for the provisions of this Act would give rise to the defence of contributory negligence.

3. Savings

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 out of 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.

4. The Government bound by this Act

This Act binds the Government of Swaziland.

Part II – Contributory negligence

5. Apportionment of liability in case of contributory negligence

- (1) (a) Where any person suffers damage as the result partly of his own fault and partly of 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 it 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 purposes of subsection (1)(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 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 connexion with such proceedings in terms of any law has been exceeded, such person shall not by virtue of the provisions of the said subsection be entitled to recover damages from the claimant.

Part III – Joint or several wrongdoers

6. Proceedings against and contributions between joint and several wrongdoers

- (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.
- (2) Written notice of any action may at any time before the close of pleadings in that action be given by the plaintiff or 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 deem fit.
- (4)
 - (a) If a joint wrongdoer is not sued in an action instituted against another joint wrongdoer and no notice of the action is given to him by the plaintiff 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;
 - (b) If no notice under subsection (2) is given either by the plaintiff or the joint wrongdoer who is being sued by the plaintiff to the wrongdoer not being sued by the plaintiff, no proceedings for a contribution shall be instituted against him under subsection (7) by a joint wrongdoer except with the leave of the court on good cause shown as to why such notice was not given to him.
- (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 in that action.
- (6)
 - (a) If in any action judgment is 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 judgement 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 judgement 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 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 of the joint wrongdoers apportion, for the purposes of paragraph (b), the damages payable by 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 joint wrongdoers pays more than his *pro rata* share of the plaintiff's costs, he shall be entitled to recover from each of the other joint wrongdoers his *pro rata* share of the excess;
 - (b) When the judgment debt has been satisfied in full, any joint wrongdoer who has paid more than the amount apportioned to him under sub-paragraph (iii) of paragraph (a) may recover from a joint wrongdoer who has paid nothing of, or less than, the amount apportioned to him, a contribution of an amount not exceeding so much of the amount 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 apportioned to him, whichever is the lesser.
- (7)
- (a) If any action judgment has been given against any one joint wrongdoer for the damage suffered by the plaintiff, such wrongdoer may, if the judgment debt has been satisfied in full and subject to the provisions of paragraph (b) of subsection (4), recover from any other joint wrongdoer a contribution in respect of his responsibility for that damage (including the 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 the other joint wrongdoer was at fault in relation to the damage suffered by the plaintiff, and to the full amount of damages awarded to the plaintiff.
 - (b) If in any action judgment has been given against two or more joint wrongdoers for the damage suffered by the plaintiff, and such judgment debt has been satisfied in full, any such joint wrongdoer who has in pursuance of such judgment paid to the plaintiff an amount in excess of the amount (hereinafter referred to as the amount apportioned to the first-mentioned 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, and to the full amount of the damages awarded to the plaintiff, may, subject to the provisions of paragraph (b) of subsection (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.
- (8)
- (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 such amount thereof as the court may deem just and equitable having regard to the degree in which the 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.
 - (b) Any costs reasonably incurred by a joint wrongdoer in an attempt to recover a contribution from any other joint wrongdoer and not recovered from that joint wrongdoer shall, for the purposes of paragraph (a), be added to the amount of that contribution.
- (9) Any joint wrongdoer from whom a contribution is claimed under any of the provisions of this section may raise against the joint wrongdoer who claims the contribution any defence which the latter could have raised against the plaintiff.

- (10) The period of extinctive prescription in respect of a claim for a contribution under any of the provisions of this section shall be twelve months from the date of the judgment in respect of which a contribution is claimed or, where an appeal has been 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 that 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.

- (11) 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 the 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 the 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.
- (12) (a) 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 paragraph (a) of subsection (7) 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;
- (b) in the application of the provisions of subsection (10) to a claim for a contribution by a joint wrongdoer under the provisions of paragraph (a), any reference in the subsection to the date of judgment shall be construed as a reference to the date of the agreement.
- (13) Whenever in any action judgment is given against any joint wrongdoer for the full amount of the damages 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 satisfied in full, every other joint wrongdoer shall 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 that another person had an opportunity of avoiding the consequences of his wrongful act and negligently failed to do so.

7. Applicability of [section 6](#) to liability imposed in terms of the Motor Vehicle Insurance Proclamation

The provisions of section six shall apply also in relation to any liability imposed in terms of the Motor Vehicle Insurance Act, [No. 19 of 1946](#) on the Government or on any person in respect of loss or damages caused by or arising out of the driving of a motor vehicle.