

Western Australia

**Law Reform (Contributory Negligence and  
Tortfeasors' Contribution) Act 1947**

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As at 04 Jan 2005

Version 02-c0-06

Extract from [www.slp.wa.gov.au](http://www.slp.wa.gov.au), see that website for further information



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## **Law Reform (Contributory Negligence and Tortfeasors' Contribution) Act 1947**

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## Law Reform (Contributory Negligence and Tortfeasors' Contribution) Act 1947

**An Act relating to the common law doctrine of contributory negligence; and to the liability of joint and several tortfeasors to make contribution in damages.**

**1. Short title**

This Act may be cited as the *Law Reform (Contributory Negligence and Tortfeasors' Contribution) Act 1947*<sup>1</sup>.

[2. *Omitted under the Reprints Act 1984 s. 7(4)(f).*]

**3. Interpretation**

In this Act, subject to the context —

**Action** includes an arbitration;

**Court** includes an arbitrator;

**Defendant** includes —

- (a) a party to an action against whom a counter-claim is made in the action; and
- (b) a person for whose act the defendant or such party was vicariously responsible;

**Fatal Accidents Act** means the Imperial Act 9 and 10 Victoriae Cap. 93 (as adopted) as amended by Act No. 37 of 1900, or any Act now or hereafter in force in substitution for or amending the same<sup>2</sup>;

**Negligence** includes breach of statutory duty;

**Plaintiff** includes —

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- (a) a party to an action who makes a counter-claim in the action; and
- (b) a person for whose act the plaintiff or such party was vicariously responsible;

*Workers' Compensation* includes all sums and benefits recoverable under the *Workers' Compensation and Injury Management Act 1981*.

*[Section 3 amended by No. 42 of 2004 s. 175.]*

***Contributory negligence — Amendment of the law***

**3A. References to claims founded on negligence**

In sections 4 and 6 —

- (a) a reference to a claim or action founded on or resulting from negligence includes a reference to a claim or action founded on or resulting from a breach of a contractual duty of care that is concurrent with and coextensive with a duty of care in tort; and
- (b) references to negligence have a corresponding meaning so far as they relate to a defendant.

*[Section 3A inserted by No. 17 of 2003 s. 4.]*

**4. Contributory negligence, Court may reduce plaintiff's damages**

- (1) Whenever in any claim for damages founded on an allegation of negligence the Court is satisfied that the defendant was guilty of an act of negligence conducing to the happening of the event which caused the damage then notwithstanding that the plaintiff had the last opportunity of avoiding or could by the exercise of reasonable care, have avoided the consequences of the defendant's act or might otherwise be held guilty of contributory negligence, the defendant shall not for that reason be entitled to judgment, but the Court shall reduce the damages which would be recoverable by the plaintiff if the happening of the event which caused the damage had been solely due to the

negligence of the defendant to such extent as the Court thinks just in accordance with the degree of negligence attributable to the plaintiff:

Provided that —

- (a) this subsection shall not operate to defeat any defence arising under a contract;
  - (b) where any contract or enactment providing for the limitation of liability is applicable to the claim the amount of damages recoverable by virtue of this subsection shall not exceed the maximum limit applicable.
- (2) The provisions of the preceding subsection shall apply to actions brought —
- (a) under the Fatal Accidents Act; or
  - (b) by virtue of section 4 of the *Law Reform (Miscellaneous Provisions) Act 1941*, in respect of a claim made for the benefit of the estate of a deceased person in consequence of the death of the deceased as the result of the negligence of another person;

and for that purpose shall be read and construed as if the following words were inserted in the following relative positions in the subsection: —

- (i) after the words “notwithstanding that the plaintiff” insert the words “or the deceased person in respect of whose death or for the benefit of whose estate the claim is brought or some other person for whose acts the deceased person was responsible”.
- (ii) after the words “recoverable by the plaintiff” insert the words “or by the persons for whose benefit the claim is made or by the estate of the deceased person in respect of which the claim is made”.

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- (3) The provisions of subsection (1) shall apply notwithstanding that one or more of the parties to the action might by reason of such negligence be held guilty of a punishable offence.
- (4) Where any case to which subsection (1) applies is tried with a jury, the jury shall determine the total damages which would have been recoverable if the party claiming the damages had not been negligent and the extent to which those damages are to be reduced.

**5. Contribution may be claimed by a person ordered to pay damages from any other person responsible**

- (1) Where by virtue of section 4(1), 2 or more persons are liable to pay damages or would if sued have been liable to pay damages, judgment recovered against one of them shall not be a bar to an action or actions against any other or others of them but in such case —
  - (i) the provisions of section 7(1)(b) shall apply with the necessary adaptations;
  - (ii) all or any of such persons may as between themselves and any other or others of them claim and cover contribution and the provisions of section 7(1)(c) and of section 7(2) shall apply with the necessary adaptations.
- (2) Where 2 or more such persons are sued jointly, the Court may order contribution as between themselves and the provisions of section 7(1)(c) and of section 7(2) shall apply with the necessary adaptations.

**6. Effect of s. 4(1) on party's right to recover workers' compensation**

- (1) Where a plaintiff in any action for damages founded on negligence would have been entitled when he commenced such action to take proceedings under the *Workers' Compensation and Injury Management Act 1981*, against any defendant or defendants in the action to recover workers' compensation and by reason of section 4(1) of this Act, the damages recoverable



by him are reduced and the reduced amount is less than he would have been entitled to recover as workers' compensation, the plaintiff shall be entitled to recover judgment against such defendant or defendants for the sum to which he would be entitled as workers' compensation: Provided that the Court shall deduct therefrom all the costs which have been unnecessarily caused by the plaintiff bringing the action instead of taking proceedings under the *Workers' Compensation and Injury Management Act 1981*.

- (2) Where a person liable to pay workers' compensation has paid such compensation to a worker or his dependants in a case where the worker or any of his dependants or the personal representatives of the worker would have had a right independently of the *Workers' Compensation and Injury Management Act 1981*, to recover reduced damages against a third party by virtue of section 4(1) of this Act, the person who has paid the workers' compensation shall have a right of indemnity against the third party and section 15(3) of the *Workers' Compensation and Injury Management Act 1981* shall be deemed to apply with the necessary adaptations but so that the sum recoverable by way of indemnity shall be reduced in the same proportion as the damages would be reducible under section 4(1) of this Act.

*[Section 6 amended by No. 42 of 2004 s. 175.]*

### ***Contribution between tortfeasors***

#### **7. Rules applicable if there are 2 or more tortfeasors**

- (1) Subject to Part 1F of the *Civil Liability Act 2002*, where damage is suffered by any person as the result of a tort —
- (a) judgment recovered against any tortfeasor liable in respect of that damage shall not be a bar to an action against any other person who would, if sued, have been liable as a joint tortfeasor in respect of the same damage;
  - (b) if more than one action is brought in respect of that damage by or on behalf of the person by whom it was

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suffered, or for the benefit of the estate, or of the wife, husband, parent or child of that person, against tortfeasors liable in respect of the damage (whether as joint tortfeasors or otherwise) the sums recoverable under the judgments given in those actions by way of damages shall not in the aggregate exceed the amount of the damages awarded by the judgment first given: and in any of those actions, other than that in which judgment is first given, the plaintiff shall not be entitled to costs unless the Court is of opinion that there was reasonable ground for bringing the action.

- (c) any tortfeasor liable in respect of that damage may recover contribution from any other tortfeasor who is or would if sued have been liable in respect of the same damage whether as a joint tortfeasor or otherwise but so that no person shall be entitled to recover contribution under this section from any person entitled to be indemnified by him in respect of the liability for which contribution is sought

A person shall be entitled to be indemnified within the meaning of this paragraph —

- (i) if his complicity in the tort arose from fraud or misrepresentation practised on him by the person from whom the indemnity is sought so that he honestly believed and had no reasonable cause to suspect the truth of the matters represented to him and would not have been liable in tort if such matters had been true;
- (ii) where the act was not clearly illegal or tortious in itself and the person seeking indemnity had no knowledge when the tort was committed of the true legal character of the act;
- (iii) where he is responsible on grounds of vicarious liability as for example in the case of master and servant or as a member of a partnership where

the act was done without his connivance,  
knowledge or express authority.

Provided that except in the case of an indictable offence arising out of some negligent act or omission, no contribution may be claimed by a person who is responsible for damages in tort if in the circumstances of the case he is or might be found guilty of any indictable offence (including an indictable offence punishable on summary conviction).

- (2) In any proceedings for contribution under this section the amount of the contribution recoverable from any person shall be such as may be found by the Court to be just and equitable; and the Court shall have power to exempt any person from liability to make contribution, or to direct that the contribution to be recovered from any person shall amount to a complete indemnity.
- (3) For the purposes of this section —
- (a) the expressions *parent* and *child* have the same meanings respectively as they have for the purposes of the Fatal Accidents Act;
  - (b) the reference in this section to *the judgment first given* shall, in a case where that judgment is reversed on appeal, be construed as a reference to the judgment first given which is not so reversed and, in a case where a judgment is varied on appeal, be construed as a reference to that judgment as so varied.

*[Section 7 amended by No. 58 of 2003 s. 14.]*

#### ***General***

### **8. Person not liable due to limitation period not entitled to benefit of s. 4(1)**

Where one person avoids liability to another person by reason of any statute of limitation applicable in the circumstances such

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first-mentioned person shall not be entitled to recover any damages from the other by virtue of section 4(1).

**9. Application of this Act**

This Act shall apply only where the acts or omissions giving rise to a claim in damages occur after its commencement.

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## Notes

- <sup>1</sup> This is a compilation of the *Law Reform (Contributory Negligence and Tortfeasors' Contribution) Act 1947* and includes the amendments made by the other written laws referred to in the following table. The table also contains information about any reprint.

### Compilation table

Short title	Number and year	Assent	Commencement
<i>Law Reform (Contributory Negligence and Tortfeasors' Contribution) Act 1947</i>	23 of 1947	7 Nov 1947	7 Nov 1947
<b>Reprint of the <i>Law Reform (Contributory Negligence and Tortfeasors' Contribution) Act 1947</i> authorised 23 May 1979</b>			
<b>Reprint of the <i>Law Reform (Contributory Negligence and Tortfeasors' Contribution) Act 1947</i> as at 2 Aug 2002</b>			
<i>Law Reform (Contributory Negligence and Tortfeasors' Contribution) Amendment Act 2003</i> <sup>4</sup>	17 of 2003	17 Apr 2003	17 Apr 2003 (see s. 2)
<i>Civil Liability Amendment Act 2003</i> s. 14	58 of 2003	30 Oct 2003	1 Dec 2004 (see s. 2 and <i>Gazette</i> 26 Nov 2004 p. 5309)
<i>Workers' Compensation Reform Act 2004</i> s. 175	42 of 2004	9 Nov 2004	4 Jan 2005 (see s. 2 and <i>Gazette</i> 31 Dec 2004 p. 7131)

- <sup>2</sup> The Imperial Act 9 & 10 Vict. c. 93 (1846) was adopted by the *Imperial Acts Adopting Ordinance 1849* (12 Vict. No. 21) and amended by Act No. 37 of 1900. It was repealed in so far as it was part of the law of W.A. by the *Fatal Accidents Act 1959* s. 2.

- <sup>3</sup> Footnote no longer applicable.

- <sup>4</sup> The *Law Reform (Contributory Negligence and Tortfeasors' Contribution) Amendment Act 2003* s. 5 reads as follows:

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**5. Transitional provision**

- (1) Subject to subsection (2), the amendment made by section 4 of the *Law Reform (Contributory Negligence and Tortfeasors' Contribution) Amendment Act 2003* applies to acts or omissions

that occurred before the commencement of that provision as if the amendment had been in force when the act or omission occurred.

- (2) The provisions of the *Law Reform (Contributory Negligence and Tortfeasors' Contribution) Act 1947*, as in force before the commencement of the *Law Reform (Contributory Negligence and Tortfeasors' Contribution) Amendment Act 2003*, apply to an act or omission about which —
- (a) a court proceeding was started before that commencement in respect of which a judgment has not been given or a decision has not been made (including a judgment or decision about liability only) before that commencement;
  - (b) a court, before that commencement, has given judgment or made a decision (including a judgment or decision about liability only), whether or not an appeal has been made against that judgment or decision before that commencement or is made on or after that commencement; or
  - (c) the persons concerned have, before that commencement, entered into an agreement to settle claims arising from the act or omission (including an agreement about liability only).

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