

**LAW REFORM (CONTRIBUTORY NEGLIGENCE AND TORTFEASORS'
CONTRIBUTION) AMENDMENT BILL 2001
EXPLANATORY MEMORANDUM**

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Explanatory note

Overview of Bill

The object of this Bill is to amend the *Law Reform (Contributory Negligence and Tortfeasors' Contribution) Act 1947* (WA) so as to provide that in certain circumstances the damages recoverable by a person who sues for breach of a contractual duty of care are to be reduced to the extent of any contributory negligence by the person.

Background

At common law, a defendant being sued for a tort could generally raise the contributory negligence of the plaintiff as a complete defence to the claim. That is, if the damage suffered by the plaintiff was partly due to the plaintiff's failure to take reasonable care, the plaintiff could not recover any damages at all from the defendant. (For example, a pedestrian injured by a speeding vehicle would not be able to claim damages if the pedestrian had contributed to the accident by failing to keep a proper lookout for vehicles.)

The *Law Reform (Contributory Negligence and Tortfeasors' Contribution) Act 1947* (WA) modified the common law by providing for apportionment of damages in cases of contributory negligence. Under the Act, if a plaintiff's damage is the result partly of the plaintiff's fault and partly of the fault of the defendant, the plaintiff can still recover damages from the defendant but the amount of damages is reduced to the extent that the court thinks just and equitable having regard to the plaintiff's share in the responsibility for the damage.

The apportionment provisions contained in the Act were based on United Kingdom legislation. There are similar provisions in the other Australian States and Territories. The apportionment provisions apply to claims of negligence and other claims in tort where contributory negligence could be a defence to the claim.

Some contracts contain an express or implied term that one of the parties has a duty to act with reasonable care. If that duty is breached, in some circumstances the other party may be able to sue for breach of duty of care both in tort and in contract. There was support in some Australian and United Kingdom cases for the view that the apportionment legislation extended to claims in contract for damages for breach of a contractual duty of care, where the duty of care owed by the defendant is the same in contract as in tort.

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Recently the High Court of Australia decided in *Astley v Austrust Limited* (1999) 197 CLR 1 that the apportionment provisions contained in the *Wrongs Act 1936* of South Australia applied only to claims for damages in tort; they did not apply to claims of breach of contractual duty of care. As a result, if a plaintiff sues a defendant for breach of duty of care in both contract and in tort, the plaintiff's damages may be reduced for contributory negligence in the claim in tort, but not in the claim in contract.

The object of this Bill is to overcome the effect of the decision in *Astley*. The Bill amends the apportionment provisions in the Act so as to extend those provisions to claims for a breach of a contractual duty of care that is concurrent and co-extensive with a tortious duty of care.

The amendments have a retrospective effect (that is, they apply to acts or omissions that occurred before the amendments commence). However, the amendments will not apply to acts or omissions about which a court has given a judgment, or about which the parties have agreed to a settlement.

Outline of provisions

Clause 1 sets out the short title of the proposed Act.

Clause 2 provides for the commencement of the proposed Act on a day on which it receives Assent.

Clause 3 is a formal provision providing that the amendments made by the Bill are to the *Law Reform (Contributory Negligence and Tortfeasors' Contribution) Act 1947* (WA).

Clause 4 Is the key provision providing that references to claims for damages founded on negligence includes a reference to a claim 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. The effect is that for the purposes of sections 4 and 6 of the Act that contributory negligence will apply to cases of breach of contractual duty.

Clause 5 provides that the amendment made may have a retrospective effect and apply to acts or omissions that occurred before the amendment commence. However, the amendments will not apply to acts or omissions about which a court has given a judgment, or about which the parties have agreed to a settlement.