

# CONTRIBUTORY INTENT AS A DEFENCE EXCLUDING DELICTUAL LIABILITY<sup>\*</sup>

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*'Contributory intent' is a term used to determine the extent of the plaintiff's fault by a method which is analogous to that of determining intent. It may be applied as a complete defence to exclude delictual liability in terms of the common law in instances where the plaintiff intentionally or voluntarily assumes the risk of harm, thereby cancelling out the defendant's fault (in the form of negligence) and hence, delictual liability. Our courts, when faced with instances of voluntary assumption of risk on the part of the plaintiff, are unsure whether consent, contributory intent or contributory negligence is the appropriate defence. This uncertainty stems from the failure of the adjudicators to grasp fully the requirements of the defences. Nevertheless, there are numerous cases in our law which outline sufficient practical and theoretical grounds for the defence of contributory intent to be recognised, developed and incorporated properly as a complete defence in our law.*

## I INTRODUCTION

As an element of delictual liability, fault refers to the legal blameworthiness or the reprehensible state of mind or conduct of someone who has acted wrongfully.<sup>1</sup> The two main forms of fault recognised are intention (*dolus*) and negligence (*culpa* in the narrow sense).<sup>2</sup> In general, fault refers to the *defendant's* conduct. On the other hand, 'contributory fault', which includes 'contributory intent', refers to a situation where the *plaintiff* also contributes, either intentionally or negligently, to the harm caused to him- or herself.<sup>3</sup>

'Contributory intent' is a term used to establish the plaintiff's fault by a method which is analogous to that of establishing intent.<sup>4</sup> In practice, 'contributory intent' may manifest in the form of a voluntary assumption of risk.<sup>5</sup> Voluntary assumption of risk, in turn, may manifest in two forms. First, depending on the circumstances, it may be embodied in the maxim *volenti non fit iniuria*, which refers to consent to the risk of injury (as a ground of

<sup>\*</sup> This article is based on my unpublished LLM dissertation entitled *Contributory Intent as a Defence Limiting or Excluding Delictual Liability* completed in 2011 at the University of South Africa.

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<sup>1</sup> J Neethling & J M Potgieter (J C Knobel ed and trans) *Neethling — Potgieter — Visser The Law of Delict* 6 ed (2010) 123; M M Loubser (ed) *The Law of Delict in South Africa* 2 ed (2012) 103.

<sup>2</sup> Neethling & Potgieter op cit note 1 at 123; Loubser op cit note 1 at 103–4.

<sup>3</sup> J C Van der Walt & J R Midgley *Principles of Delict* 3 ed (2005) 147.

<sup>4</sup> Van der Walt & Midgley *ibid* at 241; Raheel Ahmed 'Voluntary assumption of risk as a defence, excluding delictual liability with regard to sports injuries — *Hattingh v Roux* 2011 (5) SA 135 (WCC)' (2012) 33 *Obiter* 414 at 419.

<sup>5</sup> Neethling and Potgieter op cit note 1 at 171; R Ahmed 'The defence of contributory intent (voluntary assumption of risk) — *Neethling v Oosthuizen* 2009 (5) SA 376 (WCC)' (2010) 73 *THRHR* 697 at 699; Ahmed op cit note 4 at 419.

justification) and excludes the wrongfulness of the act.<sup>6</sup> As such, *volenti non fit iniuria* in the form of voluntary assumption of risk can function as a complete defence.<sup>7</sup> Secondly, where voluntary assumption of risk does not meet all the requirements for a valid consent and so cannot serve as a ground of justification, it may still comprise a ground excluding fault in the form of ‘contributory intent’ and, consequently, may still comprise a complete defence.<sup>8</sup> This would occur where the plaintiff voluntarily assumes the risk of harm by ‘intentionally’ exposing him- or herself to such risk. With regard to voluntary assumption of risk in the form of ‘contributory intent’, the plaintiff usually has intention in the form of *dolus eventualis*.<sup>9</sup> *Dolus eventualis* is present when, at the relevant time, the plaintiff foresees the possibility of harm and reconciles him- or herself with the potential consequences in the sense that he or she realises that the intended conduct is unreasonable but nevertheless accepts the eventuality of the harm which later ensues.<sup>10</sup> The ‘contributory intent’ (at least in the form of *dolus eventualis*) or voluntary assumption of risk by the plaintiff therefore serves to exclude delictual liability. Although this may be criticised as a distorted understanding of the concept of voluntary assumption of risk, it must be seen in the light of what occurs in practice, as Neethling & Potgieter<sup>11</sup> submit — a view referred to in the recent decision of *Plumridge v Road Accident Fund*.<sup>12</sup> Indeed, it is accepted by the courts that under the common law, the conscious undertaking of an unreasonable risk by the plaintiff cancels out negligence on the part of the defendant.<sup>13</sup>

<sup>6</sup> See in general *Waring and Gillow Ltd v Sherborne* 1904 TS 344; Neethling & Potgieter op cit note 1 at 103n498; Van der Walt & Midgley op cit note 3 at 140; P Q R Boberg *The Law of Delict Volume 1: Aquilian Liability* (1984) 724; Jonathan Burchell *Principles of Delict* (1993) 68; R G McKerron *The Law of Delict* 7 ed (1971) 67.

<sup>7</sup> Van der Walt & Midgley op cit note 3 at 140.

<sup>8</sup> Neethling & Potgieter op cit note 1 at 171; Ahmed op cit note 4 at 419.

<sup>9</sup> Intent may take one of three forms — direct intent, indirect intent or *dolus eventualis* (reconciliation with a foreseen possibility). See Loubser et al op cit note 1 at 109–11; Neethling & Potgieter op cit note 1 at 127; Van der Walt & Midgley op cit note 3 at 157–8. In a strict sense, a person cannot act wrongfully in respect of him- or herself. Also, it is legally impossible for such person to be conscious of the wrongfulness of his or her actions and have intent in respect of him- or herself. ‘Contributory intent’ is really just a term used to establish the plaintiff’s fault by a method which is similar to that of establishing intent. See further Ahmed op cit note 4 at 419.

<sup>10</sup> For example, where a person wilfully exposes him or herself to personal danger in order to save a person’s life, he or she does not necessarily act ‘consciously unreasonably’ and therefore may not be found to have acted with ‘contributory intent’ in the manner mentioned in the footnote above. See Neethling & Potgieter op cit note 1 at 171n285; Ahmed op cit note 4 at 419.

<sup>11</sup> Neethling & Potgieter op cit note 1 at 171.

<sup>12</sup> [2012] ZAECEHC 48 para 12. This was a judgment delivered on an application for leave to appeal to the Supreme Court of Appeal. The court specifically referred to Neethling & Potgieter’s view of voluntary assumption of risk in relation to ‘contributory intent’.

<sup>13</sup> See *Wapnick v Durban City Garage* 1984 (2) SA 414 (D) at 418C–D; *Columbus Joint Venture v ABSA Bank Ltd* 2000 (2) SA 491 (W) at 512J–513B; Van der Walt &

As will be illustrated in this contribution, the distinction between voluntary assumption of risk as a ground cancelling fault (contributory intent) and as a ground of justification is not apparent from the case law. First, it is necessary to look at the requirements of consent and to take note of the cases where the defence was successfully raised. There are a number of cases where voluntary assumption of risk in the form of consent was invalid; but I will try to show that in these cases voluntary assumption of risk in the form of ‘contributory intent’ could have been applicable. Secondly, attention must be given to voluntary assumption of risk in the form of ‘contributory intent’ and the cases where it was (partially) recognised. By analysing the cases, this contribution argues that there are sufficient practical and theoretical grounds for the defence of ‘contributory intent’ fully to be recognised, developed and incorporated as a complete defence in our law.

## II VOLUNTARY ASSUMPTION OF RISK AS A GROUND OF JUSTIFICATION

A ground of justification negates the element of wrongfulness, thereby rendering the defendant’s conduct lawful.<sup>14</sup> Grounds of justification are merely expressions of the boni mores or reasonableness criterion in certain typical circumstances.<sup>15</sup> It is not intended here to give a full exposition of ‘consent to the risk of injury’ as a ground of justification, but rather to focus on its requirements, which will indicate the borderline between this ground of justification and the voluntary assumption of risk as a ground that cancels fault. Consent to (the risk of) injury is the unilateral (and therefore revocable) legal act of a person who gives his or her consent, either expressly or impliedly, before the prejudicial conduct occurs.<sup>16</sup> It is important to note that no communication, agreement, contract or ‘bargain’<sup>17</sup> between the prejudiced person and the actor is necessary.

Although three of the requirements of consent (voluntary assumption of risk) — knowledge, appreciation and consent — have been labelled ‘essential elements’ by courts worldwide,<sup>18</sup> in our law it is generally accepted that the following requirements must be met:

Midgley op cit note 3 at 244; Ahmed op cit note 5 at 701; Ahmed op cit note 4 at 420; Johan Scott ‘Some reflections on section 1(1)(a) of the Apportionment of Damages Act 1956 and contributory intent’ in Johann van der Westhuizen (ed) *Huldigingsbundel Paul van Warmelo* (1984) 176.

<sup>14</sup> *Hattingh v Roux* 2011 (5) SA 135 (WCC) at 140F–141F referring to Neethling & Potgieter op cit note 1 at 36; see also Van der Walt & Midgley op cit note 3 at 69.

<sup>15</sup> See Neethling & Potgieter op cit note 1 at 44–6 and 78–82; Loubser et al op cit note 1 at 144–8; Van der Walt & Midgley op cit note 3 at 68–74.

<sup>16</sup> Neethling & Potgieter op cit note 1 at 104–5.

<sup>17</sup> In *Santam Insurance Co Ltd v Vorster* 1973 (4) SA 764 (A) at 780H–781B, the court rejected G L Williams’s ‘bargain theory’, which requires ‘an express or implied bargain between the parties’ (G L Williams *Joint Torts and Contributory Negligence: A Study of Concurrent Fault in Great Britain, Ireland and the Common-Law Dominions* (1951) 308). See further *Hattingh* supra note 14 at 142B–C.

<sup>18</sup> See *Waring and Gillow Ltd* supra note 6 at 344; *Esterhuizen v Administrator, Transvaal* 1957 (3) SA 710 (T) at 712A–B; *Vorster* supra note 17 at 781B–C; *Boshoff v Boshoff*

- (a) Consent must be given freely or voluntarily.
- (b) The person giving the consent must be capable of volition.
- (c) The consenting person must have full knowledge of the nature and extent of the risk of possible prejudice.
- (d) The consenting party must also comprehend and understand the nature and extent of the harm or risk.
- (e) The person consenting must in fact subjectively consent to the prejudicial act. This consent has to be inferred from the proven facts.
- (f) The consent must be permitted by the legal order; in other words, it must not be *contra bonos mores*.<sup>19</sup>

The requirement that consent must not be *contra bonos mores* is important in considering whether voluntary assumption of risk will apply as a ground of justification. However, the courts have failed fully to appreciate the meaning of this requirement.<sup>20</sup> For example, whilst consent to serious bodily injury or murder is *contra bonos mores*,<sup>21</sup> consent to bodily injury or to the risk of injury is usually not *contra bonos mores* in cases of lawful medical treatment, participation in lawful sport,<sup>22</sup> or in instances where the injury is minor.<sup>23</sup> As such, the enquiry into whether voluntary assumption of risk can apply as a ground excluding fault becomes relevant and warrants a more detailed discussion with reference to case law.<sup>24</sup>

(a) *The judiciary's recognition of volenti non fit iniuria*

The *volenti non fit iniuria* ground of justification has been invoked successfully in *Card v Sparg*,<sup>25</sup> *Boshoff v Boshoff*,<sup>26</sup> *Maartens v Pope*<sup>27</sup> and by implication (in respect of certain claims) in *Castell v De Greef*.<sup>28</sup>

In *Card v Sparg*<sup>29</sup> the plaintiff, who was a minor, alleged that she had been seduced by the defendant and as a result became pregnant and later gave birth to a child. At the time of the sexual act, the plaintiff was not a virgin and had had sexual relations with other men. However, she was sure that the defendant was the father of her child. She did not claim damages for the seduction, but claimed damages in respect of medical and hospital expenses related to the pregnancy and birth of her child, maternity wear, toiletries for

1987 (2) SA 694 (O) at 695G–H; Williams op cit note 17 at 296; F Trindade, P Cane & M Lunney *The Law of Torts in Australia* 4 ed (2007) 695.

<sup>19</sup> Neethling & Potgieter op cit note 1 at 106–8; *Hattingh* supra note 14 at 141F–H; *Plumridge* supra note 12 paras 43–4.

<sup>20</sup> See Ahmed op cit note 4 at 416.

<sup>21</sup> Van der Walt & Midgley op cit note 3 at 143.

<sup>22</sup> See *Hattingh* supra note 14 at 141A–C and *Boshoff* supra note 18 which is discussed further below.

<sup>23</sup> Neethling & Potgieter op cit note 1 at 108.

<sup>24</sup> See Ahmed op cit note 4 at 419.

<sup>25</sup> 1984 (4) SA 667 (E).

<sup>26</sup> 1987 (2) SA 694 (O).

<sup>27</sup> 1992 (4) SA 883 (N). As will be shown below, the *volenti non fit iniuria* defence should have failed in this case. See also Ahmed op cit note 5 at 700.

<sup>28</sup> 1994 (4) SA 408 (C); Ahmed op cit note 4 at 419.

<sup>29</sup> *Supra* note 25.

herself and the child, miscellaneous articles required for the child (such as a pram, cot, car seat and bath), loss of earnings or alternatively, maintenance for six months, as well as future maintenance for the child.<sup>30</sup> In this case, Zietsman J held that the plaintiff had not been seduced but that the defence of *volenti non fit iniuria* was applicable:

‘Where the plaintiff has not been seduced there seems to be no reason why the principles applicable in seduction cases should apply, and in particular why the *volenti non fit iniuria* rule should be excluded. The plaintiff, being a consenting party to the act of sexual intercourse, with full knowledge that this could lead to pregnancy and the birth of a child, is not entitled to claim damages as such and there seems to be no logical reason why she should be entitled to claim from the defendant a refund of the expenses she has incurred in respect of her own person.’<sup>31</sup>

It was evident here that the plaintiff did comply with the requirements of a valid consent. However, in instances of seduction (which applies only to female virgins), Neethling & Potgieter<sup>32</sup> opine that generally the consent of a girl is invalid not because of her ‘weakness’ or the ‘seductive conduct’ of the man, but because the consent is *contra bonos mores*. They nevertheless submit<sup>33</sup> that the consent may be valid and not *contra bonos mores* in light of the Constitution<sup>34</sup> and the changing views of the community. Accordingly, the maxim *volenti non fit iniuria* as a ground of justification may be applicable. But should the consent be invalid, it may still be argued that the plaintiff acted with ‘contributory intent’ in that she had intentionally and voluntarily assumed the risk of falling pregnant and had reconciled herself with such consequence (thus *dolus eventualis* could have been present).

In *Boshoff v Boshoff*,<sup>35</sup> the plaintiff was injured by his opponent with his racket while playing a game of squash. The plaintiff sued his opponent in respect of the injuries sustained. The defence of consent was raised.<sup>36</sup> The court confirmed that

‘[it was not *contra bonos mores* for a person capable of forming an] intention to consent in the course of lawful sport to [sustain] . . . reasonable physical injuries. Likewise it is not unlawful in itself to consent to (running) the risk of physical injuries accompanying the reasonable conduct of fellow players.’<sup>37</sup>

This case is the *locus classicus* where voluntary assumption of risk as a ground of justification is applicable as the players conduct was considered

<sup>30</sup> *Ibid* at 668H–669B.

<sup>31</sup> *Ibid* at 671D–F.

<sup>32</sup> *Op cit* note 1 at 329–30.

<sup>33</sup> *Ibid* at 328n82. The authors refer to J Neethling, J M Potgieter & P J Visser *Neethling’s Law of Personality* 2 ed (2005) 100–2.

<sup>34</sup> Constitution of the Republic of South Africa, 1996. See especially s 12(2)(b) of the Constitution.

<sup>35</sup> *Supra* note 18.

<sup>36</sup> *Ibid* at 695H.

<sup>37</sup> *Ibid* at 695F–G.

reasonable and the rules of the game were followed.<sup>38</sup> In the recent decision of *Roux v Hattingsh*,<sup>39</sup> where the defence of consent relating to playing in a rugby game did not succeed, Brand JA stated:

‘[P]ublic policy regards the game of rugby as socially acceptable despite the likelihood of serious injury inherent in the very nature of the game, it seems to me that conduct causing even serious injury cannot be regarded as wrongful if it falls within the rules of the game. . . . At the other end of the scale, I believe that conduct which constitutes a flagrant contravention of the rules of rugby and which is aimed at causing serious injury or which is accompanied by full awareness that serious injury may ensue, will be regarded as wrongful and hence attract legal liability for the resulting harm.’<sup>40</sup>

In *Maartens v Pope*<sup>41</sup> the plaintiff was a plumber who had been requested to call at the defendant’s house to inspect a soak pit. He was told to let the defendant’s wife know when he intended calling at the house as there was a dog on the premises which previously had bitten two people. The plaintiff decided to call at the house unannounced. He saw the warning signs in regard to the dog’s presence but nevertheless decided to enter. The dog bit him and he was severely injured. He sued the defendant for the injuries sustained. In the court a quo, both parties were held to be at fault and the plaintiff was awarded compensation for seventy per cent of his proven damages. The defendant appealed against this decision and the appeal court had to decide whether the plaintiff had consented to the risk of harm or perhaps, whether his ‘substantial imprudence’<sup>42</sup> contributed to the injury he sustained.<sup>43</sup> Didcott J referred to the distinction between the defence of ‘voluntary assumption of risk’ and ‘contributory negligence’ as well as the

<sup>38</sup> There is no reason why voluntary assumption of risk as a ground of justification should have not also been applicable in *Clark v Welsh* 1975 (4) SA 469 (W) as it seems that all the requirements would have been met, including the requirement that the consent must not be contra bonos mores. See further Ahmed op cit note 4 at 422–5.

<sup>39</sup> 2012 (6) SA 428 (SCA).

<sup>40</sup> Ibid at 441J–442D.

<sup>41</sup> Supra note 27. In *Joubert v Combrinck* 1980 (3) SA 680 (T) at 680H it was confirmed that the defence of volenti non fit iniuria (voluntary assumption of risk) as a ground of justification ‘applies to a claim under the *actio de pauperie*, thus a defendant sued under the *actio de pauperie* will not be liable for damage done to a plaintiff where the plaintiff, with full knowledge of the risk of sustaining damage, voluntarily accepts it. But the burden of proving this defence obviously rests on the defendant and a plaintiff’s awareness of the degree of danger to which she is exposing herself is a necessary fact in the subjective enquiry concerning the plaintiff’s understanding of and acceptance of the risk to which she exposes herself.’ See J C Knobel ‘Vrywillige anvaarding van risiko: Toestemming tot benadeling, medewerkende skuld en die *actio de pauperie*: *Maartens v Pope* 1992 4 SA 883 (N)’ (1993) 56 *THRHR* 302 at 304.

<sup>42</sup> Ibid at 886E–G. Didcott J referred to *O’Callaghan v Chaplin* 1927 AD 310 at 329 where it was submitted that ‘substantial imprudence’ may be a good defence to the *actio de pauperie*.

<sup>43</sup> Ibid at 886E.

view that they overlap<sup>44</sup> and equate to ‘substantial imprudence’.<sup>45</sup> He also referred to the judgment of *Waring and Gillow Ltd v Sherborne*<sup>46</sup> and the leading case of *Santam Insurance Co Ltd v Vorster*<sup>47</sup> in which the practical guide to establishing consent was set out. Ogilvie Thompson CJ stated that the court must first embark on an objective assessment of the facts in order to establish what, in the circumstances, would have been the inherent risks. Thereafter, the court must make a finding based on the facts as to whether the plaintiff foresaw the particular risks which later ensued and caused his injuries. In respect of the first leg of the enquiry, the court held that the plaintiff did have knowledge and appreciation of the danger: ‘The sign informed the plaintiff that a dog inhabited the property. It warned him of the need to be wary of the dog.’<sup>48</sup>

In respect of the second leg of the enquiry, that is, whether the plaintiff had assented to the risk that he might be injured,<sup>49</sup> Didcott J found that the plaintiff must have and indeed did foresee the possibility that the dog would attack him:

‘The reaction of the plaintiff was to rely on his experience and understanding of dogs. He took a chance all the same. For the possibility that the dog would attack him remained inherent in the situation which he proceeded to create by entering the property unexpectedly. . . . He must have foreseen that possibility. Indeed, he did foresee it. His own evidence confirmed that.’<sup>50</sup>

The plaintiff was found to have ‘voluntarily assumed the risk of harm done to him’ and the enquiry into the plaintiff’s ‘substantial imprudence’ was unnecessary. Judgment was awarded in favour of the defendant.<sup>51</sup>

Knobel<sup>52</sup> correctly submits that the requirement that the plaintiff must subjectively foresee and accept the risk, are requirements relevant to both consent as a ground of justification and contributory intent as a ground excluding fault. He rightly argues that in *Maartens*, the court should have found the plaintiff’s consent contra bonos mores because a person cannot consent to serious bodily injury. Rather, the court ought to have found the plaintiff at fault in the form of ‘contributory intent’.<sup>53</sup>

In *Castell v De Greef*,<sup>54</sup> the plaintiff had a family history of breast cancer and in 1982 had undergone surgery to remove lumps that were found in her breasts. In 1989, when further lumps were found, her gynaecologist

<sup>44</sup> Ibid at 886H–I. See also *Lampert v Hefer* 1955 (2) SA 507 (A) at 514A and *Vorster* supra note 17 at 778H.

<sup>45</sup> See Knobel op cit note 41 at 302.

<sup>46</sup> Supra note 6 at 344.

<sup>47</sup> Supra note 17 at 781B–E.

<sup>48</sup> *Maartens* supra note 27 at 888E–H.

<sup>49</sup> Ibid at 888I.

<sup>50</sup> Ibid at 889A–C.

<sup>51</sup> Ibid at 889I–890A.

<sup>52</sup> Knobel op cit note 41 at 304.

<sup>53</sup> Neethling & Potgieter op cit note 1 at 173n293; Knobel op cit note 41 at 303–4.

<sup>54</sup> Supra note 28.

recommended a mastectomy as a prophylaxis and referred her to a plastic surgeon (the defendant). On 7 August 1989, the defendant performed a 'subcutaneous mastectomy' on the plaintiff. It was common cause that the operation had a high risk of complications, the main one being necrosis of the skin and underlying tissue. After the operation, the plaintiff did sustain necrosis of the breasts as well as post-operative sepsis. The plaintiff then underwent a number of operations, performed by another plastic surgeon until she was satisfied with the results and did not require further surgery.<sup>55</sup>

The plaintiff subsequently sued the defendant, alleging negligent conduct. In the court a quo, Scott J dismissed the plaintiff's claim. On appeal, the plaintiff alleged that the defendant was negligent in that he had failed to warn her of the material risks of the operation or to propose alternative procedures; to prevent the onset of, or to limit the necrosis of her breasts; and to treat the post-operative sepsis which had developed in her breasts.<sup>56</sup>

Ackermann J confirmed that 'consent by a patient to medical treatment is regarded as falling under the defence of *volenti non fit iniuria*, which would justify an otherwise wrongful delictual act'.<sup>57</sup> He essentially found that the plaintiff was aware of the risks involved in the operation<sup>58</sup> and by implication, assumed them, thereby excluding wrongfulness on the part of the surgeon).<sup>59</sup> It was further held that the defendant did not fail to prevent or limit the onset of necrosis.<sup>60</sup> However, the defendant was found to have been negligent in his failing adequately or timeously to treat the post-operative sepsis.<sup>61</sup>

Although the court did not expressly say so, it seems that the plaintiff's consent to the risks involved was valid *inter alia* because she was fully informed of them. Nevertheless, the consent could not be extended so as to nullify the negligent conduct on the part of the defendant with regard to post-operative treatment. Furthermore, because of the valid consent to the risks involved, the question of 'contributory intent' on the part of the plaintiff was irrelevant.

(b) *The judiciary's dismissal of volenti non fit iniuria*

What is relevant about the particular cases to be discussed below is that even though the defence of voluntary assumption of risk (i.e. *volenti non fit iniuria*

<sup>55</sup> Ibid at 410D–412D.

<sup>56</sup> Ibid at 414E–415I.

<sup>57</sup> Ibid at 420H.

<sup>58</sup> Ibid at 429I–430I.

<sup>59</sup> Ibid at 428D–E. With regard to the plaintiff's consultation with the defendant, Ackermann J stated that it is 'neither surprising, nor suspicious, that a patient contemplating major surgery has little recall of such a consultation. It does, however, necessitate great caution in accepting any evidence by plaintiff that something was said or explained to her where there is so much of the consultation that she simply cannot remember'.

<sup>60</sup> Ibid at 430J–434I.

<sup>61</sup> Ibid at 440F.

as a ground of justification) failed, the voluntary assumption of risk (as a ground excluding fault) could have been applicable.

The deceased (Sherborne) in *Waring and Gillow Ltd v Sherborne*<sup>62</sup> was in the employ of the defendant at the time of his death. He was assisting co-workers to remove a crane at a construction site. Unfortunately an accident occurred as a result of the negligence of his co-worker — the deceased was knocked down from a platform and killed. In the court a quo, the deceased's widow succeeded in claiming damages for losses suffered from the employer. The employer appealed and alleged that the accident was caused by the deceased's own negligence and that he had consented to the risk of harm. According to the defendant, the deceased was an expert rigger; he must have known that 'the whole affair was dangerous and that he was encountering a risk'.<sup>63</sup> In respect of the defence of *volenti non fit iniuria*, Innes CJ held:

[I]n order to render the maxim applicable it must be clearly shown that the risk was known, that it was realised, and that it was voluntarily under-taken. Knowledge, appreciation, consent — these are the essential elements; but knowledge does not invariably imply appreciation and both together are not necessarily equivalent to consent. . . . In the present instance nothing was said by the deceased man from which any inference can be drawn either as to his knowledge of the danger or his willingness to encounter the risk. We are asked to infer from his conduct, his experience, and from the surrounding circumstances.<sup>64</sup>

The court turned to the facts and stated that neither knowledge nor appreciation of the risk had been satisfactorily established.<sup>65</sup> The deceased received a command and the 'fact that he did what he was told cannot possibly prove that he willingly took the risk upon himself'.<sup>66</sup>

Innes CJ held that *volenti non fit iniuria* (as a ground of justification) was not applicable and further that the deceased was not contributorily negligent.<sup>67</sup>

Apart from the reasons stated by the court, the defence of *volenti non fit iniuria* would also fail because of the *boni mores* requirement. However, voluntary assumption of risk in the form of 'contributory intent' (and as a ground excluding fault) could have been applicable. Its applicability would depend on whether it could be established that the deceased foresaw the risk of serious injury and reconciled himself with such consequence, while realising that the intended conduct was unreasonable. (If it cannot be ascertained that the deceased acted with 'contributory intent' then perhaps negligence could be imputed to him. According to the facts, though, it seems that negligence could not be proven.)

<sup>62</sup> *Supra* note 6.

<sup>63</sup> *Ibid* at 341.

<sup>64</sup> *Ibid* at 344–5.

<sup>65</sup> *Ibid* at 345.

<sup>66</sup> *Ibid* at 346–7.

<sup>67</sup> *Ibid* at 347–8.

In *Broom v Administrator, Natal*<sup>68</sup> a sixteen-year-old pupil took part in a game of rounders which was supervised by an assistant master of a school. While the pupil was standing in the queue approximately twenty feet away from the batsman, the bat (which was actually an old cricket stump without a metal tip) was flung in the air and hit the pupil on his head, injuring him.<sup>69</sup> The pupil's father sued the assistant master's employer, alleging negligence on the part of the assistant master. Contributory negligence and consent to the risk of injury were raised but were subsequently abandoned.<sup>70</sup> Accordingly, Harcourt J only had to determine whether the assistant master was negligent. He was found not to have been negligent.<sup>71</sup> It is unlikely that the game was played according to the accepted rules.<sup>72</sup> However, if consent to the risk of injury was inapplicable, voluntary assumption of risk in the form of 'contributory intent' may have been applicable as a ground excluding fault.<sup>73</sup>

In *Rousseau v Viljoen*,<sup>74</sup> the plaintiff (a flag marshal) was injured while on a race track when the defendant's car left the track and hit him. The defendant submitted that the plaintiff by 'standing in the position in which he was while acting as a flag marshal, voluntarily and knowingly accepted the risk of injury and accordingly could not recover damages'.<sup>75</sup> The court acknowledged that while the sport did involve some risk, it was not one particularly 'dangerous to life and limb', and that therefore the defence was not applicable.<sup>76</sup>

Van Winsen J was correct in concluding that consent to the risk of injury as a ground of justification was not applicable (due to the *boni mores* requirement) but that 'contributory intent as a ground excluding fault may have been applicable if the plaintiff subjectively foresaw the possibility of being hit by a midget-racing car and reconciled himself with that possibility while simultaneously acting consciously unreasonably'.<sup>77</sup>

In *Santam Insurance Co Ltd v Vorster*,<sup>78</sup> the drivers of two motor vehicles and the plaintiff (a passenger) had willingly taken part in a dicing contest when an accident ensued. The plaintiff was severely injured and permanently paralysed. He sued both drivers. The defences of *volenti non fit iniuria* and contributory negligence were raised. The trial court rejected the defence of *volenti non fit iniuria* and found all three participants to have been equally negligent.<sup>79</sup>

The defendant appealed against the trial court's decision and advanced that

<sup>68</sup> 1966 (3) SA 505 (D).

<sup>69</sup> *Ibid* at 505E.

<sup>70</sup> *Ibid* at 507H–508E.

<sup>71</sup> *Ibid* at 525G.

<sup>72</sup> M W Prinsloo 'Liability in sport and recreation' 1991 *TSAR* 42 at 43.

<sup>73</sup> See further Ahmed *op cit* note 4 at 421.

<sup>74</sup> 1970 (3) SA 413 (C).

<sup>75</sup> *Ibid* at 414C–D.

<sup>76</sup> *Ibid* at 413H and 419A: see Ahmed *op cit* note 4 at 421–2.

<sup>77</sup> Ahmed *op cit* note 4 at 422.

<sup>78</sup> *Supra* note 17.

<sup>79</sup> *Ibid* at 764H–765C.

the defence of *volenti non fit iniuria* should have been upheld, resulting in a ‘total rejection of the plaintiff’s claim’<sup>80</sup> or, in the alternative, in a reduction of the plaintiff’s claim in terms of s 1 of the Apportionment of Damages Act 34 of 1956. The Appellate Division confirmed the decision of the trial court that the plaintiff had been contributorily negligent and that the defence of *volenti non fit iniuria* had not been proven.<sup>81</sup>

Ogilvie Thompson CJ<sup>82</sup> acknowledged that the defences of *volenti non fit iniuria* and contributory negligence are separate and distinct in theory. The former entails a subjective enquiry related to the particular plaintiff, while the latter calls for an objective enquiry in conformity with the standard of the *bonus paterfamilias*. However, even though the Chief Justice differentiated between the two defences, he conflated them by stating that the defence of *volenti non fit iniuria* may sometimes overlap with the defence of contributory negligence.<sup>83</sup>

This decision elicited various comments.<sup>84</sup> Both Burchell<sup>85</sup> and Van der Walt & Midgley<sup>86</sup> submit that the defence of *volenti non fit iniuria* as a ground of justification was correctly dismissed, mainly for the reason that such consent to the risk of injury would be *contra bonos mores* in light of the fact that ‘dicing’ is not recognised as a lawful sport but an illegal activity. On closer examination of the facts, it is obvious that ‘dicing is a hazardous undertaking’<sup>87</sup> and against public policy. Furthermore, the plaintiff had on previous occasions taken part in dicing, ‘[h]e was aware of the chosen “race track” . . . and he knew of the existence of the bend in the Rondebult Road’ where the accident occurred.<sup>88</sup> He was aware of the risks ordinarily inherent in dicing.<sup>89</sup> Ogilvie Thompson CJ held that the ‘[p]laintiff was undoubtedly at fault in exposing himself to risk by participating in the “dicing contest”’.<sup>90</sup> It may be argued, therefore, that the plaintiff acted intentionally and voluntarily assumed the risk of harm. Thus, what should have been questioned is whether the plaintiff subjectively foresaw the possibility that an accident may have occurred as a result of being a part of the dicing contest and whether he reconciled himself with that possibility, while realising that

<sup>80</sup> *Ibid* at 774C.

<sup>81</sup> *Ibid* at 783F–G.

<sup>82</sup> *Ibid* at 778F–H.

<sup>83</sup> *Ibid* at 778H; see also *Lampert* *supra* note 44 at 514A.

<sup>84</sup> See J J Gauntlett ‘*Santam Insurance Co Ltd v Vorster* 1973 4 SA 764 (A)’ (1974) 37 *THRHR* 195 at 200 and Boberg *op cit* note 6 at 768–71, who submit that the court came to an equitable result but with questionable reasoning. See also Prinsloo *op cit* note 72 at 45.

<sup>85</sup> *Op cit* note 6 at 72.

<sup>86</sup> *Op cit* note 3 at 144.

<sup>87</sup> *Vorster* *supra* note 17 at 781H.

<sup>88</sup> *Ibid* at 781H.

<sup>89</sup> *Ibid* at 782H.

<sup>90</sup> *Ibid* at 783H–784A.

the intended conduct was unreasonable. In other words, the question is whether he had intention in the form of *dolus eventualis*.<sup>91</sup>

The court should have considered the defence of voluntary assumption of risk in the form of ‘contributory intent’ instead of stating that it was the ‘negligent driving around the bend that was the real cause of his injuries’.<sup>92</sup> As Neethling & Potgieter submit,<sup>93</sup> the ‘contributory intent’ on the part of the plaintiff cancelled the defendant’s fault.

Besides the cases mentioned above, there are a number of other cases — for example, *Madelbaum v Bekker*,<sup>94</sup> *Esterhuizen v Administrator, Transvaal*,<sup>95</sup> *Van Wyk v Thrills Incorporated (Pty) Ltd*,<sup>96</sup> *Oldwage v Louwrens*,<sup>97</sup> *Fourie v Naranjo*,<sup>98</sup> *Green v Naidoo*<sup>99</sup> and *Hattingh v Roux*<sup>100</sup> — where the defence of voluntary assumption of risk (as a ground of justification) was raised unsuccessfully and furthermore where it seems unlikely that voluntary assumption of risk in the form of ‘contributory intent’ would have been applicable.

### III VOLUNTARY ASSUMPTION OF RISK (CONTRIBUTORY INTENT) AS A GROUND EXCLUDING FAULT

Having dealt with consent to injury and consent to the risk of injury (voluntary assumption of risk) as a ground of justification in terms of which wrongfulness is excluded,<sup>101</sup> attention must now be paid to voluntary assumption of risk in the form of ‘contributory intent’. In instances where the plaintiff ‘intentionally’ exposes him- or herself to harm or the risk of harm<sup>102</sup> while realising that his or her conduct is unreasonable<sup>103</sup> (and does not comply with the requirements for valid consent), such a plaintiff’s conduct could indicate ‘contributory intent’ on his or her part.<sup>104</sup> Under certain circumstances, the plaintiff’s ‘contributory intent’ can cancel the defendant’s fault in the form of negligence<sup>105</sup> which, in turn, may lead to the exclusion of his or her claim.<sup>106</sup> Our courts<sup>107</sup> have stated explicitly that a plaintiff who has contributed intentionally to his or her own damage, cannot claim compensa-

<sup>91</sup> Neethling & Potgieter op cit note 1 at 127.

<sup>92</sup> Knobel op cit note 41 at 303–4.

<sup>93</sup> Neethling & Potgieter op cit note 1 at 173n296.

<sup>94</sup> 1927 CPD 375. See also Ahmed op cit note 4 at 420–1.

<sup>95</sup> Supra note 18.

<sup>96</sup> 1978 (2) SA 614 (A). See also Ahmed op cit note 4 at 423–4.

<sup>97</sup> [2004] 1 All SA 532 (C).

<sup>98</sup> [2007] 4 All SA 1152 (C).

<sup>99</sup> 2007 (6) SA 372 (W).

<sup>100</sup> Supra note 14. See also *Roux v Hattingh* supra note 39.

<sup>101</sup> See part II above.

<sup>102</sup> That is, knowing full well what the consequences of his or her conduct are.

<sup>103</sup> Neethling & Potgieter op cit note 1 at 171.

<sup>104</sup> This will depend on the circumstances.

<sup>105</sup> Neethling & Potgieter op cit note 1 at 171.

<sup>106</sup> Ibid.

<sup>107</sup> See *Wapnick* supra note 13 and *Columbus* supra note 13.

tion for such damage or part thereof from a defendant on the ground of the latter's negligent conduct. There seems to be no reason in principle why this defence should not apply also to 'contributory intent' in the form of *dolus eventualis*.<sup>108</sup>

(a) *The judiciary's partial recognition of 'contributory intent'*

As I indicated earlier,<sup>109</sup> in many of the cases where the defence of consent to the risk of injury had been raised unsuccessfully, the defence of voluntary assumption of risk in the form of 'contributory intent' could have been appropriate. Here, the focus will be first on the cases where the latter defence (albeit not *eo nomine*) has been successful, viz in *Lampert v Hefer*<sup>110</sup> and *Malherbe v Eskom*.<sup>111</sup> Secondly, the cases of *Netherlands Insurance Co of SA v Van der Vyver*,<sup>112</sup> where this defence was dismissed as not forming part of our law and *Plumridge v Road Accident Fund*,<sup>113</sup> where the court referred to the concept of 'contributory intent' but confused it with the defence of 'consent', also need to be examined.

The plaintiff in *Lampert v Hefer*<sup>114</sup> voluntarily took a seat in the sidecar of a motorcycle driven by the defendant who was highly intoxicated. The plaintiff knew that the defendant was intoxicated and incapable of exercising reasonable care and control over the vehicle. An accident occurred, the driver of the motorcycle — Hefer — died, and the plaintiff sustained severe injuries. The plaintiff sued the defendant (the executrix of Hefer's estate) for compensation in respect of the injuries sustained from the accident (on the grounds of negligence). She alleged that Hefer drove the motorcycle while under the influence of alcohol and as a consequence 'failed to exercise proper care'. The defendant pleaded that the plaintiff had realised and appreciated the risk to which she was exposing herself, but nevertheless voluntarily undertook the risk and consented to being a passenger in the sidecar of the motorcycle.<sup>115</sup> The court *quo* held that voluntary assumption of risk was a good defence and gave judgment in favour of the defendant.<sup>116</sup> The plaintiff sought leave to appeal.

The Appellate Division refused the plaintiff's application for leave to appeal *in forma pauperis* on the ground that the appeal had no reasonable

<sup>108</sup> Contributory intent as a complete defence is also applicable to claims under the *actio de pauperie* and the *actio de pastu*: see Neethling & Potgieter *op cit* note 1 at 359, 361 and 373. Moreover it is also recognised as a defence in s 30(6) of the National Nuclear Regulator Act 47 of 1999.

<sup>109</sup> In part II above.

<sup>110</sup> *Supra* note 44.

<sup>111</sup> 2002 (4) SA 497 (O).

<sup>112</sup> 1968 (1) SA 412 (A).

<sup>113</sup> *Supra* note 12.

<sup>114</sup> *Supra* note 44.

<sup>115</sup> *Ibid* at 509H.

<sup>116</sup> *Ibid* at 510A.

prospect of success.<sup>117</sup> Fagan JA submitted that the defendant's plea of voluntary assumption of risk on the part of the plaintiff 'disclosed a good defence. The evidence showed that the plaintiff voluntarily took her seat in the side-car; there was no suggestion that she was compelled by necessity or otherwise to do so.'<sup>118</sup> He agreed with the finding of the court a quo that

'[the plaintiff] knew that Hefer was intoxicated to the degree he had indicated. . . . [S]he had often driven with him before when he was intoxicated and there had been no accident. But serious intoxication in the driver of a motor vehicle must always involve a risk of accident, and she must have or should have appreciated that risk even though he and she had been lucky before.'<sup>119</sup>

The court found that Hefer's intoxication had been the cause of the accident.<sup>120</sup>

In this case, the court overlooked the important requirement that consent must not be *contra bonos mores*. Indeed, it is against public policy voluntarily to assume the risk of serious bodily harm. More significantly, if the consent was rendered invalid, 'contributory intent' may have become relevant. It may have been argued that the plaintiff acted with 'contributory intent' as she was aware of the danger of harm, but nevertheless exposed herself to it.

Although Fagan JA<sup>121</sup> considered voluntary assumption of risk (contributory intent), he stated that voluntary assumption of risk and contributory negligence may overlap. This was unfortunate. As Neethling & Potgieter<sup>122</sup> explain, where the plaintiff is aware of the danger but nevertheless exposes him- or herself to such risk of harm, the plaintiff acts with intention and not negligence. In contrast, where the plaintiff should have been aware of the danger (as a reasonable person) but was not, such a plaintiff acts with contributory negligence and not intention. The two defences are therefore distinct. So, according to Neethling & Potgieter,<sup>123</sup> if the injured plaintiff 'should have realised' that Hefer was unable to control the motorcycle properly, it follows that she was guilty of contributory negligence.

The remark by Fagan JA — that she 'must have or should have appreciated that risk' — thus confused the issue, for either she did appreciate the risk ('must have'), in which case there is voluntary assumption of the risk, or she ought to have appreciated the risk ('should have'), in which case there is contributory negligence. Admittedly, Schreiner JA<sup>124</sup> did distinguish between voluntary assumption of risk and contributory negligence in this

<sup>117</sup> *Ibid* at 515A.

<sup>118</sup> *Ibid* at 514D–F.

<sup>119</sup> *Ibid* at 514G–H.

<sup>120</sup> *Ibid* at 514H–515A.

<sup>121</sup> *Ibid* at 513H–514B.

<sup>122</sup> Neethling & Potgieter *op cit* note 1 at 172.

<sup>123</sup> Neethling & Potgieter *op cit* note 1 at 291.

<sup>124</sup> *Lampert supra* note 44 at 508G–H.

case. Nevertheless, he did not regard assumption of risk as a separate defence ‘over and above consent as a ground of justification’.<sup>125</sup>

Schwietering<sup>126</sup> pointed out that this judgment showed a marked uncertainty regarding the nature of this defence. He argued that this case dealt with contributory fault and not with consent. He suggested further that the courts should either rely on the Apportionment of Damages Act to reduce the plaintiff’s claim by means of apportionment, or they should completely exclude the claim.<sup>127</sup> Schwietering<sup>128</sup> also indicated that consent in the true sense can apply as a ground of justification as long as the consent is within the power of disposal of the person consenting. He welcomed Von Thur & Siegwart’s<sup>129</sup> submission that ‘valid’ consent which is *contra bonos mores* cannot apply as a ground of justification, but that in terms of an invalid consent (voluntary assumption of risk), contributory fault may play a role. Consequently, Schwietering,<sup>130</sup> like Neethling & Potgieter,<sup>131</sup> submitted that in this case the plaintiff’s action failed, not because of a ground of justification (one cannot consent in circumstances when it is *contra bonos mores*), but on the ground of ‘contributory intent’.

Strauss<sup>132</sup> also argued that the plaintiff’s consent in this case was *contra bonos mores* and that perhaps the underlying principle of the defence of voluntary assumption of risk in this type of case is not consent but a form of contributory fault, namely ‘contributory intent’ or ‘reckless exposure to a known risk’.<sup>133</sup>

It is submitted that Strauss, Schwietering and Neethling & Potgieter adopt the correct view. In this case, voluntary assumption of risk as a ground of justification should have failed, but voluntary assumption of risk in the form of ‘contributory intent’ — a ground excluding fault — should have been applicable.

In *Malherbe v Eskom*,<sup>134</sup> the plaintiff (an engineer) was injured whilst working on the defendant’s electrical distribution box. The circuit breaker, which served as a safety mechanism, had been removed from the electrical

<sup>125</sup> Neethling & Potgieter op cit note 1 at 172n291.

<sup>126</sup> K Schwietering ‘Insake: *Lampert v Hefer* 1955 2 SA 507 (A)’ (1957) 20 *THRHR* 138 at 138.

<sup>127</sup> *Ibid* at 138.

<sup>128</sup> *Ibid* at 142.

<sup>129</sup> A von Thur & A Siegwart *Allgemeiner Teil des Schweizerischen Obligationenrechts* 3 ed (1974) 359; Schwietering op cit note 126 at 142.

<sup>130</sup> Schwietering op cit note 126 at 144.

<sup>131</sup> Neethling & Potgieter op cit note 1 at 172.

<sup>132</sup> S A Strauss ‘Bodily injury and the defence of consent’ (1964) 61 *SALJ* 179 at 184; Boberg op cit note 6 at 759.

<sup>133</sup> The use of the word ‘reckless’ may be misinterpreted and associated with ‘gross negligence’. It is therefore better to refer to ‘unreasonable exposure to a known risk’: see Neethling & Potgieter op cit note 1 at 127 and Van der Walt & Midgley op cit note 3 at 158.

<sup>134</sup> *Supra* note 111.

distribution box. A short circuit took place and the plaintiff was injured.<sup>135</sup> Van Rooyen AJ<sup>136</sup> stated that the plaintiff was a qualified engineer who had experience and training with electricity. He knew that the circuit breaker had been removed and was aware of the risk involved if he were to work on the box. Under these circumstances Van Rooyen AJ held that the plaintiff had voluntarily assumed the risk of harm. The court recognised that voluntary assumption of risk by the plaintiff cancels negligence and excludes liability, but again seemed to confuse such assumption of risk with the defence of consent to the risk of injury, a defence which excludes wrongfulness.<sup>137</sup> However, despite this confusion, Van Rooyen AJ clearly accepted voluntary assumption of risk as a ground that cancels fault:

‘In respect of him who consents no wrong is committed or, differently expressed, consent to the injury excludes wrong (*volenti non fit iniuria*). Such consent to injury, or consent to the risk of injury, excludes wrongfulness. Closely related to this rule is that of voluntary assumption of risk, where the plaintiff, well knowing of danger or risk of harm, deliberately exposes himself to the danger or risk, and thereupon suffers damage. Such conduct could have the result that he forfeits his right to claim damages from the person who caused the danger or risk of injury.’<sup>138</sup>

In *Netherlands Insurance Co of SA v Van der Vyver*,<sup>139</sup> Ozen’s wife suspected him of infidelity and she hired the respondent as a private investigator. The respondent followed Ozen in his vehicle to a deserted veld close to a road. Ozen had a woman in the car. While Ozen was behind the wheel of his slow-moving vehicle, the respondent hurled himself onto the bonnet of the car, trying to stop Ozen, so that he could converse with him. However, Ozen accelerated and swerved the vehicle from side to side. The respondent clung onto the vehicle as best he could, until he eventually fell off.<sup>140</sup> The respondent sustained injuries and claimed compensation from the insurer of Ozen’s motor vehicle. The respondent alleged that Ozen had deliberately driven the vehicle in such a manner so as to dislodge him from the bonnet, or alternatively that he fell off the bonnet due to Ozen’s negligent driving. Ozen alleged that the respondent had voluntarily accepted the risk of harm. In the court a quo, it was held that both Ozen and the respondent were equally negligent.<sup>141</sup>

On appeal it was held that Ozen had acted with intent and not mere negligence. The court rejected Ozen’s defence that the respondent had voluntarily accepted the risk of injury (as a ground of justification).<sup>142</sup> In order to succeed with this defence, the court held that the respondent must

<sup>135</sup> Ibid at 498FG.

<sup>136</sup> Ibid at 498G–H and 507F–G.

<sup>137</sup> Neethling & Potgieter op cit note 1 at 173n296.

<sup>138</sup> *Malherbe* supra note 111 at 498D–F.

<sup>139</sup> Supra note 112.

<sup>140</sup> Ibid at 412G–H.

<sup>141</sup> Ibid at 412H–413H.

<sup>142</sup> Ibid at 413H.

have realised the nature and extent of the risk and must have voluntarily consented to it. The court found that when the respondent leapt onto the bonnet, he assumed that Ozen would stop. In light of this there was no consent on the part of the respondent.<sup>143</sup>

In this case the court had an opportunity to consider voluntary assumption of risk in its two forms: consent to the risk of injury as a ground of justification, and ‘contributory intent’ as a ground which cancels fault.<sup>144</sup> The court considered Ozen’s defence that the respondent had ‘contributory intent’, with Milne JA pointing out that

‘the respondent was under no legal or moral compulsion to adopt the course he did and, that he realised that what might happen to him in doing what he did, is clear from his evidence. . . . Ozen was trying to dislodge the respondent . . . and the risk which the respondent knew he was taking became an actuality. . . . [W]hen the vehicle was on the main road and travelling at a high speed, it was out of the respondent’s power to jump off it with safety to himself but his evidence shows that he was, in any event, determined to remain upon it, if he could, until he could achieve his purpose of bringing about a confrontation between Ozen and himself.’<sup>145</sup>

Milne JA in effect pointed out that the respondent had clearly acted intentionally (in the form of *dolus eventualis*) and voluntarily assumed the risk of harm. He stated: ‘[I] regard it as established that, entirely of his own free will (and certainly against Ozen’s will) he assumed the risk of just “the kind of harm” as actually happened to him.’<sup>146</sup>

However, in absence of direct authority, Van Blerk JA stated that ‘[n]o authority from our case law was cited for the statement that contributory intent is an independent defence, nor was reference made to any of the authoritative sources of our law recognising it’.<sup>147</sup> Thus the court was not prepared to acknowledge contributory intent as a separate defence.<sup>148</sup>

Van der Vyver<sup>149</sup> points out that in the court a quo, Boshoff J simply attributed negligence to both parties and sidestepped the possibility of ‘contributory intent’, even though the facts had shown that such intent was present. On appeal, the court was also able to hold that Ozen had acted with intent, but that the respondent had not (the question whether the respondent was negligent was not even considered). Van der Vyver<sup>150</sup> submits that the court in this case should have considered ‘contributory intent’ within the

<sup>143</sup> Neethling & Potgieter op cit note 1 at 172–3.

<sup>144</sup> Neethling & Potgieter op cit note 1 at 172.

<sup>145</sup> *Netherlands* supra note 112 at 424.

<sup>146</sup> *Ibid* at 425–6.

<sup>147</sup> *Ibid* at 422. The translation is from Neethling & Potgieter op cit note 1 at 173.

<sup>148</sup> See Van der Walt & Midgley op cit note 3 at 147; Neethling & Potgieter op cit note 1 at 173.

<sup>149</sup> J D van der Vyver ‘*Netherlands Insurance Co of SA Ltd v Van der Vyver* 1968 1 SA 412 (A)’ (1968) 31 *THRHR* 295 at 296.

<sup>150</sup> *Ibid* at 297.

ambit of the Apportionment of Damages Act, which would have led to a reduction of damages.

Boberg<sup>151</sup> submits that this decision bears out Williams's view that even if 'contributory intent' were to exist as a separate defence in theory, in practice the facts would generally be 'subsumed under consent or causation'.<sup>152</sup> The court held that there was no causal connection between the respondent's intentional act of flinging himself onto the bonnet of the vehicle and his subsequent injuries. Thus the respondent intended to jump onto the bonnet of the vehicle, but did not intend the consequent injuries. In other words, intention must be linked with the consequence (the court held that the respondent's injuries were caused by Ozen's intentional and negligent acts). Boberg<sup>153</sup> refers to Van der Merwe & Olivier,<sup>154</sup> who reject the view that the respondent's act did not cause his injuries, based on the *conditio sine qua non* test. The latter-mentioned authors conclude that the respondent did have contributory intent ('medewerkende opset' in the sense of an unreasonable consent to the infliction of harm) and that s 1(1)(a) of the Apportionment of Damages Act should have been applied to reduce the respondent's claim by half.

In this case the court was correct in holding that a defence of *volenti non fit iniuria* in the form of consent to the risk of injury (as a ground of justification) was not tenable since, even if the respondent had consented to the risk of injury, such consent would have been *contra bonos mores*.<sup>155</sup> Thus 'contributory intent' as a ground excluding fault would have been relevant and applicable in this case. Milne AJ clearly acknowledged that the respondent had acted intentionally (in the form of *dolus eventualis*) as did the plaintiff in the case of *Lampert*:

'I do not think there can be any doubt that the respondent elected to encounter the risk of the kind of damage that actually happened to him, at least as fully as the plaintiff elected to encounter the corresponding risk in the *Lampert* case.'<sup>156</sup>

In *Plumridge v Road Accident Fund*<sup>157</sup> the plaintiff was injured whilst driving his motorcycle on a race track. According to the accepted facts, the accident occurred when the plaintiff suddenly turned to his right (probably without warning) in front of the deceased, who was driving immediately behind him

<sup>151</sup> Boberg op cit note 6 at 703.

<sup>152</sup> Boberg *ibid* states that the court's finding that causation was lacking renders obiter its doubts about recognising 'contributory intent' as a defence in our law, and refers to *Mabaso v Felix* 1981 (3) SA 865 (A) at 876H–877A and *Wapnick* supra note 13.

<sup>153</sup> Boberg *ibid*.

<sup>154</sup> N J van der Merwe & P J J Olivier *Die Onreëmatige Daad in die Suid-Afrikaanse Reg* 4 ed (1980) 174–9; see also N J van der Merwe 'Van der Vyver v Netherlands Insurance Co of SA 1967 (2) SA 476 (T)' (1967) 30 *THRHR* 287 at 287.

<sup>155</sup> Neethling & Potgieter op cit note 1 at 172–3 and 173n293.

<sup>156</sup> *Netherlands* supra note 112 at 426H.

<sup>157</sup> *Supra* note 12.

at a very high speed. The two motorcycles collided at a t-position.<sup>158</sup> The defendant (the Road Accident Fund acting on behalf of the insured driver, the deceased) raised inter alia the defence of *volenti non fit iniuria*.<sup>159</sup> The plaintiff could not recall how the accident occurred and the deceased died at the scene of the accident.<sup>160</sup> Tshiki J was faced with contradictions in the evidence where the plaintiff's witnesses contradicted those of the defendant.<sup>161</sup>

In spite of the fact that the plaintiff was unable to recall how the accident occurred, he submitted that he was an amateur rider and had been on the particular race track about six to seven times before. He had never obtained permission to enter the track<sup>162</sup> and would ride with other high speed drivers (such as the deceased). He confirmed that his motorcycle was tuned to ride at high speeds and that he was aware of the risks involved, 'especially when there was no specific purpose'.<sup>163</sup> The plaintiff further conceded that if one had to exit the track one would do so at the entrance to the pit lane. One would not do so on the 'straight' of the track, which is the most dangerous part of the track (where the highest speeds are reached). The plaintiff agreed that it would have been very dangerous for a rider unexpectedly to execute a right hand turn in front of another driver.<sup>164</sup>

Tshiki J referred to the six requirements of consent<sup>165</sup> and found,<sup>166</sup> based on the plaintiff's concessions, that the plaintiff 'was aware of what he was doing and had consented to the dangers inherent to riding a motorcycle on a race track at such high speeds'.<sup>167</sup> He referred to the decision of *Lampert*,<sup>168</sup> where the defence of voluntary assumption of risk was referred to as a good defence, and *Vorster*,<sup>169</sup> where the defence of *volenti non fit iniuria* was distinguished from that of contributory negligence. He stated that even though the defence seldom succeeds, it 'does not mean that the Courts do not or will not entertain it'.<sup>170</sup> He further found that the deceased was not negligent and upheld the defence of voluntary assumption of risk as a ground excluding wrongfulness.<sup>171</sup>

The plaintiff thereafter applied for leave to appeal against the judgment of the court a quo to the Supreme Court of Appeal. Tshiki J dismissed the application for leave to appeal and stated that there was overwhelming evidence, which he accepted, that riders who used the track at their own risk,

<sup>158</sup> Ibid paras 32, 55 and 58.

<sup>159</sup> Ibid para 4.

<sup>160</sup> Ibid para 29.

<sup>161</sup> Ibid para 30.

<sup>162</sup> Ibid para 12.

<sup>163</sup> See *ibid* paras 13, 34 and 35.

<sup>164</sup> Ibid para 34.

<sup>165</sup> See *ibid* para 14 as well as part II above on the requirements of consent.

<sup>166</sup> Ibid paras 34 and 45.

<sup>167</sup> Ibid paras 46–7.

<sup>168</sup> Ibid para 50.

<sup>169</sup> Ibid paras 53 and 56.

<sup>170</sup> Ibid para 52.

<sup>171</sup> Ibid para 58.

without permission, should have reasonably foreseen that there could be other riders on the track.<sup>172</sup> He stated that the plaintiff could not use the excuse that he was not aware of the deceased's presence on the track. He should have reasonably foreseen that another driver could have been on the track and should have taken the necessary precautions.

The judge<sup>173</sup> reiterated that the deceased was not negligent in the slightest degree. Yet, his submissions above clearly referred to negligence. He<sup>174</sup> referred to foreign jurisdictions, in particular America where '[v]oluntary exposure to danger is listed under contributory negligence' and confirmed that *volenti non fit iniuria* and contributory negligence should not be equated. Of importance though, is that Tshiki J agreed with Neethling & Potgieter's submissions that

'[w]hen a person is well aware of the danger but nevertheless willfully exposes himself to it, he acts intentionally in respect of the prejudice he or she suffers. . . . Where a plaintiff does act with contributory intent, the fault of the defendant (in the form of negligence) is eliminated by the contributory intent of the plaintiff. Although the defendant is also at fault, he is not held liable towards the plaintiff because of the fact that the plaintiff himself acts intentionally. The contributory intent (at least *dolus eventualis*) or assumption of risk by the plaintiff therefore cancels the defendant's fault.'<sup>175</sup>

The judge<sup>176</sup> referred once again to *Vorster*<sup>177</sup> and found it unnecessary to follow Ogilvie Thompson CJ's ruling as a result of dissimilar facts. He further submitted that '[c]onsequently, they both consented to reckless driving and therefore the [defendant's] defence of *volenti non fit injuria* ought to have succeeded'.<sup>178</sup>

Tshiki J's judgment and reasoning, along with the judgments of *Lampert*, *Vorster*, *Maartens* and *Netherlands Insurance*, highlight the confusion surrounding the defence of voluntary assumption of risk. On the facts of the *Plumridge* case, it can no doubt be said that the plaintiff voluntarily assumed the risk of harm by 'intentionally' exposing himself to the risk of harm, knowing full well the consequences of doing so, while realising that the intended conduct is unreasonable. Besides the type of illegal activity he was engaged in, he performed a dangerous manoeuvre (a sudden turn to the right on the 'straight' of the track) which resulted in the death of the other rider. Even though Tshiki J referred to the requirements of consent as well as the requirement that such consent must not be *contra bonos mores*, he did not seem fully to grasp the effect of this requirement, which is that the plaintiff could not have consented to serious bodily injury, just as the deceased could not have consented to death. Thus with regard to both riders, consent was

<sup>172</sup> Ibid para 5.

<sup>173</sup> Ibid para 6.

<sup>174</sup> Ibid paras 7–8.

<sup>175</sup> Ibid para 12.

<sup>176</sup> Ibid para 14.

<sup>177</sup> Supra note 17.

<sup>178</sup> *Plumridge* supra note 12 para 15.

invalid. Tshiki J was correct in finding that the plaintiff had voluntarily assumed the risk of harm, but seems to have been confused as to whether it applied as a defence negating wrongfulness or fault. This is confirmed by the fact that he stated that the plaintiff had consented to the risk of harm but then also stated (in his judgment where he dismissed the application for leave to appeal to the Supreme Court of Appeal) that the plaintiff had ‘contributory intent’.<sup>179</sup> Thus it could be argued that the plaintiff voluntarily assumed the risk of harm in the form of ‘contributory intent’ (as consent was invalid) thereby negating the fault (in the form of negligence) of the deceased.

#### IV CONCLUSION

The overall conclusion which emerges from the cases discussed above is that voluntary assumption of risk as a ground of justification is only applicable when all the requirements relating to consent are met. With regard to *volenti non fit iniuria* (as a ground of justification) many judges test the facts of the case strictly against the three essential requirements as laid out in *Waring*.<sup>180</sup> They tend to overlook the rest of the requirements, especially the requirement that such consent should not be *contra bonos mores*.

Only in instances where the consent is rendered invalid does the defence of voluntary assumption of risk in the form of ‘contributory intent’ become relevant. As Knobel<sup>181</sup> points out, the requirements that the plaintiff must foresee and accept the risk are relevant to both consent as a ground of justification and contributory intent as a ground excluding fault. The dividing line is mainly that consent must not be *contra bonos mores*.

As I have shown above, ‘contributory intent’ may be relevant and applicable in a wide variety of circumstances. It cannot be stressed enough that each case must be judged on its own merits. *Volenti non fit iniuria* is still a part of our common law and is often raised in cases of negligence. Voluntary assumption of risk as a form of fault is also present in practice but unfortunately the courts are reluctant, mainly due to the absence of clear authority, to recognise it as a complete defence excluding delictual liability. In *Plumridge*, at least Tshiki J referred to voluntary assumption of risk in the form of ‘contributory intent’. This decision, as well as the decisions of *Lampert*, *Vorster*, *Maartens* and *Netherlands Insurance*, illustrate how confused our courts remain when presented with voluntary assumption of risk on the part of the plaintiff. The courts are not sure whether such plaintiff has ‘consent’, ‘contributory intent’ or ‘contributory negligence’. The answer should depend first on whether the requirements for consent are present, and (if not) then whether ‘contributory intent’ may be attributed to the plaintiff. If these two options do not apply, ‘contributory negligence’ may be the appropriate defence.<sup>182</sup>

<sup>179</sup> Ibid para 12.

<sup>180</sup> Supra note 6.

<sup>181</sup> Op cit note 41 at 304.

<sup>182</sup> See part I above; Neethling & Potgieter op cit note 1; Ahmed op cit note 4 at 420 and 426; and Ahmed op cit note 5 at 701.